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EQUAL BENEFITS, UNEQUAL BURDENS: HOW THE MOVEMENT FOR GAY RIGHTS IN THE WORKPLACE IS AFFECTING RELIGIOUS EMPLOYERS

Laura Christine Henderson

"The issue of gay marriage and same-sex unions burst with a fury into our national consciousness in 2003."¹ Activists on both sides tend to frame the debate around the rights of homosexual persons or the prerogatives of the state regarding the family.² Often forgotten, though, is the effect these relationships have on private persons outside of the relationship.³ For better or worse, recognition of same-sex unions reverberates throughout society and affects more than the relationship between same-sex couples and the state.⁴ While same-sex marriage has made its way into headlines and ballots,⁵ gay rights advocates have waged

¹ B.A., Christendom College, 2003; J.D. Candidate, May 2006, The Catholic University of America, Columbus School of Law. The author thanks Dale Schowengerdt, Esq., Margaret Nell, and Joline Sikaitis for their expert assistance and Patrick for his superhuman patience and encouragement.

² Compare HUMAN RIGHTS CAMPAIGN, ANSWERS TO QUESTIONS ABOUT MARRIAGE EQUALITY 4 (2004), available at http://www.hrc.org/Template.cfm?Section=Get_Involved1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=17262 ("[P]eople ... are fighting for the right of same-sex couples to marry because they recognize that it is simply not fair to deny some families the protections all other families are eligible to enjoy."). with Citizenlink, Q&A: Why Not Same Sex ‘Marriage’? (Nov. 19, 2003), http://www.family.org/cforum/Feature/a0028908.cfm. ("The definition of marriage to male and female [sic] is ... absolutely rooted in sociological fact: that male and female need each other, and that children need their mothers and fathers married so that we can be sure that they are there to participate in raising them.").


a more successful movement in the workplace. In addition to advancing antidiscrimination policies, this movement has promoted the availability of employer-sponsored domestic partner benefits. Advocates point out that benefits such as insurance coverage for spouses give married employees additional compensation unavailable to employees in same-sex relationships. It is simply a matter of equal pay for equal work.

For others, such as Catholic Charities of Maine, the movement for domestic partner benefits presents an affront on religious liberty. In 2001, the city of Portland, Maine required employers accepting certain city grants to offer domestic partner benefits to their employees. This requirement forced Catholic Charities to compromise two fundamental principles of its identity: its service to the poor and its witness to Catholic teaching on marriage and sexuality. Because it refused to compromise

6. Herrschaft & Mills, supra note 4, at 8 (reporting that "both public and private employers are continuing to implement policies that recognize same-sex relationships"). In 2003, there was an eighteen percent increase in the number of private employers and colleges and universities offering health insurance to employees' domestic partners and a nineteen percent increase in the number of employers including sexual orientation in their non-discrimination policies. Id. at 5-6. Additionally, 175 cities, counties, and quasi-governmental agencies provide health insurance to their employees' domestic partners. Id. at 6.

7. Id. at 8, 12.

8. See Jeffrey G. Sherman, Domestic Partnership and ERISA Preemption, 76 Tul. L. Rev. 373, 374 (2001). Sherman gives an example:

Suppose an employer has two male employees of equal skill, seniority, responsibility, and productivity: Smith and Jones. The employer pays each employee a $50,000 salary, but there is a difference in their fringe benefits. The employer provides health insurance coverage with a market value of $6000 for Smith and Smith's consort. But the employer provides Jones with health insurance only for himself with a market value of only $3000. Smith, in other words, is receiving $3000 more compensation than Jones . . . . This particular violation of the "equal pay for equal work" maxim is almost routine in workplace environments where Smith has a female consort designated a "wife," and Jones has a male or female consort designated a "domestic partner." Id. at 374-75.

9. Id. at 374.

10. Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp. 2d 77, 94 (D. Me. 2004) ("Catholic Charities . . . claims that the Ordinance violates its First Amendment right to the free exercise of religion.").

11. Id. at 83.

12. Id. at 94 ("Catholic Charities argues that, in order to comply with the Ordinance, it will be forced to violate its sincerely held religious beliefs."). The court found, "[T]here is nothing in the record to suggest that Catholic Charities' religious beliefs have been substantially burdened. Catholic Charities did, after all, decline to follow the Ordinance and was able to provide the service programs without the benefit of [the city] funds." Id. Nevertheless, the loss of funding negatively affected Catholic Charities' ability to fully carry out its mission. The court alluded to this, stating, "Catholic Charities . . . proceeded, at least in part, to carry out the service programs." Id. at 83-84.
its position on marriage, the nonprofit service organization lost funding for several of its programs, including child development and child care programs. Similarly, the Salvation Army of Portland refused to comply with the policy, which it considered an effort to legitimize same-sex unions. As a result, the Army lost $60,000 in yearly funding that went to its “meals-on-wheels” program to feed the community’s elderly and needy.

This dark side of rights has yet to surface in all of its dimensions. It has become particularly pronounced, however, in the enactment of equal benefits ordinances by local governments, such as Portland, Maine, across the country. Equal benefits ordinances (EBOs) generally require private employers that contract with the city to provide the same benefits to their employees’ same-sex partners as they do to their employees’ spouses. Many municipal and state governments have taken the lead by providing spousal benefits to their employees’ domestic partners. EBOs go one step further by requiring, in effect, that whenever government funds indirectly provide spousal benefits, they will also provide domestic partnership benefits.

EBOs have been successful in equalizing the actual compensation between employees with spouses and employees with domestic 

13. Id. at 83; see also infra section I.C.5.
16. Dr. Hadley Arkes used this phrase to describe the social disapproval that persons opposed to same-sex marriage can expect to experience as the right to same-sex marriage becomes increasingly accepted in mainstream society. Hadley Arkes, Ethics & Pub. Policy Ctr., The Question of Marriage: A Lecture by Hadley Arkes (Oct. 8, 2004), http://www.eppc.org/conferences/eventID.87/conf_detail.asp.
18. See infra section I.A.
19. See infra section I.A.
20. See HERRSCHAFT & MILLS, supra note 4, at 24-26; WHITE PAPER, supra note 1, at 34.
partners. However, they present a moral dilemma to employers who ascribe to certain religious traditions because they require private employers to financially support lifestyles that the employers believe to be immoral. This dilemma is especially pronounced for organizations such as Catholic Charities, who rely on government contracts and grants for funding to carry out their service to the community. A satisfactory compromise is difficult to achieve due to the strength of convictions on both sides and the complex web of federal and state law.

The federal Employee Retirement Income Security Act of 1974 (ERISA) greatly restricts state and local governments' ability to regulate or legislate regarding employee benefits. ERISA provides a comprehensive regulatory scheme for employee benefit plans, and courts have held that it preempts all laws relating to employee benefit plans, including EBOs. However, ERISA does not regulate the employee benefit plans of many religious organizations, leaving these organizations at the mercy of state and local governments. Case law on this issue is sparse. However, federal cases in Maine and California, and a state appellate court ruling in New York indicate that EBOs may be enforceable against religious organizations whose employee benefit plans do not fall under the ambit of ERISA, causing an inequality between the

22. MARC A. ROGERS & DALEY DUNHAM, THE INSTITUTE FOR GAY AND LESBIAN STRATEGIC STUDIES, CONTRACTS WITH EQUALITY: AN EVALUATION OF THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE 30, (2003) ("An estimated 26,000 individuals are now enjoying health insurance coverage and other benefits that they may have previously been unable to obtain.").

23. See infra section I.D. This Comment focuses on Catholic employers; however, employers of Protestant, Muslim, and Jewish traditions may face the same dilemma. See THE MARRIAGE LAW PROJECT, THE CATHOLIC UNIV. OF AM., WORLD RELIGIONS AND SAME-SEX MARRIAGE 2-4 (July 2002), http://marriagelaw.cua.edu/publications/wrr.pdf (summarizing the positions taken by the major world religions on the subject of same-sex marriage).

24. See CATHOLIC CHARITIES ME., ANNUAL REPORT 2003 at 9 (indicating that eighty-seven percent of its funding came from government sources); CATHOLIC CHARITIES OF THE ARCHDIOCESE OF N.Y., ANNUAL REPORT 2003 at 20 (indicating that approximately forty percent of its funding in 2003 came from government sources); CATHOLIC CHARITIES OF CAL., REPORT TO STAKEHOLDERS 2002-2003 at 8 (indicating that fifty percent of its local agencies' cash income came from government sources).

25. See infra Section II.C.


27. See infra section I.B.

28. See infra notes 69-73 and accompanying text.

29. See infra section I.B.


effect of EBOs on secular and religious organizations. These cases also suggest solutions for religious organizations, although the solutions are by no means simple.

Part I of this Comment examines the history and structure of EBOs, with special attention given to San Francisco, New York City, and the state of California. Next, it explains the relationship between EBOs and federal law. It also contrasts the principles behind EBOs with the teachings of the Roman Catholic Church. Part II analyzes the extent to which EBOs present a dilemma for religious employers, particularly for certain Catholic organizations. Finally, Part III explores the options available to religious employers and suggests a strategy for religious employers faced with EBOs.

I. A COMPLEX WEB OF LOCAL AND FEDERAL LAW, COURT RULINGS, AND CHURCH TEACHING

A. Equal Benefits Ordinances

1. San Francisco: Setting the Trend

The EBO movement began in San Francisco in 1996 with amendments to the city’s existing antidiscrimination laws. Since 1972, the city has been prohibited from entering into contracts “with companies that discriminate on the basis of sexual orientation.” The Administrative Code now stipulates that no agency acting on behalf of the city or county can contract for more than $5,000 with any contractor that “discriminates in the provision of [employee benefits] between employees with domestic partners and employees with spouses.” As written, this applies to any

32. See infra notes 208-09 and accompanying text.

33. Air Transp., 992 F. Supp. at 1157; S.F., CAL., ADMIN. CODE ch. 12B (2005), http://www.amlegal.com/library/ca/sanfrancisco.shtml (follow “Administrative Code” hyperlink, then select “Chapter 12 B: Nondiscrimination in Contracts”). The San Francisco ordinance achieved a two-part mission. First, it assured equal benefits to non-employee members of same-sex couples. ROGERS & DUNHAM, supra note 22, at 7. Second, it acted as a symbolic defiance by gay activists against President Bill Clinton and the Democratic National Committee for the recent passage of the Federal Defense of Marriage Act. Id. Although San Francisco has long been a leader in implementing gay-friendly policies, id. at 6, the ordinance did not pass easily in city council, due in large part to the opposition of Roman Catholic Archbishop William Levada, id. at 8. The Archbishop’s opposition “nearly derailed” the ordinance because of the powerful leverage of Catholic Charities, which held millions of dollars in contracts with the city. Id. However, one city supervisor was kept from voting on whether to “table discussion of the bill.” Id. The supervisor’s absence caused a tie, allowing the bill to move forward. Id. The bill was signed into law in November, 1996. Id.


