

# AN EVALUATION OF LOCAL LAWS REQUIRING GOVERNMENT CONTRACTORS TO ADOPT LGBT-RELATED WORKPLACE POLICIES

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## INTRODUCTION

In April 2011, the Nashville City Council passed an ordinance prohibiting city contractors from discriminating against their employees on the basis of sexual orientation or gender identity.<sup>1</sup> Councilmembers who proposed the ordinance said it ensured that employment decisions were based “on performance and talent.”<sup>2</sup> Over seventy private businesses and other organizations endorsed it.<sup>3</sup> The mayor said it “ma[de] sense” to “requir[e] companies that do business with the city to adopt a nondiscrimination policy similar to [the city’s] own . . . .”<sup>4</sup>

Months later, however, the state legislature effectively repealed the Nashville ordinance by passing a statute that prohibits localities from enacting or enforcing ordinances that reach beyond the state’s non-discrimination law.<sup>5</sup> Because Tennessee’s non-discrimination law does not include sexual orientation and gender identity,<sup>6</sup> Nashville’s ordinance was void. Supporters of the bill argued that ordinances like Nashville’s imposed “a patchwork of policies” on businesses, and would have a “chilling effect” on movement of business to the area.<sup>7</sup> These concerns echoed those of councilmembers opposed to Nashville’s ordinance, who argued that it “could preclude some small businesses from vying for government work,”<sup>8</sup> and that it “could hamper continuance of [Nashville’s] operations.”<sup>9</sup>

Nashville’s ordinance, though the first in Tennessee, was the

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<sup>1</sup> NASHVILLE, TENN., CODE OF ORDINANCES tit. 4, ch. 4.28, § 4.28.010 (Municode through 2011 Code). See also Michael Cass, *Gay Bias Ban Called “Milestone Moment,”* TENNESSEAN, Apr. 6, 2011, at Main News (summarizing the vote).

<sup>2</sup> Michael Cass, *Council Advances Anti-Gay Bias Bill*, TENNESSEAN, Feb. 16, 2011, at Main News.

<sup>3</sup> Chas Sisk, *Haslam Reverses Metro’s Anti-Bias Law*, TENNESSEAN, May 24, 2011, at News; see TENN. EQUAL PROJECT, SUPPORTERS OF THE METRO CONTRACT ACCOUNTABILITY NON-DISCRIMINATION ORDINANCE, <https://docs.google.com/document/d/1QPU20PiC1zz7tFIjnumBw13aMhSvn2bgqwyrpif18Q/edit?hl=en&pli=1#> (last visited Feb. 16, 2012).

<sup>4</sup> Michael Cass, *Dean Would Sign Anti-Gay Bias Bill*, TENNESSEAN, Feb. 12, 2011, at Local/Business.

<sup>5</sup> H.B. 600, 2011 Gen. Assem., 106th 2d Sess. (Tenn. 2011). This bill does not prohibit ordinances that apply only to city employees.

<sup>6</sup> See TENN. CODE ANN. §§ 4-21-401 to -402, 4-21-404, 4-21-407 (2011).

<sup>7</sup> Michael Cass, *Williamson Lawmaker Aims to Thwart Nashville’s Anti-Gay Bias Bill*, TENNESSEAN, Jan. 13, 2011, at Main News.

<sup>8</sup> See Nate Rau, *Nashville’s Anti-Gay Bias Policy May Extend to Contractors*, TENNESSEAN, Jan. 6, 2011, at Main News.

<sup>9</sup> Cass, *supra* note 1.

latest in a thirty-year effort by state and local governments to use their contracting power to require private sector employers to adopt LGBT-inclusive policies. Like Nashville, a number of state and local governments have enacted sexual orientation and gender identity non-discrimination ordinances that apply only to contractors.<sup>10</sup> In addition, some have added sexual orientation and gender identity to “affirmative action” requirements for local government contractors and some have passed ordinances that require contractors to offer benefits to their employees’ domestic partners on the same terms that they are offered to spouses (Equal Benefits Ordinances or EBOs).<sup>11</sup> Currently, at least sixty-eight local governments have at least one of these types of contractor requirements.<sup>12</sup>

Because of their reach and structure, these ordinances may have several advantages over local non-discrimination provisions that apply more broadly to the private sector. Such advantages include requirements that contractors affirmatively adopt these policies in order to get lucrative government contracts, and the threat of losing those contracts if they fail to do so or if they violate their policies. However, these contractor requirements have also generated some criticism—as Nashville’s experience shows.

This is the first study to assess both the positive effects of these ordinances, and the validity of arguments made against them, by analyzing local governments’ experiences with implementing and enforcing them. It is based on an original survey of the sixty-eight localities that have at least one of these types of contractor requirements, as well as eight other studies that three of these jurisdictions have conducted. Although some states have also passed laws requiring state government contractors to adopt these policies,<sup>13</sup> this review focuses only on local ordinance implementation and enforcement.

The three principle findings of this study are:

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<sup>10</sup> See *infra* note 14.

<sup>11</sup> See *infra* notes 14, 16.

<sup>12</sup> See *infra* note 14.

<sup>13</sup> See, e.g., CAL. PUB. CONT. CODE § 10295.3(a)(1), (e)(1) (West 2009) (requiring state government contractors to offer equal benefits to domestic partners); MD. CODE ANN., STATE FIN. & PROC. §§ 19-101 to -102, 19-103(j), 19-104, 19-114 to -116 (LexisNexis 2009) (requiring that state government contractors not discriminate based on sexual orientation); Mass. Exec. Order No. 526, 1177 Mass. Reg. 3 (Mar. 4, 2011) (adding gender identity to contractor non-discrimination and affirmative action requirements in Massachusetts).

**Almost all of the localities surveyed reported uniform compliance with the contractor ordinances, with little to no resistance by contractors.** Twenty-five of the twenty-nine localities that provided information about their non-discrimination and affirmative action ordinances reported that contractors complied with the sexual orientation and gender identity requirements without resistance. Three of the twenty-nine localities reported just minimal resistance initially, but then the contractors agreed to comply when the requirements were explained to them. Similarly, the localities reported very little contractor resistance to EBOs. To the extent there were a handful of companies that resisted the EBOs, their main focus was on the requirement that domestic partner benefits be extended to different-sex couples.

**Of all the localities that responded to the survey, only two reported individual enforcement investigations or actions for violations of these contractor requirements, and these localities just reported one such instance each.** Twenty-eight of the twenty-nine localities reported that no complaints of sexual orientation or gender identity discrimination had been filed under their non-discrimination ordinances. The remaining locality was unaware if any complaints had been made because discrimination complaints were handled by a state agency, rather than the local agency implementing the contractor requirements. In addition, none of these localities reported that contractors had been barred from bidding on future contracts because they did not comply with these ordinances. Similarly, of the twelve localities with EBOs that provided detailed responses to the survey, only one, the City of Los Angeles, reported that a single complaint had been filed. None of these localities reported that contractors had been barred from bidding on future contracts because of non-compliance. However, a large contract in one city, Oakland, was terminated for non-compliance.

**The contractor requirements have been adopted, implemented, and enforced with little disruption to government operations or work, administrative burden, cost or litigation.** No locality reported that any of these ordinances made it difficult to find qualified contractors to carry out government work or operations. None of the localities that added sexual orientation and gender identity to non-discrimination or affirmative action ordinances reported that doing so was administratively burdensome or resulted in

additional administrative or contractor costs. Similarly, ten of the twelve localities that gave detailed responses to questions about their EBOs reported that their EBOs were not administratively burdensome while the remaining one, San Francisco, declined to answer the question because it had not measured the burden of its ordinance. Further, studies by three of these localities showed that EBOs resulted in minimal additional administrative or contractor costs. Finally, only local EBOs had been subjected to litigation, four of seven of those cases were against San Francisco, the first jurisdiction to adopt an EBO, and no cases have been brought against any of these ordinances since 2004.

### I. LOCAL CONTACTOR ORDINANCES MANDATING LGBT-RELATED WORKPLACE POLICIES

To date, at least sixty-eight local governments have used their spending powers to require their contractors to adopt LGBT-related workplace policies.<sup>14</sup> They have enacted three types of

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<sup>14</sup> The local governments that have taken this step include: ARLINGTON COUNTY, VA., COUNTY CODE ch. 31, §§ 31-3(A)(1), 31-10(B) (2011), <http://www.arlingtonva.us/departments/CountyBoard/CountyCode/file74533.pdf>; ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, §§ 2-1414(a), 2-1414(h), 2-1417 (Municode through 2012 Code); AUSTIN, TEX., CITY CODE §§ 5-4-2 to -3 (AmLegal through 2012 Code); BALT., MD., CITY CODE art. 5, §§ 29-1, 29-3, 29-6, 29-15, 29-16 (2007), <http://www.baltimorecity.gov/Government/CityCharterCodes.aspx>; BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, §§ 13.26.010, 13.26.100 (Code Publishing Company through 2012 Code); BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.21.020, 2.21.070(1)–(2), (8) (2011), <http://bloomington.in.gov/code>; BOS., MASS., CITY OF BOSTON MUNICIPAL CODE ch. 12, § 12-9.3 (AmLegal through 2010 Code); BOULDER, COLO., REV. CODE tit. 12, ch. 12-1-3(a), 12-1-10 (2000), <http://www.colocode.com/boulder2/chapter12-1.htm>; BROOKLINE, MASS., GENERAL BY-LAWS art. 4.5, §§ 4.5.1–3 (2010); BURIEN, WASH., MUNICIPAL CODE ch. 8.50, §§ 8.50.010, 8.50.050, 8.50.060(4) (Code Publishing Company through 2010 Code); CAMBRIDGE, MASS., MUNICIPAL CODE tit. 2, ch. 2.76, §§ 2.76.100, 2.76.110, 2.76.150 (Municode through 2011 Code); CANTON, OHIO, GENERAL OFFENSE CODE pt. 5, ch. 547, §§ 547.02(a)–(b), 547.07(a) (Walter H. Drane Co. through 2011 Code); CEDAR FALLS, IOWA, CITY CODE ch. 15, art. 3, div. 1, §§ 15-56, 15-71; div. 4, § 15-131 (Municode through 2012 Code); CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, §§ 12-5.63 to .65; ch. 17, art. I, § 17-3; ch. 17, art. III, §§ 17-36 to -39 (Municode through 2011 Code); CHARLOTTESVILLE, VA., CODE OF ORDINANCES ch. 22, art. I, § 22-10 (Municode through 2012 Code); CLEVELAND HEIGHTS, OHIO, CODE ch. 171, § 171.09(a) (Walter H. Drane Co. through 2011 Code); COOK COUNTY, ILL., MUNICIPAL CODE pt. I, ch. 42, art. II, §§ 42-31, 42-40 (Municode through 2011 Code); COUNCIL BLUFFS, IOWA, CODE OF ORDINANCES tit. 1, ch. 1.40, §§ 1.40.030(15), 1.40.030 (24), 1.40.060(17), 1.40.080(a) (Municode through 2011 Code); DALL., TEX., CITY CODE, ch. 15B, §§ 15B-1(6)–(7), 15B-3 to -4 (AmLegal through 1997 Code); DANE COUNTY, WIS., COUNTY ORDINANCES, tit. 4, ch. 19, subch. II, § 19.50(2) (2009), <http://www.county>

ofdane.com/ordinances; DES MOINES, IOWA, MUNICIPAL CODE ch. 62, art. VI, §§ 62-166, 62-168 (Municode through 2012 Code); DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, §§ 27-3-1(a)(1)-(6), 27-3-2 (Municode through 2010 Code); DUBUQUE, IOWA, CITY CODE tit. 8, ch. 3, § 8-3-3(A); ch. 4, § 8-4-6(A), 8-4-6(C) (Sterling Codifiers through 2010 Code); EAST LANSING, MICH., CODE OF ORDINANCES pt. II, ch. 22, art. II, §§ 22-33(b)(1), (b)(7), (c), (f)-(h), 22-38(g)-(j) (Municode through 2011 Code); EUGENE, OR., CITY CODE ch. 4, § 4.625(1) (2011), <http://www.eugene-or.gov/portal/server.pt?open=512&objID=269&PageID=1790&cached=true&mode=2>; EVANSTON, ILL., CITY CODE tit. 1, ch. 12, §§ 1-12-3, 1-12-5, 1-12-9(B)-(C) (Municode through 2011 Code); FORT DODGE, IOWA, MUNICIPAL CODE tit. 2, ch. 2.16, §§ 2.16.050(15), 2.16.070(a), 2.16.140(h) (2010), <http://www.fortdodgeiowa.org/egov/docs/1155244749399.htm>; FORT WAYNE, IND., CODE OF ORDINANCES tit. IX, ch. 93, §§ 93.035-.038 (AmLegal through 2011 Code); HARRISBURG, PA., CITY CODE tit. 4, ch. 4-101, §§ 4-101.2, 4-101.4 (2010), [http://www.equalitypa.org/ADH\\_toolkit/harrisburg%20title%20four.htm](http://www.equalitypa.org/ADH_toolkit/harrisburg%20title%20four.htm); HARTFORD, CONN., MUNICIPAL CODE pt. II, ch. 2, art. VIII, div. 11, § 2-696(A) (Municode through 2011 Code); HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, §§ 2-7.00 to .05 (2010), <http://www.hayward-ca.gov/municipal/HMCWEB/Non-DiscriminatoryEmploymentPractices.pdf>; INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, § 581-102; art. IV, § 581-412(e) (Municode through 2011 Code); IOWA CITY, IOWA, CITY CODE tit. 2, ch. 3, § 2-3-1 (Sterling Codifiers through 2012 Code); ITHACA, N.Y., CITY CODE pt. I, ch. 39, art. I, § 39-1; pt. II, ch. 215, art. 1, § 215-3(A)(1) (General Code through 2010 Code); JOHNSON COUNTY, IOWA, HUMAN RIGHTS ORDINANCE §§ IV(A)(1)-(3), X(B) (2010), [http://www.state.ia.us/government/crc/docs/Johnson\\_County\\_Human\\_Rights\\_Ordinance.pdf](http://www.state.ia.us/government/crc/docs/Johnson_County_Human_Rights_Ordinance.pdf); KING COUNTY, WASH., CODE ch. 12.16, §§ 12.16.010-.020 (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, §§ 2.72.010, 2.72.030-.040 (Municode through 2010 Code); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, §§ 10.8, 10.8.2 (AmLegal through 2012 Code); MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(b) (Municode through 2007 Code); MIAMI BEACH, FLA., CODE ch. 2, art. VI, div. 3, § 2-373(b), (f) (Municode through 2011 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(a)(1)-(b) (Municode through 2012 Code); NORTHAMPTON, MASS., CODE ch. 22, art. XIX, §§ 22-100, 22-104 (a)(2) (General Code through 2010 Code); OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.040(A); tit. 9, ch. 9.44, § 9.44.020(A)(1) (Municode through 2011 Code); OAK PARK, ILL., VILLAGE CODE ch. 13, art. 3, §§ 13-3-1, 13-3-4 (Sterling Codifiers through 2011 Code); OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, §§ 3.18.010(C), 3.18.020(A), 3.18.020(D)-(F), 3.18.040 (Code Publishing Company through 2012 Code); PEORIA, ILL., CODE OF ORDINANCES ch. 17, art. III, §§ 17-118(1)-(3), (6), 17-120(c) (Municode through 2011 Code); PHILA., PA., HOME RULE CHARTER art. 8, ch. 2, § 8-200(2)(d) (AmLegal through 2011 Code); PHX., ARIZ., CITY CODE ch. 18, art. I, §§ 18-1, 18-4; art. II, § 18-10.01 (Code Publishing Company through 2012 Code); PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. VI, ch. 651, § 651.04 (Municode through 2011 code); PORTLAND, OR., CITY CODE & CHARTER tit. 23, ch. 23.01, § 23.01.050 (2001), <http://www.Portlandonline.com/auditor/index.cfm?c=28168>; PRINCE GEORGES COUNTY, MD., CODE subtit. 10A, div. 2, § 10A-122 (2010), <http://lis.princegeorgescountymd.gov/lis/default.asp?File=&Type=SearchCode>; RALEIGH, N.C., CODE div. II, pt. 4, ch. 3, § 4-1004 (Municode through 2011 Code); ROCHESTER, N.Y., CITY CODE pt. II, ch. 63, §§ 63-2, 63-7 (General Code through 2012 Code); SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.010 (Quality Code through Publishing 2011 Code); ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, §§ 183.02(5), 183.04

ordinances:

1. **Non-discrimination** ordinances that require contractors not to discriminate on the basis of sexual orientation or gender identity in employment;
2. **Affirmative action**<sup>15</sup> ordinances that require contractors to take certain outreach steps in their employment practices with respect to sexual orientation and gender identity; and
3. **Equal benefits ordinances** that require contractors to offer benefits to the domestic partners of employees on the same terms they are offered to spouses.

### *A. Non-Discrimination Ordinances*

Sixty-one of these localities have ordinances that specifically prohibit discrimination on the basis of sexual orientation by local government contractors, forty-two also prohibit discrimination based on gender identity.<sup>16</sup> These ordinances include contractor

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(Municode through 2011 Code); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 35, §§ 22.3501, 22.3504 (AmLegal through 2012 Code); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1-.2 (AmLegal through 2012 Code); SAN MATEO COUNTY, CAL, CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, §§ 2.50.04-.050 (Municode through 2011 Code); SANTA MONICA, CAL., MUNICIPAL CODE art. 4, ch. 4.65, § 4.65.025 (Quality Code Publishing through 2012 Code); SEATTLE, WASH., MUNICIPAL CODE tit. 14, ch. 14.10, §§ 14.10.010, 14.10.030 (Municode through 2011 Code); SPRINGFIELD, ILL., CODE OF ORDINANCES tit. IX, ch. 93, § 93.08 (Municode through 2011 Code); SUFFOLK COUNTY, N.Y., LAWS OF SUFFOLK COUNTY art. III, § 143-12 (2010), <http://www.suffolk.lib.ny.us/govdocs/gdlocal.shtml> (follow “Clerk of the Suffolk County Legislature” hyperlink; then search Laws of Suffolk County); TACOMA, WASH., MUNICIPAL CODE ch. 1.07, § 1.07.030 (2010), <http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title01-AdministrationAndPersonnel.pdf>; TOMPKINS COUNTY, N.Y., CODE pt. II, ch. 92, § 92-5(A)(1) (General Code through 2011 Code); TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-144 (AmLegal through 2012 Code); TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, §§ 3.46.010-.020 (Code Publishing Company through 2011 Code); WEST HOLLYWOOD, CAL., MUNICIPAL CODE tit. 9, ch. 9.28, § 9.28.050 (Quality Code through Publishing 2011 Code); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-321 (Municode through 2011 Code).

<sup>15</sup> “Affirmative action ordinance” here refers to those ordinances that explicitly require “affirmative action,” and those that require contractors to take certain outreach steps but do not use the term “affirmative action.” Both types of ordinances require contractors to take outreach steps that resemble some of the steps federal government contractors are required to take under Executive Order 11246 with respect to ethnicity and religion, such as conspicuously posting the non-discrimination policy at the job site and including the policy in all job advertisements. 3 C.F.R. 167 (1965).

<sup>16</sup> Localities that prohibit discrimination on the basis of sexual orientation



alone include: ARLINGTON COUNTY, VA., COUNTY CODE ch. 31, §§ 31-10, 31-3(B)(1); BROOKLINE, MASS., GENERAL BY-LAWS §§ 4.5.1-3; CANTON, OHIO, GENERAL OFFENSE CODE pt. 5, ch. 547, §§ 547.01-.02; CHARLOTTESVILLE, VA., CODE OF ORDINANCES ch. 2, art. I, § 22-10; DES MOINES, IOWA, CODE ch. 62, art. VI, § 62-168; EUGENE, OR., CITY CODE ch. 4, § 4.625; FORT WAYNE, IND., CODE OF ORDINANCES tit. IX, ch. 93, §§ 93.035-.036; HARRISBURG, PA., CODE §§ 4-101.4, 4-101.2; HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, §§ 2-7.00 to .02; OAK PARK, ILL., VILLAGE CODE ch. 13, art. 3, §§ 13-3-1, 13-3-4; PHX., ARIZ., CITY CODE ch. 18, art. I, §§ 18-1, 18-4; PRINCE GEORGES COUNTY, MD., CODE subtit. 10A, div. 2, § 10A-122; RALEIGH, N.C., CODE div. II, pt. 4, ch. 3, § 4-1004; SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 35, §§ 22.3501-.3504, 22.3512-.3514; SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.040; SUFFOLK COUNTY, N.Y., LAWS OF SUFFOLK COUNTY art. III, § 143-12; TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, §§ 28-137, 28-144; YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, §§ 2-316, 2-320 to -321.

Localities that prohibit discrimination on the bases of sexual orientation and gender identity include: ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1414; AUSTIN, TEX., CITY CODE §§ 5-4-1 to -2; BALT., MD., CODE art. 5, §§ 5-29-1 to -6, 5-29-15 to -16; BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, §§ 13.26.010-.110; BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.21.020-.030; BOS., MASS., CITY OF BOSTON MUNICIPAL CODE ch. 12, §§ 12-9.1, 12-9.12; BOULDER, COLO., REV. CODE tit. 12, ch. 12-1-3(a)(1), 12-1-10; BURIEN, WASH., MUNICIPAL CODE ch. 8.5, §§ 8.50.030-.050; CAMBRIDGE, MASS., MUNICIPAL CODE tit. 2, ch. 2.76, §§ 2.76.030, 2.76.100(A); CEDAR FALLS, IOWA, CITY CODE ch. 15, art. 3, div. 1, §§ 15-56, 15-71; CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, §§ 12.5-62 to -65; ch. 17, art. I, § 17.3 (although gender identity is not explicitly included in the contractor non-discrimination ordinance, gender identity and expression is included in the definition of "sex" in the city's broader non-discrimination ordinance and therefore is likely protected under "sex" in the contractor-specific ordinance); CLEVELAND HEIGHTS, OHIO, CODE ch. 171, § 171.09; COOK COUNTY, ILL., MUNICIPAL CODE pt. I, ch. 42, art. II, §§ 42-31, 42-40; COUNCIL BLUFFS, IOWA, CODE OF ORDINANCES tit. 1, ch. 1.40, §§ 1.40.060(17), 1.40.080(a)(1); DALL., TEX., CITY CODE ch. 15B, §§ 15B-1 to -3; DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, §§ 19.04(7), 19.50; DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, § 27-3-2; DUBUQUE, IOWA, CITY CODE tit. 8, ch. 3, § 8-3-3; EAST LANSING, MICH., CODE OF ORDINANCES pt. II, ch. 22, art. II, §§ 22-31 to -33; EVANSTON, ILL., CITY CODE tit. 1, ch. 12, §§ 1-12-3, 1-12-5; FORT DODGE, IOWA, MUNICIPAL CODE tit. 2, ch. 2.16, §§ 2.16.070(a)(1), 2.16.050(15); HARTFORD, CONN., MUNICIPAL CODE pt. II, ch. 2, art. VIII, div. 11, § 2-655; INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, § 581-102; IOWA CITY, IOWA, CITY CODE tit. 2, ch. 3, § 2-3-1; ITHACA, N.Y., CITY CODE pt. II, ch. 215, art. I, §§ 215-2, 39-1; JOHNSON COUNTY, IOWA, HUMAN RIGHTS ORDINANCE §§ IV(A), X; KING COUNTY, WASH., CODE ch. 12.16, §§ 12.16.010(G)-.020; L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, §§ 10.8, 10.8.4 (although gender identity is not explicitly included in the contractor non-discrimination ordinance, gender identity and expression is included in the definition of "sex" in the city's broader non-discrimination ordinance and therefore is likely protected under "sex" in the contract-specific ordinance); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, §§ 2.72.010-.040; MADISON, WIS., CODE OF ORDINANCES ch. 39, §§ 39.02(9)(b), 39.03(2)(hh); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(a); NORTHAMPTON, MASS., CODE ch. 22, art. XIX, §§ 22-100, 22-104(A)(2); PEORIA, ILL., CODE OF ORDINANCES ch. 17, art. III, §§ 17-116, 17-118, 17-120; PHILA., PA., HOME RULE CHARTER art. 9, ch. 11, § 9-

ordinances that are separate from any broader non-discrimination ordinance the locality may have, as well as broad non-discrimination ordinances that specifically state that the ordinance applies to local government contractors.<sup>17</sup> Cities and counties of various sizes across the country—from Ypsilanti, Michigan,<sup>18</sup> to Los Angeles, California<sup>19</sup>—have enacted these ordinances.