35. S.F., CAL., ADMIN. CODE ch. 12B.1(b)-(e). These benefits include “bereavement leave, family medical leave, health benefits, membership or membership discounts,
of the contractors' employees, no matter where their location.\(^6\) If, however, the cost of providing these benefits to an employee's domestic partner exceeds the cost of providing them to a spouse, the contractor can require the employee to provide the excess cost.\(^7\) Also, if an employer cannot provide a certain benefit, he can satisfy the provision by paying the employee the value of the benefit in cash.\(^8\) All contracts with the city must contain a provision stating that the contractor, as well as all subcontractors, complies with these requirements.\(^9\)

2. Following San Francisco's Lead: Equal Benefits Ordinances Across the Country\(^{40}\)

Equal benefits ordinances are a relatively new approach to ending discrimination against same-sex couples.\(^41\) At the time of this writing, ten cities or counties and the state of California have passed EBOs.\(^42\) The moving expenses, pension and retirement benefits or travel benefits as well as any benefits other than [those listed]." \textit{Id.} ch. 12B.1(b). This requirement extends only to domestic partners "where the domestic partnership has been registered with a governmental entity pursuant to State or local law authorizing such registration." \textit{Id.}

36. \textit{See} \textit{Air Transp.}, 992 F. Supp. at 1157. The broad scope of the ordinance, however, was limited under the Commerce Clause of the U.S. Constitution. \textit{See infra} text accompanying note 69.


38. \textit{Id.}

39. \textit{Id.} ch. 12B.2(b).

40. \textit{See} \textit{ROGERS} \& \textit{DUNHAM}, \textit{supra} note 22, at 6 ("[San Francisco's] EBO's impact has been magnified because it has inspired other cities to consider and, in several instances, pass similar legislation.").

41. \textit{Id.} (explaining that the EBO concept was "new" but "governmental insistence upon non-discrimination toward gays and lesbians for city contractors was not new"). In addition to ending discrimination, some jurisdictions state that EBOs improve the quality of the contracts. For instance, the City of Minneapolis, Minnesota, reasoned, "Requiring 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." \textit{MINNEAPOLIS, MINN., CODE OF ORDINANCES} § 18.200 (2005), \url{http://www.municode.com/resources/code_list.asp?StateID=23} (follow "Minneapolis Code of Ordinances—1991," then follow "Title 2 Administration," then follow "Chapter 18 Purchasing"); \textit{accord} \textit{L.A.}, \textit{CAL.}, \textit{ADMIN. CODE} § 10.8.2.1(a) (2005), \url{http://www.lacity.org/nxt/gateway.dll?f=templates&fn=default.htm} (follow "Los Angeles Charter and Administrative Code," then follow "Administrative Code," then follow "Division 10 Contracts," then select "Chapter 1 Contracts General").

New York City Council enacted the most recent EBO in June 2004.43

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43. See Mike McIntire, Domestic Partners' Benefits Affirmed by City Council, N.Y. TIMES, June 29, 2004, at B3. The Bill is considered an extension of the city's already existing law that requires the city to offer equal benefits to its employees' domestic partners. As New York City Council Member Christine Quinn explained, "The city has an obligation to demand that businesses that receive public money treat their employees with the same dignity and respect that the city treats its own employees." David Andreatta, Domestic Partners Benefits Bill Called Litmus Test for Bloomberg, N.Y. SUN, Nov. 14, 2003, at 13. The bill was met, however, with adamant opposition from religious organizations affected by it, particularly Catholic Charities of the Archdiocese of New York, Agudath Israel, an orthodox Jewish organization, and the Salvation Army. Andy Humm, Equal Benefits Law; Hearing Into Police Activity During Convention; New Sexual Harassment Charges in the City Council, GOTHAM GAZETTE, Oct. 5, 2004, http://www.gothamgazette.com/article/civilrights/20041005/3/1138; Mark A. Kellner, Army Facing Battle on Benefits, CHRISTIANITYTODAY.COM, July 13, 2004, http://www.christianitytoday.com/ct/2004/128/22.0.html. Notably, New York City Mayor Michael Bloomberg also vigorously contested the bill, in contrast to his "record of embracing a broad view of civil rights for gays and lesbians." McIntire, supra. The mayor vetoed the bill when the city council first passed it, although the city council promptly overrode his veto. Id. In stating his opposition to the bill, the mayor warned that it would "inhibit companies from doing business with the city." Mayor Vetoes Equal-Benefits Bill, N.Y. SUN, June 4, 2004, at 2, LEXIS NYSUN. The director of the mayor's contracts office further warned that "the bill would reduce the number of vendors willing to compete for the city's business. . . . [P]articularly . . . in the areas of foster care and health care, where only a few faith-based organizations are equipped to handle the demand." Andreatta, supra. The mayor also criticized using the city's "procurement policies to push social issues." McIntire, supra. The mayor challenged the ordinance in court. The New York Supreme Court issued an order that the mayor enforce the law, but the New York Supreme Court, Appellate Division overruled, holding that the measure, termed the "Equal Benefits Law," was preempted by both state and federal law. Sabrina Tavernise, Council Will Seek to
California was the first state to implement such a law when it enacted Assembly Bill 17 (AB 17) on October 11, 2003.\textsuperscript{44} EBOs vary in their specifics, but certain elements are common. EBOs do not mandate specific benefits but require that whatever benefits a contractor does provide be offered with no distinction between employees’ spouses and domestic partners.\textsuperscript{45} Most EBOs define domestic partners as those

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Reinstate Law Giving Partners Benefits, N.Y. TIMES, Mar. 17, 2005, at B4; see also infra section I.C.6. The city council has stated that it intends to appeal the Appellate Division’s ruling. Tavernise \textit{supra}.

44. HERRSCHAFT & MILLS, \textit{supra} note 4, at 16. The law applies to contracts executed or amended beginning in January 2007. CAL. PUB. CONT. CODE § 10295.3(a)(1). AB 17 was enacted as part of an “ambitious agenda” of California’s gay and lesbian legislative caucus. Bill Ainsworth, \textit{Gay and Lesbian Caucus Moves Its Bills Forward}, SAN DIEGO UNION-TRIBUNE, May 11, 2003, at A3. Assemblywoman Christine Kehoe, head of the caucus and sponsor of the bill, stated that the measure is “a matter of equal rights.” \textit{Id}. Supporters listed five reasons for the bill’s necessity:

(1) Domestic partner benefits provide compensation equity, (2) reducing discrimination brings benefits to both employers and employees, and improves the quality of goods and services purchased with public dollars, (3) the cost and administrative burdens of domestic partner benefits are negligible, (4) equal benefits laws follow an important tradition of disassociating government from invidious private discrimination, and (5) increasing the number of people covered by private health insurance improves public health and reduces the costs of publicly funded health care programs.


The California Catholic Conference (CCC), however, charged the bill with ignoring “the import of cultural norms, the weight of human history, as well as the validity of the sacrament of marriage for Catholics.” CAL. CATHOLIC CONFERENCE, \textit{ALERT RE: AB 17 (KEHOE) STATE CONTRACTS: ACQUISITION OF GOODS AND SERVICES} (2003) http://www.cacatholic.org/backgrndrs2003.html (follow “AB17 (Kehoe)” hyperlink). The CCC stressed its support of universal health care but argued that the bill was not “an attempt to expand health coverage” but, rather, was part of “an agenda to make domestic partnership equivalent to marriage.” \textit{Id}. In addition to moral concerns, the CCC warned, “The economic impact of AB 17 becoming law could be substantial, e.g., 13,800 college students might not be able to use their [state scholarships] at Catholic colleges, many of our Catholic hospitals will have to turn away Medi-Cal recipients, childcare programs run by Catholic organizations may be closed.” \textit{Id}. The CCC deplored the fact that “all attempts by the CCC to negotiate an exemption for religious organizations have been unsuccessful.” \textit{Id}. The Seventh-Day Adventist Church State Council also voiced opposition, contending that religious employers would be singled out by the bill because of the scope of federal preemption. SENATE FLOOR ANALYSIS, Assemb. 2003-04 AB 17, 2003-04 Reg. Sess., at 9-10 (2003), http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0001-0050/ab_17_cfa_20030912_180029_sen_floor.html. Its prediction proved to be accurate. See infra section II.A.

registered with a governmental authority or with the employer. EBOs may apply to practically all contracts, or only to specific kinds. Most apply only to contracts involving a threshold amount of government funds. Most EBOs have waiver provisions for emergencies, or when

46. See HERRSCHAFT & MILLS, supra note 4, at 16. The Human Rights Campaign explains, "Domestic partner registries provide same-sex couples and, in many places, opposite-sex unmarried couples, an official means to record their commitments to each other in the absence of legal marriage. As of Dec. 31, 2003, two states and 66 cities and counties had domestic partner registries." Id. Domestic partner registrants must meet certain requirements. For example, California requires that potential domestic partners be over eighteen years old and capable of consent, share a common residence, agree to be responsible for each other's living expenses, and not be married or part of another registered domestic partnership. CAL. FAM. CODE § 297 (West 2004).

47. See CITY OF BERKELEY, supra note 45, at 1; 2003 Cal. Stat. 752; L.A., CAL., ADMIN. CODE § 10.8.2.1(b)(8); SEATTLE, WASH., MUN. CODE ch. 20.45.010(E).

48. CAL. PUB. CONT. CODE § 10295.3(a)(1), (c)(4) (covering acquisition of goods or services, but excluding bulk contracts for water, power, or natural gas unavailable under a competitive bidding process); BROWARD COUNTY, FLA. CODE, § 16 1/2-157 (2001), http://www.library.municode.com/mcc/home.htm?infobase=102888&doc_method=cleardoc (expand “Chapter 16 1/2 Human Rights,” expand “Article VIII Domestic Partnership Act,” follow “Sec. 16 1/2-157”) (covering purchase, construction, or maintenance of public works or improvements); L.A., CAL., ADMIN. CODE §§ 10.8.2.1(b)(5), 10.8.2.1(i)(2)(a) (covering performance of public works, purchase of goods, grants, leases and licenses, but exempting investments of city funds); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 18.200(c) (2005), http://www.municode.com/resources/code_list.asp?StateID=23 (follow “Minneapolis Code of Ordinances—1991,” then follow “Title 2 Administration,” then follow “Chapter 18 Purchasing”) (covering personal services, the sale, purchase, or rental of supplies, or construction, but excluding development contracts); OAKLAND, CAL., CODE § 2.32.020 (goods and services not including property contracts); SAN MATEO COUNTY, CAL., COUNTY CODE ch. 2.93.010(a) (2005), http://municipalcodes.lexisnexis.com/codes/sanmateo (follow “Title 2 Administration”) (covering public works, consulting, services, purchase of supplies, material, or equipment); City of Seattle, Equal Benefits Program Frequently Asked Questions (2004), available at http://cityofseattle.net/contract/equalbenefits/eb-faq.htm (exempting “human services . . . , franchises . . . power agreements . . . financial services, leases, grants, [or] loans”).

49. CAL. PUB. CONT. CODE § 10295.3(a)(1) (covering contracts over $100,000); L.A., CAL., ADMIN. CODE § 10.8.2.1(b)(5) (covering contracts over $5,000); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 18.200(c) (covering contracts over $100,000); NEW YORK CITY, N.Y., ADMIN. CODE § 6-126(b)(4) (2004), http://public.leginfo.state.ny.us/nenugetf.cgi (follow “New York City Administrative Code,” then follow “Title 6, Chapter 1 6-101 — 6-128 Contracts and Purchases”) (covering contracts over $100,000, aggregated by contractor); OAKLAND, CAL., CODE § 2.32.020 (covering contracts over $25,000); SAN MATEO COUNTY, CAL., COUNTY CODE ch. 2.93.010(a) (covering contracts over $5,000); CITY OF BERKELEY, supra note 45, at 1-2 (covering contracts over $25,000 for for-profit employers, $100,000 for nonprofits, $350,000 for lessees, and $100,000 for grants); CITY OF SEATTLE, EQUAL BENEFITS PROGRAM RULES § 5.3 (2000), available at http://seattle.gov/contract/equalbenefits/eb-finalrules.htm (covering contracts over $33,000 in 2000, adjusted periodically).
the goods or services are not available from a compliant contractor. Many EBOs allow a contractor to avoid giving benefits specifically to domestic partners by allowing the employer the option of providing spousal benefits to any household member of the employee's choice. One EBO explicitly exempts religious organizations.

**B. The Broad Scope of ERISA Preemption**

1. The Statute's Function

ERISA considerably hampers the ability of state and local governments to require private employers to offer benefits to same-sex partners and spouses. ERISA lays out a comprehensive regulatory scheme for the administration of employee pension plans. This regulatory scheme includes reporting and disclosure rules, limitations on the conditions that employers can place on plan participation, requirements that the plans become vested rights for employees within a certain period, and, for some pension plans, minimum funding standards. ERISA also governs an extensive list of employee welfare benefits, including health insurance plans, disability benefits, and life

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50. See CAL. PUB. CONT. CODE § 10295.3(c)(2). California's EBO, for example, allows a waiver "[i]f the contract is necessary to respond to an emergency, as determined by the state agency, that endangers the public health, welfare, or safety." Id.

51. CAL. PUB. CONT. CODE § 10295.3(c); L.A., CAL., ADMIN. CODE § 10.8.2.1(i)(1)(g); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 18.200(c); NEW YORK CITY, N.Y., ADMIN. CODE § 6-126(k); OAKLAND, CAL., CODE § 2.32.060; SAN MATEO COUNTY, CAL., COUNTY CODE ch. 2.93.020(b)(3); CITY OF BERKELEY, supra note 45, at 2; CITY OF SEATTLE, supra note 49, § 13.1.6.

52. CAL. PUB. CONT. CODE § 10295.3(e)(3); L.A., CAL., ADMIN. CODE § 10.8.2.1(d)(2); NEW YORK CITY, N.Y., ADMIN. CODE § 6-126(c)(1)(a)(ii); SEATTLE, WASH., MUN. CODE ch. 20.45.020(B)(2) (2005), http://clerk.ci.seattle.wa.us/-public/toc/20-45.htm.

53. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 18.200(f)(6)-(7).


55. See Wiedenbeck, supra note 54, at 311-12. ERISA does not, however, mandate that employers provide benefits of any sort. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 651 (1995) ("The federal statute does not go about . . . requiring employers to provide any given set of minimum benefits . . . .").

56. Wiedenbeck, supra note 54, at 311-12.

57. Id. at 312.

58. Id.

59. Id.
insurance provided by the employer when offered as part of a plan.\textsuperscript{60} Congress's primary concern in enacting ERISA was employee pension plans rather than welfare plans; accordingly, ERISA places far fewer regulations on welfare plans.\textsuperscript{61} The regulations on welfare plans generally require that their execution meet certain federal standards of reporting and fiduciary care, rather than regulating the content of the plans themselves.\textsuperscript{62}

In order to ensure uniformity in plan regulation,\textsuperscript{63} Congress included a clause preempting of all state laws that "relate to" an employer-sponsored benefit plan.\textsuperscript{64} As a result, any attempt by a state to regulate such employee benefit plans, including both retirement plans and welfare plans such as health and dental insurance plans, runs the risk of federal preemption.\textsuperscript{65} However, ERISA only concerns "plans, funds, or programs,"\textsuperscript{66} and does not preempt any state laws dealing with employee benefits that are not "plans."\textsuperscript{67} Thus, employee benefits that involve one-time payments rather than ongoing administration generally are not preempted and can be regulated by state laws.\textsuperscript{68}

\textsuperscript{60} 29 U.S.C. § 1002(1) (2000). Benefits that constitute welfare plans include (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

\textsuperscript{61} See DANA SHILLING, THE COMPLETE GUIDE TO HUMAN RESOURCES AND THE LAW 116, 201-02 (1998) ("Federal regulation of pension benefits via ERISA is extremely thorough and detailed; ERISA regulation of welfare benefit plans is far less extensive.").

\textsuperscript{62} Wiedenbeck, supra note 54, at 311-12.

\textsuperscript{63} Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) ("Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations."); see also Sherman, supra note 8, at 416-17 (explaining Congress' intent in adopting a broad preemption clause).

\textsuperscript{64} 29 U.S.C. § 1144(a) (preempting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

\textsuperscript{65} See Emily V. Griffen, Comment, "Relations Stop Nowhere": ERISA Preemption of San Francisco's Domestic Partner Ordinance, 89 CAL. L. REV. 459, 462 (2001) ("ERISA still throws a large preemptive shadow over state and local law-making.").

\textsuperscript{66} 29 U.S.C. § 1002.

\textsuperscript{67} See id. § 1003(a). The statute itself does not define "plan." Wiedenbeck, supra note 54, at 316. The U.S. Supreme Court has determined that a plan is one that "by nature requires an ongoing administrative program to meet the employer's obligation." \textit{Fort Halifax Packing Co.}, 482 U.S. at 11.

\textsuperscript{68} See, e.g., \textit{Fort Halifax Packing Co.}, 482 U.S. at 11-12 (holding that one-time severance payments did not constitute an ERISA plan); Massachusetts v. Morash, 490 U.S. 107, 120-21 (1989) (holding that the payment of unused vacation time at the employee's termination, out of the employer's general assets, was not an ERISA plan); see
2. The "Church Plan" Exemption

ERISA contains a highly relevant exemption to the wide scope of its preemption: the statute explicitly exempts "church plans." ERISA defines "church plans" as those "established and maintained . . . for its employees . . . by a church or by a convention or association of churches which is [tax-exempt]." The statute provides that, for these purposes, a person is an employee of a church if he works for any tax-exempt organization "controlled by or associated with a church or a convention or association of churches." This definition of "church" is very broad, encompassing religiously affiliated hospitals, schools, and charitable organizations. The employee benefit plans of such religiously affiliated organizations, therefore, are generally exempt from ERISA and subject to state law.

However, the administrator of a church plan may elect to make the plan subject to ERISA under § 410(d) of the Internal Revenue Code. By election, the administrator of a church plan waives the exemption and chooses to subject the plan to the many requirements of ERISA. The administrator executes the election by either attaching a statement to its annual tax return or by requesting a letter from the Treasury to

also, Wiedenbeck, supra note 54, at 316-21 (describing the development of the definition of a “plan” for ERISA purposes). Furthermore, non-retirement benefits that are not listed in the statute are also exempt from ERISA, even if they are given as part of a welfare plan. See 29 U.S.C. § 1002(1); Wiedenbeck, supra note 54, at 337.

69. 29 U.S.C. § 1003(b)(2). For an explanation of the limited legislative history of the church plan exemption, as well as conjectures as to its purpose, see Timothy Liam Epstein, Note, Surviving Exemption: Should the Church Exemption to ERISA Still Be in Effect?, 11 Elder L.J. 395, 405-08 (2003) (citation in title omitted).

70. 29 U.S.C. § 1002(33).
71. Id. § 1002(33)(C)(ii); see also Wiedenbeck, supra note 54, at 348.
73. Sulentic, supra note 72, at 48. However, the church plans exemption does not apply to a plan primarily for the benefits of employees of the church or organization "who are employed in connection with one or more unrelated trades or businesses." 29 U.S.C. § 1002(33)(B)(i); see also Charles P. Reynolds, Daniel J. Wintz & Deirdre Dessingue Halloran, Asset Management Strategies Revisited, 37 Cath. Law. 165, 170 (1996).
75. See Sulentic, supra note 72, at 40-41. However, choosing not to elect does not free a church plan from all federal regulation. Sulentic points out that "non-electing plans do remain subject to a wide variety of pre-ERISA regulations that remain extant under the Code in order to preserve their tax-qualified status." Id. at 43.
determine its status under the Code. Because most of ERISA concerns employee pension plans, election imposes much more federal regulation on church pension plans than on church welfare plans. Nevertheless, election remains significant for church welfare plans because it exempts them from state law.

C. Court Treatment of ERISA and Equal Benefits Ordinances

To date, four published decisions specifically have addressed equal benefits ordinances. These cases, while far from representing a definite legal consensus, provide parameters to the applicability of the ordinances and highlight the legal issues of greatest concern to religious employers. Understanding the EBO cases involves, first, a look at two important Supreme Court rulings on ERISA preemption.