Twenty of these ordinances apply to all local government contracts without exception.<sup>20</sup> Twelve of these ordinances apply

1103; PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. VI, ch. 651, §§ 651.01, 651.04, 657.01; ROCHESTER, N.Y., CITY CODE pt. II, ch. 63, §§ 63-2, 63-7; ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, §§ 183.02, 183.04; S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1; SEATTLE, WASH., MUNICIPAL CODE tit. 14, ch. 14.10, §§ 14.10.010, 14.10.030; SPRINGFIELD, ILL., CODE OF ORDINANCES tit. IX, ch. 93, §§ 93.01, 93.08; TACOMA, WASH., MUNICIPAL CODE ch. 1.07, § 1.07.030; TOMPKINS COUNTY, N.Y., CODE pt. II, ch. 92, § 92-5(A)(6); WEST HOLLYWOOD, CAL., MUNICIPAL CODE tit. 9, ch. 9.28, § 9.28.050.

<sup>17</sup> For an example of a separate contractor ordinance, see ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1414. For an example of a broad non-discrimination ordinance that explicitly applies to local government contractors, see PHX., ARIZ., CITY CODE ch. 18, art. I, §§ 18-1, 18-4.

<sup>18</sup> YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-320.

<sup>19</sup> L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, §§ 10.8.1–.4.

<sup>20</sup> AUSTIN, TEX., CITY CODE § 5-4-1 to -2 (applying to all contractors, but applying only to subcontractors with contracts of \$2,000 or more and fifteen or more employees); BALT., MD., CODE art. 5, § 5-29-1; BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.26.030; CAMBRIDGE, MASS., MUNICIPAL CODE tit. 2, ch. 2.76, § 2.76.100(A) (non-discrimination requirements appear to apply to all contractors even though the broad non-discrimination ordinance does not apply to the private sector); CEDAR FALLS, IOWA, CITY CODE ch. 15, art. 3, div. 1, § 15-71 (non-discrimination requirements appear to apply to all contractors even though the broad non-discrimination ordinance does not apply to the private sector); COOK COUNTY, ILL., MUNICIPAL CODE pt. I, ch. 42, art. II, § 42-40; DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, §§ 19.52, 19.54; DES MOINES, IOWA, CODE ch. 62, art. VI, § 62-168 (non-discrimination requirements appear to apply to all contractors even though the broad non-discrimination ordinance does not apply to the private sector); EAST LANSING, MICH., CODE OF ORDINANCES pt. II, ch. 22, art. II, § 22-33(g) (non-discrimination requirements appear to apply to all contractors even though the broad non-discrimination ordinance does not apply to the private sector); EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-5; FORT WAYNE, IND., CODE OF ORDINANCES tit. IX, ch. 93, § 93.036; HARTFORD, CONN., MUNICIPAL CODE pt. II, ch. 2, art. VIII, div. 11, §§ 2-655, 2-696; HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, § 2-7.02; INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, § 581-102 (non-discrimination requirements appear to apply to all contractors even though the broad non-discrimination ordinance does not apply to the private sector); ITHACA, N.Y., CITY CODE pt. I, ch. 39, art. I, § 39-1; L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.1.1; PRINCE GEORGES COUNTY, MD., CODE subtit. 10A, div. 2, § 10A-122; RALEIGH, N.C., CODE div. II, pt. 4, ch. 3, § 4-1004; ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, § 183.04 (non-discrimination requirements

to contractors with contracts above a certain dollar amount.<sup>21</sup> The dollar thresholds in these ordinances range from \$1,000 to \$50,000.<sup>22</sup> Eighteen ordinances exempt certain types of contracts.<sup>23</sup> The most common exemptions are for sole source

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appear to apply to all contractors even though the broad non-discrimination ordinance does not apply to the private sector); SEATTLE, WASH., MUNICIPAL CODE tit. 14, ch. 14.10, § 14.10.010.

<sup>21</sup> See ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1411 (applying to contracts over \$1,000); BROOKLINE, MASS., GENERAL BY-LAWS § 4.4.2(e) (applying to contracts of \$10,000 or more); CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-12 (applying to contracts of \$17,500 or more, or as adjusted annually by city council); CHARLOTTESVILLE, VA., CODE OF ORDINANCES ch. 2, art. I, § 22-10 (applying to contracts over \$10,000); COUNCIL BLUFFS, IOWA, CODE OF ORDINANCES tit. 1, ch. 1.40, § 1.40.060(17) (applying to contracts over \$50,000); DALL., TEX., CITY CODE ch. 15B, § 15B-3 (applying to construction contracts for over \$10,000 and to contracts for goods and services over \$50,000); EUGENE, OR., CITY CODE ch. 4, § 4.615 (applying to contracts of \$2,500 or more); FORT DODGE, IOWA, MUNICIPAL CODE tit. 2, ch. 2.16, § 2.16.050(15) (applying to contracts over \$10,000); PHILA., PA., HOME RULE CHARTER art. 8, ch. 2, § 8-200 (AmLegal through 2011 Code) (applying to contracts over \$10,000 indexed for inflation); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1(c) (applying to contracts over \$5,000); TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-20(1) (applying to contracts over \$50,000); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-316 (applying to contracts over \$2,000).

<sup>22</sup> See ordinances cited *supra* note 21.

<sup>23</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1413(3)-(4) (exempting emergency or sole source procurement contracts, and contracts with contractors that have fourteen or fewer employees); BLOOMINGTON, IND., MUNICIPAL CODE § 2.21.070(8) (2011), <http://bloomington.in.gov/code> (exempting contracts specifically exempted by regulations promulgated by the human rights commission and approved by the common council); BROOKLINE, MASS., GENERAL BY-LAWS § 4.4.2 (articulating requirements do not apply to contracts for work “outside the state and no recruitment of workers within the state is involved; [contracts] involving standard commercial supplies or raw materials”; when the contractor is a non-profit private membership club; when the contractor has fewer than six employees; “contracts involving joint purchases with the state[;] contracts with the [state] for construction of public works[;] contracts for financial assistance with a government or governmental agency[;] notes and bonds of the Town[;] employment by the Town of officers and employees of the Town[;] whenever it is deemed necessary or appropriate . . .” by the Human Relations Commission or the Board of Selectman to exempt the contract); CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-67 (exempting “contracts for the purchase or sale of . . . real estate or for the development or annexation of real estate; [c]ontracts with other governmental entities; [c]ollective bargaining and employment contracts; [p]urchases made at auctions or bankruptcy sales; contracts for the purchase of goods or services . . . which can only be made from a single source; [c]ontracts with contracting entities which the City Manager determines have met affirmative action requirements of other governmental entities with requirements similar to those of the City; [c]ontracts with contracting entities which employ only owners or the owners’ relatives, or which employ less than three [employees]; [c]ontracts for sale of goods, services, or property by the City”; and contracts for “emergency

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purchases”); HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, § 2-7.06 (exempting “contracts with other governmental jurisdictions; contracts with manufacturers whose principal place of business is outside of the [U.S.]”; contracts with manufacturers whose principal place of business is in the U.S. but outside the State of California; contracts with a sole source supplier; and contracts resulting from an emergency where a delay would jeopardize the welfare of citizens or the city’s operational effectiveness would be threatened); KING COUNTY, WASH., CODE ch. 12.16, § 12.16.050 (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx) (exempting “real property sale [and] lease [transactions and] government agency contracts”); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, § 2.72.130 (Municode through 2010 Code) (exempting “[c]ontracts with other governmental jurisdictions; [c]ontracts with manufacturers located outside the continental U.S.; [c]ontracts with sole source suppliers of goods and services; and [c]ontracts [entered into because of an emergency] where the general welfare is at stake”); MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(b) (Municode through 2007 Code) (exempting “contracts with the State of Wisconsin, another state government, the [federal government]”); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(a) (Municode through 2012 Code) (stating requirements do not apply to contracts exempted by the director of the Minneapolis Department of Civil Rights or the Minneapolis Commission on Civil Rights); PEORIA, ILL., CODE OF ORDINANCES ch. 17, art. III, § 17-120(a) (Municode through 2011 Code) (requirements do not apply when contractor is a sole source for the good or service and the good or service is essential for governmental operations); PHILA., PA., HOME RULE CHARTER art. 8, ch. 2, § 8-200 (exempting joint procurement contracts if likely to result in lower cost to the city); PHX., ARIZ., CITY CODE ch. 18, art. I, § 18-4(A)(5) (Code Publishing Company through 2012 Code) (exempts contractors with less than thirty-five employees, otherwise applies to all contractors that meet the definition of “employer” in the broader non-discrimination ordinance); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 35, § 22.3503 (AmLegal through 2012 Code) (exempting contracts with other public entities); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.5-1 (stating requirements do not apply when contractor is the sole source; contract is needed to respond to an emergency; contract involves specialized litigation requirements; contract is with another public entity and the goods or services are not available from another source or the contract is necessary to serve a substantial public interest; the requirements of the contract would be inconsistent with terms or conditions of a grant; subvention or agreement with a public agency; no compliant bidder is available; where the city determines that bulk purchasing arrangements through other public entities would reduce purchasing costs; where the city determines that the requirements would result in the city entering into a contract with an entity that is being used to evade the intent of the ordinance); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.060 (Municode through 2011 Code) (allowing the board to waive the requirements if the contractor demonstrates that compliance would cause undue hardship); SUFFOLK COUNTY, N.Y., LAWS OF SUFFOLK COUNTY art. III, § 143-12(c) (2010), <http://www.suffolk.lib.ny.us/govdocs/gdlocal.shtml> (follow “Clerk of the Suffolk County Legislature” hyperlink; then search Laws of Suffolk County) (stating requirements do not apply to activities of the contractor “that are unrelated, separate, or distinct from the county contract”); TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-143 (exempting federally funded contracts, and contracts entered into “in the case of an emergency or when special circumstances exist which, in the interest of the city, compel such exemption”); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-316

suppliers (meaning no other contractor can provide a good or service); contracts with government entities; and contracts entered into in order to respond to an emergency.<sup>24</sup> Two contractor non-discrimination ordinances only apply to construction contractors.<sup>25</sup> Seventeen of the contractor non-discrimination ordinances apply to contractors who fit the definition of “employer” in the locality’s broader non-discrimination ordinance.<sup>26</sup> For example, Boston’s ordinance requires that contractors be found in violation of the city’s broader non-discrimination ordinance before contract-specific penalties may be imposed.<sup>27</sup> Boston’s broad non-discrimination ordinance, which applies to all public and private sector employers, exempts employers with six or fewer employees, non-

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(exempting creditor or debtors of the city, and “persons who are sole proprietors of their business and who have no employees”).

<sup>24</sup> See ordinances cited *supra* note 23.

<sup>25</sup> CLEVELAND HEIGHTS, OHIO, CODE ch. 171, § 171.09 (Walter H. Drane Co. through 2011 Code); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, §§ 2.50.040, 2.50.060.

<sup>26</sup> ARLINGTON COUNTY, VA., COUNTY CODE ch. 31, § 31-3(B) (2010), <http://www.arlingtonva.us/departments/CountyBoard/CountyCode/file74533.pdf>; BOS., MASS., CITY OF BOSTON MUNICIPAL CODE ch. 12, § 12-9.3 (AmLegal through 2010 Code); BOULDER, COLO., REV. CODE tit. 12, ch. 12-1-10 (2010), <http://www.colocode.com/boulder2/chapter12-1.htm>; BURIEN, WASH., MUNICIPAL CODE ch. 8.5, § 8.50.040 (Code Publishing Company through 2010 Code); CANTON, OHIO, GENERAL OFFENSE CODE pt. 5, ch. 547, § 547.02(a) (Walter H. Drane Co. through 2011 Code); DUBUQUE, IOWA, CITY CODE tit. 8, ch. 3, § 8-3-3 (Sterling Codifiers through 2010 Code); HARRISBURG, PENN., CITY CODE tit. 4, ch. 4-101, § 4-101.4 (2010), [http://www.equalitypa.org/ADH\\_toolkit/harrisburg%20title%20four.htm](http://www.equalitypa.org/ADH_toolkit/harrisburg%20title%20four.htm); IOWA CITY, IOWA, CITY CODE tit. 2, ch. 3, § 2-3-1 (Sterling Codifiers through 2012 Code); JOHNSON COUNTY, IOWA, HUMAN RIGHTS ORDINANCE § IV (2010), [http://www.state.ia.us/government/crc/docs/Johnson\\_County\\_Human\\_Rights\\_Ordinance.pdf](http://www.state.ia.us/government/crc/docs/Johnson_County_Human_Rights_Ordinance.pdf); NORTHAMPTON, MASS., CODE ch. 22, art. XIX, § 22-100 (General Code through 2010 Code); OAK PARK, ILL., VILLAGE CODE ch. 13, art. 3, §§ 13-3-1 to -2 (Sterling Codifiers through 2011 code); PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. V, ch. 659, §§ 659.01–.021 (Municode through 2011 Code); ROCHESTER, N.Y., CITY CODE pt. II, ch. 63, § 63-2 (General Code through 2012 Code); SPRINGFIELD, ILL., CODE OF ORDINANCES tit. IX, ch. 93, §§ 93.01, 93.08 (Municode through 2011 Code) (appearing to incorporate the religious exemption from the definition of “employer” in the local broader non-discrimination ordinance, which allows religious organizations to give employment preferences based on religion; but explicitly states that the non-discrimination requirements apply to all contractors regardless of the number of employees, while the broader ordinance applies only to employers with five or more employees); TACOMA, WASH., MUNICIPAL CODE ch. 1.07, § 1.07.030 (2010), <http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title01-AdministrationAndPersonnel.pdf>; TOMPKINS COUNTY, N.Y., CODE pt. II, ch. 92, § 92-5(A) (General Code through 2011 Code); WEST HOLLYWOOD, CAL., MUNICIPAL CODE tit. 9, ch. 9.28, §§ 9.28.010–.050 (Quality Code through Publishing 2011 Code).

<sup>27</sup> BOS., MASS., CITY OF BOSTON MUNICIPAL CODE ch. 12, § 12-9.12.

profit private membership clubs, and religious organizations.<sup>28</sup>

The compliance requirements, enforcement procedures, and remedies available under these ordinances vary. More than half of these local ordinances (thirty-five) require that an equal opportunity statement be included in all government contracts, and allow the locality to terminate the contract and debar the employer from future contracting opportunities with the locality if the contractor has been found in violation.<sup>29</sup>

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<sup>28</sup> *Id.* ch. 12, § 12-9.2.

<sup>29</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1414 (Municode through 2012 Code); AUSTIN, TEX., CITY CODE ch. 5-4, § 5-4-2 (AmLegal through 2012 Code); BALT., MD., CODE art. 5, subtit. 29, § 29-11 (2010), <http://www.baltimorecity.gov/Government/CityCharterCodes.aspx>; BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.26.010 (Code Publishing Company through 2012 Code); BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.21.030, 2.21.070 (2011), <http://bloomington.in.gov/code>; BROOKLINE, MASS., GENERAL BY-LAWS art. 4.5, §§ 4.5.1–.3 (2010); CAMBRIDGE, MASS., MUNICIPAL CODE tit. 2, ch. 2.76, § 2.76.100 (Municode through 2011 Code); CANTON, OHIO, GENERAL OFFENSE CODE pt. 5, ch. 547, §§ 547.06–.08; CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, §§ 12-5.61, 12-5.64 to .65 (Municode through 2011 Code); COOK COUNTY, ILL., MUNICIPAL CODE pt. I, ch. 42, art. II, § 42-40 (Municode through 2011 Code); DALL., TEX., CITY CODE ch. 15B, §§ 15B-3, 15B-7 (AmLegal through 1997 Code); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, §§ 19.50–.71 (2010), <http://www.countyofdane.com/ordinances>; DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, § 27-3-2 (Municode through 2010 Code); EAST LANSING, MICH., CODE OF ORDINANCES pt. II, ch. 22, art. II, § 22-33(g) (Municode through 2011 Code); EUGENE, OR., CITY CODE ch. 4, § 4.625 (2010), <http://www.eugene-or.gov/portal/server.pt?open=512&objID=269&PageID=1790&cached=true&mode=2>; EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-5 (Municode through 2011 Code); FORT WAYNE, IND., CODE OF ORDINANCES tit. IX, ch. 93, §§ 93.036–.038 (AmLegal through 2011 Code); HARTFORD, CONN., MUNICIPAL CODE pt. II, ch. 2, art. VIII, div. 11, § 2-696 (Municode through 2011 Code); HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, §§ 2-7.00 to .08 (2010), <http://www.hayward-ca.gov/municipal/HMCWEB/Non-DiscriminatoryEmploymentPractices.pdf>; INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, § 581-102 (Municode through 2011 Code); KING COUNTY, WASH., CODE ch. 12.16, §§ 12.16.010–.180 (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, §§ 2.72.010–.130 (Municode through 2010 Code); L.A., CAL., ADMIN. CODE div. 10, ch. 1, art. 1, § 10.8.2 (AmLegal through 2012 Code); MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(b) (Municode through 2007 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50 (Municode through 2012 Code); PRINCE GEORGES COUNTY, MD., CODE subtit. 10A, div. 2, § 10A-122 (2010), <http://lis.princegeorgescountymd.gov/lis/default.asp?File=&Type=SearchCode>; ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, § 183.04 (Municode through 2011 Code); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 35, §§ 22.3505–.3512 (AmLegal through 2012 Code); S.F., CAL., CODE §§ 12B.1–.6 (AmLegal through 2012 Code); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, §§ 2.50.040–.050 (Municode through 2011 Code); SPRINGFIELD, ILL., CODE OF ORDINANCES tit. IX, ch. 93, § 93.08; SUFFOLK COUNTY, N.Y., LAWS OF SUFFOLK COUNTY art. III, § 143-12 (2010),

Some of these localities have more stringent compliance requirements, or provide additional remedies. Five jurisdictions require employers to undergo a pre-approval or certification process before they contract with the local government.<sup>30</sup> For example, Atlanta requires that the office of contract compliance review information submitted by the employer to determine whether the employer is in compliance before awarding a contract.<sup>31</sup> A few jurisdictions allow for a monetary penalty against a contractor that has violated the non-discrimination clause. For example, Hayward, California, imposes a per day penalty of the greater of \$250.00 or 1 percent of the contract amount for the time the contractor is deemed in non-compliance with the ordinance.<sup>32</sup> Three jurisdictions attribute liability for a contractor's violation to the local agency that entered into the contract.<sup>33</sup>

Two localities, King County and Seattle, Washington, specifically provide that an aggrieved individual may file a complaint and seek individual remedies for a violation of the contractor non-discrimination ordinance, separate from the enforcement rights and remedies available under a broader non-

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<http://www.suffolk.lib.ny.us/govdocs/gdlocal.shtml> (follow "Clerk of the Suffolk County Legislature" hyperlink; then search Laws of Suffolk County); TACOMA, WASH., MUNICIPAL CODE ch. 1.07, § 1.07.080; TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, §§ 28-137, 28-144 (AmLegal through 2012 Code); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, §§ 2-321 to -329 (Municode through 2011 Code).

<sup>30</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1412(10); BROOKLINE, MASS., GENERAL BY-LAWS art. 4.5, §§ 4.5.2-3; MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(d); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.040(a); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-319. Additionally, the ordinances of Oak Park, Illinois grant the city council the right to ask for policy verification from contractors, but it is unclear whether the council has exercised this right. OAK PARK, Ill., VILLAGE CODE ch. 13, art. 3, § 13-3-2 (Sterling Codifiers through 2011 Code). The ordinances of Canton, Ohio permit (but do not require) the Executive Secretary to hold a pre-award conference with the successful bidder to ensure compliance with the non-discrimination requirements.

<sup>31</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1412(10).

<sup>32</sup> HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, § 2-7.02(g).

<sup>33</sup> DUBUQUE, IOWA, CITY CODE tit. 8, ch. 4, § 8-4-6(A)(2)(b) (Sterling Codifiers through 2010 Code); IOWA CITY, IOWA, CITY CODE tit. 2, ch. 4, § 2-4-5(I)(2) (Sterling Codifiers through 2012 Code); JOHNSON COUNTY, IOWA, HUMAN RIGHTS ORDINANCE § X(B)(2) (2010), [http://www.state.ia.us/government/crc/docs/Johnson\\_County\\_Human\\_Rights\\_Ordinance.pdf](http://www.state.ia.us/government/crc/docs/Johnson_County_Human_Rights_Ordinance.pdf).

discrimination ordinance.<sup>34</sup> The contractor non-discrimination ordinances of two other localities do not explicitly provide for individual remedies when a complaint is filed, but may be able to award them or include them in a conciliation agreement if the contractor is found to have violated the ordinance.<sup>35</sup>

Some localities have less stringent compliance requirements, or provide more limited remedies. Thirteen jurisdictions require only that an equal opportunity statement is included in the contract, and do not explicitly provide for contract remedies, such as termination or debarment.<sup>36</sup> Thirteen other jurisdictions require only that an agency actor or body, such as the city manager or the human rights commission, ensure contractor compliance with a non-discrimination requirement, without explicitly requiring that any non-discrimination provision be included in government contracts.<sup>37</sup> Six of these limited

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<sup>34</sup> KING COUNTY, WASH., CODE ch. 12.16, § 12.16.115; SEATTLE, WASH., MUNICIPAL CODE tit. 14, ch. 14.10, § 14.10.050(A) (Municode through 2011 Code).

<sup>35</sup> AUSTIN, TEX., CITY CODE § 5-4-3 (AmLegal through 2012 Code) (stating that the Equal Employment/Fair Housing Office shall “endeavor to eliminate or correct the practice or violation complained of by informal methods of conference, conciliation, and persuasion”); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 35, § 22.3509 (AmLegal through 2012 Code) (allowing “[a]n remedy provided by law or agreed to by the business firm”).

<sup>36</sup> CEDAR FALLS, IOWA, CITY CODE ch. 15, art. 3, div. 1, §§ 15-56, 15-71 (Municode through 2012 Code); CHARLOTTESVILLE, VA., CODE OF ORDINANCES ch. 2, art. I, § 22-10 (Municode through 2012 Code); CLEVELAND HEIGHTS, OHIO, CODE ch. 171, § 171.09 (Walter H. Drane Co. through 2011 Code) (allowing for minor monetary penalties, but not termination or debarment); COUNCIL BLUFFS, IOWA, CODE OF ORDINANCES tit. 1, ch. 1.40, § 1.40.060(17) (Municode through 2011 Code); DES MOINES, IOWA, CODE ch. 62, art. VI, § 62-168 (Municode through 2012 Code); ITHACA, N.Y., CITY CODE pt. I, ch. 39, art. I, § 39-1 (General Code through 2010 Code); OAK PARK, ILL., VILLAGE CODE ch. 13, art. 3, § 13-3-1 to -4 (Sterling Codifiers through 2011 Code); PHILA., PA., HOME RULE CHARTER art. 8, ch. 2, § 8-200(2)(d) (AmLegal through 2011 Code); PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. V, ch. 657, § 657.01 (Municode through 2011 Code); RALEIGH, N.C., CODE div. II, pt. 4, ch. 3, § 4-1004 (Municode through 2011 Code); ROCHESTER, N.Y., CITY CODE pt. II, ch. 63, § 63-7 (General Code through 2012 Code); TOMPKINS COUNTY, N.Y., CODE pt. II, ch. 92, § 92-5(A)(6) (General Code through 2011 Code); WEST HOLLYWOOD, CAL., MUNICIPAL CODE tit. 9, ch. 9.28, § 9.28.050 (Quality Code Publishing through 2011 Code).

<sup>37</sup> ARLINGTON COUNTY, VA., COUNTY CODE ch. 31, § 31-10 (2010), <http://www.arlingtonva.us/departments/CountyBoard/CountyCode/file74533.pdf>; BOS., MASS., CITY OF BOSTON MUNICIPAL CODE ch. 12, § 12-9.12 (AmLegal through 2010 Code); BOULDER, COLO., REV. CODE tit. 12, ch. 12-1-10 (2010), <http://www.colocode.com/boulder2/chapter12-1.htm>; BURIEN, WASH., MUNICIPAL CODE ch. 8.5, § 8.50.060 (Code Publishing Company through 2010 Code); DUBUQUE, IOWA, CITY CODE tit. 8, ch. 4, § 8-4-6(A)(2)(b); FORT DODGE, IOWA, MUNICIPAL CODE tit. 2, ch. 2.16, § 2.16.050(15) (2010), <http://www.fortdodgeiowa.org/egov/docs/1155244749399.htm>; HARRISBURG, PENN., CITY CODE tit. 4, ch.



ordinances explicitly state that the general ordinance prohibiting employment discrimination applies to contractors, but do not explicitly provide for contract remedies, such as termination or debarment.<sup>38</sup> Instead, the remedies match those that are available to complainants under the general non-discrimination ordinance.