1. Shaw v. Delta Air Lines: Defining the Parameters of ERISA Preemption

The seminal case in defining the parameters of ERISA preemption is Shaw v. Delta Air Lines, Inc. In this case, the Court addressed whether state laws concerning discrimination based on pregnancy "related to" employee benefit plans such that ERISA preempted them. The Court examined both the language and legislative history of ERISA and found that "Congress used the words 'relate to' . . . in their broad sense." Thus the Court held that a law relates to an ERISA plan and is preempted whenever the law "has a connection with or reference to" an

76. 26 C.F.R. § 1.410(d)-1(c)(3) (2005); see also Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp 2d 77, 89 (D. Me. 2004).

77. Sulentic, supra note 72, at 46. In fact, whether a church welfare benefit plan can elect is an unclear area of law. The Department of Labor has stated, "It is the Department's understanding that an election pursuant to Code section 410(d), as referenced in ERISA section 4(b)(2), is available for purposes of Title I of ERISA only to a pension benefit arrangement." Op. Pension & Welfare Benefit Programs, 95-07A (1995), www.dol.gov/ebsa/Regs/AOs/main.htm. But see Am. Ass'n of Christian Sch. Voluntary Employees Beneficiary Ass'n Welfare Plan Trust v. United States, 850 F.2d 1510, 1517 (11th Cir. 1988) (indicating in dicta that church welfare plans can elect); Duckett v. Blue Cross & Blue Shield of Al., 75 F. Supp. 2d 1310, 1316 n.3 (M.D. Ala. 1999) (indicating in dicta that church welfare plans can elect); Sulentic, supra note 72, at 41 ("[T]he DOL and the courts have clearly recognized that the concept of a church plan may just as easily be applied to a welfare benefit plan."); infra notes 151-56 and accompanying text (explaining the Federal District of Maine's decision that employee welfare plans can be elected).

78. See Sulentic, supra note 72, at 46-47 ("[T]he impact of ERISA preemption is greater with respect to welfare plans.").

79. See infra sections I.C.3-6.


81. Id. at 96-97.

82. Id. at 97-98.
employee benefit plan. For over a decade after Shaw, the Court continued to interpret ERISA preemption broadly.

2. Travelers: Signaling an End to Expansive Preemption?

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co. curbed the Court's broad interpretation of ERISA preemption. The Court examined a state law that imposed fees on the use of health insurance plans other than Blue Cross/Blue Shield. The Court found that the fees did influence employers to buy certain insurance plans. However, the Court cautioned that "relate to" should not be taken to "the furthest stretch of its indeterminacy." The law's "indirect economic influence" on an employer's choice of insurance plans did not "function as a regulation of an ERISA plan itself." Thus, ERISA did not preempt the state law.

83. Id. at 97. The Court held that New York's Human Rights Law, which a state court had interpreted as requiring that employers treat pregnancy the same as other nonoccupational disabilities in benefits plans, was preempted "insofar as it prohibits practices that are lawful under federal law." Id. at 88, 108 (citing Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Bd., 359 N.E.2d 393 (1976)). New York's Disability Benefits Law, which required employers to provide the same benefits for pregnancy as for any other disability, was not preempted. However, the Court narrowed its application by holding that the state could not "enforce [the law's] provisions through regulation of ERISA-covered benefit plans." Id. at 89-90, 109.


86. Sherman, supra note 8, at 423-24.
87. Travelers, 514 U.S. at 649.
88. Id. at 659 ("[T]he surcharges . . . make the Blues more attractive . . . as insurance alternatives . . . .").
89. Id. at 655.
90. Id. at 659. While considered a departure from Shaw, the holding of Travelers was not entirely unanticipated. In Shaw, the Court mentioned in a footnote, "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983).
91. Travelers, 514 U.S. at 662.
The Court, however, did not overrule past ERISA preemption decisions, noting that the laws overturned in those cases "mandated employee benefit structures or their administration." \(^92\) The Court indicated that indirect economic influence over the administration of employee benefit plans did not necessarily merit ERISA preemption.\(^93\) Indirect economic influence, nevertheless, could merit preemption when the law "might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage." \(^94\) Thus, after *Travelers*, a state law that "mandates employee benefit structures or their administration" definitely "relates to" an ERISA plan and is consequently preempted.\(^95\) A state law with an "indirect economic effect" may or may not be preempted, depending on whether the economic effects force an ERISA plan to adopt a certain scheme of substantive coverage.\(^96\) Since *Travelers*, the Supreme Court has taken a more restrained approach to ERISA preemption.\(^97\)

3. Air Transport Ass'n of America v. City & County of San Francisco: *San Francisco's EBO Comes Before the Court*

The District Court for the Northern District of California addressed San Francisco's EBO in *Air Transport Ass'n of America v. City & County of San Francisco*.\(^98\) In this case, two airline trade organizations challenged the ordinance's requirement as it applied to the thirty-one member airlines that flew into the San Francisco International Airport.\(^99\) Among the five arguments advanced by the plaintiffs, two remain

\(^{92}\). Id. at 658.

\(^{93}\). Id. at 662.

\(^{94}\). Id. at 668.

\(^{95}\). See Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001) (finding preemption because a state law "governs the payment of benefits, a central matter of plan administration"); *Travelers*, 514 U.S. at 657-58 (1995) (upholding cases finding ERISA preemption where "state laws... mandated employee benefit structures or their administration"); Griffen, *supra* note 65, at 482.

\(^{96}\). See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 333 (1997) (finding no ERISA preemption because the state law encouraged ERISA plans to meet certain standards but did not compel them to do so); *Travelers*, 514 U.S. at 668 ("We do not hold today that ERISA pre-empt[s] only direct regulation of ERISA plans, nor could we do that with fidelity to the views expressed in our prior opinions in the matter."); Helms, *supra* note 84, at 343.


\(^{98}\). 992 F. Supp. 1149 (N.D. Cal. 1998), *aff'd in part and remanded in part*, 266 F.3d 1064 (9th Cir. 2001).

\(^{99}\). Id. at 1155-56.
relevant to all equal benefits ordinances. First, they argued that the ordinance violated the Commerce Clause of the U.S. Constitution. Examining U.S. Supreme Court precedent, the court held that "the dormant Commerce Clause precludes State and local laws that have the extraterritorial effect of regulating 'commerce occurring wholly outside the boundaries of a State.' Insofar as section 12B.1(d)(iv) of the ordinance forbid contractors from "provid[ing] discriminatory benefit packages to its employees anywhere in the United States without facing penalties," the court held that "the City effectively regulates certain extraterritorial practices of City contractors." Furthermore, the ordinance was "not shielded by the market participant exception" of the Commerce Clause, because the "class of economic activity encompasses much more than that in which the City is a 'major participant.'" Thus, the court struck down section 12B.1(d)(iv), which applied to "out-of-State conduct. . . . not related to the purpose of the contract."

100. The plaintiffs also asserted that the city exceeded its power under the California Constitution, id. at 1158, that the Board of Supervisors did not have authority under the city's charter, id. at 1160, and that the ordinance as applied to airlines was preempted by the Federal Airline Deregulation Act, id. at 1180. The court dismissed these claims leaving ATA with "argu[ments] that the Ordinance is invalid on two major grounds." See Griffen, supra note 65, at 477.

101. Air Transp., 992 F. Supp. at 1160-61. The plaintiffs asserted several constitutional arguments, including Due Process Clause, state sovereignty, and Commerce Clause arguments. Id.

102. Id. at 1161 (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).


105. Id.

106. Id. at 1163.

107. Id. The market participant exception was first enunciated by the Supreme Court in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). The Court expounded the standard in White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983). In White, the Court held that the Commerce Clause did not prevent Boston from issuing an order that, although affecting interstate commerce, "covers a discrete, identifiable class of economic activity in which the city is a major participant," because, "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" Id. at 211 n.7. A Supreme Court plurality limited the market participant exception in South-Central Timber Dev., Inc. v. Wunicke, 467 U.S. 82 (1984). The plurality held, "The State may not impose conditions . . . that have a substantial regulatory effect outside of that particular market." Id. at 97 (plurality opinion). In Air Transport, the district court found that section 12B.1(d)(iv) of San Francisco's ordinance failed to meet even the broader market participant standards of White. Air Transp., 992 F. Supp. at 1163.

The plaintiffs' second relevant argument was that ERISA preempted the entire ordinance. The first question was whether the ordinance related to ERISA plans. Examining Shaw and its progeny, the court found that ERISA preempted the ordinance with regard to all benefits that "can only be administered through some sort of plan." However, the court did not find preemption where the ordinance required benefits not within ERISA's scope. Such non-ERISA benefits included "moving expenses, memberships and membership discounts and travel benefits." Therefore, the city could still require that the airlines provide these benefits to the domestic partners of employees working in the city or on city contracts.

Second, the court considered the city's argument that it was acting as a market participant. The city argued that the ordinance was not a law, per se, but a condition to a voluntary transaction between the contractor and the city. Because ERISA's preemption provision applies only to state laws, the city maintained that the ordinance did not fall under the ambit of the provision. First, the court had to decide whether there was a market participant exception to ERISA, as there is to the Commerce Clause. The court concluded that there was such an exception, but this exception only applies when the state acts out of a profit motive and not a policy motive. Here, the court found that the city enacted the EBO

109. Id. at 1165.
110. Id. at 1166.
111. Id. at 1169. The court found that the ordinance related to ERISA plans even though employers could comply with the ordinance by purchasing separate insurance policies for their employees' domestic partners. Id. at 1169-70. The policies "would be employee welfare benefit plans under ERISA," and, even if they were not, "the Ordinance nevertheless imposes an obligation that is measured by reference to ERISA plans." Id. at 1170.
112. Id. at 1175.
113. Id.
114. Id. The plaintiffs appealed, but not on the grounds of ERISA preemption. Rather, the plaintiffs argued that the requirements of the ordinance that were not preempted by ERISA were, nonetheless, preempted by the Airline Deregulation Act, the Railway Labor Act, and state law. Air Transport Ass'n of Am. v. City & County of S.F., 266 F.3d 1064, 1069-70 (9th Cir. 2001). The Ninth Circuit found no preemption by other federal laws but remanded the issue of state law preemption. Id. at 1079.
116. Id.
117. Id. at 1177.
118. Id.
119. Id. See supra note 107 (explaining the market participant exception to the Commerce Clause).
120. Air Transp., 992 F. Supp. at 1178 (citing Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1995)). In reaching this conclusion, the court disregarded two previous Ninth Circuit court decisions ruling that there was not a
for policy reasons. Therefore, the market participant exception did not apply, and the ordinance was a state law for ERISA preemption purposes.

_Air Transport_ held that the city could not, under the Commerce Clause of the U.S. Constitution, require a contractor to offer non-discriminatory benefits to those employees that worked outside the city, in work unrelated to the city contract. Furthermore, the city could not require any of its contractors, even within the city, to offer non-discriminatory benefits covered by ERISA. The benefits preempted by ERISA include "family medical and bereavement leave paid from accumulated funds and health and pension benefits." However, the city could require contractors to offer its employees' domestic partners such benefits as "moving expenses, memberships and membership discounts and travel benefits," whenever the contractor offered these to its employees' spouses, because ERISA did not cover these benefits.
4. S.D. Myers, Inc. v. City & County of San Francisco: A Second Challenge to San Francisco’s EBO

Not long after *Air Transport*, San Francisco’s ordinance received another challenge in *S.D. Myers, Inc. v. City & County of San Francisco*, which reached the Ninth Circuit. In this case, an Ohio-based company challenged the ordinance after the city refused to contract with it, despite the fact that it was the lowest bidder, because the company would not agree to provide benefits to the domestic partners of its employees. The *S.D. Myers* decision was more deferential toward the statute, albeit without explicitly contradicting *Air Transport*. The court found that the ordinance did not violate the Commerce Clause because it pertained to the domestic partners of employees working in the city or on a city contract.

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127. 253 F.3d 461 (9th Cir. 2001).
128. *Id.* at 466. The court did not change the ruling of *Air Transport* that the ordinance could not be applied to “any of a contractor’s operations elsewhere within the United States.” *Id.* (quoting *Air Transp.*, 992 F. Supp. at 1163).
130. *S.D. Myers*, 253 F.3d at 472. The court noted that the statute could be read to require contractors “to provide nondiscriminatory benefits to all employees at a non-City location if there were any employees working on a City contract at the non-City location,” which would make it more likely to violate the Commerce Clause. *Id.* at 468. However, the court interpreted the statute narrowly, to mean only “that contractors are required to provide nondiscriminatory benefits to employees working on a City contract, no matter where those employees are located.” *Id.* Most EBOs enacted after this decision do not mandate equal benefits for contractors’ employees who work out-of-state and unrelated to government contracts. Most are unclear, however, as to whether it applies to all employees at a location, outside of the jurisdiction, where work on the contract is being performed, or whether it applies only to those employees working on the contract. *See Cal. Pub. Cont. Code § 10295.3(a)(5) (West 2004); Minneapolis, Minn., Code of Ordinances § 18.200(i) (2005), http://www.municode.com/resources/code_list.asp?State ID=23 (follow “Minneapolis Code of Ordinances—1991,” then follow “Title 2 Administration,” then follow “Chapter 18 Purchasing”); Oakland, Cal., Code § 2.32.030(B)(2005), http://municipalcodes.lexisnexis.com/codes/oakland/ (follow “Title 2 Administration and Personnel,” then follow “Chapter 2.32”); San Mateo County, Cal., County Code ch. 2.93.030 (2005), http://municipalcodes.lexisnexis.com/codes/sanmateo (follow “Title 2 Administration”). Los Angeles and New York have stated more clearly that their EBOs apply to employees outside of the city or city property only if those employees are working on the city contract. *City of Los Angeles, Rules and Regulations Implementing the Equal Benefits Ordinance* 13, (July 1, 2004) available at http://http://www.lacity.org/bca/eborules&regs.pdf; *New York City, N.Y., Admin. Code § 6-126(e) (2004), http://public.leginfo.state.ny.us/nenugetf.cgi (follow “New York City Administrative Code,” then follow “Title 6, Chapter 1 (6-101—6-128) Contracts and Purchases”). Seattle, on the other hand, indicates that the EBO applies to
The district court avoided extending *Air Transport*’s ERISA preemption finding. Rather, the district court found, and the Ninth Circuit agreed, that Myers lacked standing “to make an ERISA preemption claim,” because Myers stated that it would not offer bereavement and family medical leave to its employees with domestic partners, no matter what the court’s ruling. Because Myers would not comply with the city’s contract requirements with regard to non-ERISA benefits, the court found that Myers’ injury was hypothetical. The court found that Myers did not satisfy the case or controversy requirement as enunciated by the Supreme Court. Thus, although the district court found ERISA preemption in *Air Transport*, the Ninth Circuit, by not ruling directly on the preemption issue, circumvented either affirming or denying this holding. The two cases made clear, however, that the city could not require its contractors to provide domestic partner benefits for their employees who worked outside the city and not on city contracts.

5. Catholic Charities of Maine, Inc. v. City of Portland: Applying the Church Plans Exception

In *Catholic Charities of Maine, Inc. v. City of Portland*, a federal court considered, for the first time, the effect of EBOs on a religious organization. Catholic Charities, a nonprofit organization affiliated with the Roman Catholic Church, did not comply with Portland, Maine’s EBO, thereby losing the funding that its programs had received all employees in a location where work on a city contract is performed. PURCHASING & CONTRACTING SERV., supra note 121, § 6.2.3.

131. The case was initially decided by Judge Claudia Wilken, who also decided *Air Transport*. However, Judge Wilken did not extend her finding of ERISA preemption in *Air Transport* to the facts of *S.D. Myers*. S.D. Myers, Inc. v. City & County of S.F., No. C 97-04463 CW, 1999 U.S. Dist. LEXIS 8748, at *40-41 (N.D. Cal. May 27, 1999), aff’d in part and remanded in part, 253 F.3d 461 (9th Cir. 2001). The Ninth Circuit upheld the decision. *S.D. Myers*, 253 F.3d at 474-75.

132. *S.D. Myers*, 253 F.3d at 474.

133. *Id.* at 474-75.

134. *Id.* at 475 (“[T]he alleged injury was never ‘actual or imminent’ since Myers would not have contracted with the City even if Myers were required only to provide non-ERISA benefits.”).

135. *Id.* at 474-76 (citing Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc, 528 U.S. 167, 180-81 (2000)).

136. See supra notes 110-22, 131-35 and accompanying text.

137. See supra notes 112-14, 130 and accompanying text.


139. See *id.* at 82-83. Portland’s EBO was less expansive than most. See supra note 42 (discussing other state and municipal EBOs).

from the city the year before. The crux of the case was whether ERISA governed Catholic Charities' benefits plans. The first question the court addressed was whether Catholic Charities' employee benefit plans were church plans which would make them exempt from ERISA.

The court considered Catholic Charities' bylaws, which specify that the Diocesan Bishop and Vicar General always serve as President and Vice President of its Board of Directors. Furthermore, the Bishop "essentially controls the Board of Directors," and Catholic Charities "cannot sell any of its property or assets without the Bishop's approval." The court found that these facts "certainly suggest that Catholic Charities is 'controlled by' the Catholic Church." Moreover, the court found that Catholic Charities indisputably satisfied the less exacting criteria of being "'associated with' a church," because "it shares common religious bonds and convictions with the Roman Catholic Church." Therefore, the court ruled that Catholic Charities' "health benefit plans are 'church plans' under ERISA and [are] eligible to be exempt from its coverage."

Because Catholic Charities' benefits plans were church plans, Portland's ordinance would be applicable to Catholic Charities, ERISA notwithstanding, if Catholic Charities' benefits plans had not been elected under 410(d). Accordingly, the court next considered whether Catholic Charities' election under section 410(d) of the Internal Revenue Code brought it within ERISA's coverage. Catholic Charities argued that it had made the election for all of its plans the previous July. The city contested the premise that the Code allowed for the election of

141. Id. The court found that "Catholic Charities provides a number of benefits to its employees, including retirement benefits, health benefits, bereavement leave, an employee assistance program, and paid and unpaid leaves of absence. It extends benefits to families, but not to domestic partners of employees." Id. (citations omitted) (footnote omitted).
142. See id. at 84-90.
143. Id. at 84.
144. Id. at 85.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id. at 86 (footnote omitted).
150. See id.; Sulentic, supra note 72, at 48 ("[A] non-electing church plan may not be subject to the requirements of ERISA but is subject to the requirements of state law."). Thus the ERISA exemption gives religious institutions greater freedom from federal law but subjects them to greater regulation by state laws that compromise their religious beliefs. Id.; see also infra notes 202-08 and accompanying text.
151. Catholic Charities of Me., 304 F. Supp. 2d at 86.
152. See id.
health plans at all. The court found, "There is certainly no suggestion anywhere that Congress intended church plan treatment to be different for pension plans than for welfare plans." Furthermore, the court noted that allowing pension plans, but not welfare plans, to elect coverage would conflict with Congress's intent "to ensure that plans and plan sponsors would be subject to a uniform body of employee benefits law." Therefore, the court held that Catholic Charities had successfully elected its employee welfare benefits plan under 410(d) and was subject to ERISA.

After finding that ERISA governed Catholic Charities' benefits plans, the court found that the Portland ordinance "demands that certain employers change their plans and offer coverage to domestic partners," thus invoking ERISA preemption. Next, the court considered whether the ordinance escaped preemption because it was conditional, rather than an "outright mandate." Like San Francisco, the City of Portland argued that because its EBO was not a direct mandate on all employers,

153. *Id.* at 86-87 ("According to the City, only church pension plans may voluntarily elect to be subject to federal regulation; church welfare plans have no means of opting in."). In its arguments, the city referred to Department of Labor Advisory Letter No. 95-07A, stating the Department's position that employee welfare plans cannot elect in. *Id.* at 89. However, the court decided that opinion letters "do not receive the typical level of deference," and found them unpersuasive. *Id.*

154. *Id.* at 88. The court surmised that "it seems likely that the drafters simply never consciously thought about whether welfare plans should be included or excluded." *Id.* The court noted that election made church welfare plans subject to Title I of ERISA, as well as to the Internal Revenue Code, thus "election by church welfare plans is not an empty exercise." *Id.* at 87.

155. *Id.* at 90. The court explained,

If only church pension plans are permitted to elect coverage, these goals of uniformity and burden reduction are undermined. An organization like Catholic Charities, which maintains separate pension and welfare plans, would have to comply with ERISA for its pension plans, but would have to comply with state law and local law for its welfare plans.