### *B. Affirmative Action Ordinances*

Of the sixty-one localities with sexual orientation or gender identity contractor non-discrimination ordinances, thirty-five do not require contractors to take “affirmative action” or recruitment outreach steps with respect to any characteristic, including for racial minorities and women.<sup>39</sup> Of the remaining twenty-six localities, twenty-two require that contractors take “affirmative action” or recruitment outreach steps with respect to sexual orientation,<sup>40</sup> and sixteen of these also include gender identity.<sup>41</sup>

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4-101, § 4-101.4 (2010), [http://www.equalitypa.org/ADH\\_toolkit/harrisburg%20title%20four.htm](http://www.equalitypa.org/ADH_toolkit/harrisburg%20title%20four.htm); IOWA CITY, IOWA, CITY CODE tit. 2, ch. 4, § 2-4-5(I)(3); JOHNSON COUNTY, IOWA, HUMAN RIGHTS ORDINANCE § X(B)(3); NORTHAMPTON, MASS., CODE ch. 22, art. XIX, § 22-100 (General Code through 2010 Code); PEORIA, ILL., CODE OF ORDINANCES ch. 17, art. III, § 17-120 (Municode through 2011 Code); PHX., ARIZ., CITY CODE ch. 18, art. I, § 18-2 (Code Publishing Company through 2012 Code); SEATTLE, WASH., MUNICIPAL CODE tit. 14, ch. 14.10, § 14.10.040.

<sup>38</sup> BURIEN, WASH., MUNICIPAL CODE ch. 8.5, § 8.50.050; HARRISBURG, PENN., CITY CODE tit. 4, ch. 4-101, §§ 4-101.2, 4-101.4 (2010); NORTHAMPTON, MASS., CODE ch. 22, art. XIX, § 22-100 (General Code through 2010 Code); PHX., ARIZ., CITY CODE ch. 18, art. I, §§ 18-1, 18-4; ROCHESTER, N.Y., CITY CODE pt. II, ch. 63, § 63-7; TOMPKINS COUNTY, N.Y., CODE pt. II, ch. 92, § 92-5(A)(6).

<sup>39</sup> “Affirmative action” and outreach steps mean only those ordinances that address practices of an employer directed at its individual employees and applicants; it does not include ordinances that require the city to ensure that minority- and women-owned businesses are represented among their contractors.

<sup>40</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, §§ 2-1413(2), 2-1414 (Municode through 2012 Code); AUSTIN, TEX., CITY CODE § 5-4-2(2); BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.21.070(8), 2.31.030(d) (2011), <http://bloomington.in.gov/code>; CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-65 (Municode through 2011 Code); CHARLOTTESVILLE, VA., CODE OF ORDINANCES ch. 22, art. I, § 22-10 (Municode through 2012 Code); DALL., TEX., CITY CODE ch. 15B, § 15B-3 (AmLegal through 1997 Code); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, § 19.54 (2010), <http://www.countyofdane.com/ordinances>; DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, § 27-3-2 (Municode through 2010 Code); EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-5 (Municode through 2011 Code); HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, § 2-7.02(a) (2010), <http://www.hayward-ca.gov/municipal/HMCWEB/Non-DiscriminatoryEmploymentPractices.pdf>; INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, § 581-102 (Municode through 2011 Code); KING

Four of the sixty-one localities exclude sexual orientation and gender identity from their “affirmative action” or recruitment outreach ordinances, although they do have these requirements for other protected groups such as racial minorities and women.<sup>42</sup>

With respect to sexual orientation and/or gender identity, these localities generally require contractors to take steps that resemble some of the steps federal government contractors are required to take under Executive Order 11,246 with respect to ethnicity and religion.<sup>43</sup> These steps include acts such as conspicuously posting the non-discrimination policy at the job site;<sup>44</sup> including the policy in all job advertisements;<sup>45</sup> notifying

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COUNTY, WASH., CODE ch. 12.16, § 12.16.040 (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.4 (AmLegal through 2012 Code); MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(b) (2010) (Municode through 2007 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(a)(1) (Municode through 2012 Code); ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, § 183.04 (Municode through 2011 Code); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.2 (AmLegal through 2012 Code); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.040 (Municode through 2011 Code); SUFFOLK COUNTY, N.Y., LAWS OF SUFFOLK COUNTY art. III, § 143-12 (2010), [http://www.suffolk.lib.ny.us/govdocs/gd\\_local.shtml](http://www.suffolk.lib.ny.us/govdocs/gd_local.shtml) (follow “Clerk of the Suffolk County Legislature” hyperlink; then search Laws of Suffolk County); TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-138 (AmLegal through 2012 Code); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-320 (Municode through 2011 Code); CITY OF CAMBRIDGE, CITY OF CAMBRIDGE AFFIRMATIVE ACTION PROGRAM, YEARS 2007–2010, at 6–8, <http://www.cambridgema.gov/aff/relatedlinks.aspx> (follow “The Affirmative Action 2007-2010 Plan document” hyperlink) (last visited Jan. 30, 2012) [hereinafter CITY OF CAMBRIDGE].

<sup>41</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 114, art. 4, div. 5, §§ 2-1413(2), 2-1414 (Municode through 2012 Code); AUSTIN, TEX., CITY CODE § 5-4-2(2); BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.21.070(8), 2.31.030(d); CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-65; DALL., TEX., CITY CODE ch. 15B, § 15B-3; DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, § 19.54; DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, § 27-3-2; EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-5; INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, § 581-102; KING COUNTY, WASH., CODE ch. 12.16, § 12.16.040; L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.4; MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(b); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(a)(1); ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, § 183.04; S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.2; CITY OF CAMBRIDGE, *supra* note 40.

<sup>42</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.26.060 (Code Publishing Company through 2012 Code); BROOKLINE, MASS., GENERAL BY-LAWS art. 4.4, § 4.4.1(d) (2010); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, § 2.72.030 (Municode through 2010 Code); PHX., ARIZ., CITY CODE ch. 18, art. I, § 18-12 (Code Publishing Company through 2012 Code).

<sup>43</sup> 41 C.F.R. § 60-50.1 (2011).

<sup>44</sup> See, e.g., YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3,

unions of equal employment obligations;<sup>46</sup> furnishing employment and personnel information to the city or county if requested;<sup>47</sup> filing compliance reports or project cite reports if needed;<sup>48</sup> certifying that the contractor has not discriminated in violation of the equal opportunity requirements;<sup>49</sup> developing affirmative action plans;<sup>50</sup> disseminating equal employment policies internally and externally;<sup>51</sup> appointing an internal equal opportunity director to oversee compliance;<sup>52</sup> providing training on equal opportunity and non-discrimination requirements to staff;<sup>53</sup> reviewing selection procedures to ensure that the contractor is not discriminating;<sup>54</sup> and notifying subcontractors of non-discrimination requirements.<sup>55</sup>

The sexual orientation and gender identity “affirmative action” or outreach requirements in eight of these ordinances apply to all local government contracts.<sup>56</sup> Fifteen of these ordinances apply to contracts above a certain dollar amount.<sup>57</sup> The dollar thresholds

§ 2-321.

<sup>45</sup> See, e.g., TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-138(b).

<sup>46</sup> See, e.g., ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, § 183.04(3).

<sup>47</sup> See, e.g., EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-5(E) (Municode through 2011 Code).

<sup>48</sup> See, e.g., ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1414(f) (Municode through 2012 Code).

<sup>49</sup> See, e.g., L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.3(A) (AmLegal through 2012 Code).

<sup>50</sup> See, e.g., BLOOMINGTON, IND., MUNICIPAL CODE § 2.21.070(8) (2011), <http://bloomington.in.gov/code>.

<sup>51</sup> See, e.g., CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-65(b)(3) (Municode through 2011 Code).

<sup>52</sup> See, e.g., *id.* § 12.5-65(b)(2).

<sup>53</sup> See, e.g., BLOOMINGTON, IND., MUNICIPAL CODE § 2.21.070(8).

<sup>54</sup> See, e.g., KING COUNTY, WASH., CODE ch. 12.16, § 12.16.040(C) (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx).

<sup>55</sup> See, e.g., CITY OF CAMBRIDGE, *supra* note 40.

<sup>56</sup> AUSTIN, TEX., CITY CODE § 5-4-2(B) (AmLegal through 2012 Code) (applying to all contractors, but applying only to subcontractors with contracts of \$2,000 or more and fifteen or more employees); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, § 19.54 (2010), <http://www.countyofdane.com/ordinances>; DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, § 27-3-2(b) (Municode through 2010 Code); EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-5 (Municode through 2011 Code); INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, § 581-102 (Municode through 2011 Code); MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(b) (2010) (Municode through 2007 Code); ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, § 183.04(2) (2010) (Municode through 2011 Code); CITY OF CAMBRIDGE, *supra* note 40.

<sup>57</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1411 (Municode through 2012 Code) (applying to contracts over \$1,000 in Atlanta, GA); BROOKLINE, MASS., GENERAL BY-LAWS art. 4.4, § 4.4.2(e) (2010) (applying to

in these ordinances range from \$1,000 to \$100,000.<sup>58</sup> Three of these localities have lower thresholds for their non-discrimination requirements than for their “affirmative action” or outreach requirements.<sup>59</sup> Thirteen ordinances exempt certain types of contracts.<sup>60</sup> All thirteen localities exempt the same types of

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contracts of \$10,000 or more in Brookline, MA); CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-12(1) (applying to contracts of \$17,500 or more, or as adjusted annually by city council of Champaign, IL); CHARLOTTESVILLE, VA., CODE OF ORDINANCES ch. 2, art. I, § 22-10 (Municode through 2012 Code) (applying to contracts over \$10,000 in Charlottesville, VA); COUNCIL BLUFFS, IOWA, CODE OF ORDINANCES tit. 1, ch. 1.40, § 1.40.060(17) (Municode through 2011 Code) (applying to contracts over \$50,000 in Council Bluffs, IA); DALL., TEX., CITY CODE ch. 15B, § 15B-3 (AmLegal through 1997 Code) (applying to construction contracts for over \$10,000 and to contracts for goods and services over \$50,000 in Dallas, TX); EUGENE, OR., CITY CODE ch. 4, § 4.615 (2010), <http://www.eugene-or.gov/portal/server.pt?open=512&objID=269&PageID=1790&cached=true&mode=2> (applying to contracts of \$2,500 or more in Eugene, OR); FORT DODGE, IOWA, MUNICIPAL CODE tit. 2, ch. 2.16, § 2.16.050(15) (2010), <http://www.fortdodgeiowa.org/egov/docs/1155244749399.htm> (applying to contracts over \$10,000 in Fort Dodge, IA); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.1.1 (AmLegal through 2012 Code) (providing that contractors with contracts of \$1,000 or more must comply with the outreach steps; construction contractors with contracts of \$5,000 or more and non-construction contractors with contracts of \$100,000 or more must develop a written affirmative action plan in Los Angeles, CA); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(d) (Municode through 2012 Code) (requiring a written affirmative action plan if the contract is over \$50,000 in Minneapolis, MN); PHILA., PA., HOME RULE CHARTER art. 8, ch. 2, § 8-200(2) (AmLegal through 2011 Code) (applying to contracts over \$25,000 indexed for inflation in Philadelphia, PA); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1(c) (AmLegal through 2012 Code) (applying to contracts over \$5,000 in San Francisco, CA); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 4, art. 2.5, ch. 2.50, § 2.50.040 (Municode through 2011 Code) (applying to contracts of \$100,000 or more in San Mateo, CA); TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-20 (AmLegal through 2012 Code) (applying to contracts over \$50,000 in Tucson, AZ); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-316 (Municode through 2011 Code) (applying to contracts over \$2,000 in Ypsilanti, MI).

<sup>58</sup> See ordinances cited *supra* note 57.

<sup>59</sup> L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.1.1; MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(d); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.040 (containing no threshold for non-discrimination requirements, but outreach steps are not required unless the contract is \$100,000 or more).

<sup>60</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1413(3)–(4); BLOOMINGTON, IND., MUNICIPAL CODE § 2.21.070(8) (2011), <http://bloomington.in.gov/code>; CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-67; HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, § 2-7.06 (2010), <http://www.hayward-ca.gov/municipal/HMCWEB/Non-DiscriminatoryEmploymentPractices.pdf>; KING COUNTY, WASH., CODE ch. 12.16, § 12.16.050 (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, § 2.72.130 (Municode through 2010 Code);

contracts from their non-discrimination requirements and their “affirmative action” or outreach requirements. One contractor non-discrimination ordinance only applies to construction contractors.<sup>61</sup>

Of the twenty-two localities that include sexual orientation or gender identity in their “affirmative action” or outreach ordinances, none require statistical analysis of employees’ sexual orientation or gender identity, or any numerical goals and timetables based on sexual orientation or gender identity. Fifteen of these twenty-two ordinances require that contractors perform statistical workforce analyses to determine the employment rates of women and minorities (defined as racial and/or ethnic minorities), or set numerical goals and timetables for hiring women and minorities.<sup>62</sup>

### *C. Equal Benefits Ordinances*

We identified seventeen localities that have Equal Benefits

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MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(b); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(a); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.5-1; SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.060; SUFFOLK COUNTY, N.Y., LAWS OF SUFFOLK COUNTY art. III, § 143-12(c) (2010), <http://www.suffolk.lib.ny.us/govdocs/gdlocal.shtml> (follow “Clerk of the Suffolk County Legislature” hyperlink; then search Laws of Suffolk County); TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-143(2); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-316. For an example of a separate contractor ordinance, see ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1414. For an example of a broad non-discrimination ordinance that explicitly applies to local government contractors, see PHX., ARIZ., CITY CODE ch. 18, art. I, § 18-1-4 (Code Publishing Company through 2012 Code).

<sup>61</sup> SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, §§ 2.50.040, 2.50.060.

<sup>62</sup> Some localities also include people with disabilities in these requirements. ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1414; BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, §§ 13.26.010–.020 (Code Publishing Company through 2012 Code); CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-65(b)(1); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, § 19.50(2) (2010), <http://www.countyofdane.com/ordinances>; DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, § 27-3-2(c) (Municode through 2010 Code); EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-5(A) (Municode through 2011 Code); HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, §§ 2-7.00 to .02; KING COUNTY, WASH., CODE ch. 12.16, § 12.16.156; L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.4 (AmLegal through 2012 Code); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, § 2.72.030; MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02; PEORIA, ILL., CODE OF ORDINANCES ch. 17, art. III, § 17-120(c) (Municode through 2011 Code); TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-137; CITY OF CAMBRIDGE, *supra* note 40.

Ordinances.<sup>63</sup> These ordinances require contractors to provide benefits to unmarried partners on the same terms that they are provided to spouses. The first EBO was enacted by San Francisco in 1996.<sup>64</sup> Currently, seventeen localities<sup>65</sup> and one state, California,<sup>66</sup> have EBOs. These EBOs have been passed in six different states, with the highest concentration (nine) in California.

EBOs require benefits be offered “on the same terms” meaning contractors may comply in three ways: 1) by offering the same benefits to spouses and domestic partners (or by paying employees with domestic partners a cash equivalent if the locality is unable to offer the benefits);<sup>67</sup> 2) offering no benefits to either spouses or domestic partners;<sup>68</sup> or 3) offering no employee benefits because the contractor has no employees.<sup>69</sup> In some localities, contractors may also comply by allowing employees to choose any member of the household to receive spousal equivalent benefits.<sup>70</sup>

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<sup>63</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, §§ 13.29.010–.100; DANE COUNTY, WIS., CODE tit. 5, ch. 25, subch. II, § 25.016; KING COUNTY, WASH., CODE ch. 12.16, §§ 12.19.010–.050; L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2.1; LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, §§ 2.73.010–.090; MIAMI BEACH, FLA., CODE ch. 2, art. VI, div. 3, § 2-373 (Municode through 2011 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 118, § 18.200; OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, §§ 2.32.010–.110 (Sterling Codifiers through 2011 Code); OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.020 (Code Publishing Company through 2012 Code); PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.053 (2009), <http://www.portlandonline.com/auditor/index.cfm?c=28168>; SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, §§ 3.54.010–.120 (Quality Code Publishing through 2011 Code); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, §§ 22.4301–.4308 (AmLegal through 2012 Code); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1(b) (AmLegal through 2012 Code); SANTA MONICA, CAL., MUNICIPAL CODE art. 4, ch. 4.65, § 4.65.025 (Quality Code Publishing through 2011 Code); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.8, ch. 2.84, §§ 2.84.010–.050; SEATTLE, WASH., MUNICIPAL CODE tit. 20, ch. 20.45, §§ 20.45.010–.050 (Municode through 2011 Code); TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, §§ 3.46.010–.060 (Code Publishing Company through 2011 Code).

<sup>64</sup> See CITY & CNTY. OF S.F., HUMAN RIGHTS COMM’N, OVERVIEW OF THE EQUAL BENEFITS ORDINANCE, available at <http://www.sf-hrc.org/ftp/uploadedfiles/sfhu manrights/docs/over12b.pdf>. See generally S.F., CAL. ADMIN. CODE §§ 12B.1–2.

<sup>65</sup> See ordinances cited *supra* note 63.

<sup>66</sup> CAL. PUB. CONT. CODE § 10295.3(e) (Deering 2011).

<sup>67</sup> See, e.g., BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.040(A)(2).

<sup>68</sup> See, e.g., TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, § 3.46.020(B)(3).

<sup>69</sup> See, e.g., CITY OF SAN DIEGO, CAL., EQUAL BENEFITS PROGRAM, RULES IMPLEMENTING THE EQUAL BENEFITS ORDINANCE 6 (2011), available at <http://www.sandiego.gov/administration/pdf/eborules101213.pdf>.

<sup>70</sup> See, e.g., OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.020(B)(2)

None of the EBOs are explicitly limited to same-sex partners, and therefore, require that any couple who meets the definition of “domestic partner” in the ordinance, whether same-sex or different-sex, be provided benefits on the same terms as spouses.<sup>71</sup>

The benefits required by fourteen of these EBOs include health insurance benefits and a range of other fringe benefits, which make up an employee’s total compensation package.<sup>72</sup> For example, San Diego, California’s EBO defines “employee benefits” as:

[A]ll remuneration other than wages, salary, bonuses, commissions, and stock options offered to an employee as part of the employee’s total compensation package, including bereavement leave, family leave, no-additional-cost services, health and medical benefits, employee discounts, memberships or membership discounts, moving expenses, pension and retirement benefits, transportation and travel benefits, and any other employment or fringe benefits.<sup>73</sup>

Olympia, Washington’s EBO is limited to equal health insurance benefits (medical, dental, and vision benefits), and San Mateo, California’s EBO explicitly exempts pension and retirement

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(Quality Code Publishing through 2012 Code).

<sup>71</sup> All EBOs cover couples who are registered as domestic partners with a state or local government registry. Many also cover couples that are registered as domestic partners with an employer’s internal registry and/or meet the criteria for domestic partnership included in the EBO. See KING COUNTY, WASH., CODE ch. 12.16, § 12.19.020(D) (2009), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx).

<sup>72</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.040; DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(2)(b) (2010), <http://www.countyofdane.com/ordinances>; KING COUNTY, WASH., CODE ch. 12.16, § 12.19.020(E); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.040(A) (Municode through 2010 Code); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2.1(b)(2) (AmLegal through 2012 Code); MIAMI BEACH, FLA., CODE ch. 2, art. VI, div. 3, § 2-373(a)(1) (Municode through 2011 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 118, § 18.200(c) (Municode through 2012 Code); OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.040(A) (Sterling Codifiers through 2011 Code); PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.052(E) (2009), <http://www.portlandonline.com/auditor/index.cfm?c=28168>; SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.030(D) (Quality Code through Publishing 2011 Code); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, § 22.4302 (AmLegal through 2012 Code); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1(b) (AmLegal through 2012 Code); SEATTLE, WASH., MUNICIPAL CODE tit. 20, ch. 20.45, § 20.45.010(F) (Municode through 2011 Code); TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, § 3.46.010(D).

<sup>73</sup> SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, § 22.4302.

benefits.<sup>74</sup> Santa Monica, California's EBO does not specify which benefits are covered.<sup>75</sup>

Fourteen EBOs state the geographic reach of the ordinance. All of these EBOs state that they apply to the contractor's operations that occur within the locality and elsewhere in the United States where work related to the contract is being performed.<sup>76</sup> Thirteen EBOs also apply to work performed on real property outside of the locality if the property is owned or occupied by the locality and the contractor's presence on the property is related to the contract.<sup>77</sup> In addition to these requirements, San Francisco, California's EBO was written to apply to "any of a contractor's operations elsewhere [in] the United States,"<sup>78</sup> but a district court in California has held that the dormant commerce clause prohibits this application.<sup>79</sup>

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<sup>74</sup> OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.010(D) (Code Publishing Company through 2012 Code); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.8, ch. 2.84, § 2.84.010(e) (Municode through 2011 Code).

<sup>75</sup> SANTA MONICA, CAL., MUNICIPAL CODE art. 4, ch. 4.65, § 4.65.025(1) (Quality Code Publishing through 2012 Code).

<sup>76</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.030(B); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(3)(1); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.030(B); L.A., CAL. CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2.1(e)(2) (AmLegal through 2012 Code); MIAMI BEACH, FLA., CODE ch. 2, art. VI, div. 3, § 2-373(d)(2); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(i); OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.030; PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.054; SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.040(B); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, § 22.4303; S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1(d); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.84, § 2.84.030 (Municode through 2011 Code); SEATTLE, WASH., MUNICIPAL CODE tit. 20, ch. 20.45, § 20.45.030; TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, § 3.46.030.

<sup>77</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.030(B); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(3)(1); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.030(B); L.A., CAL. CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2.1(e)(2); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(i); OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.030; PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.054; SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.040(B) (extending the ordinance to work performed on property outside of the city, but owed or occupied by the city, regardless of whether the contractor's presence on the property is related to the contract); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, § 22.4303; S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1(d); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.8, ch. 2.84, § 2.84.030; SEATTLE, WASH., MUNICIPAL CODE tit. 20, ch. 20.45, § 20.45.030; TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, § 3.46.030.

<sup>78</sup> S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1(d)(iv).

<sup>79</sup> *Air Transp. Ass'n v. City of S.F.*, 992 F. Supp. 1149, 1162 (N.D. Cal. 1998), *aff'd*, 266 F.3d 1064 (9th Cir. 2001).



All localities exempt some contracts from the EBO requirements, or allow waivers in certain circumstances. Thirteen localities exempt contracts that are below a certain dollar amount.<sup>80</sup> The dollar thresholds in these ordinances range from \$5,000 to \$100,000.<sup>81</sup> Miami Beach, Florida's EBO also exempts employers with fifty or fewer full-time employees.<sup>82</sup>

Localities also offer waivers or exempt contracts in a number of different circumstances, including when the contract is necessary to respond to an emergency;<sup>83</sup> when no compliant contractor can provide the goods or services;<sup>84</sup> for joint purchasing agreements with another government;<sup>85</sup> for contracts with a sole source provider;<sup>86</sup> for contracts with a public entity;<sup>87</sup> for contracts with a

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<sup>80</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.030(A) (applying the ordinance to contracts with for-profit entities of \$25,000 or more, contracts with non-profit entities of \$100,000 or more, contracts with “[e]ntities which generate \$350,000 or more in annual gross receipts and which occupy City property pursuant to a written agreement for the exclusive use or occupancy of said property for a term exceeding 29 days in any calendar year”); KING COUNTY, WASH., CODE ch. 12.19, § 12.19.020(A) (2009), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx) (applying the ordinance to contracts of \$25,000 or more); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.030(A) (applying the ordinance to contracts with for-profit entities with contracts of \$100,000 or more and contracts with “[f]or-profit entities which generate . . . (\$350,000.00) or more in annual gross receipts and which occupy city property pursuant to a written agreement for the exclusive use or occupancy of said property for a term exceeding twenty-nine (29) days in any calendar year”); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2.1(b)(5) (AmLegal through 2012 Code) (applying the ordinance to contracts for more than \$5,000); MIAMI BEACH, FLA., CODE ch. 2, art. VI, div. 3, § 2-373(a)(6) (applying the ordinance to contracts for more than \$100,000); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(c) (applying the ordinance to contracts for more than \$100,000); OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.020 (Sterling Codifiers through 2011 Code) (applying the ordinance to contracts of \$25,000 or more); OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.010(A) (applying the ordinance to contracts of \$50,000 or more); SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.040(A) (applying the ordinance to contracts of more than \$25,000); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1(c) (applying the ordinance to contracts for more than \$5,000); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES § 2.84.010(a) (applying the ordinance to contracts for more than \$5,000); SEATTLE, WASH., MUNICIPAL CODE tit. 20, ch. 20.45, § 20.45.010(A) (applying the ordinance to contracts for \$44,000 in 2010 and adjusted for inflation thereafter); TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, § 3.46.010(A) (applying the ordinance to contracts for \$50,000 or more).