*Id.*

156. *Id.* However, the court held that the ERISA preemption was not retroactive. See *id.* at 82. Therefore, because Catholic Charities had yet to elect its benefits plans, ERISA did not preempt the ordinance when the city originally denied the funds. *Id.*

157. *Id.* at 92. The court found that the ordinance was more like the law in *Shaw* and the more recent case, *Egelhoff v. Egelhoff*, 552 U.S. 141 (2001) (holding that ERISA preempts a state law concerning retirement benefits beneficiaries), and less like the law in *Travelers*. *Catholic Charities of Me.*, 304 F. Supp. 2d at 92; see *supra* notes 83, 87, 95 and accompanying text (explaining the laws at issue in *Shaw*, *Travelers*, and *Egelhoff*). However, the court held that the ERISA preemption was not retroactive. See *Catholic Charities of Me.*, 304 F. Supp. 2d at 82. Therefore, because Catholic Charities had yet to elect its benefits plans, ERISA did not preempt the ordinance when the city originally denied the funds. *Id.*

it was not a law subject to ERISA preemption. However, the court, referencing *Air Transport*, found that Portland’s EBO, like San Francisco’s, had a legislative purpose of expanding ERISA plans’ coverage, which would “undermine Congress’s goal of shielding benefit plans from inconsistent regulation.” Therefore, the Portland EBO had an “impermissible connection with Catholic Charities’ ERISA plans” and was preempted. As in *Air Transport*, the court held that the ordinance was not preempted with respect to benefits not covered by ERISA, namely, Catholic Charities’ self-funded employee assistance program, bereavement benefits, and leaves of absence. In order to receive municipal funding, Catholic Charities still had to offer these benefits to its employees’ domestic partners although it did not have to offer health benefits plans or other ERISA benefits to its employees’ domestic partners.


The most recent EBO court battle began after New York City Mayor Michael Bloomberg refused to enforce New York City’s Equal Benefits Law. The city council sought an injunction, and the New York Supreme Court ruled in favor of the city council, directing the mayor to implement and enforce the EBO. A five judge panel of the New York Supreme Court, Appellate Division, however, overruled the lower court. In a short, unanimous opinion, the court found that the EBO was preempted by both state and federal law. The court gave only a

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159. *Id.; see supra* notes 116-18 and accompanying text.

160. *Catholic Charities of Me.*, 304 F. Supp. 2d at 92. Here, the court’s analysis resembles the *Air Transport* market participant exception analysis. *See supra* notes 116-22. However, perhaps because Portland was not buying goods or services, per se, from Catholic Charities, the court did not specifically refer to a market participant exception. Rather, the court spoke of the fact that “Catholic Charities could avoid the Portland Ordinance by giving up [the city’s] funds.” *Catholic Charities of Me.*, 304 F. Supp. 2d at 92.


162. *Id.* at 93.

163. *Id.* at 92. Neither party appealed this decision. *See Gregory D. Kesich, Catholic Charities, City Claim Victory: A Judge Upholds Portland’s Domestic Partnership Law but Limits the City’s Restrictions on Groups Getting Grants, PORTLAND PRESS HERALD (Me.), Feb. 7, 2004, at 1A.* However, Catholic Charities submitted a motion for reconsideration on the issue of whether its election was retroactive. The court denied the motion. *Catholic Charities of Me.*, 319 F. Supp. 2d at 88.


167. *Id.* at 109-10.
few sentences to its discussion of ERISA preemption, but cited to and agreed with the holdings of *Catholic Charities of Maine*\textsuperscript{168} and *Air Transport*.\textsuperscript{169} The court held that because the EBO "mandate[s] employee benefit structures or their administration," even if only conditionally . . . it is connected with a core concern of ERISA, impermissibly interferes with its goal of uniform plan administration, and is thus preempted."\textsuperscript{170}

In summary, equal benefits ordinances have not survived intact under direct challenges.\textsuperscript{171} The courts have held that EBOs can only place restrictions on the benefits given to employees either working within the jurisdiction or working elsewhere on contract-related work.\textsuperscript{172} Furthermore, two district courts have held that ERISA preempts the ordinances insofar as they affect employee benefit plans, including pension plans and health care plans.\textsuperscript{173} However, the ordinances have been upheld with regard to non-plan benefits, including family discounts, the payment of moving expenses, bereavement leave, and leaves of absence.\textsuperscript{174} Notably, these ordinances are apparently completely enforceable, with regard to all benefits, against churches and religious organizations that have not elected under 410(d).\textsuperscript{175} Thus, despite the fact that the courts have significantly reduced their enforceability, EBOs continue to be of great concern to religious employers.\textsuperscript{176}

\section*{D. Moral Dilemmas for Religious Institutions, Focusing on Catholic Teaching}

\subsection*{1. Catholic Teachings on Marriage and Family}

The reaction of religious groups clearly shows that EBOs present serious concerns to organizations of many different religious traditions.\textsuperscript{177}

\begin{thebibliography}{999}
\item 168. Id. at 110 (citing *Catholic Charities of Me.*, 304 F. Supp. 2d at 84).
\item 169. Id. (citing *Air Transp. Ass'n of Am. v. City & County of S.F.*, 992 F. Supp. 1149, 1176 (N.D. Cal. 1998)).
\item 170. Id. (citations omitted) (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 658 (1995)).
\item 171. See, e.g., supra text accompanying notes 165-66.
\item 172. See supra notes 108, 130 and accompanying text.
\item 173. See supra notes 109-22, 161 and accompanying text. The Northern District of California has premised this preemption finding on the condition that the government acts with more power than an ordinary consumer. See supra note 121.
\item 174. See supra notes 112-13, 134, 162 and accompanying text.
\item 175. See supra notes 150-51 and accompanying text.
\item 176. See infra section II.
\item 177. See, e.g., Humm, supra note 43 (noting the initial objections of an Orthodox Jewish organization, which were addressed in the amended version of the legislation); Kellner, supra note 43 (noting the objection of the Salvation Army).
\end{thebibliography}
Catholic organizations, in particular, have been a leading voice in opposition to EBOs. The teachings of the Catholic Church affirm the dignity of all human persons, no matter what their sexual orientation. Additionally, the Church has consistently advocated affordable, quality health care for all people. The mere availability of health care to members of same-sex unions is not the problem. Rather, the dilemma is that these ordinances compel employers to implicitly place domestic partnerships on the same level as marriage. The Catholic Church teaches that marriage was ordained by God "with its own nature, essential properties and purpose," namely, the mutual perfection of the spouses and "cooperat[ion] with God in the procreation and upbringing of new human lives." The Church teaches that sexuality is ordered to the communion of man and woman in marriage and ordained by God to share in the work of creation. Therefore, the Church insists that marriage can only be the union of one man and one woman.

2. Cooperation with Same-Sex Unions

Based on these teachings, the Church has charged its faithful with a two-fold, seemingly incongruous duty: "Moral conscience requires that, in every occasion, Christians give witness to the whole moral truth, which is contradicted both by approval of homosexual acts and unjust discrimination against homosexual persons." The Church instructs, "In those situations where homosexual unions have been legally recognized or have been given the legal status and rights belonging to marriage, clear and emphatic opposition is a duty." The Catholic Church, therefore, asserts that its faithful must avoid unjust discrimination, but,
at the same time, avoid the equivocation of same-sex unions and marriage between a man and a woman.\textsuperscript{189}

These teachings, moreover, bind Catholic institutions as well as individuals.\textsuperscript{190} In an address given to a group of U.S. bishops before his passing, Pope John Paul II emphasized, "The Church’s many institutions in the United States—schools, universities, hospitals and charitable agencies . . . must themselves embody a clear corporate testimony to [the Gospel’s] saving truth."\textsuperscript{191} This involves "offering a convincing witness . . . to the Church’s teaching, particularly on . . . marriage and family, and the right ordering of public life."\textsuperscript{192}

The dilemma, then, exists where Catholic employers must draw the line between avoiding unjust discrimination and endorsing same-sex unions.\textsuperscript{193} Formal cooperation with laws purposely recognizing same-sex unions is unacceptable under all circumstances.\textsuperscript{194} Material cooperation, compliance without the intent to recognize same-sex unions, may be allowed, but must be avoided as much as possible.\textsuperscript{195} Catholic employers in California, New York City, and the many other jurisdictions with EBOs now face these moral judgments whenever they wish to use government funding to continue their services.\textsuperscript{196}

\begin{itemize}
  \item \textsuperscript{189} \textit{Id.} ("There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family.").
  \item \textsuperscript{190} \textit{See} Massachusetts Catholic Conference, Faith-Based Integrity and Same-Sex Marriage: An Overview 3-4 (Aug. 2004) (on file with the author).
  \item \textsuperscript{191} Pope John Paul II, Address to the Bishops of the Provinces of Portland in Oregon, Seattle, and Anchorage on their “Ad Limina” Visit ¶ 2 (June 24, 2004), http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/june/documents/hf_jp-ii_spe _20040624_usa-bishops_en.html.
  \item \textsuperscript{192} \textit{Id}.
  \item \textsuperscript{193} Massachusetts Catholic Conference, \textit{supra} note 190, at 6-7.
  \item \textsuperscript{194} Congregation for the Doctrine of the Faith, \textit{supra} note 183, ¶ 4.
  \item \textsuperscript{195} \textit{Id.} ¶ 5 ("One must refrain from any kind of formal cooperation in the enactment or application of such gravely unjust laws and, as far as possible, from material cooperation on the level of their application.").
  \item \textsuperscript{196} The Massachusetts Catholic Conference addressed the distinction between formal and material cooperation in response to the related issue of the legalization of same-sex marriage:

\begin{quote}
  \textit{[F]ormal cooperation occurs when a person agrees with and willingly assists an immoral act of another person or institution. . . .}
  
  \textit{. . . .}
  
  \textit{Material cooperation occurs when circumstances (such as a legal mandate) pressure a person to get involved with an immoral act of another person or institution which the cooperator does not agree with or intend. . . . How far an unwilling participant must go to avoid material cooperation with the recognition of same-sex marriage will depend on various factors. In certain cases, extenuating circumstances, such as the need to provide for one’s family or the obligation to provide a necessary service that is in itself good, may excuse}
\end{quote}
II. RELIGIOUS EMPLOYERS AND EBOs

A. Legal Consequences: Troubling Inequity for Religious Organizations

The consensus of *Air Transport*, *S.D. Myers*, and *Catholic Charities of Maine* is that, with regard to non-ERISA benefits, EBOs *are* enforceable upon employers working on a government contract wherever the work on the contract is done.\(^{197}\) Therefore, employers wishing to contract with an EBO jurisdiction will be required to offer bereavement leave, travel discounts, and other non-ERISA benefits without distinguishing between an employee’s spouse or an employee’s domestic partner.\(^{198}\) *Air Transport* and *Catholic Charities of Maine*, however, curtailed the import of these ordinances by finding ERISA preemption regarding employee benefit plans.\(^{199}\) According to these cases, a local government generally cannot require that its contractors offer the same pensions or health insurance to its employees' domestic partners as it does to its employees' spouses,\(^{200}\) except when those benefits come as part of a church plan.\(^{201}\)

Because ERISA preemption of EBOs varies according to whether employee benefits are part of a church plan,\(^{202}\) these holdings differentiate between secular and religious employers.\(^{203}\) *Catholic Charities of Maine* held that Portland’s “Ordinance is neutral and generally applicable” and thus does not violate the Free Exercise Clause of the First Amendment.\(^{204}\) In effect, however, EBOs single out religious

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197. See *supra* notes 112, 134, 162.