<sup>81</sup> See ordinances cited *supra* note 80.

<sup>82</sup> MIAMI BEACH, FLA., CODE ch. 2, art. VI, div. 3, § 2-373(A)(5).

<sup>83</sup> See, e.g., *id.* § 2-373(g)(3)(a).

<sup>84</sup> See, e.g., OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.060(D)(1).

<sup>85</sup> See, e.g., OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.020(C)(6).

<sup>86</sup> See, e.g., SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.070(A)(1)

non-profit entity;<sup>88</sup> for contracts with corporations providing banking services;<sup>89</sup> when the contractor is subject to a collective bargaining agreement that was in effect before the ordinance passed;<sup>90</sup> when requiring the benefits would be inconsistent with the terms of a grant from, or other agreement, with a public entity;<sup>91</sup> for contracts that would require specialized litigation;<sup>92</sup> for bulk purchasing contracts;<sup>93</sup> when only one contractor has bid;<sup>94</sup> for contracts with religious organizations;<sup>95</sup> for agreements involving trusts, bonds or securities;<sup>96</sup> for property rent or purchase contracts;<sup>97</sup> contracts only for the purchase of goods;<sup>98</sup> and when compliance would result in significant financial loss to the contractor.<sup>99</sup>

All localities except one, Santa Monica, California, require that local government contracts include a written provision stating that the contractor will comply with the equal benefits ordinance.<sup>100</sup> One locality, San Francisco, also requires that

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(Quality Code through Publishing 2011 Code).

<sup>87</sup> See, e.g., PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.053(C)(3) (2012), <http://www.portlandonline.com/auditor/index.cfm?c=28168>.

<sup>88</sup> See, e.g., LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.060(A)(3) (Municode through 2010 Code).

<sup>89</sup> See, e.g., SANTA MONICA, CAL., MUNICIPAL CODE art. 4, ch. 4.65, § 4.65.030 (Quality Code Publishing through 2011 Code).

<sup>90</sup> See, e.g., SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, § 22.4308(c) (AmLegal through 2012 Code).

<sup>91</sup> See, e.g., L.A., CAL., CHARTER & ADMINISTRATIVE CODE § 10.8.2.1(i)(1)(f) (AmLegal through 2012 Code).

<sup>92</sup> See, e.g., BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.060(A)(7) (Code Publishing Company through 2012 Code).

<sup>93</sup> See, e.g., S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.5-1(d)(2) (AmLegal through 2012 Code).

<sup>94</sup> See, e.g., DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(3)(b) (2011), <http://www.countyofdane.com/ordinances>.

<sup>95</sup> See, e.g., MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(f)(6)–(7) (Municode through 2011 Code).

<sup>96</sup> See, e.g., LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.060(A)(9) (Municode through 2010 Code).

<sup>97</sup> See, e.g., KING COUNTY, WASH., CODE ch. 12.19, § 12.19.020(A) (2011), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx).

<sup>98</sup> See, e.g., DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(2)(d)(1).

<sup>99</sup> See, e.g., LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.060(A)(9).

<sup>100</sup> See BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.26.050 (Code Publishing Company through 2012 Code); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(5); KING COUNTY, WASH., CODE ch. 12.19, § 12.19.030(F); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2.1(f) (AmLegal through 2012 Code); LONG BEACH, CAL., MUNICIPAL

contractors undergo an EBO compliance certification process before bidding on city contracts, and Dane County, Wisconsin, requires that contractors submit certification affirming that they have complied with the EBO before they receive final payment.<sup>101</sup> Eleven EBOs allow the city and/or an aggrieved employee to seek civil remedies for a violation of the ordinance;<sup>102</sup> four EBOs explicitly provide for individual remedies for an aggrieved employee.<sup>103</sup> Rules implementing San Diego, California's EBO also provide for individual remedies for an aggrieved employee.<sup>104</sup> Fifteen provide contract remedies, including termination of contract and debarment from future bidding, if an employer fails to provide equal benefits.<sup>105</sup>

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CODE vol. 1, tit. 2, ch. 2.73, § 2.73.050; MIAMI BEACH, FLA., CODE ch. 2, art. VI, div. 3, § 2-373(b) (Municode through 2011 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(b)(2); OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.050 (Sterling Codifiers through 2011 Code); OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.020(F) (Code Publishing Company through 2012 Code); PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.053(G) (2001), <http://www.portlandonline.com/auditor/index.cfm?c=28168>; SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.060 (Quality Code through Publishing 2011 Code); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, § 22.4304(e) (AmLegal through 2012 Code); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.2(a) (AmLegal through 2012 Code); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.8, ch. 2.84, § 2.84.020(e) (Municode through 2011 Code); SEATTLE, WASH., MUNICIPAL CODE tit. 20, ch. 20.45, § 20.45.020(G) (Municode through 2011 Code); TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, § 3.46.020(G) (Code Publishing Company through 2011 Code).

<sup>101</sup> DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(8); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.4. For details on San Francisco's compliance procedure, see S.F. Human Rights Comm'n, *How to Comply with the Equal Benefits Ordinance*, <http://sf-hrc.org/index.aspx?page=96#How%20do%20I%20Comply> (last visited Feb. 22, 2012).

<sup>102</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.090; DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(12); KING COUNTY, WASH., CODE ch. 12.18, §§ 12.18.040, 12.18.085; LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.090; MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200(m); OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.090(C); PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.055(D); SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.100(D); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.8, ch. 2.84, § 2.84.040(c)-(f); SEATTLE, WASH., MUNICIPAL CODE tit. 20, ch. 20.45, § 20.45.040(D); TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, § 3.46.040(D).

<sup>103</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.090(B); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(12); OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.090(C); SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.100(D).

<sup>104</sup> CITY OF SAN DIEGO, CAL., *supra* note 69, at 12.

<sup>105</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.090(A); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(12)(b), (e); KING COUNTY, WASH., CODE ch. 12.18, § 12.18.060(A)(1), (B)(1)(c); LONG BEACH,

*D. Advantages and Disadvantages of Local Contractor Ordinances*

Governments and LGBT advocates have tried several ways to expand protections for LGBT people in the workplace. Some of these include passing protections for LGBT government employees;<sup>106</sup> enacting anti-discrimination laws that apply to all public and private sector employers;<sup>107</sup> using government contracting power to impose protections on government contractors;<sup>108</sup> and encouraging employers to voluntarily adopt non-discrimination policies.<sup>109</sup> At the local level, ordinances

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CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.090(a); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2.1(h); MIAMI BEACH, FLA., CODE ch. 2, art. VI, div. 3, § 2-373(f); OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.090(B); OLYMPIA, WASH., MUNICIPAL CODE tit. 3, ch. 3.18, § 3.18.020(D)–(E); PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.055(D)–(E); SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.100(B); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, §§ 22.4305, 22.4307(b); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.2(h); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.8, ch. 2.84, § 2.84.040(c); SEATTLE, WASH., MUNICIPAL CODE tit. 20, ch. 20.45, § 20.45.040(B); TUMWATER, WASH., MUNICIPAL CODE tit. 3, ch. 3.46, § 3.46.040(B).

<sup>106</sup> The federal government prohibits discrimination based on sexual orientation and gender identity in government employment, along with thirty states (twenty-one by statute and ten others by executive order) and the District of Columbia, and at least 203 cities and counties across the country. See 3 C.F.R. 13,087 (1998); Brad Sears et al., *Analysis of Scope and Enforcement of State Laws and Executive Orders*, in DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 16-1, 16-2 to 16-4 (2009), available at <http://scholarship.org/uc/item/0k93c8mh>; U.S. OFFICE OF PERS. MGMT., GUIDANCE REGARDING THE EMPLOYMENT OF TRANSGENDER INDIVIDUALS IN THE FEDERAL WORKFORCE, <http://www.opm.gov/diversity/Transgender/Guidance.asp> (last visited Feb. 22, 2012). See also Exec. Ord. 10-24, 36 Mo. Reg. 1167 (Aug. 16, 2010) (prohibiting discrimination on the basis of sexual orientation in Missouri).

<sup>107</sup> Twenty-one states and the District of Columbia prohibit discrimination against public and private sector employees based on sexual orientation and gender identity; at least 139 localities prohibit the same by local ordinance. Sears et al., *supra* note 106, at 16-4; HUMAN RIGHTS CAMPAIGN, CITIES AND COUNTIES WITH NON-DISCRIMINATION ORDINANCES THAT INCLUDE GENDER IDENTITY, <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Feb. 22, 2011).

<sup>108</sup> In conducting research for this article, we identified sixty-eight localities with contractor-specific non-discrimination ordinances, affirmative action ordinances, and/or equal benefits ordinances. See generally ordinances cited *supra* notes 100, 102, 105, 106.

<sup>109</sup> For example, the Human Rights Campaign recognizes those companies that have enacted LGBT-friendly policies in its annual Corporate Equality Index. HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX 2012 (2012), available at [http://sites.hrc.org/documents/CorporateEqualityIndex\\_2012.pdf](http://sites.hrc.org/documents/CorporateEqualityIndex_2012.pdf).

focused specifically on contractors may have some advantages over broader ordinances that prohibit discrimination by all public and private sector employers. However, one principle disadvantage of these local ordinances, in particular as compared to state laws, Title VII, or the proposed Employment Non-Discrimination Act (ENDA), is that most do not have an individual private right of action.

### 1. Advantages of Local Contractor Ordinances

First, in general, local contractor ordinances have more proactive enforcement mechanisms than local ordinances that apply to the private sector more broadly. Under these ordinances, contractors are generally required to sign provisions in their contracts stating that they will abide by non-discrimination and affirmative action ordinances, and EBOs.<sup>110</sup> Some localities also require that contractors submit company documents showing that they have an LGBT-inclusive non-discrimination policy or offer domestic partner benefits.<sup>111</sup> San Francisco requires that businesses undergo a certification procedure to ensure that they are EBO-compliant before they are permitted to bid on city contracts.<sup>112</sup>

In addition, the contractual relationship provides an opportunity for the local government to directly communicate the requirements to private businesses, and to supply contractors with educational materials regarding compliance. In almost every locality, contractors are required to acknowledge and agree to the protections at the time they enter into a government contract.<sup>113</sup> Contractors are also often given government-

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<sup>110</sup> *See, e.g.*, L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, §§ 10.8–10.8.2.

<sup>111</sup> *See, e.g.*, ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1412(10) (Municode through 2012 Code); BROOKLINE, MASS., GENERAL BY-LAWS art. 4.5, § 4.5.2 (2010); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(d) (Municode through 2012 Code); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.040(a) (Municode through 2011 Code); YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-319 (Municode through 2011 Code).

<sup>112</sup> SAN FRANCISCO, CAL., ADMIN. CODE § 12B.4 (AmLegal through 2012 Code).

<sup>113</sup> Some localities include written non-discrimination, affirmative action, and/or equal benefits provisions in local government contracts. *See, e.g.*, ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1414; BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.29.050 (Code Publishing Company through 2012 Code); CEDAR FALLS, IOWA, CITY CODE ch. 15, art. 3, div. 1, §§ 15-56, 15-71 (Municode through 2012 Code).

produced materials to assist them in implementing the policies—notably, almost every locality with an EBO has created materials to explain to contractors how to comply.<sup>114</sup> Local agency involvement in implementing the policies may make compliance easier and more likely.

In contrast, broader non-discrimination local ordinances do not provide any compliance-checking mechanisms so employers may not even be aware of the ordinance unless a complaint is filed.<sup>115</sup> Employers must be aware of local ordinances in order for them to

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<sup>114</sup> City of Berkeley, Cal., *Equal Benefits Ordinance Fact Sheet* (June 4, 2011) (on file with the Williams Institute); CITY OF SAN DIEGO, CAL., *supra* note 69; Dane Cnty. Gov. Purchasing Div., *Summary of Domestic Partner Equal Benefit Requirement*, [http://www.danepurchasing.com/partner\\_benefit.aspx](http://www.danepurchasing.com/partner_benefit.aspx) (last updated May 2, 2011); King Cnty., Wash., Procurement Servs., *Equal Benefits to Employees with Domestic Partners*, [http://www.kingcounty.gov/operations/procurement/Services/Equal\\_Benefits.aspx](http://www.kingcounty.gov/operations/procurement/Services/Equal_Benefits.aspx) (last updated Jan. 1, 2008); City of Long Beach, Cal., *News Details: Equal Benefits Ordinance*, <http://www.longbeach.gov/news/displaynews.asp?NewsID=4413&targetid=41> (last visited Feb. 22, 2012); City of L.A., Cal., Bureau of Contract Admin., *Equal Benefits Ordinance for the City*, [http://bca.lacity.org/index.cfm?nxt=ee&nxt\\_bod\\_y=content\\_ebo.cfm](http://bca.lacity.org/index.cfm?nxt=ee&nxt_bod_y=content_ebo.cfm) (last visited Feb. 22, 2012) (discussing compliance information directed to contractors and to city departments); City of Miami Beach, Fla., *Quick Reference Guide to Equal Benefits Compliance* (on file with the Williams Institute); City of Oakland, Cal., *EBO How-To Guide*, Nov. 2004 (on file with the Williams Institute); City of Oakland, Cal., *Equal Benefits, Non-Discrimination, Equal Access: FYI*, July 2002 (on file with the Williams Institute); City of Olympia, Wash., Admin. Servs., *Equal Benefits: Quick Reference Guide*, <http://olympiawa.gov/city-government/departments/administrative-services/equal-benefits.aspx> (last updated Aug. 31, 2010); Mgmt. & Fin., *Equal Benefits*, <http://www.portlandonline.com/omf/index.cfm?c=43774> (last visited Jan. 30, 2012); CITY OF SACRAMENTO, CAL., REQUIREMENTS OF THE NON-DISCRIMINATION IN EMPLOYEE BENEFITS CODE, <http://www.cityofsacramento.org/generalservices/procurement/ordinances/documents/EBO-Packet.pdf> (last visited Feb. 22, 2012); City of Seattle, Wash., Dep't of Exec. Admin., *Equal Benefits Ordinance: Frequently Asked Questions*, <http://www.seattle.gov/contracting/docs/ebFaq.pdf> (last updated Feb. 13, 2009); CITY OF SAN DIEGO, CAL., EQUAL BENEFITS ORDINANCE CERTIFICATION OF COMPLIANCE, *available at* <http://www.sandiego.gov/arts-culture/pdf/ebocertcomp.pdf> (last visited Feb. 22, 2012); S.F. Human Rights Comm'n, *supra* note 101; City of San Diego, Cal., *Equal Benefits Ordinance: Frequently Asked Questions* (on file with the Williams Institute); City of San Diego, Cal., *Equal Benefits Ordinance Overview* (on file with the Williams Institute); Purchasing Div., Dane Cnty., Wis., *Notification of Domestic Partner Equal Benefits Requirement*, [http://danedocs.countyofdane.com/webdocs/pdf/purch/partner\\_poster.pdf](http://danedocs.countyofdane.com/webdocs/pdf/purch/partner_poster.pdf) (last updated Oct. 2008); San Mateo Cnty., Cal., *Frequently Asked Questions: Equal Benefits Ordinance*, [http://www.co.sanmateo.ca.us/vgn/images/portal/cit\\_609/11/13/564061790EqualBenefitBrochure\\_1.pdf](http://www.co.sanmateo.ca.us/vgn/images/portal/cit_609/11/13/564061790EqualBenefitBrochure_1.pdf) (last visited Feb. 22, 2011).

<sup>115</sup> *See, e.g.*, TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, §§ 17-14, 17-15 (AmLegal through 2012 Code) (providing a typical local non-discrimination ordinance with a purely complaint-driven enforcement scheme).

have any deterrent value. Most states do not prohibit sexual orientation and gender identity discrimination by statute, making it particularly important that employers are aware of protections in local, but not state, laws.<sup>116</sup>

Second, failing to comply with these local contractor ordinances results in a drastic consequence that encourages compliance. Notably, most localities may terminate any agreement with a contractor who is found to have violated the ordinance, and may debar the contractor from bidding on future opportunities for a period of time.<sup>117</sup> Broader local non-discrimination ordinances

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<sup>116</sup> See Crosby Burns & Jeff Krehely, *Small Businesses Support Fairness: CAP Survey Finds Owners Back Employment Non-Discrimination Act*, CENTER FOR AMERICAN PROGRESS, Oct. 5, 2011, [http://www.americanprogress.org/issues/2011/10/enda\\_poll.html](http://www.americanprogress.org/issues/2011/10/enda_poll.html) (demonstrating that twenty-nine states do not prohibit employment discrimination based on sexual orientation by statute and thirty-five do not prohibit discrimination based on gender identity).

<sup>117</sup> ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1414(h); AUSTIN, TEX., CITY CODE ch. 5.4, §§ 5-4-2 to -6 (AmLegal through 2012 Code); BALT., MD., CODE art. 29, § 29-11 (2010), <http://www.baltimorecity.gov/Government/CityCharterCodes.aspx>; BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, §§ 13.26.010, 13.26.110; BLOOMINGTON, IND., MUNICIPAL CODE § 2.21.070 (2011), <http://bloomington.in.gov/code>; BROOKLINE, MASS., GENERAL BY-LAWS art. 4.5, § 4.5.3 (2010); CAMBRIDGE, MASS., MUNICIPAL CODE tit. 2, ch. 2.76, § 2.76.100(A) (Municode through 2011 Code); CANTON, OHIO, GENERAL OFFENSE CODE pt. 5, ch. 547, § 547.07 (Walter H. Drane Co. through 2011 Code); CHAMPAIGN, ILL., MUNICIPAL CODE ch. 12.5, art. III, § 12.5-64 (Municode through 2011 Code); COOK COUNTY, ILL., MUNICIPAL CODE pt. I, ch. 42, art. II, § 42-40 (Municode through 2011 Code); DALL., TEX., CITY CODE ch. 15B, § 15B-3(6) (AmLegal through 1997 Code); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, § 19.58 (2010), <http://www.countyofdane.com/ordinances>; DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, § 27-3-2(f) (Municode through 2010 Code); EAST LANSING, MICH., CODE OF ORDINANCES pt. II, ch. 22, art. II, § 22-33(g) (Municode through 2011 Code); EUGENE, OR., CITY CODE ch. 4, § 4.625 (2010), <http://www.eugene-or.gov/portal/server.pt?open=512&objID=269&PageID=1790&cached=true&mode=2>; EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-5 (Municode through 2011 Code); FORT WAYNE, IND., CODE OF ORDINANCES tit. IX, ch. 93, § 93.038 (AmLegal through 2011 Code); HARTFORD, CONN., MUNICIPAL CODE pt. II, ch. 2, art. VIII, div. 11, § 2-655(d) (Municode through 2011 Code); HAYWARD, CAL., MUNICIPAL CODE ch. 2, art. 7, § 2-7.02(g) (2010), <http://www.hayward-ca.gov/municipal/HMCWEB/Non-DiscriminatoryEmploymentPractices.pdf>; INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, § 581-102 (Municode through 2011 Code); KING COUNTY, WASH., CODE ch. 12.16, § 12.16.050 (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.72, §§ 2.72.010–.030 (Municode through 2010 Code); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2 (2010) (AmLegal through 2012 Code); MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(e)(2) (Municode through 2007 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(7) (Municode through 2012 Code); PRINCE GEORGES COUNTY, MD., CODE subtit. 10A, div. 2, § 10A-122 (2010), <http://lis.princegeorgescountymd>.

often only impose a modest civil penalty for a violation,<sup>118</sup> or focus only on remedying discrimination against an individual complainant.<sup>119</sup> These local ordinances often do not even allow the complainant to file suit in court, which limits the remedies available to an individual to those that may be provided through an administrative hearing.<sup>120</sup>

Third, contractor-specific ordinances can reach employers outside of the boundaries of the locality that enacted the protections. For example, a federal district court in California has held that EBOs may reach contractor operations in the locality, contractor operations that occur elsewhere in the United States where work related to the contract is being performed, and work performed on real property outside of the locality if the property is owned or occupied by the locality and the contractor's presence is related to the contract.<sup>121</sup> While the permissible geographic scope of contractor non-discrimination ordinances has not been litigated, presumably they may reach contractors' operations in other jurisdictions to the same extent as EBOs. Broader local ordinances, by contrast, may only apply within the locality's corporate boundaries.<sup>122</sup> Because of the reach of contractor ordinances, even if enacted in a state with LGBT-

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gov/lis/default.asp?File=&Type=SearchCode; ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, § 183.04(6) (Municode through 2011 Code); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 35, § 22.3509 (AmLegal through 2012 Code); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.2; SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.050(b) (Municode through 2011 Code); SPRINGFIELD, ILL., CODE OF ORDINANCES tit. IX, ch. 93, § 93.08 (Municode through 2011 Code); SUFFOLK COUNTY, N.Y., LAWS OF SUFFOLK COUNTY art. III, § 143-12(A)(1) (2010), <http://www.suffolk.lib.ny.us/govdocs/gdlocal.shtml> (follow "Clerk of the Suffolk County Legislature" hyperlink; then search Laws of Suffolk County); TACOMA, WASH., MUNICIPAL CODE ch. 1.07, § 1.07.030 (2010), <http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title01-AdministrationAndPersonnel.pdf>; TUCSON, ARIZ., CODE pt. II, ch. 28, art. VI, § 28-144; YPSILANTI, MICH., CODE OF ORDINANCES pt. II, ch. 2, art. VI, div. 3, § 2-324(a) (Municode through 2011 Code).

<sup>118</sup> See, e.g., CLEVELAND, OHIO, CODE ch. 663, § 663.99 (Walter H. Drane Co. through 2011 Code) (providing a penalty of not more than \$1,000 for a violation of the fair employment ordinance).

<sup>119</sup> See, e.g., ATLANTA, GA., CODE OF ORDINANCES pt. II, ch. 94, art. XI, § 94-12 (providing a typical broad non-discrimination ordinance that is focused on remedying discrimination against an individual complainant).

<sup>120</sup> Nan D. Hunter, *Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 N.Y.L. SCH. J. HUM. RTS. 565, 572 (2000).

<sup>121</sup> *Air Transp. Ass'n v. City of S.F.*, 992 F. Supp. 1149, 1161-65 (N.D. Cal. 1998), *aff'd*, 266 F.3d 1064 (9th Cir. 2001).

<sup>122</sup> See, e.g., *City of Oakland v. Brock*, 67 P.2d 344, 641 (Cal. 1937) ("A municipal corporation has generally no extraterritorial powers of regulation.").



friendly laws, they can provide legal protection for LGBT employees working in states that do not have such statewide statutory protections.

Fourth, as a result of the advantages described above, contractor-specific ordinances may more directly and to a greater extent promote the economy and efficiency of a local government than provisions that apply more broadly. Contractor ordinances may positively impact a locality's bottom line by ensuring that its contractors are benefiting from economic gains associated with fair employment policies. For example, the preamble to Minneapolis's EBO states,

[r]equiring contractors to provide to employees with domestic partners benefits equal to those provided to employees who are married will require contractors to maintain a competitive advantage in recruiting and retaining the highest quality work force, thereby improving the quality of goods and services that the city receives. The City of Minneapolis has a fiscal responsibility to ensure that it purchases the best quality goods and services possible within its budgetary constraints. To ensure that the City of Minneapolis receives improved quality of goods and services, the functions of the purchasing agent are expanded as provided in this section.<sup>123</sup>

Similarly, Los Angeles's EBO was enacted "to ensure that the City's contractors will maintain a competitive advantage in recruiting and retaining capable employees, thereby improving the quality of the goods and services the City and its people receive, and ensuring protection of the City's property."<sup>124</sup> Three other localities have stated in their EBOs that one purpose of the ordinance is to support the efficiency of local government operations. Dane County, Wisconsin states in the county code chapter that includes its EBO that the general purpose of the chapter is "to achieve greater efficiency and economy in the operation of Dane County government."<sup>125</sup> Similarly, Oakland's<sup>126</sup> and Sacramento's<sup>127</sup> EBOs cite furthering "convenience" as a

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<sup>123</sup> MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 18, § 18.200 (Municode through 2012 Code).

<sup>124</sup> L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8.2.1 (AmLegal through 2012 Code).

<sup>125</sup> DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.01 (2010), <http://www.countyofdane.com/ordinances>.