199. See *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 96 (D. Me. 2004); *Air Transp. Ass'n of Am. v. City & County of S.F.*, 992 F. Supp. 1149, 1155 (N.D. Cal. 1998); *Griffen, supra* note 65, at 482-83 (“It may appear that, with the Supreme Court's new, more common-sense approach to ERISA preemption . . . courts should find San Francisco's Ordinance not preempted by ERISA. . . . But in fact, under current Supreme Court analysis of ERISA preemption, San Francisco's Ordinance, and laws like it, are preempted.”); *supra* text accompanying notes 109-22, 161.

200. See *supra* notes 109-22, 161 and accompanying text. Simply in economic terms, this holding is significant. See *ROGERS & DUNHAM, supra* note 22, at 35 (reporting that “the average employer spends roughly 6% of labor costs on health care benefits for employees and family members”); *SHILLING, supra* note 61, at 115 (describing the high cost of health insurance coverage, an ERISA benefit). However, ERISA preemption of these local ordinances has not yet been confirmed by a federal appellate or state supreme court. *See supra* notes 131-36 and accompanying text.

201. See *Catholic Charities of Me.*, 304 F. Supp. 2d at 86.

202. See id. at 82.

203. See *supra* text accompanying notes 150-56.

204. *Catholic Charities of Me.*, 304 F. Supp. 2d at 94-95. The Supreme Court has ruled that a “neutral, and generally applicable” law is not unconstitutional simply because it
organizations that have not elected to subject their benefit plans to ERISA under section 410(d).\footnote{205} The result is that an individual employer who happens to be Catholic and, for religious reasons, chooses not to offer health insurance coverage to employees' domestic partners, even while offering coverage to employees' spouses, may still contract with an EBO jurisdiction.\footnote{206} Similarly, a Catholic organization that has elected its plans into ERISA also will not have to offer such coverage.\footnote{207} However, an identical Catholic organization that has not elected into ERISA would be compelled to offer domestic partner coverage equal to its spousal coverage in order to receive funding.\footnote{208}

B. Moral Consequences and the San Francisco Compromise

At a minimum, all employers in EBO jurisdictions desiring to contract with the government must determine whether their religious beliefs permit them to offer non-ERISA benefits to their employees' domestic partners.\footnote{209} The simplest way to avoid this dilemma would be for the employer to not offer any such benefits that relate to an employee’s burdens a party's religious beliefs. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990). An analysis of the constitutionality of EBOs under the Free Exercise Clause is beyond the scope of this Comment. It should be noted, however, that the California Supreme Court recently upheld an analogous law, which required a Catholic employer to include contraception in its prescription drug plan, over claims that it violated the Free Exercise Clause. Catholic Charities of Sacramento v. Superior Court, 85 P.3d 67 (Cal.), cert. denied, 125 S. Ct. 53 (2004).

\footnote{205} See SENATE FLOOR ANALYSIS, Assemb. 2003-04 AB 17, 2003-04 Reg. Sess., at 9-10 (2003), http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0001-0050/ab-17_cfa_20030912_180029_sen_floor.html. The Seventh-Day Adventist Church went so far as to characterize the bill as "directed solely at religious employers." Id. at 10; see supra note 44.

\footnote{206} See Air Transport Ass'n of Am. v. City & County of S.F., 992 F.Supp 1149, 1191 (N.D. Cal. 1998), aff'd in part, remanded in part, 266 F.3d 1064 (9th Cir. 2001). Despite this ruling, most contractors with San Francisco offered full benefits to their employees' domestic partners. ROGERS & DUNHAM, supra note 22, at 1, 13. However, ninety-five contractors, including Federal Express, complied only with regard to the non-ERISA benefits. Id. at 13. Federal Express, which joined as a plaintiff in the Air Transport lawsuit, cited business reasons for objecting to the EBO, but may have had religious objections as well. Id. at 11.

\footnote{207} See supra notes 150-56 and accompanying text.

\footnote{208} See Sherman, supra note 8, at 393-94. Sherman explains, "[C]hurch plans are subject to state laws, including state laws mandating domestic partner benefits, and will not be shielded by ERISA's preemption provision: a somewhat ironic result, inasmuch as some religious institutions are among the most conspicuous opponents of domestic partner benefits." Id. Some EBOs may not extend to grants to charitable organizations, but several explicitly include grants. See supra note 48.

marital status. However, some states mandate such benefits. Furthermore, employers may find it unjust not to provide benefits such as paid leave to care for a sick spouse. To the extent that providing these benefits to an employee's domestic partner constitutes an unacceptable level of material cooperation with a same-sex union, it follows that EBOs present a serious quandary to Catholic employers wishing to contract with the government.

EBOs present an even greater moral dilemma for religious employers that fall under ERISA's church plan exemption, because the EBOs apply to these employers with regard to ERISA-regulated benefits as well.

210. EBOs do not require that employers offer any particular benefits. Rather, whenever they do offer benefits, they must do so in a manner that does not differentiate between spouses and domestic partners. See supra note 45. For example, California's EBO states, "A contractor is not deemed to be in violation . . . if the contractor . . . [e]lects not to provide benefits to employees based on their marital status or domestic partnership status, or elects not to provide benefits to employees' spouses and to employees' domestic partners." CAL. PUB. CONT. CODE § 10295.3(e)(4) (West Supp. 2005).

211. For example, California regulates the number of absences an employer must allow its employees for family reasons. CAL. GOV'T CODE § 12945.2 (West 2004). Now, under California's Public Contract Code, an employer must extend this leave equally, regardless of whether an employee must leave to care for a spouse or for a domestic partner. CAL. PUB. CONT. CODE § 10295.3(a)(1).

212. This is especially the case for Catholic employers in light of the Church's insistence on a just wage. A just wage is that which are sufficient to allow an employee "to lead a life worth of man and to fulfill family responsibilities properly." JOHN XXIII, MATER ET MAGISTRA ¶ 71 (William J. Gibbons trans., 1961). Pope John Paul II explained that this includes more than wages but also "various social benefits intended to ensure the life and health of workers and their families." JOHN PAUL II, ON HUMAN WORK ¶ 19 (Catholic News Service trans., 1981).

213. Kesich, supra note 163. Providing these non-ERISA benefits may not constitute an unacceptable level of material cooperation. See id. An employer may, for example, give bereavement leave to an employee at the death of his domestic partner, recognizing the impact of the loss of a loved one without necessarily expressing endorsement of homosexual behavior. ARCHDIOCESE OF SAN FRANCISCO, THE CHURCH AND PROPOSITION S: THE MOST COMMONLY ASKED QUESTIONS ABOUT THE ARCHDIOCESE'S STAND ON THE DOMESTIC PARTNERSHIP BILL (n.d.). John Kerry, CEO of Catholic Charities of Maine, indicated that "remaining benefits such as bereavement and medical leave [were] minor issues." Huang, supra note 14. The "primary concern" was that the organization need not "treat [unmarried partners] the same as married couples." Kesich, supra note 163. Also, the Archdiocese of San Francisco stated that hospital visitation rights should be extended to include domestic partners, at a citizen's request, so long as it was done "without equating domestic partnership with marriage." ARCHDIOCESE OF SAN FRANCISCO, supra. However, providing non-ERISA benefits still poses a moral problem for Catholic employers insofar as it entails recognizing a domestic partnership as tantamount to marriage. Telephone Interview with Edward Mechmann, Assistant Dir., Family Life/Respect Life Office of the Archdiocese of N.Y., N.Y. (Nov. 5, 2004). A close examination of the nuances of material cooperation, however, is beyond the scope of this Comment.

214. See supra notes 205-08 and accompanying text.
Offering benefits such as health insurance to an employee’s domestic partner on the same terms as another employee’s spouse implies approval of the employee’s same-sex union. The Archbishop of San Francisco responded to this dilemma by striking a compromise with the city. After San Francisco Mayor Willie Brown refused to grant an exemption, the Archbishop agreed to let each employee choose one member of his household to receive benefits—whether that person was a domestic partner, spouse, family member, or friend. In view of this compromise, jurisdictions have included this option within their EBO language. The continuing protest against these ordinances by religious organizations, however, demonstrates that this compromise is not unquestionably acceptable.


218. Lattin, supra note 216; see also, Michael M. Uhlmann, The Bishop Blinks, CRISIS, March 1997, at 7, 7. Uhlmann characterizes the compromise as a “fig-leaf,” which the Mayor offered, knowing that the San Francisco “Church was a tiger that had long ago lost its claws.” Id. Uhlmann finds the “fig-leaf” morally unacceptable because, the faithful, whose generosity over many decades has made Catholic Charities the largest and most efficient charitable provider in the nation, now face a demoralizing prospect: by an act of civil law acceded to by their bishop, a portion of their contributions will henceforth subsidize the patently immoral decisions of certain Church employees.

Id. In response, Archbishop William Levada defended his decision as a “breakthrough” that “broadens the scope of health benefits” in such a way that Catholic agencies are not “forced to recognize a category based on unacceptable sexual criteria.” Levada, supra note 217, at 14.