<sup>126</sup> OAKLAND, CAL., MUNICIPAL CODE tit. 2, ch. 2.32, § 2.32.010 (Municode through 2010 Code).

<sup>127</sup> SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.010 (Quality Code through Publishing 2011 Code).

benefit to the city governments. In addition, several localities that prohibit contractors from discriminating based on sexual orientation and gender identity have pointed to the economic benefits of non-discrimination ordinances.<sup>128</sup>

Fifth, it may be legally, politically, and procedurally more feasible to pass these ordinances than provisions that apply more broadly. This is suggested by the local jurisdictions that have contractor requirements but do not have corresponding policies applying more broadly to the private sector. Of the sixty-one localities identified for this study that have a contractor non-discrimination ordinances, seven are in cities that do not also have broader sexual orientation and gender identity non-discrimination ordinances that apply to all private sector employers.<sup>129</sup> One of those is in North Carolina, which lacks a state law or a single local ordinance that prohibits private sector employers from discriminating on the basis of sexual orientation and gender identity.<sup>130</sup> Additionally, at least eighteen local governments require contractors to take affirmative action or engage in outreach steps with respect to sexual orientation and

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<sup>128</sup> Some of these ordinances directly point to economic benefits that are realized by the locality as a result of ensuring non-discrimination. *E.g.*, EVANSTON, ILL., CITY CODE tit. 1, ch. 12, § 1-12-2 (Municode through 2011 Code); FORT WAYNE, IND., CODE OF ORDINANCES tit. IX, ch. 93, § 93.001 (AmLegal through 2011 Code); HARRISBURG, PA., CITY CODE tit. 4, ch. 4-101, § 4-101.2 (2010), [http://www.equalitypa.org/ADH\\_toolkit/harrisburg%20title%20four.htm](http://www.equalitypa.org/ADH_toolkit/harrisburg%20title%20four.htm); L.A., CAL., MUNICIPAL CODE ch. 4, art. 12, § 49.70; OAK PARK, ILL., VILLAGE CODE ch. 13, art. 3, § 13-3-1; PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. VI, ch. 651, § 651.01 (Municode through 2011 code); S.F., CAL., ADMINISTRATIVE CODE ch. 12A, § 12A.1 (AmLegal through 2012 Code); WEST HOLLYWOOD, CAL., MUNICIPAL CODE tit. 9, ch. 9.28, § 9.28.010 (Quality Code through Publishing 2011 Code). Other ordinances state that non-discrimination requirements allow employees to reach their “full productive capacities.” Businesses can benefit from having productive employees, and these benefits can be passed along to the local governments that contract with them. *E.g.*, COUNCIL BLUFFS, IOWA, CODE OF ORDINANCES tit. 1, ch. 1.40, § 1.40.010 (Municode through 2011 Code); MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.03 (Municode through 2007 Code).

<sup>129</sup> BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.21.030–.070 (2011), <http://bloomington.in.gov/code>; CHARLOTTESVILLE, VA., CODE OF ORDINANCES ch. 2, art. I, § 22-10 (Municode through 2012 Code); CLEVELAND HEIGHTS, OHIO, CODE ch. 171, § 171.09 (Walter H. Drane Co. through 2011 Code); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, §§ 19.02–.59; HARTFORD, CONN., MUNICIPAL CODE pt. II, ch. 2, art. VIII, div. 11, § 2-655 (Municode through 2011 Code); RALEIGH, N.C., CODE div. II, pt. 4, ch. 3, § 4-1004 (Municode through 2011 Code) (applying only to the Department of Community Services and not other private sector employees); SAN MATEO COUNTY, CAL., CODE OF ORDINANCES tit. 2, art. 2.5, ch. 2.50, § 2.50.040 (Municode through 2011 Code).

<sup>130</sup> See Equality North Carolina, *Local LGBT-Friendly Policies*, <http://equalitync.org/issues/local> (last visited Feb. 22, 2012).

gender identity, but we have not identified any local governments that require all private sector employers to do the same.<sup>131</sup> Likewise, seventeen local governments require contractors to provide domestic partner benefits, but we have not identified any local government that requires all private sector employers to offer such benefits.

Finally, in some states, contractor-specific ordinances may be less vulnerable to judicial invalidation than broader non-discrimination ordinances that apply to the entire private sector. There are two issues that arise in legal challenges to local ordinances: whether a locality has the authority to enact the ordinance, and whether a state law preempts the local ordinance.<sup>132</sup> A locality may not enact an ordinance if it does not have the authority to do so under the state constitution, state statutes, or the local charter.<sup>133</sup> A Connecticut Supreme Court case suggested that even if a local government did not have the authority under these sources to enact a broad non-discrimination ordinance, it might still have the authority to enact non-discrimination ordinances that apply only to contractors.<sup>134</sup>

Similarly, a local ordinance is invalid if it is preempted by a state statute.<sup>135</sup> For example, two courts have found that local non-discrimination ordinances that apply broadly to the private sector are preempted by state non-discrimination laws.<sup>136</sup>

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<sup>131</sup> Some localities do require private sector employers covered by a local non-discrimination ordinance to post non-discrimination policy within the workplace, one obligation that often appears in contractor “affirmative action” and outreach ordinances. See, e.g., SACRAMENTO, CAL., CITY CODE tit. 9, ch. 9.20, § 9.20.020(C)(1) (Quality Code through Publishing 2011 Code). However, this is the only obligation we have found imposed by local ordinance that resembles “affirmative action” or outreach steps.

<sup>132</sup> See, e.g., *Hartman v. City of Allentown*, 880 A.2d 737 (Pa. Commw. Ct. 2005).

<sup>133</sup> See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007); see also DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (2001) (outlining a comprehensive state-by-state review of local government power vis-à-vis state government power).

<sup>134</sup> *New Haven Comm’n on Equal Opportunities v. Yale Univ.*, 439 A.2d 404, 408 (Conn. 1981) (finding that the city did not have the power to enact a broad local non-discrimination ordinance, but severing from the broader provisions a section that applied only to construction contractors; stating, “[t]he provisions of the New Haven Code other than those relating to employment discrimination by employers having no contractual relationship with the municipality are not relevant to the present case”).

<sup>135</sup> See Diller, *supra* note 133, at 1114.

<sup>136</sup> *Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33, 38 (Cal. Ct. App.

However, California appellate court cases<sup>137</sup> and Attorney General Opinions<sup>138</sup> explain that even if broad non-discrimination ordinances enacted under local government police power are preempted by a state law, localities can rely on their contracting powers to pass ordinances that apply only to contractors. When a local government relies on its contracting power, rather than its police power, the ordinance falls outside the scope of the state's power to regulate discrimination.<sup>139</sup> So long as the local government is regulating outside of that scope, the ordinance is not preempted by state law.<sup>140</sup>

These decisions from California suggest that localities in states with preemptive non-discrimination laws may still be able to rely on their contracting power to enact contractor-specific non-discrimination ordinances. California provides the only decisions directly on point, but a Georgia court has also suggested that localities are able to regulate discrimination in their own affairs, even when they could not regulate discrimination in the city more broadly because of a preemptive state non-discrimination law.<sup>141</sup> Though the challenged ordinance applied only to discrimination by the city itself, the holding may also provide a basis for finding that a broad non-discrimination law does not preempt local contractor ordinances.

While the limited litigation around state law preemption of EBOs has had mixed results, it is likely that local ordinances that require all private employers to provide equal benefits for domestic partners would be preempted by the federal Employee Retirement Income Security Act (ERISA) and possibly state law. This probably explains why no such local ordinances have been identified. In terms of local EBOs and state law preemption, the Ninth Circuit has held that EBOs are not preempted by California's broad domestic partnership law.<sup>142</sup> New York's highest court, on the other hand, invalidated New York City's EBO on the grounds that it was preempted by a state

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1993); *Hutchcraft Van Serv., Inc. v. City of Urbana Human Relations Comm'n*, 433 N.E.2d 329, 334 (Ill. App. Ct. 1982).

<sup>137</sup> *Alioto's Fish Co. v. Human Rights Comm'n of San Francisco*, 174 Cal. Rptr. 763, 768 (Cal. Ct. App. 1981); *Delaney*, 18 Cal. Rptr. 2d at 37–38.

<sup>138</sup> See 44 Op. Cal. Att'y Gen. 65, 67 (1964); 42 Op. Cal. Att'y Gen. 169, 175 (1963). See also 60 Op. Cal. Att'y Gen. 394, 397 (1977); 42 Op. Cal. Att'y Gen. 114, 117 (1963) (explaining that preemption does not restrict city ordinances).

<sup>139</sup> *Alioto's Fish Co.*, 174 Cal. Rptr. at 763.

<sup>140</sup> *Id.*

<sup>141</sup> *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521–22 (Ga. 1995).

<sup>142</sup> *S.D. Myers, Inc. v. City of S.F.*, 336 F.3d 1174, 1176, 1180 (9th Cir. 2003).

procurement statute requiring that contracts be awarded to the “lowest responsible bidder.”<sup>143</sup>

Courts have found that EBOs are preempted by ERISA to the extent that they require self-insured employers to provide health care benefits to domestic partners, in at least some circumstances.<sup>144</sup> ERISA preemption is discussed more fully in Part VII.D below. However, one court has held that an exception to ERISA preemption is available to localities for EBOs, the “marketplace participant” exception, which would not apply to ordinances that require all private employers within the jurisdiction to have domestic partner benefits.<sup>145</sup>

## 2. Disadvantages of Local Contractor Ordinances

The principal disadvantage of local LGBT-related ordinances that apply to contractors, as opposed to the private sector more generally is their more limited scope. They only apply to businesses that have contacts with the locality.

The other chief disadvantage, as described above, is that most ordinances do not provide for an individual right of action and corresponding remedies.<sup>146</sup> This provides less incentive for employees to come forward with complaints, and places the burden of enforcement on the locality. Thus, enforcement is then limited by the resources that the localities allocate to such efforts. An individual right of action creates an incentive for individuals and the private bar to enforce non-discrimination laws. As discussed below, the lack of an individual’s right of action, and

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<sup>143</sup> Council of New York v. Bloomberg, 846 N.E.2d 433, 438 (N.Y. 2006).

<sup>144</sup> Air Transp. Ass’n v. City of S.F., 992 F. Supp. 1149, 1155 (N.D. Cal. 1998), *aff’d*, 266 F.3d 1064 (9th Cir. 2001); *Bloomberg*, 846 N.E.2d at 440–42. See Catholic Charities of Me. v. City of Portland, 304 F. Supp. 2d 77, 93–96 (D. Me. 2004). See *infra* Section VII.D.1 for discussion of ERISA preemption.

<sup>145</sup> See *Air Transp. Ass’n*, 992 F. Supp. at 1162–63. The “marketplace participant” exception requires that the locality is acting as a normal consumer in the marketplace when purchasing goods or services from the employer; if no such financial transaction occurs between the locality and the employer, the “market participant” exception cannot apply. *Id.* at 1177–78, 1180.

<sup>146</sup> ATLANTA, GA. CODE OF ORDINANCES pt. II, ch. 2, art. X, div. 11, § 2-1417 (Municode through 2012 Code). Cf. AUSTIN, TEX., CITY CODE § 5-4-3(B) (AmLegal through 2012 Code); CEDAR FALLS, IOWA, CITY CODE ch. 15, art. 3, div. 1, § 15-67(c) (Municode through 2012 Code); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. II, § 25.016(12)(e) (2010), <http://www.countyofdane.com/ordinances>; SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 35, §§ 22.3505, 22.3507, 22.3509 (AmLegal through 2012 Code). See also *supra* notes 35–36, 102–03 and accompanying text (permitting individuals to file complaints for remedies).

limited resources that localities have allocated for enforcement, may contribute to the finding of this study of almost no individual enforcement action under any of these contractor ordinances.

*E. Common Arguments in Opposition to Local Contractor Ordinances*

While ordinances mandating LGBT-friendly workplace policies for contracts may be more legally, politically, and procedurally viable, for some localities, proposal for these ordinances have also been met with arguments for not passing them. Opponents argue that a jurisdiction may lose contractors or not have the best contractors if they are required to comply with these policies that reach beyond federal and many state laws.<sup>147</sup> Others have argued that the policies will be costly to enforce and will be administratively burdensome for already strained local governments.<sup>148</sup> Additionally, a few of the ordinances have been challenged in court, prompting concern that other localities will face litigation as a result of passing similar ordinances.<sup>149</sup>

## II. METHODOLOGY

This is the first study to evaluate the three main types of contractor ordinances, in order to determine both the positive impact they have on LGBT-related workplace policies and the validity of the arguments made against them. The study is based on a survey of those localities that have adopted LGBT-related contractor requirements, as well as the findings of eight studies and self-evaluations conducted by these jurisdictions. The

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<sup>147</sup> See, e.g., *Nashville Passes "Gender Identity" Ordinance*, BAPTIST PRESS, Apr. 6, 2011, <http://www.scbaptistpress.org/bpnews.asp?id=35000>; Chris Roberts, *More LGBT Woes for Target: Chain Could Lose SF City Contract Over Same-Sex Benefits*, SF APPEAL (Sept. 8, 2010, 10:30 AM), <http://sfappeal.com/news/2010/09/more-lgbt-woes-for-target-chain-could-lose-city-contract-over-same-sex-benefits.php>; Memorandum from Robert H. Drummer, Senior Legislative Attorney, to Montgomery Cnty. Council (Feb. 2, 2010), available at [http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2010/100202/20100202\\_8.pdf](http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2010/100202/20100202_8.pdf).

<sup>148</sup> See Matthew Leising, *Council Passes Benefits for Domestic Partners*, CONTRA COSTA TIMES (S.F.), Nov. 30, 2001, at A1; Letter from Ralph Schulz & Debbie Dale Mason, Nashville Area Chamber of Commerce, to the Members of the Metro Council (Feb. 11, 2011), <http://www.nashvillescene.com/images/blogimages/2011/02/11/1297461121-chamberonbl2011-838.pdf>.

<sup>149</sup> See, e.g., Perkins Coie, *Contractors Must Provide Equal Benefits to Employees with Domestic Partners*, WASH. EMP. LAW LETTER, Jan. 2000, at 6.

positive impact of these ordinances was studied by looking at what the ordinances have accomplished. For example, have more contractors adopted LGBT-inclusive policies as a result of the ordinances? Have they provided redress for specific violations? The arguments against the ordinances were evaluated by asking those enforcing them if the concerns around their enactment have been born out. Have the work and operations of local governments been disrupted because they could not find compliant contractors? Have they been costly to administer or burdened local administrative agencies?

All of the sixty-eight localities identified above were contacted for purposes of this study. Sixteen localities with EBOs (all except Santa Monica) were contacted first by email on April 4, 2011. If the locality did not respond to the email, a follow-up email was sent on April 11, 2011. If no response to the second email was received, the localities were contacted by phone on April 21, 2011. If no one was available to answer the questions by phone, a voicemail was left explaining what information was sought. The localities that did not respond were contacted again on May 13, 2011. The localities with contractor non-discrimination ordinances and affirmative action requirements were contacted about these provisions by email on June 28, 2011. Those that did not respond were contacted again by email on August 30, 2011, and finally by phone on September 16, 2011.

Santa Monica passed its EBO on April 28, 2011.<sup>150</sup> The city was contacted by phone on May 5, 2011, with a request for information about any trainings that have been conducted or materials that have already been developed. The city provided the limited information it had available.

On December 7, 2011, just those jurisdictions that had already responded to early requests were sent a set of further questions to clarify statements about compliance with their ordinances. Follow-up emails with these questions were sent on December 21, 2011.

When the localities were contacted, they were asked to answer a set of questions about their experiences with adopting, implementing, and enforcing their non-discrimination ordinances,<sup>151</sup> ordinances requiring affirmative action or outreach

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<sup>150</sup> SANTA MONICA, CAL., MUNICIPAL CODE art. 4, ch. 4.65, § 4.65.025 (Quality Code Publishing through 2012 Code).

<sup>151</sup> These questions included: Have contractors been willing to comply with the sexual orientation and/or gender identity requirements of the contractor-

steps,<sup>152</sup> and EBOs.<sup>153</sup>

Thirty-eight cities and counties provided responses to our questions. These localities include: Austin, Texas; Baltimore, Maryland; Berkeley, California; Bloomington, Indiana; Cambridge, Massachusetts; Canton, Ohio; Charlottesville, Virginia; Council Bluffs, Iowa; Dane County, Wisconsin; Des Moines, Iowa; Detroit, Michigan; Eugene, Oregon; Hartford, Connecticut; Indianapolis, Indiana; Iowa City, Iowa; Johnson County, Iowa; King County, Washington; Los Angeles, California; Madison, Wisconsin; Miami Beach, Florida; Minneapolis, Minnesota; Northampton, Massachusetts; Oakland, California; Olympia, Washington; Phoenix, Arizona; Portland, Oregon; Prince George's County, Delaware; Raleigh, North Carolina; Sacramento, California; Saint Paul, Minnesota; San Diego,

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specific non-discrimination ordinance?; Do you think more contractors adopted workplace policies that include sexual orientation and/or gender identity as a result of the contracting ordinance?; Did adding sexual orientation and/or gender identity to the contractor-specific non-discrimination ordinance require hiring additional staff, conducting additional trainings, or require any other specific actions on the part of the city beyond what was already required to implement the non-discrimination ordinance?; Have any administrative complaints of sexual orientation or gender identity discrimination been filed under the ordinance?; Does the inclusion of sexual orientation and/or gender identity to the ordinance present any administrative burden beyond that associated with the other characteristics included in the ordinance?

<sup>152</sup> These questions included: Have contractors been willing to comply with the sexual orientation and/or gender identity requirements of the affirmative action ordinance?; Do you think more contractors adopted workplace policies that include sexual orientation and/or gender identity as a result of the contracting ordinance?; Has an investigation ever been conducted because a contractor allegedly failed to take affirmative action steps with respect to sexual orientation?; Has a contractor ever been debarred because it did not take affirmative action steps with respect to sexual orientation?; Does the inclusion of sexual orientation to the affirmative action ordinance present any additional administrative burden beyond that associated with the other characteristics included in the ordinance?

<sup>153</sup> These questions included: Have contractors been willing to comply with the EBO?; Do you think more contractors offer benefits to domestic partners as a result of the EBO?; What was the implementation procedure like?; Were additional staff hired to implement or to enforce the EBO?; Were documents produced to explain the EBO to staff/contractors/employees of contractors?; Were there special trainings provided to staff on the EBO?; Were any other specific actions taken to implement the EBO?; What is the general enforcement scheme for the EBO?; How many staff members are responsible for enforcing the EBO?; Have administrative complaints been filed under the EBO?; If so, how were they handled and what were the dispositions?; Have any contractors been investigated for an alleged violation of the EBO?; Have any contractors been debarred for violating the EBO?; Has the city/county/state experienced any administrative burden as a result of the EBO?



California; San Francisco, California; San Mateo County, California; Santa Monica, California; Seattle, Washington; Tucson, Arizona; Tumwater, Washington; and West Hollywood California.<sup>154</sup> Their responses are presented in the next section.

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<sup>154</sup> All information presented in this report from these localities was gathered from the following sources:

Austin: E-mail from Elizabeth Godfrey, Publ. Info. Coordinator, Austin Comm'n and Pub. Info. Office, to Christy Mallory, Legal Research Fellow, Williams Inst. (Sept. 14, 2011, 12:20 PST) (on file with the Williams Institute).

Baltimore: E-mail from Shirley A. Williams, Chief, Balt. Minority & Women's Bus. Opportunity Office, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 29, 2011, 11:39 PST) (on file with the Williams Institute).

Berkeley: Telephone interview with the City of Berkeley staff, Berkeley, Cal. (Apr. 22, 2011).

Bloomington: E-mail from Barbara McKinney, Dir., Bloomington Human Rights Comm'n, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 29, 2011, 6:29 PST) (on file with the Williams Institute).

Cambridge: E-mail from Colleen Johnston, Exec. Dir. Cambridge Human Rights Comm'n, City of Cambridge, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 6, 2011, 6:07 PST) (on file with the Williams Institute).

Canton: E-mail from Corey Minor Smith, Dir. of Compliance, Canton Purchasing Dep't, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 29, 2011, 7:07 PST) (on file with the Williams Institute); E-mail from Kim Harper, Contracts Officer, Canton Purchasing Dep't, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 29, 2011, 5:08 PST) (on file with the Williams Institute).

Charlottesville: E-mail from Jennifer Luchard, City of Charlottesville, to Christy Mallory, Legal Research Fellow, Williams Inst. (Sept. 7, 2011, 10:42 PST) (on file with the Williams Institute).

Council Bluffs: E-mail from Tamra Madsen, Assistant City Att'y & Dir., Civil Rights Comm'n, City of Council Bluffs, to Christy Mallory, Legal Research Fellow, Williams Inst. (Oct. 19, 2011, 15:09 PST) (on file with the Williams Institute).

Dane County: Telephone interview with Wesley Sparkman, Contract Compliance Officer, Dane Cnty. Gov't Purchasing Dep't, Madison, Wis. (July 2, 2011).

Des Moines: E-mail from Rudy Simms, Dir., Des Moines Human Rights Comm'n, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 29, 2011, 9:29 PST).

Detroit: Telephone interview with the Detroit Human Rights Dep't staff, Detroit, Mich. (July 3, 2011).

Eugene: E-mail from Jamie Garner, Purchasing Analyst, City of Eugene Purchasing, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 30, 2011, 15:25 PST) (on file with the Williams Institute).

Hartford: Telephone interview with Aileen Ortiz, Hartford Human Relations Comm'n, Hartford, Conn. (July 2, 2011).

Indianapolis/Marion County: E-mail from Maxine Russell, Chief of Equal Opportunity, City of Indianapolis, to Christy Mallory, Legal Research Fellow, Williams Inst. (Sept. 16, 2011, 6:23 PST) (on file with the Williams Institute).

Iowa City: E-mail from Dale Helling, Assistant City Manager, City of Iowa City, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 30, 2011, 8:41 PST) (on file with the Williams Institute).

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Johnson County: E-mail from Janet Lyness, County Att’y, Johnson Cnty. Atty’s Office, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 29, 2011, 8:05 PST) (on file with the Williams Institute).

King County: E-mail from Bailey de Iongh, Dir., King Cnty. Office of Civil Rights, to Christy Mallory, Legal Research Fellow, Williams Inst. (Apr. 5, 2011, 17:02 PST) (on file with the Williams Institute); E-mail from Bailey de Iongh, Dir., Office of Civil Rights, King Cnty., to Christy Mallory, Legal Research Fellow, Williams Inst. (Apr. 25, 2011, 14:42 PST) (on file with the Williams Institute).

City of Los Angeles: E-mail from Mario Interiano, Contract Compliance Analyst, City of L.A., to Christy Mallory, Legal Research Fellow, Williams Inst. (Mar. 31, 2011, 9:41 PST) (on file with the Williams Institute).

Madison: E-mail from Christina Thiele, Clerk Typist, Madison Dep’t of Civil Rights, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 29, 2011, 11:43 PST) (on file with the Williams Institute).

Miami Beach: Telephone interview with Cristina Delvat, Contracts Compliance Specialist, Miami Beach Proc. Div. (Apr. 22, 2011); E-mail from Cristina Delvat, Contracts Compliance Specialist, Miami Beach Proc. Div., to Christy Mallory, Legal Research Fellow, Williams Inst. (Apr. 25, 2011, 14:11 PST) (on file with the Williams Institute).

Minneapolis: E-mail from Gary T. Warnberg, Dir. of Purchasing, City of Minneapolis, to Heidi P. Hoffman, Aide to Council Member Gary Schiff, City of Minneapolis (June 9, 2011, 5:34 CST) (on file with the Williams Institute).

Northampton: E-mail from Corinne Philippides, Mayoral Aide, Office of Mayor Clare Higgins, City of Northampton, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 6, 2011, 10:34 PST) (on file with the Williams Institute).

Oakland: E-mail from Vivian Inman, Contract Compliance Officer, City of Oakland, to Christy Mallory, Legal Research Fellow, Williams Inst. (Apr. 4, 2011, 8:07 PST) (on file with the Williams Institute).

Olympia: Telephone interview with the City of Olympia, Olympia, Wash. (Apr. 22, 2011).

Phoenix: E-mail from Trevor Bui, Contract Compliance Officer, Phx. Equal Emp’t Opportunity Dep’t, to Christy Mallory, Legal Research Fellow, Williams Inst. (Aug. 30, 2011, 14:54 PST) (on file with the Williams Institute).

Portland: Telephone interview with Loretta Young, Workforce Training & Hiring Program Coordinator, City of Portland, Portland, Or. (May 5, 2011).

Raleigh: E-mail from Michael Williams, Assistant Dir., Pub. Affairs Dep’t, City of Raleigh, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 7, 2011, 7:25 PST) (on file with the Williams Institute).

Sacramento: Telephone interview with Craig Lymus, Contracts Officer, City of Sacramento (Apr. 25, 2011).

Saint Paul: E-mail from Alexander Dumke, Fed. Labor Standards Compliance, City of Saint Paul, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 29, 2011, 10:15 PST) (on file with the Williams Institute).

San Diego: E-mail from Pamela Ison, Budget & Policy Advisor, City of San Diego, to Christy Mallory, Legal Research Fellow, Williams Inst. (Apr. 4, 2011, 14:45 PST) (on file with the Williams Institute); E-mail from Nora Nugent, Living Wage & Equal Benefits Ordinances Manager, City of San Diego, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 1, 2011, 12:05 PST) (on file with the Williams Institute).

San Francisco: Telephone interview with Tamra Winchester, Acting Senior Contract Compliance Officer, Human Rights Comm’n, City of S.F. (June 29,

Most of these cities and counties provided detailed responses, but a few localities provided limited information. Four cities provided very limited information on enforcement of their EBOs: Berkeley,<sup>155</sup> King County, Minneapolis, and Olympia.<sup>156</sup> Cambridge, Berkeley, Eugene, Northampton, Raleigh, and West Hollywood provided very limited information on enforcement of their contractor non-discrimination or affirmative action ordinances.<sup>157</sup> Minneapolis and Seattle provided detailed

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2011); E-mail from Tamra Winchester, Acting Senior Contract Compliance Officer, S.F. Human Rights Comm'n, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 29, 2011, 16:29 PST) (on file with the Williams Institute).

San Mateo County: Telephone interview with Glenn Levy, Deputy Cnty. Counsel, San Mateo Cnty. (Apr. 25, 2011).

Santa Monica: E-mail from Candace Tysdal, Assistant Dir. of Finance, City of Santa Monica (May 5, 2011, 15:38 PST) (on file with the Williams Institute).

Seattle: Telephone interview with Jim Wurzer, Purchasing & Contracting Servs. Officer, City of Seattle, Wash. (Apr. 25, 2011).

Tucson: E-mail from Liana Perez, Dir., Office of Equal Opportunity Programs, City of Tucson, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 5, 2011, 10:02 PST) (on file with the Williams Institute).

Tumwater: E-mail from Hanna Myers, Exec. Sec'y, City of Tumwater, to Brad Sears, Exec. Dir., Williams Inst. (May 16, 16:43 PST) (on file with the Williams Institute).

West Hollywood: Telephone interview with Corey Schaffer, City Clerk, City of West Hollywood (July 8, 2011); E-mail from Corey Schaffer, City Clerk, City of West Hollywood, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 8, 2011, 15:27 PST).

<sup>155</sup> Berkeley routed the researcher calling to gather information to six different departments before routing her to the contracts department, where she left a voicemail. Two of these departments told her that no such ordinance existed. During this process, the researcher spoke to the Human Resources Department and the City Attorney's Office, which told her, respectively, that any complaints filed under the ordinance would be referred to the state enforcement agency rather than handled by the city, and that all the office knew of enforcement was that contractors were required to sign an affidavit saying they offered equal benefits before they were permitted to submit bids. Telephone interview with the City of Berkeley (Apr. 22, 2011).

<sup>156</sup> The Olympia Administrative Services Department told the researcher that employees could file complaints of EBO ordinance violations online, and the city would handle the complaint from there. The department was unable to provide any other information about their ordinance. Telephone interview with the City of Olympia, Olympia, Wash. (Apr. 22, 2011). At the researcher's request, the department forwarded her to the legal department, where she left a voicemail that was not returned.

<sup>157</sup> E-mail from Colleen Johnston, Exec. Dir., Cambridge Human Rights Comm'n, City of Cambridge, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 6, 2011, 6:07 PST) (on file with the Williams Institute); E-mail from Jamie Garner, Purchasing Analyst, City of Eugene Purchasing, to Christy Mallory, Legal Research Fellow, Williams Inst. (June 30, 2011, 15:25 PST) (on file with the Williams Institute); E-mail from Corinne Philippides, Mayoral Aide, Office of Mayor Clare Higgins, City of Northampton, to Christy

responses about their EBOs, but no information about their non-discrimination or affirmative action ordinances. Santa Monica was only able to provide limited information about its EBO because the ordinance had so recently passed.<sup>158</sup> However, the limited responses from these localities support that they have not invested any significant resources or hired new staff to implement or enforce their EBOs, contractor-specific non-discrimination, or affirmative action ordinances.

The agencies that provided data and information for this study largely reported similar experiences with these ordinances. However, these agencies may be qualitatively different from agencies that did not respond to our requests. Many agencies did not respond despite repeated attempts. This may indicate a lack of staff and resources at these agencies, which, in turn, may mean that these agencies are not able to dedicate the time and effort needed to implement and enforce their ordinances. They may not be equipped or available to answer contractors' questions, which alleviated resistance in almost every case for the agencies that provided information. And they may not be able to produce educational materials, or train staff on enforcing the ordinances, like some of the agencies that responded. Nevertheless, more than half of the localities contacted provided information that can inform future debates in localities seeking to pass similar protections for LGBT workers.

During the survey, we also identified nine studies that these jurisdictions had conducted to design and evaluate their ordinances. These include a report by Oakland evaluating other EBOs before it adopted its own;<sup>159</sup> five evaluations by San Francisco of its EBO conducted in 1999,<sup>160</sup> 2000,<sup>161</sup> 2001,<sup>162</sup> 2002,<sup>163</sup>

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Mallory, Legal Research Fellow, Williams Inst. (July 6, 2011, 10:34 PST) (on file with the Williams Institute); E-mail from Michael Williams, Assistant Dir., Pub. Affairs Dep't, City of Raleigh, to Christy Mallory, Legal Research Fellow, Williams Inst. (July 7, 2011, 7:25 PST) (on file with the Williams Institute); Telephone interview with Corey Schaffer, City Clerk, City of West Hollywood, Cal. (July 8, 2011).

<sup>158</sup> SANTA MONICA, CAL., MUNICIPAL CODE art. 4, ch. 4.65, § 4.65.025 (Quality Code Publishing through 2012 Code).

<sup>159</sup> Letter from Office of the City Manager/Contract Compliance & Emp't Servs. Div., to Office of the City Manager, City of Oakland, Cal., (Nov. 13, 2001) (on file with the Williams Institute) [hereinafter Letter from City Manager of Oakland].

<sup>160</sup> S.F. HUMAN RIGHTS COMM'N, TWO YEAR REPORT ON THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE (1999), *available at* <http://www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=145> [hereinafter TWO YEAR REPORT].

<sup>161</sup> S.F. HUMAN RIGHTS COMM'N, THREE YEAR REPORT ON THE SAN FRANCISCO

and 2004;<sup>164</sup> a five year cost estimate by Miami Beach in 2005 of its EBO;<sup>165</sup> a survey by Miami Beach of its contractors before it passed its EBO to measure any potential resistance;<sup>166</sup> and an evaluation by San Diego of its EBO six months after the ordinance went into effect.<sup>167</sup> Information from these reports is also summarized below.

### III. COMPLIANCE WITH LGBT-INCLUSIVE CONTRACTOR REQUIREMENTS

#### A. Compliance

Many private companies have publicly supported ordinances that prohibit contractors from discriminating on the basis of sexual orientation and gender identity, and require contractors to offer domestic partner benefits.<sup>168</sup> Local agencies' experiences with implementing these ordinances reflect that support, finding that, almost without exception, private businesses interested in contracting with the locality are willing to adopt and comply with these policies. In almost all localities that responded, any resistance to these policies was minimal and short-lived. In the few localities that reported some initial resistance, contractors

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EQUAL BENEFITS ORDINANCE (2000), available at <http://www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=143> [hereinafter THREE YEAR REPORT].

<sup>162</sup> S.F. HUMAN RIGHTS COMM'N, FOUR YEAR REPORT ON THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE (2001), available at <http://www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=144> [hereinafter FOUR YEAR REPORT].

<sup>163</sup> S.F. HUMAN RIGHTS COMM'N, FIVE YEAR REPORT ON THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE (2002), available at <http://www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=142> [hereinafter FIVE YEAR REPORT].

<sup>164</sup> S.F. HUMAN RIGHTS COMM'N, SEVEN YEAR UPDATE ON THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE (2004), available at <http://www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=140> [hereinafter SEVEN YEAR REPORT].

<sup>165</sup> Memorandum from Jorge M. Gonzalez, City Manager, to Mayor David Dermer and Members of the City Comm'n, City of Miami Beach (Oct. 19, 2005) (on file with the Williams Institute).

<sup>166</sup> *Id.*

<sup>167</sup> CITY OF SAN DIEGO, CAL., EQUAL BENEFITS ORDINANCE, REPORT NO. 11-130, FISCAL YEAR 2011 ANNUAL (6-MONTH) REPORT (2011) [hereinafter CITY OF SAN DIEGO ANNUAL REPORT].

<sup>168</sup> For example, more than seventy businesses endorsed a Nashville, Tennessee ordinance prohibiting contractors from discriminating on the basis of sexual orientation and gender identity. TENN. EQUAL. PROJECT, *supra* note 3. See also *San Francisco to Expand Its Domestic Partners Law; Pressure from Hill Doesn't Affect Board*, WASH. POST, Aug. 11, 1998, at A11 (explaining the San Francisco vote to expand the city's domestic partners policy).

quickly agreed to comply with the policies.

In terms of sexual orientation and gender identity non-discrimination ordinances, almost every locality reported that contractors were complying without resistance, and the localities that had encountered some resistance reported that it was easily overcome by explaining the requirements to the contractor. Twenty-five<sup>169</sup> of twenty-nine localities reported that all contractors doing business with the local government were willing to comply with the sexual orientation and/or gender identity requirements in the local ordinance. Three localities, Bloomington, Iowa City, and Madison, reported that they have encountered a few contractors who were initially resistant to complying with these requirements. All three cities said that they responded to the contractors' questions, and explained that the law requires the inclusion of these characteristics. Bloomington and Iowa City reported that they were unaware of any contractor who failed to bid after the requirements were explained, and Madison reported that in "most instances" contractors were willing to comply once they understood the law. One locality, Phoenix, did not provide a response to this question.

Additionally, no locality<sup>170</sup> reported that contractors were unwilling to comply with any particular affirmative action step, or objected to the use of the phrase "affirmative action" with respect to sexual orientation or gender identity. However, contractor resistance to the sexual orientation and gender identity provisions generally in Bloomington and Madison may have concerned these requirements in addition to the non-discrimination requirements because their ordinances contained both non-discrimination and affirmative action requirements.

Six of eleven localities that responded reported some resistance to their EBOs: Dane County, Miami Beach, San Francisco, San Mateo County, Seattle, and Tumwater. All of these localities reported that when resistant contractors were given information clarifying the requirements of the ordinance, contractors were

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<sup>169</sup> Austin, Baltimore, Berkeley, Cambridge, Canton, Charlottesville, Council Bluffs, Dane County, Des Moines, Detroit, Eugene, Hartford, Indianapolis, Johnson County, King County, City of Los Angeles, Northampton, Prince George's County, Saint Paul, Raleigh, San Diego, San Francisco, San Mateo County, Tucson, and West Hollywood. WILLIAMS INST., CITY ENFORCEMENT IMPLEMENTATION (on file with Williams Institute).

<sup>170</sup> Austin, Bloomington, Cambridge, Charlottesville, Detroit, King County, City of Los Angeles, Madison, Saint Paul, San Francisco, and Tucson. WILLIAMS INST., *supra* note 169.

willing to comply in most cases.

Three localities, Miami Beach, San Francisco, and Seattle, reported that most resistance was from contractors who did not want to offer benefits to different-sex partners (as required by all three ordinances), even though they already did, or were willing to, offer the benefits to same-sex partners. These contractors were mainly concerned that covering different-sex partners would greatly increase costs, or that they would be forced to move to another insurance carrier because their current carrier would not cover different-sex partners. Miami Beach and San Francisco both said that they explained to these contractors that they could comply by paying a cash equivalent to employees with different-sex domestic partners, rather than switching carriers. San Francisco also explained that under its ordinance, if any employee of the contractor has a preexisting medical condition or if other insurers do not have the same pool of doctors, the contractor is not required to switch carriers, and may use their current insurer's definition of "domestic partners."

Seattle reported that several contractors based outside of Washington State resisted compliance, claiming that offering same-sex domestic partner benefits was barred by the state where they were based.<sup>171</sup> San Mateo reported that no contractors resisted because of costs, but a few resisted because they found it "politically unacceptable" to offer the benefits.

Before Miami Beach passed its EBO, the City's Procurement Division surveyed contractors that were doing business with the city at that time.<sup>172</sup> The purpose of the survey, in part, was to gauge contractors' reactions to the requirements. More than 2,800 surveys were distributed, and 604 responses were received (22 percent). When asked if they already provided domestic partner benefits, 64.7 percent of contractors reported that they did. When asked whether they would continue to do business with the city if they were required to offer domestic partner benefits, 76.3 percent reported that they would, 19.2 percent reported that they would not, and 4.5 percent did not answer. Since the ordinance went into effect, Miami Beach reported that only two non-compliant contractors submitted bids, but in neither case were the companies the lowest bidders, so there was no need for the city to pursue enforcement of the EBO.<sup>173</sup>

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<sup>171</sup> See *supra* note 152.

<sup>172</sup> See Memorandum from Jorge M. Gonzalez, *supra* note 165.

<sup>173</sup> *Id.*

In an evaluation of its EBO, San Diego found that all of its 302 contractors were in compliance with the EBO during the first six months of enforcement.<sup>174</sup> The vast majority of contractors (72 percent) complied by offering benefits to domestic partners.<sup>175</sup> Twenty percent of contractors were in compliance because they offered no spousal or domestic partner benefits and 3 percent had no employees.<sup>176</sup> The remaining 1 percent did not offer the benefits, but were deemed in compliance with San Diego's EBO under a provision that exempts firms subject to a collective bargaining agreement that existed before the EBO went into effect.<sup>177</sup>

In an evaluation of its EBO, San Francisco also found that the vast majority of contractors that have undergone their certification procedure have been found in compliance with the EBO, and that compliance increased over time. During the first seven years of the EBO, it found that compliance increased from 91 percent in the first six months of implementation to 94.6 percent after seven years.<sup>178</sup> In 2011, in response to the present survey, San Francisco reported that the compliance rate was 93.6 percent.

There are three ways to comply with the San Francisco EBO, and the evaluation found that the majority of contractors complied by offering equal benefits to spouses and domestic partners (45 percent), 28 percent complied by not offering any benefits based on marital or domestic partnership status, and 27 percent complied because they had no employees (sole proprietorships).<sup>179</sup> All three categories are considered compliant because domestic partners are not treated differently than spouses.<sup>180</sup>

Over the first seven years of implementation, San Francisco also found that there was an 8 percent decrease in those contractors complying by offering no employee benefits to spouses

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<sup>174</sup> CITY OF SAN DIEGO ANNUAL REPORT, *supra* note 167, at 2.

<sup>175</sup> *Id.* at 3.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> The compliance rate rose steadily between 1999 and 2004, from 93 percent compliance in 1999, 93.1 percent in 2000, 93.5 percent in 2001, 94 percent in 2002, to 94.6 percent compliance in 2004. TWO YEAR REPORT, *supra* note 160; THREE YEAR REPORT, *supra* note 161; FOUR YEAR REPORT, *supra* note 162; FIVE YEAR REPORT, *supra* note 163; SEVEN YEAR REPORT, *supra* note 164.

<sup>179</sup> SEVEN YEAR REPORT, *supra* note 164, at 3.

<sup>180</sup> *Id.*



or domestic partners.<sup>181</sup> It concluded, “[t]his decline refutes the assertion that Equal Benefits legislation encourages employers to take away benefits they might otherwise offer.”<sup>182</sup> It also found that most of the contractors who complied by not offering benefits to spouses or domestic partners had fewer than twenty employees and offered no employee benefits to any employee, single, married, or partnered.<sup>183</sup>

At the end of seven years, San Francisco estimated that 66,492 employees of its contractors were taking advantage of domestic partner benefits provided by the EBO.<sup>184</sup> It also found that contractors that complied by offering equal benefits could be found in forty states and D.C. and in over 600 cities nationwide,<sup>185</sup> and reported compliance by large (5,000 or more employees), medium (500–4,999 employee) and small companies (under 500 employees), “[in] proportions [that] are reflective of the U.S. business community in general . . . .”<sup>186</sup>

Several other localities that had not conducted studies such as San Francisco’s also reported that more companies had adopted LGBT-inclusive policies because of the ordinances. For example, San Diego reported having several conversations with contractors when the ordinance first passed about how to properly add the protections to their handbooks. Bloomington reported that it has instructed several employers to amend their affirmative action plans to include sexual orientation in order to bid on city contracts, and the contractors had done so. These reports are also consistent with several media reports of companies changing their policies in order bid on local government contracts.<sup>187</sup>

The results of this survey indicate that these ordinances have increased workplace protections for LGBT people. The fact that even resistant contractors were willing to comply when the ordinances were explained suggests that the ordinances have resulted in protections from employers who otherwise did not have internal LGBT-inclusive policies. The minimal resistance to

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 3 n.4.

<sup>184</sup> *Id.* at 4.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 3 (footnote omitted).

<sup>187</sup> See, e.g., Julie Forster, *Domestic Partner Benefits Solid*, SAINT PAUL PIONEER PRESS, Mar. 14, 2004, at D2; Rachel Gordon, *Bechtel Agrees to Extend Its Benefits Policy*, EXAMINER, May 4, 2000, at A16; Eve Mitchell, *Benefits for Both*, ALAMEDA TIMES-STAR, Aug. 3, 2003, at Sunday Feature.

these ordinances reported by the localities also indicates that they have caused little, if any, disruption to the contracting process for both the agencies and the contractors.

Because agencies do not track whether contractors had the policies in place before they decided to bid on contracts, it is difficult to say how many more contractors have adopted internal LGBT-inclusive policies because of the ordinances. However, even if many of the businesses that were awarded contracts already had protections in place, the local ordinances provide an external enforcement mechanism for the pre-existing internal corporate policies. The ordinances establish an administrative complaint procedure, and provide remedies for violations, which go beyond internal remedies available for breach of corporate policies. In this way, the ordinances provide greater protection for LGBT people, whether or not contractors already have LGBT-inclusive policies in place.

Compliance with these provisions, particularly the affirmative action requirements and the EBOs, demonstrates that the ordinances are valuable in securing protections that go beyond the mandates of current state laws. For example, none of the contractors in these localities were required by state laws applying to all private sector employers to take affirmative action with respect to sexual orientation or gender identity because no such statewide laws existed.

Most (68 percent) of the localities in this study were in states with statewide non-discrimination protection for LGBT people, so their contractors were most likely already legally required to comply with the non-discrimination provisions. Nonetheless, almost a third were in states without statewide laws, and these localities reported no more resistance to the requirements than localities in states with statewide anti-discrimination laws.

Localities interested in passing EBOs may find more contractor-support for the ordinances if they only require benefits for same-sex partners. The majority of contractor resistance reported by the localities in this study was to the requirement that benefits be provided to different-sex partners. However, limiting benefits to same-sex partners may be politically less popular and may open up the ordinances to equal protection challenges.<sup>188</sup>

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<sup>188</sup> See *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 606, 609 (7th Cir. 2001).

*B. The Impact of Waivers on EBO Compliance*

In evaluating compliance with these ordinances, it is important to consider that all localities with EBOs allow contractors to request waivers from the EBO requirements under certain circumstances. Although these contractors are offering spousal benefits, but not domestic partner benefits, the locality does not consider them out of compliance with the EBO. Data collected from four localities indicate that contractors primarily comply with EBOs through non-discriminatory benefits policies as opposed to obtaining waivers.<sup>189</sup>

Waiver provisions in EBOs are fairly consistent across localities. All or most of the EBOs provide exemptions in the following circumstances: when the locality is responding to an emergency; when no compliant contractor can provide goods or services; when the contractor is a sole-source provider; when the requirements would be inconsistent with a grant or agreement with a public agency; and when the contract is with a public entity.<sup>190</sup> A few ordinances include other exemptions, for example, when there is only one bidder or when the contract is with a non-profit entity.<sup>191</sup>

Four localities, San Francisco, Miami Beach, Minneapolis, and Sacramento, provided specific details about their waiver programs. During the years that San Francisco evaluated its EBO, between 1,232 and 1,604 waivers were requested each year.<sup>192</sup> In these years, it granted most of these waivers, between 94.8 percent and 99.3 percent of all requests for waivers. The vast majority of these waivers were granted because the non-compliant contractor was a sole source for the goods or services needed. During the third year of the EBO, San Francisco entered into 187,575 transactions covered by the ordinance, 0.7 percent of which were entered into pursuant to a waiver.<sup>193</sup> Data on the total number of covered transactions are unavailable for the other years.

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<sup>189</sup> Miami Beach, Minneapolis, Sacramento, and San Francisco. WILLIAMS INST., *supra* note 169.

<sup>190</sup> See, e.g., SACRAMENTO, CAL., CITY CODE tit. 3, ch. 3.54, § 3.54.070 (Quality Code through Publishing 2011 Code).

<sup>191</sup> *Id.*

<sup>192</sup> TWO YEAR REPORT, *supra* note 160, at 13; THREE YEAR REPORT, *supra* note 161, at 8; FOUR YEAR REPORT, *supra* note 162, at 5; FIVE YEAR REPORT, *supra* note 163, at 8; SEVEN YEAR REPORT, *supra* note 164, at 5.

<sup>193</sup> THREE YEAR REPORT, *supra* note 161, at 8.

**Table 1. Waivers Granted to San Francisco Contractors, 1998–2002 & 2004**

Percentage of Waivers Granted <sup>194</sup>						
Type of Waiver	1998	1999	2000	2001	2002	2004
Sole Source or Blanket Sole Source <sup>195</sup>	93.1%	93.1%	90.2%	93.2%	91.4%	92.5%
Public Entity	3%	2.4%	2.9%	2.1%	2.5%	3.3%
Company was a Shell Company for a Non-Compliant Company	0	0	0	0	0	0
No Compliant Company Bid	3.1%	4.8%	6.6%	<.1%	0	.3%
Bulk Purchasing	.5%	0	<.1%	4.4%	5.7%	4%
Emergency	0	.4%	.1%	.2%	.5%	0
Total requested	1,474	1,393	1,389	1,232	1,287	1,604
Total granted	1,398 (94.8%)	1,383 (99.3%)	1,371 (98.7%)	1,216 (98.7%)	1,263 (98.1%)	1,527 (95.2%)

San Francisco's self-evaluation studies point out that just because contractors obtain a waiver does not mean they are not providing at least some form of domestic partner benefits to their employees. For example, companies that only extended domestic partner benefits to same-sex domestic partners have to obtain a waiver because the EBO requires that same-sex and different-sex domestic partners be covered.<sup>196</sup> In addition, if companies just extended medical benefits to domestic partners, but not retirement or leave benefits, they also must seek a waiver because the EBO requires equal medical, retirement and leave benefits.<sup>197</sup> For example, San Francisco found that out of the ten

<sup>194</sup> Percentages may not add up to 100 percent due to rounding.

<sup>195</sup> Blanket sole source is a designation for those contractors who would be approved as a sole source for every contract they were to enter into with the city, and as such do not have to be approved as a sole source on each individual contract submitted.

<sup>196</sup> FIVE YEAR REPORT, *supra* note 163, at 8–9.

<sup>197</sup> *Id.* at 9.

largest contractors (in terms of dollars awarded) who received waivers in the first five years of implementation, one had since become compliant by offering domestic partner benefits, and five offered domestic partner benefits, but did not fully comply with the EBO.<sup>198</sup> Three of the remaining four that did not offer benefits were public entities San Francisco was required to work with to satisfy a federal or state mandate.<sup>199</sup>

In 2005, Miami Beach determined that waivers would have been granted to twenty-eight contractors if the EBO had been in effect for the previous five years.<sup>200</sup> This represented 16 percent of the 174 contracts awarded in those five years.

Minneapolis reported that of the 143 contracts entered into in 2010, totaling approximately \$65 million, 102 contracts (\$28 million contracting dollars) were covered by the EBO. The city reported that forty-one contracts were not covered either because the contractor received a waiver or because the contracts did not fall within the ordinance. Under the Minneapolis ordinance, any contracts for less than \$100,000 and all construction contracts are not required to comply with the EBO.<sup>201</sup>

Sacramento reported that it most commonly grants waivers for companies that have “world-wide operations” where the relationship between the city and the company is such that there is a possibility that the city will interact with an employee of another country at any time. These companies requested waivers on account of the difficulty in offering domestic partner benefits to employees all over the world, where cultures and laws differ.<sup>202</sup> However, Sacramento was unable to provide data on the number of contracts covered by the EBO, and the number of contractors who received a waiver.

The data indicates that most contractors comply with EBOs as opposed to receiving waivers. The only two localities that provided enough data to determine the impact of the waiver programs on compliance were San Francisco, with 0.7 percent of

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> See Memorandum from Jorge M. Gonzalez, *supra* note 165.

<sup>201</sup> MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 118, § 18.200(c) (Municode through 2012 Code).

<sup>202</sup> The specific example the city gave was a company that contracts to provide IT support to the city. The city said that in this case, when Sacramento employees call for IT support, they are often routed to technicians outside of the U.S. The IT provider was concerned that all of these employees were working on the contract, and therefore they would have to be offered domestic partner benefits under the EBO.

EBO-covered contracts entered into pursuant to a waiver, and Miami Beach, reporting 16 percent of EBO-covered contracts entered into pursuant to waiver. And as noted above, the San Francisco data indicates that some of the contractors who received waivers provided some form of domestic partnership benefits, just not enough to fully comply with San Francisco's EBO.

#### IV. INVESTIGATION AND ENFORCEMENT OF INDIVIDUAL VIOLATIONS

All of the local agencies reported having established complaint procedures as required by the local contractor ordinances. However, very few individual complaints have been made under the ordinances.

The twenty-nine localities<sup>203</sup> included in this study that have ordinances specifically prohibiting sexual orientation and gender identity discrimination by contractors indicated that enforcement was complaint driven. Therefore, aside from including the non-discrimination provision in their contracts, they did not monitor contractors until and unless a complaint was filed.

Twenty-eight localities<sup>204</sup> reported that no sexual orientation or gender identity complaints had been filed against contractors under their ordinances. The one remaining locality, Eugene, Oregon, reported that it refers employees with complaints of discrimination based on any protected characteristic to the Oregon Bureau of Labor Statistics, the state office responsible for enforcing the state non-discrimination statute, and was therefore unaware if complaints had been made on either basis against city contractors. None of these localities reported that contractors had been debarred for discriminating against an employee on the basis of sexual orientation or gender identity in any locality.

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<sup>203</sup> Austin, Baltimore, Berkeley, Bloomington, Cambridge, Canton, Charlottesville, Council Bluffs, Dane County, Des Moines, Detroit, Eugene, Hartford, Indianapolis, Iowa City, Johnson County, King County, City of Los Angeles, Madison, Northampton, Phoenix, Prince George's County, Raleigh, Saint Paul, San Diego, San Francisco, San Mateo County, Tucson, and West Hollywood. WILLIAMS INST., *supra* note 169.

<sup>204</sup> Austin, Baltimore, Berkeley, Bloomington, Cambridge, Canton, Charlottesville, Council Bluffs, Dane County, Des Moines, Detroit, Hartford, Indianapolis, Iowa City, Johnson County, King County, City of Los Angeles, Madison, Northampton, Phoenix, Prince George's County, Raleigh, Saint Paul, San Diego, San Francisco, San Mateo County, Tucson, and West Hollywood. *See id.*

None of the eleven localities<sup>205</sup> that provided information on affirmative action ordinances including sexual orientation or gender identity reported proactive monitoring of compliance with the sexual orientation and gender identity requirements. No contractor has been debarred under the sexual orientation or gender identity provisions of the affirmative action requirements in any of these localities.

Ten localities<sup>206</sup> that provided information about their EBOs reported that they monitored compliance with the EBO by requiring contractors to submit an affidavit of compliance when they bid on contracts. Miami Beach said that in addition to requiring an affidavit, the city requires contractors to verify that they offer the benefits with company-produced documentation (an employee handbook, for example).

San Francisco has a more intensive procedure to evaluate contractor compliance.<sup>207</sup> First, vendors are required to submit documentation verifying that they have an EBO to the agency.<sup>208</sup> The agency then reviews the materials and determines whether the vendor is in compliance, or if additional materials are needed to demonstrate compliance.<sup>209</sup> The determination is then logged in a database so that government departments may access the information when they are evaluating vendors that have bid on contracts.<sup>210</sup> In all of these localities, once a contractor has signed an affidavit and submitted any other required documentation, it is no longer monitored and enforcement becomes a complaint-driven process.

Eleven localities<sup>211</sup> reported that no complaints had been filed

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<sup>205</sup> Austin, Bloomington, Cambridge, Charlottesville, Detroit, King County, City of Los Angeles, Madison, Saint Paul, San Francisco, and Tucson. *See id.*

<sup>206</sup> Dane County, City of Los Angeles, Miami Beach, Minneapolis, Oakland, Portland, Sacramento, San Diego, San Mateo County, and Seattle. *See id.* *See also* CITY OF SAN DIEGO: EQUAL BENEFITS ORDINANCE: FREQUENTLY ASKED QUESTIONS (2011) (answering EBO questions).

<sup>207</sup> *See* S.F. Human Rights Comm'n, City of S.F., Cal., Chapter 12B Equal Benefits Ordinance File Review Flow Chart (on file with the Williams Institute) [hereinafter Chapter 12B Flow Chart]; S.F. Human Rights Comm'n, City of San Francisco, Cal., Equal Benefits Documentation Guide [hereinafter Equal Benefits Documentation Guide] (on file with the Williams Institute).

<sup>208</sup> Chapter 12B Flow Chart, *supra* note 207. Documentation may be letters from insurance carriers, employee handbooks, and portions of insurance plans purchased by the employer. Equal Benefits Documentation Guide, *supra* note 207.

<sup>209</sup> Chapter 12B Flow Chart, *supra* note 207.

<sup>210</sup> *Id.*

<sup>211</sup> Dane County, King County, Miami Beach, Minneapolis, Oakland,

under their EBOs since they went into effect. Nine localities<sup>212</sup> reported that although no complaints had been filed under their EBOs, if the locality were to receive complaints the handling procedures set out in the ordinances would be strictly followed. Additionally, King County noted that if a complaint were filed against a King County contractor for a violation of another locality's EBO or a state or local non-discrimination law and a finding of reasonable cause was made, King County would consider debarment based on that evidence.<sup>213</sup>

Los Angeles reported that one complaint had been filed under its EBO. The complaint alleged that the employer's health benefits were not made available to the employee's domestic partner. The city conducted a compliance investigation, and determined that the benefits were governed by ERISA, and as such, the employer did not have to provide them.<sup>214</sup>

All of the twelve localities<sup>215</sup> that provided information about their EBOs reported that no contractor was debarred from contracting under the EBO ordinance. One locality, Oakland, terminated an office supply contract, however, because the contractor was found to be out of compliance.<sup>216</sup>

In this survey, localities were not asked to explain why they had so few individual complaints. However, at least three different reasons seem likely to contribute to the scarcity of enforcement actions. First, and in particular for anti-discrimination provisions, employees may file complaints under more widely known laws that cover all private employees and provide an individual right of action. Second, the lack of individual complaints may reflect a lack of investment in the enforcement agencies. Finally, and in particular for EBOs, the lack of individual complaints may be the result of widespread

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Portland, Sacramento, San Diego, San Mateo County, Seattle, and Tumwater. See WILLIAMS INST., *supra* note 169.

<sup>212</sup> Dane County, Miami Beach, Oakland, Portland, Sacramento, San Diego, San Francisco, San Mateo County, and Seattle. See *id.* Tumwater did not respond to this question.

<sup>213</sup> See *id.*

<sup>214</sup> *Id.*

<sup>215</sup> Dane County, City of Los Angeles, Miami Beach, Minneapolis, Oakland, Portland, Sacramento, San Diego, San Francisco, San Mateo County, Seattle, and Tumwater. See *id.*

<sup>216</sup> Memorandum from Robert H. Drummer, Senior Legisl. Attorney, to Montgomery Cnty., Md., City Council (Feb. 2, 2010), available at [http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2010/100202/20100202\\_8.pdf](http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2010/100202/20100202_8.pdf).



compliance.

*A. Availability of Other Laws for Redress*

It seems likely that in localities or states with laws that prohibit discrimination more generally in the private sector, employees pursue the more widely known enforcement mechanisms under those provisions. Most of the contractor non-discrimination ordinances included in this study are in localities or states that have enacted these more general provisions. Eighteen of the twenty-nine localities with contractor non-discrimination provisions included in this study are in localities with statutes that prohibit employment discrimination based on sexual orientation and/or gender identity.<sup>217</sup> Twenty-two of the twenty-nine are in localities that also have broad non-discrimination ordinances that apply to all private sector

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<sup>217</sup> BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, §§ 13.26.010, 13.26.110 (Code Publishing Company through 2012 Code); CAMBRIDGE, MASS., MUNICIPAL CODE tit. 2, ch. 2.76, §§ 2.76.030(4), 2.76.100(A) (Municode through 2011 Code); COUNCIL BLUFFS, IOWA, CODE OF ORDINANCES tit. 1, ch. 1.40, §§ 1.40.060(17), 1.40.080(a)(1) (Municode through 2011 Code); DANE COUNTY, WIS., COUNTY ORDINANCES tit. 4, ch. 19, subch. II, §§ 19.04(7), 19.50-.71 (2010), <http://www.countyofdane.com/ordinances>; DES MOINES, IOWA, MUNICIPAL CODE ch. 62, art. VI, § 62-168 (Municode through 2012 Code); EUGENE, OR., CITY CODE ch. 4, § 4.625(1)(a) (2010), <http://www.eugene-or.gov/portal/server.pt?open=512&objID=269&PageID=1790&cached=true&mode=2>; HARTFORD, CONN., MUNICIPAL CODE pt. II, ch. 2, art. VIII, div. 11, § 2-655(A) (Municode through 2011 Code); JOHNSON COUNTY, IOWA, HUMAN RIGHTS ORDINANCE §§ 4(A), 10(B)(3) (2010), [http://www.state.ia.us/government/crc/docs/Johnson\\_County\\_Human\\_Rights\\_Ordinance.pdf](http://www.state.ia.us/government/crc/docs/Johnson_County_Human_Rights_Ordinance.pdf); KING COUNTY, WASH., CODE ch. 12.16, §§ 12.16.010-.180 (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8 (AmLegal through 2012 Code); MADISON, WIS., CODE OF ORDINANCES ch. 39, § 39.02(9)(b) (2010) (Municode through 2007 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.50(1) (Municode through 2012 Code); NORTHAMPTON, MASS., CODE ch. 22, art. XIX, §§ 22-100, 22-104 (General Code through 2010 Code); PRINCE GEORGES COUNTY, MD., CODE subtit. 10A, div. 2, § 10A-122 (2010), <http://lis.princegeorgescountymd.gov/lis/default.asp?File=&Type=SearchCode>; ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, § 183.02 (2010) (Municode through 2011 Code); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 35, § 22.3501 (AmLegal through 2012 Code); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1 (AmLegal through 2012 Code); WEST HOLLYWOOD, CAL., MUNICIPAL CODE tit. 9, ch. 9.28, § 9.28.050 (Quality Code through Publishing 2011 Code). See Sears et al., *supra* note 106, at 15-1, 15-10, 15-11 (listing state statutes that prohibit discrimination on the basis of sexual orientation and/or gender identity). Since publication in September 2009, Massachusetts added gender identity to its non-discrimination statute. H. 3810, 187th Gen. Ct., Reg. Sess. (Mass. 2011) (codified at MASS. GEN. LAWS ch. 4, § 7 (2008)).

employers.<sup>218</sup> Only four are in localities not also covered by either a broad local ordinance or a statewide law that includes sexual orientation and/or gender identity.<sup>219</sup>

However, this explanation for the lack of individual discrimination claims would not equally apply to local affirmative action requirements for contractors and EBOs. There are not any local or state laws that explicitly require the private sector more broadly to have affirmative action programs that include sexual orientation and/or gender identity, or provide domestic partner benefits for same-sex and different-sex couples.<sup>220</sup>

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<sup>218</sup> AUSTIN, TEX., CITY CODE §§ 5-4-1 to -6 (AmLegal through 2012 Code); BALT., MD., CODE arts. 3, 5, §§ 3-1, 5-29-2 to -3 (2010), <http://www.baltimorecity.gov/Government/CityCharterCodes.aspx>; BERKELEY, CAL., MUNICIPAL CODE tit. 13, ch. 13.26, § 13.26.010; CAMBRIDGE, MASS., MUNICIPAL CODE tit. 2, ch. 2.76, §§ 2.76.030, 2.76.100(A), 2.76.120(D) (Municode through 2011 Code); CANTON, OHIO, GENERAL OFFENSE CODE pt. 5, ch. 547, §§ 547.01–.02 (Walter H. Drane Co. through 2011 Code); COUNCIL BLUFFS, IOWA, CODE OF ORDINANCES tit. 1, ch. 1.40, §§ 1.40.060(17), 1.40.080 (Municode through 2011 Code); DES MOINES, IOWA, MUNICIPAL CODE ch. 62, art. VI, §§ 62-71, 62-168 (Municode through 2012 Code); DETROIT, MICH., MUNICIPAL CODE pt. III, ch. 27, art. III, § 27-3-1 (Municode through 2010 Code); EUGENE, OR., CITY CODE ch. 4, §§ 4.620, 4.625 (2010), <http://www.eugene-or.gov/portal/server.pt?open=512&objID=269&PageID=1790&cached=true&mode=2>; INDIANAPOLIS-MARION COUNTY, IND., REV. CODE tit. III, ch. 581, art. I, §§ 581-101 to -103; art. IV, § 581-403 (Municode through 2011 Code); IOWA CITY, IOWA, CITY CODE tit. 2, ch. 3, § 2-3-1 (Sterling Codifiers through 2012 Code); JOHNSON COUNTY, IOWA, HUMAN RIGHTS ORDINANCE § IV(A) (2010), [http://www.state.ia.us/government/crc/docs/Johnson\\_County\\_Human\\_Rights\\_Ordinance.pdf](http://www.state.ia.us/government/crc/docs/Johnson_County_Human_Rights_Ordinance.pdf); KING COUNTY, WASH., CODE ch. 12.16, §§ 12.18.020–.130 (2010), [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); L.A., CAL., CHARTER & ADMINISTRATIVE CODE div. 10, ch. 1, art. 1, § 10.8 (AmLegal through 2012 Code); MADISON, WIS., CODE OF ORDINANCES ch. 39, §§ 39.02(9)(b), 39.03(2)(hh) (Municode through 2007 Code); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.40(b) (Municode through 2012 Code); NORTHAMPTON, MASS., CODE ch. 22, art. XIX, §§ 22-100, 22-104 (General Code through 2010 Code); PRINCE GEORGES COUNTY, MD., CODE subtit. 10A, div. 2, § 10A-122 (2010), <http://lis.princegeorgescountymd.gov/lis/default.asp?File=&Type=Search>; ST. PAUL, MINN., CODE OF ORDINANCES pt. II, tit. XVIII, ch. 183, §§ 183.02–.03 (Municode through 2011 Code); SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, §§ 22.4301–.4303 (AmLegal through 2012 Code); S.F., CAL., ADMINISTRATIVE CODE ch. 12B, § 12B (AmLegal through 2012 Code); TUCSON, ARIZ., CODE pt. II, ch. 17, art. III, § 17-12(b); ch. 28, art. VI, §§ 28-137, 28-144 (AmLegal through 2012 Code).

<sup>219</sup> BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.21.030–.070 (2011), <http://bloomington.in.gov/code>; CHARLOTTESVILLE, VA., CODE OF ORDINANCES ch. 2, art. I, § 22-10 (Municode through 2012 Code); PHX., ARIZ., CITY CODE ch. 18, art. I, §§ 18-1, 18-4 (Code Publishing Company through 2012 Code); RALEIGH, N.C., CODE div. II, pt. 4, ch. 3, § 4-1004 (Municode through 2011 Code).

<sup>220</sup> State laws requiring these policies extend only to state government contractors. *See, e.g.*, CAL. PUB. CONT. CODE § 10295.3 (Deering 2011) (requiring state government contractors to offer equal benefits to domestic partners); MD.

*B. Lack of Investment in Enforcement*

Second, local agency limitations may also account for the lack of complaints filed under all three types of contract ordinances. Studies of complaints filed on the basis of sexual orientation and gender identity under broader local non-discrimination ordinances have concluded that local enforcement agencies often lack the staff and resources needed to fully enforce the ordinances.<sup>221</sup> Similar limitations were documented in academic literature describing the role of agencies enforcing state and local civil rights laws prior to the enactment of the Civil Rights Act of 1964.<sup>222</sup>

This explanation seems especially likely for the enforcement of non-discrimination and affirmative action ordinances. As noted above, none of the localities that responded reported monitoring the affirmative action requirements for sexual orientation and gender identity. In fact, the City of Los Angeles indicated that if it were not for a strained budget, it would have been more proactive in monitoring compliance with the affirmative action ordinance, but it currently did not have enough resources.<sup>223</sup> In contrast, a number of these localities do monitor compliance with race and sex affirmative action steps by requiring regular submission of workforce statistics.<sup>224</sup>

In addition, none of the localities with non-discrimination and affirmative action requirements affirmatively responded that they had hired additional permanent staff to enforce these

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CODE ANN., STATE FIN. & PROC. §§ 19-101 to -120 (LexisNexis 2009) (requiring that state government contractors not discriminate based on sexual orientation); Mass. Exec. Order 526, 1177 Mass. Reg. 3 (Mar. 4, 2011) (adding gender identity to contractor non-discrimination and affirmative action requirements in Massachusetts).

<sup>221</sup> Brad Sears et al., *Administrative Complaints on the Basis of Sexual Orientation and Gender Identity*, in DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT, *supra* note 106, at 11-1, 11-4; Roddrick A. Colvin, *Improving State Policies Prohibiting Public Employment Discrimination Based on Sexual Orientation*, 20 REV. PUB. PERSONNEL ADMIN. 5, 7 (2000); Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, 26 AM. REV. PUB. ADMIN. 175 (1996).

<sup>222</sup> ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 14 (1971).

<sup>223</sup> WILLIAMS INST., *supra* note 169.

<sup>224</sup> *See, e.g.*, CITY OF L.A., BUREAU OF CONTRACT ADMIN. FORM: NONDISCRIMINATION-EQUAL EMPLOYMENT-AFFIRMATIVE ACTION, *available at* [http://www.portoflosangeles.org/forms/Affirmative\\_Action.PDF](http://www.portoflosangeles.org/forms/Affirmative_Action.PDF) (last visited Feb. 28, 2011).

contractor ordinances. Twenty-one localities<sup>225</sup> included in this study with contractor non-discrimination ordinances reported that the implementation duties associated with the sexual orientation and gender identity requirements were integrated into the responsibilities of staff that enforced the ordinances as a whole. Six other localities<sup>226</sup> did not specifically state whether their staffing needs were affected by the inclusion of sexual orientation and gender identity in the non-discrimination ordinances, but provided other information indicating that no additional staff were hired to enforce these protections when they went into effect.

Similarly, eleven localities<sup>227</sup> with affirmative action ordinances reported that the inclusion of sexual orientation and gender identity into their existing ordinances did not require any staff beyond that needed to enforce the ordinance as a whole. One city, Cambridge, provided limited responses, but did not indicate that any additional staff had been hired to implement the sexual orientation and gender identity provisions of the ordinance.<sup>228</sup>

Nine of the twelve localities with EBOs that responded did not indicate that they hired additional staff to implement or enforce them.<sup>229</sup> Of the other three, only one, San Francisco, hired additional, permanent, full-time staff. San Francisco hired six full-time staff to start up its EBO program, and now retains the equivalent of 4.5 full-time staff to enforce the EBO.<sup>230</sup> San Mateo

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<sup>225</sup> Baltimore, Bloomington, Canton, Charlottesville, Council Bluffs, Dan County, Des Moines, Detroit, Hartford, Indianapolis-Marion County, Iowa City, Johnson City, King County, City of Los Angeles, Madison, Prince George's County, St. Paul, San Francisco, San Mateo County, and Tucson. WILLIAMS INST., *supra* note 169.

<sup>226</sup> Berkley, Cambridge, Eugene, Northampton, Raleigh, and West Hollywood. *Id.*

<sup>227</sup> Austin, Bloomington, Charlottesville, Detroit, King County, City of Los Angeles, Madison, St. Paul, San Francisco, and Tucson. *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Dane County, City of Los Angeles, Minneapolis, Oakland, Portland, Sacramento, San Diego, Seattle, and Tumwater. *Id.*

<sup>230</sup> According to a 2001 report by the Oakland Contract Compliance & Employment Services Division before it adopted its EBO, staffing for the EBO in San Francisco was equivalent to five full-time employees; thirteen existing full-time staff members responsible for contract enforcement handled EBO implementation and enforcement in Los Angeles, and Seattle and Berkeley each dedicated one full-time position to EBO enforcement. As noted above, the Oakland report contradicts what Seattle and Berkeley indicated in the current survey and Los Angeles confirmed it hired no new employees. Memorandum from Office of the City Manager/Contract Compliance & Emp't. Servs. Div. to Office of City Manager (Nov. 13, 2001) (on file with the Williams Institute).

hired one temporary staff person to start up its EBO program, and then existing procurement department staff became responsible for enforcing the program after it was developed. Miami Beach hired one additional staff member to implement and enforce both its EBO and its living wage ordinance.

The fact that few staff was hired as the result of these ordinances can be looked at in two ways. First, the lack of staff may indicate a lack of investment in enforcement of the ordinances—contributing to the low number of individual complaints. Alternatively, these localities could have been making reasonable resource allocations by not investing further in enforcement. They may have determined that given the small size of the LGBT population and the existing capacity of their enforcement staff, no additional staff was necessary to enforce the LGBT-specific contractor provisions. Research by the Williams Institute has shown that only 3.8 percent of the population identifies as LGBT,<sup>231</sup> that workplace discrimination complaint rates on the basis of sexual orientation are approximately 5 in 10,000;<sup>232</sup> and that the take up rate for same-sex and different-sex domestic partner benefits would be 0.3 percent to 2.3 percent of a contractor's employees.<sup>233</sup>

In fact, two cities, Austin and Phoenix, said that they expected “enforcing” the sexual orientation non-discrimination ordinance would require more staff, but because no complaints had been filed, they did not need to hire staff. Thus, it is plausible that significant additional investment is not necessary to enforce these LGBT-specific contractor provisions.

### *C. Widespread Compliance*

Finally, the lack of individual enforcement action may indicate widespread compliance. This may be especially true for EBOs. All of the EBOs at least require contractors to submit an affidavit

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<sup>231</sup> Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual and Transgender?*, WILLIAMS INST. 1 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

<sup>232</sup> CHRISTOPHER RAMOS ET AL., WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 1999–2007, at 1 (2008), available at <http://policyarchive.org/handle/10207/bitstreams/15682.pdf>.

<sup>233</sup> Michael Ash & M. V. Lee Badgett, *Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-Sex and Unmarried Different-Sex Couples*, 24 CONTEMP. ECON. POL'Y 582, 582 (2006).

of compliance when they bid on contracts, if not more extensive pre-clearance. Thus, for there to be a violation by these contractors, the contractor would have to lie about a policy that is easy to verify, or change its entire benefits plan after receiving a contract. In contrast, even with an anti-discrimination policy in place, the actions of one or several employees can create a violation under the anti-discrimination ordinances.

In addition, the education efforts by localities with EBOs may have contributed to widespread compliance and the lack of complaints. All of the localities<sup>234</sup> with EBOs that responded, except Tumwater and Minneapolis,<sup>235</sup> provided materials on their EBOs that they created for staff, contractors, and employees of contractors, or make these documents available online. Additionally, one city that did not respond, Long Beach, makes these documents available online. These materials included:

- Detailed web pages directed to contractors with information on compliance and access to the necessary forms.
- Detailed rulebooks, handouts, and compliance guides.
- Short fact sheets, FAQs, and brochures on the ordinances.
- Compliance posters for employers.<sup>236</sup>

In contrast, all of the localities with contractor-specific non-discrimination<sup>237</sup> and affirmative action<sup>238</sup> ordinances reported that they did not produce any additional or special enforcement materials dealing with the sexual orientation and gender identity requirements. Instead, they incorporated these characteristics into existing materials as needed.

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<sup>234</sup> Berkeley, King County, City of Los Angeles, Dane County, Long Beach, Miami Beach, Oakland, Olympia, Portland, Sacramento, San Diego, San Mateo County, San Francisco, and Seattle. WILLIAMS INST., *supra* note 169.

<sup>235</sup> Minneapolis provides a link to its EBO on the city website, but no more detailed information regarding implementation or enforcement. See CITY OF MINNEAPOLIS: PURCHASING DIV., *Procurement*, [http://www.minneapolismn.gov/finance/procurement/procurement\\_index](http://www.minneapolismn.gov/finance/procurement/procurement_index) (last visited Feb. 28, 2012).

<sup>236</sup> See sources *supra* note 114.

<sup>237</sup> Austin, Baltimore, Berkeley, Bloomington, Cambridge, Canton, Charlottesville, Council Bluffs, Dane County, Des Moines, Detroit, Eugene, Hartford, Indianapolis, Iowa City, Johnson County, King County, City of Los Angeles, Madison, Northampton, Phoenix, Prince George's County, Raleigh, Saint Paul, San Diego, San Francisco, San Mateo County, Tucson, and West Hollywood. WILLIAMS INST., *supra* note 169.

<sup>238</sup> Austin, Bloomington, Cambridge, Charlottesville, Detroit, King County, City of Los Angeles, Madison, Saint Paul, San Francisco, and Tucson. *Id.*

## V. BROADER CORPORATE AND GOVERNMENT POLICY REFORM

The present study was designed to measure the most direct affects of LGBT-related local contractor ordinances on the business and employees covered by them—the adoption of LGBT-friendly workplace policies by covered contractors, and the individual investigations and enforcement actions initiated by or on behalf of their employees. However, in evaluating its EBO, San Francisco also focused on another effect of its pioneering EBO, encouraging broader changes in corporate and public policy.

In its five-year evaluation, San Francisco notes that its EBO “has been credited with playing a major role in [the] explosion of domestic partner benefits” offered by companies in the United States.<sup>239</sup> The report states that “at the time the [EBO] was [adopted], only 500 employers in the U.S. offered such benefits,” while 4,500 did so in 2002—75 percent of which did so in compliance with the City’s contracting requirements.<sup>240</sup>

In addition, it notes that its EBO has had “a noticeable impact on the insurance industry,” including increasing the number of insurance companies willing to offer domestic partnership benefits, especially for employers with few employees, and all but eliminating the practice of levying surcharges for domestic partnership benefits as a result of “clear actuarial statistics indicating that claims for domestic partners are no more expensive than those of spouses.”<sup>241</sup>

In terms of public policy, its 2004 evaluation notes that fourteen other government bodies had adopted EBOs and that several more governments were considering them, all using San Francisco’s EBO as a model.<sup>242</sup> Its five-year evaluation notes that its EBO played a role in encouraging California’s and other domestic partner registries that provide for a number of rights and obligations beyond workplace benefits.<sup>243</sup> Only thirty-three jurisdictions offered these broader domestic partner registries when San Francisco’s EBO was adopted, while sixty-three had such registries after five years of implementation.<sup>244</sup>

No doubt there are many factors contributing to the growing

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<sup>239</sup> FIVE YEAR REPORT, *supra* note 163, at 1 (footnote omitted).

<sup>240</sup> *See id.*

<sup>241</sup> *Id.* at 9–10.

<sup>242</sup> SEVEN YEAR REPORT, *supra* note 164, at 5 n.11.

<sup>243</sup> FIVE YEAR REPORT, *supra* note 163, at 1.

<sup>244</sup> *Id.* at 11.

recognition of same-sex couples by private companies, insurers, and governments in the first seven years of San Francisco's EBO. However, its evaluations include endorsements by many community and government leaders crediting its EBO, at least in part, with sparking and encouraging these broader policy changes. While it is likely that San Francisco's EBO, as the first in the country, had a larger impact on encouraging policy reform than those that followed, further study is warranted on whether and how local and state EBOs encourage broader corporate and government policy reform.

## VI. ARGUMENTS AGAINST LGBT-RELATED CONTRACTOR ORDINANCES

The survey also asked localities to respond to the concerns raised prior to the passage of the ordinances, including that the localities would be unable to secure contractors to carry out their work effectively, that the ordinances would be administratively burdensome, that they would be costly to implement, and that they would result in litigation.

### *A. Disruption of Work and Operations of Government*

As indicated by the discussion of widespread compliance with these ordinances above, none of the localities that responded to the survey reported that the ordinances in any way hampered their ability to carry out their work. None of the localities reported that because of the ordinances they were unable to hire the contractors that they needed.

### *B. Administrative Burden*

Almost every locality in this study said that their ordinances did not create an administrative burden. All of the twenty-nine localities<sup>245</sup> included in this study with contractor-specific non-discrimination ordinances reported that there was little or no administrative burden associated with implementing or enforcing the sexual orientation and gender identity requirements. Similarly, all eleven localities<sup>246</sup> included in this study that require affirmative action steps with respect to sexual orientation

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<sup>245</sup> See *supra* note 237.

<sup>246</sup> See *supra* note 238.



and/or gender identity said that the burden associated with including these characteristics in the general ordinance is minimal, if any.

When specifically asked whether EBOs were burdensome administratively, eleven localities<sup>247</sup> said that they were not. These eleven localities reported that the ordinances were fairly easy and quick to implement, and enforcement duties were assumed by the local governments without any major problems. Portland added that the program has been particularly easy to implement since the city switched to an online system for compliance verification that allows contractors to submit affidavits electronically. King County said that the EBO does present an administrative burden on the Procurement Department, but did not respond to a request for more details. San Francisco reported that the administrative burden of the EBO has not been measured.

### *C. Costs*

The survey asked localities about two types of costs: costs associated with implementing and enforcing the ordinances, and whether the ordinances resulted in an increase in contract prices for the localities.

#### 1. Administrative Costs

Consistent with the discussion above on the localities reporting little administrative burden resulting from these ordinances, and that only one, San Francisco's EBO, resulted in the hiring of new, full-time, permanent staff, the localities report very little administrative costs associated with these ordinances. No data was provided or otherwise available on the administrative costs associated with adding sexual orientation and gender identity to contractor non-discrimination ordinances or affirmative action ordinances.

However, San Diego assessed the costs associated with its EBO in its evaluation, and one study quantified administrative costs for three of the larger localities with EBOs: Berkeley, Seattle, and San Francisco. In the first six months of enforcement, San Diego

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<sup>247</sup> Dane County, City of Los Angeles, Miami Beach, Minneapolis, Oakland, Portland, Sacramento, San Diego, San Mateo County, Seattle, and Tumwater. WILLIAMS INST., *supra* note 169.

reported that “[t]here is no additional cost for the City of San Diego associated with the EBO.”<sup>248</sup> According to a 2001 report by the Oakland Contract Compliance & Employment Services Division, yearly EBO administration costs for Berkeley, Seattle, and San Francisco were \$95,000, \$100,000, and \$450,000, respectively, as reported by these localities.<sup>249</sup> There was no dollar estimate provided for the administration of the Los Angeles EBO, but the Oakland report states that it costs more than that of San Francisco. In response to this survey, San Francisco reported that it has not recently ascertained the administrative cost associated with its EBO. The Oakland report is contradicted by the response of Los Angeles to the present survey. It reports that it has not hired any additional staff to implement and enforce its EBO.

These additional costs for EBOs, as opposed to the non-discrimination and affirmative action ordinances may be because sexual orientation and gender identity are simply added to localities existing non-discrimination and affirmative action ordinances and enforcement framework. Localities were already checking for these policies and have no additional work beyond checking to make sure that sexual orientation and gender identity are included. At minimum, EBOs require checking for a different type of benefits policy. They are also likely to be more demanding on staff because of the waiver provisions and, in some cases, compliance checks that go beyond getting an affidavit from the contractor. However, as noted above, despite the additional work these ordinances may create, only San Francisco reported hiring any new, permanent, full-time staff to implement its EBO.

## 2. Contacting Costs

No data was provided or otherwise available on increased contract prices associated with adding sexual orientation and gender identity to contractor non-discrimination ordinances or affirmative action ordinances. Data was collected on increased contract costs for three localities with EBOs. In a 2005 recommendation for its EBO, the Miami Beach City Commission estimated that it would cost the city approximately \$73,224 per year.<sup>250</sup> This estimate did not consider any economic benefits

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<sup>248</sup> CITY OF SAN DIEGO ANNUAL REPORT, *supra* note 167, at 5.

<sup>249</sup> Letter from City Manager of Oakland, *supra* note 159.

<sup>250</sup> Memorandum from Jorge M. Gonzalez, *supra* note 165. This figure was

from the EBO resulting from contractors attracting and retaining a more highly skilled and productive workforce.

The 2001 Oakland report, discussed above, estimated that the financial impact of an EBO on Oakland contractors to be an increase of 0.5 percent to 2 percent over the normal cost of doing business.<sup>251</sup> It also states that San Francisco reported that there was an average increase in costs of approximately 2 percent (ranging from 1.5 percent to 3 percent) for its contractors to comply with its EBO. It should be noted that the Oakland and San Francisco EBOs under consideration extended benefits to same-sex and different-sex partners.

In sum, the twenty-nine localities<sup>252</sup> with nondiscrimination and affirmative action contractor ordinances provided no data that these ordinances increased administrative or contractor costs. This is consistent with the reports that none of these localities hired additional staff to enforce these ordinances and there were no reports of investigations or enforcement actions under these ordinances.

Administrative and contractor costs were quantified for several larger localities with EBOs. Only San Francisco's EBO, which has a more robust pre-clearance procedure, and applies to same-sex and different-sex domestic partners, had administrative costs estimated at over \$100,000 per year. Estimates for San Francisco and Oakland indicate that contractor costs increased from 0.5 percent to 3 percent a year. However, none of these studies consider the economic benefits from the EBO, such as contractors attracting and retaining a more highly skilled and productive workforce.

#### *D. Litigation*

Concerns that these LGBT-related contractor ordinances would result in litigation have centered on EBOs. None of the respondents to this survey reported litigation resulting from

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calculated by comparing the lowest and best bids that did not meet the requirement of the EBO, versus the next lowest and best bids that did meet the requirements of the EBO for all contracts in the five years before the report was produced. If the lowest and best bidder did not meet the requirements of the EBO, but would qualify for a waiver (16 percent of contractors), that bid was used in the calculation rather than the lowest and best bidder that offered equal benefits.

<sup>251</sup> Letter from City Manager of Oakland, *supra* note 159.

<sup>252</sup> See *supra* notes 237–38.

adding sexual orientation and gender identity to contractor non-discrimination and affirmative action ordinances. Beyond the responses to this survey, we were only able to locate one challenge to the sexual orientation non-discrimination requirement of a local non-discrimination contractor ordinance, and in that case the ordinance was upheld.<sup>253</sup>

However, EBOs in three jurisdictions, San Francisco, New York, and Minneapolis were challenged in court six times. Four of these challenges were to San Francisco's EBO, the first EBO enacted. The last of these cases, a challenge to Minneapolis's EBO, was brought in 2004. We have found no litigation involving EBOs since 2004.

In two of these six cases, courts found that the EBOs were partially preempted by ERISA,<sup>254</sup> in particular to the extent that they require self-insured employers to offer health care coverage to domestic partners.<sup>255</sup> In the challenge to New York City's EBO, the court found not only that the health care component was preempted by ERISA, but that the entire EBO was preempted by a New York state procurement statute.<sup>256</sup> The three other cases either upheld the EBO or were dismissed for lack of standing before substantive issues were reached.<sup>257</sup>

## 1. ERISA Preemption

Both times ERISA preemption was litigated, EBOs have been

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<sup>253</sup> *Alioto's Fish Co. v. Human Rights Comm'n of S.F.*, 174 Cal. Rptr. 763, 764 (Ct. App. 1981) (discussing whether the locality had the authority to enact the ordinance under the state constitution, state law, or the municipal charter, and relatedly, whether the ordinance was preempted by any state law). Because the analysis in this case is highly dependent on state law, it is difficult to determine what the outcome may be for a similar challenge to a different locality's ordinance.

<sup>254</sup> Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

<sup>255</sup> *Air Transp. Ass'n v. City of S.F.*, 992 F. Supp. 1149, 1180 (N.D. Cal. 1998), *aff'd*, 266 F.3d 1064 (9th Cir. 2001); *Council of New York v. Bloomberg*, 846 N.E.2d 433, 442 (N.Y. 2006).

<sup>256</sup> *Bloomberg*, 846 N.E.2d at 438.

<sup>257</sup> *S.D. Myers, Inc. v. City of S.F.*, 336 F.3d 1174, 1180 (9th Cir. 2003); *S.D. Myers, Inc. v. City of S.F.*, 253 F.3d 461, 476 (9th Cir. 2001); *Titus Constr. v. City of Minneapolis*, No. 04-1487, 2004 U.S. Dist. LEXIS 20121, at \*6 (D. Minn. Sept. 21, 2004). The fourth case was a challenge to San Francisco's EBO brought by an electrical contracting company that had religious objections to the EBO. FIVE YEAR REPORT, *supra* note 163, at 13.

limited, in part, as a result.<sup>258</sup> The biggest difference between these challenges was how the courts applied the availability of a “marketplace participant” exception to ERISA preemption.<sup>259</sup> The “marketplace participant” exception has been borrowed by courts from preemption cases involving the National Labor Relations Act (NLRA).<sup>260</sup> In effect, this exception allows a locality to regulate in ways that would otherwise be preempted by federal laws that seek to standardize an industry (like the NLRA and ERISA) so long as the city does not exert more power than an ordinary consumer would in the transaction.

New York’s highest court held that the city could not rely on the exemption any time it required ERISA-regulated benefits under the EBO because the city was “setting policy,” rather than engaging in the buying process like a normal consumer.<sup>261</sup> However, a district court in California left open the possibility of a “market participant” exception to ERISA preemption of EBOs when the city “wields no more power than an ordinary consumer.”<sup>262</sup> In that case, *Air Transport v. City of San Francisco*, the court determined that the city had more “economic power” over an airport than a normal consumer would, so it could not require the airport to provide the benefits.<sup>263</sup>

As a result of the *Air Transport* ruling, San Francisco has only allowed companies to limit their compliance with its EBO in “rare instances” where the city determines that it “wields more power than an ordinary consumer.”<sup>264</sup> In 2005, only thirty-three companies chose to limit their benefits on this basis.<sup>265</sup> To put that number in perspective, San Francisco entered into 187,575

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<sup>258</sup> *Air Transp. Ass’n*, 992 F. Supp. at 1180; *Bloomberg*, 846 N.E.2d at 438. A third case also limited a Portland, Maine ordinance that was similar to an EBO based on ERISA preemption. The ordinance required that equal benefits be provided to the domestic partners of employees of the city, the Portland School Committee, and any organization accepting Housing and Community Development funds from the city. An organization that accepted housing funds argued that the ordinance was preempted by ERISA. The court agreed, limiting the ordinance to non-ERISA fringe benefits, such as bereavement leave and leaves of absence. *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 83–84, 93 (D. Me. 2004).

<sup>259</sup> *Air Transp. Ass’n*, 992 F. Supp. at 1177; *Bloomberg*, 846 N.E.2d at 441–42.

<sup>260</sup> *Air Transp. Ass’n*, 992 F. Supp. at 1178.

<sup>261</sup> *Bloomberg*, 846 N.E.2d at 442.

<sup>262</sup> *Air Transp. Ass’n*, 992 F. Supp. at 1180.

<sup>263</sup> *Id.*

<sup>264</sup> FIVE YEAR REPORT, *supra* note 163, at 13.

<sup>265</sup> *Id.*

transactions in 2003.<sup>266</sup> The city still relies on the market participant exception in all other situations (“most often,” according to the city), requiring contractors to offer ERISA-regulated benefits. King County, Washington, and Los Angeles, California have also issued rules implementing their EBOs, which apply the *Air Transport* holding.<sup>267</sup> The rules, issued in 2011, state that employers are required to offer ERISA-regulated benefits in a non-discriminatory manner, unless the contractor demonstrates that the county cannot meet the “marketplace participant” exception with respect to a particular contract.<sup>268</sup> San Francisco’s ordinance, and Los Angeles’s and King County’s practices adopted in light of *Air Transport* have not generated any further ERISA-related litigation.

Any time a locality requires contractors to provide health care benefits in its EBO, there is a possibility that the ordinance will be challenged on ERISA preemption grounds. However, even in cases that find that ERISA preemption applies, the scope of preemption is limited. ERISA only regulates some benefits, most significantly health care benefits, and only regulates self-insured employers.<sup>269</sup> Therefore, even if ERISA preemption is found to apply, localities may still require all contractors to offer benefits that ERISA does not regulate, and may require contractors that are not self-insured to offer all benefits on equal terms. Further, San Francisco’s experience following the *Air Transport* ruling strongly suggests that in some jurisdictions the “marketplace participant” exception will shield the EBO from ERISA preemption in the vast majority of cases. Moreover, we have not been able to find a challenge brought against an EBO since 2004, and, according to agencies, contractors are complying with all EBO requirements. Finally, despite ERISA litigation, health benefits are included in all EBOs passed since 2004 that specify which benefits must be offered.<sup>270</sup>

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<sup>266</sup> THREE YEAR REPORT, *supra* note 161, at 8.

<sup>267</sup> L.A., Cal. Dep’t of Pub. Works Rules & Regulations Implementing the Equal Benefits Ordinance, at 10–11 (Aug. 15, 2011); King Cnty., Wash. Exec. Admin. Rules Implementing Equal Benefits Ordinance 14823, and Ordinance 16856 (Jan. 30, 2011) [hereinafter Exec. Admin. Rules].

<sup>268</sup> Exec. Admin. Rules, *supra* note 267.

<sup>269</sup> HINDA RIPPS CHAIKIND, CONG. RESEARCH SERV., ERISA REGULATION OF HEALTH PLANS: FACT SHEET 1 (2003).

<sup>270</sup> Four localities define “employee benefits” to include health benefits have passed EBOs since 2004: DANE COUNTY, WIS., COUNTY ORDINANCES tit. 5, ch. 25, subch. I, § 25.016(b) (2010), <http://www.countyofdane.com/ordinances>; LONG BEACH, CAL., MUNICIPAL CODE vol. 1, tit. 2, ch. 2.73, § 2.73.040(A) (Municode

## 2. Other Arguments

The *Air Transport* case also held that the EBO was not an invalid exercise of power under the state constitution or the City Charter, but limited its geographic scope, finding that the dormant commerce clause prohibits application of the EBO to “out-of-state conduct that is not related to the purposes of the City contract.”<sup>271</sup> The result of this ruling is that EBOs may reach contractors’ operations in the locality; contractors’ operations which occur elsewhere in the United States where work related to the contract is being performed; and work performed on real property outside of the locality if the property is owned or occupied by the locality and the contractor’s presence is related to the contract.<sup>272</sup> All of the other EBOs that specifically state their geographic reach are structured to apply to only this conduct.<sup>273</sup>

The *Air Transport* case also upheld the ordinance to preemption challenges based on the Railway Labor Act and the Airline Deregulation Act, except “when it is applied in a manner that creates coercive economic incentives for air carriers to alter their routes.”<sup>274</sup> The court explained that coercion would only occur “if the burden of compliance is so great that carriers will reject City contracts that are essential to operating out of the Airport . . . .”<sup>275</sup> It is not clear from the information provided by San Francisco whether any air carriers are exempt from the EBO as a result of this decision.

The Ninth Circuit upheld San Francisco’s EBO in a second case that advanced different arguments under the Commerce Clause, the Due Process Clause, and the California Constitution.<sup>276</sup> These arguments primarily focused on the plaintiff’s objection to the city applying its EBO to the contractor’s employees who worked

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through 2010 Code); PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.052(E) (2009), <http://www.portlandonline.com/auditor/index.cfm?c=28168>; SAN DIEGO, CAL., MUNICIPAL CODE ch. 2, art. 2, div. 43, § 22.4302 (AmLegal through 2012 Code). However, Portland’s ordinance does state that “employee benefits” do not include benefits that are preempted by state and federal law. PORTLAND, OR., CITY CODE & CHARTER tit. 3, ch. 3.100, § 3.100.052-.053.

<sup>271</sup> *Air Transp. Ass’n v. City of S.F.*, 992 F. Supp. 1149, 1165 (N.D. Cal. 1998), *aff’d*, 266 F.3d 1064 (9th Cir. 2001).

<sup>272</sup> *Id.* at 1161–65.

<sup>273</sup> *See supra* notes 76–77.

<sup>274</sup> *Air Transp. Ass’n*, 992 F. Supp. at 1188, 1191.

<sup>275</sup> *Id.* at 1187.

<sup>276</sup> *S.D. Myers, Inc. v. City of S.F.*, 253 F.3d 461, 461, 745–76 (9th Cir. 2001).

outside of the local jurisdiction or the state of California. In response to these arguments, the court affirmed the extraterritorial applications of the EBO that were upheld by the *Air Transport* case.<sup>277</sup>

In addition, the court noted that while the California Constitution forbids a municipal corporation from “exercis[ing] its *governmental* functions beyond its corporate boundaries,” it “may . . . exercise [its] *proprietary* powers,” including the power to control commercial relationships, outside of the city’s corporate boundaries.<sup>278</sup> Further, the court found that the EBO constituted a “mode in which a city chooses to contract,” which is a municipal affair and therefore not controlled by the state constitution.<sup>279</sup>

Shortly after this case was decided, the same contractor filed suit again, arguing that the EBO was preempted by California’s broad domestic partnership law. This case also reached the Ninth Circuit, and the court again upheld the EBO finding that the domestic partnership law did not explicitly preclude San Francisco from enacting the EBO or “occupy the field” of domestic partnership regulation in the state.<sup>280</sup>

The New York case that resulted in an ERISA preemption decision also held that the EBO was preempted by a state procurement statute that required that a contract be awarded to the “lowest responsible bidder.”<sup>281</sup>

## CONCLUSION

Local agency experiences with implementing and enforcing contractor non-discrimination and affirmative action ordinances, and EBOs, indicate that these ordinances have value in providing workplace protections for LGBT people. In most cases, contractors are willing to comply with the ordinances in order to contract with the local government. There is evidence that more contractors are adopting LGBT-inclusive policies as a direct result of the contracting ordinances. And, in cases where no other law requires contractors to afford protections to LGBT people, high compliance rates show that contractors are willing to accept the possibility of external enforcement in order to contract.

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<sup>277</sup> *Id.* at 469.

<sup>278</sup> *Id.* at 473 (quoting *City of Oakland v. Brock*, 67 P.2d 344, 345 (Cal. 1937)).

<sup>279</sup> *Id.* at 474 (quoting *Associated Builders Contractors, Inc. v. S.F. Airports Comm.*, 981 P.2d 499, 506 (Cal. 1999)).

<sup>280</sup> *S.D. Myers, Inc. v. City of S.F.*, 336 F.3d 1174, 1178–79 (9th Cir. 2003).

<sup>281</sup> *Council of New York v. Bloomberg*, 846 N.E.2d 433, 438–40 (N.Y. 2006).



There have been almost no investigation or enforcement actions under these ordinances. No complaints had been filed under any of the non-discrimination or affirmative action ordinances, and only one complaint has been filed under an EBO. This probably reflects widespread compliance with the ordinances resulting from the affirmative requirement that contractors acknowledge and adopt the required policies; the significant threat of losing government contracts; the availability of alternative and more widely known enforcement mechanisms for discrimination complaints; the small size of the LGBT population; and the minimal resources almost all jurisdictions have invested in enforcing their ordinances.

Another result of these ordinances identified by San Francisco, the first locality in the United States that adopted an EBO, was that it was a leader in policy. In self-evaluations, it credits its EBO for the growing number of companies that offer domestic partnership benefits, even those who are not its contractors; changes in California law that recognized same-sex domestic partners broadly, eventually providing them with almost all of the rights and obligations of marriage; and the growing number of governments who similarly recognized domestic partners either for public employee benefits or more broadly under state law.

The actual experience of local agencies in enforcing and implementing these ordinances contradicts several of the arguments that have been made in opposition to the ordinances. No locality reported that the ordinances inhibited their ability to carry out the operations and work of their governments. Almost every locality that provided information reported that these ordinances were not administratively burdensome to enforce. For almost all localities, any demands created by these ordinances were handled by existing staff, and trainings were developed to ensure smooth integration of the new responsibilities.

Several of the larger jurisdictions with EBOs estimated the administrative or contractor costs with their EBOs. These estimates showed a minimal increase in contractor costs, but did not consider any of the economic benefits resulting from the EBOs, such as having contractors with more highly skilled and productive employees.<sup>282</sup>

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<sup>282</sup> See Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies*, WILLIAMS INST. (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corporate-Statements-Oct-2011.pdf>.