219. See supra note 52.

220. Michael M. Uhlmann, Archbishop Levada Responds to Crisis: Uhlmann Responds, CRISIS, July/Aug. 1997, at 13, 15 (responding to the Archbishop’s reply, Uhlmann maintains that the San Francisco compromise is unacceptable). Uhlmann argues, “The extension of marital benefits to an apparently unlimited class of other relationships—which is precisely what would be permitted under the revised San Francisco regulation—cannot but further undermine the institution of marriage.” Id. An official with the Archdiocese of New York expressed similar views in regard to the exemption provided in New York City’s EBO:

Have no doubt—this law promotes an ideological agenda hostile to religious liberty. Efforts to obtain a true religious exemption were rejected. Instead, the
C. Economic Consequences

Religious employers who choose to comply with EBOs face the increased cost of providing benefits to their employees' domestic partners or other designated beneficiaries. EBO supporters generally insist that the increase in cost is insignificant. As a result of required additional benefits imposed on nonprofit employers like Catholic Charities, however, these organizations will have fewer resources to fund their charitable operations. Furthermore, religious employers that accept the compromise codified in many EBOs incur greater costs than other contractors. While most contractors must provide equal benefits only to employees with registered domestic partners, a religious organization accepting this compromise must offer the same benefits to any household member of the employee's choosing.

Employers affected by EBOs who do not find the San Francisco compromise morally acceptable face a greater dilemma. One option is to not offer any benefits to an employee's spouse and to remove all references to an employee's spouse in the benefits agreement. This Council included a disingenuous "exemption" that permits a religious employer to give benefits to a "household member" instead of a "domestic partner." This is a sham. The bill even prohibits asking about the "household member"—a "don't ask, don't tell" gag rule that applies only to religious employers. So much for the First Amendment.

Mechmann, supra note 215.

221. See Rogers & Dunham, supra note 22, at 35.

222. Id. at 35 (estimating that labor costs will increase between 0.03% and 0.18% for contractors). However, the California Assembly's Appropriations Committee predicted that California's EBO would bring financial losses for the state, as well. The Committee estimated that, because "in some cases the low bidder on a contract could be disqualified ... [the] costs could be potentially in the millions of dollars annually." Assembly Bill Analysis, Assemb. 2003-04 AB 17, 2003-04 Reg. Sess., at 2 (2003), http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0001-0050/ab_17_cfa_20030605_101348_asm_floor.html.

223. For instance, administrative expenses account for only twelve percent of Catholic Charities of the Archdiocese of New York's annual budget. Most of this money goes to personnel costs. Catholic Charities of the Archdiocese of New York, supra note 24, at 21. Edward Mechmann of the Archdiocese of New York, N.Y. pointed out that health coverage already costs the Archdiocese approximately $9400 for an employee and spouse. Compliance with the EBO would increase these costs and reduce the funds available for service programs. Carrie Mason-Draffen, Benefits Law Seen as Taxing, Newsday (N.Y.), Oct. 28, 2004, at A51, 2004 WLNR 3146566 (describing detriment to small businesses as a result of the EBO); Email from Edward Mechmann, Assistant Dir., Family Life/Respect Life Office, Archdiocese of New York, to the author (Nov. 22, 2004) (on file with author).

224. Telephone Interview with Edward Mechmann, supra note 213.

225. See supra text accompanying note 208.

226. See supra note 52 and accompanying text.

227. See Rogers & Dunham, supra note 22, at 28. In San Francisco, only one city contractor is known to have taken this route to compliance. Id.
option not only conflicts with Catholic teaching on just wages, it places religious organizations at a disadvantage in finding and retaining employees. On the other hand, some religious organizations may find that they have no option other than to forfeit city funds. The effect will vary greatly depending on how much funding the organization receives. Catholic Charities of Maine lost its funding for one year, but was able to continue its programs. The Salvation Army of San Francisco lost a $3.5 million contract for its meals-on-wheels program. Catholic Charities of

228. See supra note 212. The development of group health insurance plans, like the development of Catholic just wage theory, presumed that a worker must support himself as well as his dependent wife and children. The plans were designed in the 1930s and 1940s "within the construct of the family wage—a single breadwinner and dependent family." JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 12-13 (2003). The dependents' "only claim was through a wage earner; in turn, the wage earner became dependent on the employer for meeting all family needs." Id. at 13. Domestic partner benefits for same-sex couples, therefore, do not serve the same needs as envisioned by Catholic just wage theory and family-oriented health benefit plans. Same-sex couples are more likely to have separate jobs and less likely to take advantage of domestic partner benefits. See Foreman supra note 126, at 320. Indeed, the low cost of domestic partner benefits to employers, touted by advocates of such benefits, can be attributed to the fact that same-sex couples have low enrollment rates. See M. V. Lee Badgett, Calculating Costs with Credibility: Health Care Benefits for Domestic Partners, ANGLES, Nov. 2000, at 1, 3, available at http://www.iglss.org/media/files/Angles_51.pdf. The main motive for EBOs is ideological, rather than a concern for unmet healthcare needs. See CONTRACTS WITH EQUALITY, supra note 22, at 28 (stating that the "main goal" of San Francisco's EBO "was to encourage employers to treat employees with domestic partners equally").

229. See Christopher Ramey, Note, Revealing the Inadequacy of AB 17: How Dictating Morality Upon Faith-Based Organizations Will Wreak Havoc on California's Economy, 26 T. JEFFERSON L. REV. 125, 137-38 (2004); Foreman, supra note 126, at 321. Cf. Reynolds, Wintz & Halloran, supra note 73, at 171 ("In order for dioceses to be competitive, they may have to offer retirement benefits equivalent to those being offered by for-profit employers."); SHILLING, supra note 61, at 157 ("The major factors in employee compensation are current compensation, pension plans ... and health benefits.").

230. The Archdiocese of New York found itself in a similar situation nearly a decade ago when Mayor Ed Koch issued an order banning discrimination against homosexuals by any program using city funds. Joyce Purnick, O'Connor Says He Might Reject City's Financing, N.Y. TIMES, Dec. 14, 1984, at A1. Archbishop John O'Connor maintained that, while the church did not condone such discrimination, the order impermissibly interfered with the Archdiocese's hiring decisions. Joyce Purnick, O'Connor Says Aid From City Is Not Essential, N.Y. TIMES, May 20, 1985, at B3. The Archbishop stated that the Archdiocese would forego city funds, a $72 million setback, rather than comply. Id. The New York Court of Appeals ultimately ruled that the order exceeded the mayor's power, so the Archdiocese did not, in the end, forfeit city funding. Under 21 v. City of New York, 482 N.E.2d 1, 10 (N.Y. 1985).


232. 144 CONG. REC. 17,812 (1998) (statement of Rep. Riggs) (noting that because the Salvation Army "refused to buckle to the city police" it "forfeited $3.5 million of its
California receives approximately fifty percent of its funding from government sources. Catholic Charities of the Archdiocese of New York has contracts with the city worth tens of millions of dollars annually. Forfeiture of funding would severely curtail the ability of these organizations to carry out their service programs. At the same time, the citizens of the EBO jurisdiction, especially the poor, would suffer greatly from the loss of the services provided by these organizations.

III. WHERE SHOULD RELIGIOUS ORGANIZATIONS GO FROM HERE?

Equal benefits ordinances constrict Catholic and other religious organizations from fulfilling their mission in accord with the precepts of their faith. Nevertheless, these ordinances have become increasingly


233. CATHOLIC CHARITIES OF CAL., supra note 24, at 1, 8.


235. See, e.g., CAL. PUB. CONT. CODE, supra note 44. In addition to the services by Catholic Charities, supra note 234, many educational programs could also lose funding, such as the New York Archdiocese's Head Start pre-school program. Telephone Interview with Edward Mechmann, supra note 213. Assembly Bill 17 could affect greatly California's Catholic Colleges if it requires them to comply with the EBO in order to receive state scholarship funding. This depends on whether the reception of state scholarships qualifies as a contract, an issue which has yet to be resolved in a court of law. Telephone Interview with Robert Teegarden, Legislative Dir., Cal. Catholic Conference (Oct. 14, 2004).

236. In 2003 alone, Catholic Charities of the Archdiocese of New York served 80,000 hungry and homeless people, 4000 immigrants, and 40,000 children and youth. It has also led an extended outreach to those affected by the terrorist attacks of Sept. 11, 2001. The organization works in ten counties through more than 130 agencies. CATHOLIC CHARITIES OF THE ARCHDIOCESE OF N.Y., supra note 24, at 8, 12, 18. Catholic Charities of the Archdiocese New York, as an aggregate, is the largest non-public provider of social services to the people of New York City. Telephone Interview with Edward Mechmann, supra note 213. Similarly, Catholic Charities of California is the largest non-public provider of immigrant services in the state. Telephone Interview with Robert Teegarden, supra note 235. Mr. Mechmann pointed out that while other organizations may eventually step into Catholic Charities' place, citizens receiving regular oversight from Catholic Charities would suffer greatly in the meantime. These include children in foster care programs and in adoption proceedings. These also include mental health patients, especially because the government-sponsored health plans do not adequately cover ongoing, community-based mental health services, such as outpatient counseling. Telephone Interview with Edward Mechmann, supra note 213. See generally Ramey, supra note 229 (discussing the economic repercussions of AB17).

237. See supra section I.D.
Some religious organizations may find the San Francisco compromise, as written into many EBOs, acceptable and may fulfill the requirements without qualms. For those that do not accept such a compromise, resolution of the EBO dilemma requires administrative restructuring, litigation, and legislation.

A. Avoiding the Church Plan Bind

The first step for religious organizations should be to consider election under 410(d). For religious employers, election carries several advantages in addition to exemption from EBOs. First, election would make the church plan exempt from state legislation and state lawsuits. Second, ERISA election does not impose significant federal regulations on welfare benefits plans. On the downside, whether there may be an election of employee welfare plans is an unsettled area of law, and a court or administrative ruling may foreclose this option. Also, election results in more extensive federal regulation for employee pension plans. Furthermore, even for those religious organizations that can make an election, EBO preemption is far from automatic in any jurisdiction other than the Federal District of Maine. No other court has yet disputed the holding of Catholic Charities of Maine, but no other

238. See supra text accompanying notes 40-44.
239. See Humm, supra note 43 (explaining that Agudath Israel, an Orthodox Jewish organization, originally opposed New York City's Equal Benefits Bill but withdrew its opposition when its limited religious exemption, similar to the San Francisco compromise, was added).
240. See infra sections III.A–B.
241. See supra text accompanying notes 74-78, 150-56.
242. Sulentic, supra note 72, at 48-49.
243. Id. at 46-47.
244. See supra note 77.
245. See supra note 59; see also Sulentic, supra note 72, at 42-44 (summarizing the effect of election on church pension plans). But see Reynolds, Wintz & Halloran, supra note 73, at 171 (“Coverage under Title I of ERISA is not terribly onerous.”). An official at Catholic Charities of the Archdiocese of New York acknowledged this option but indicated that the organization may encounter procedural difficulties in electing its employee benefit plans into ERISA, because of the restructuring that would be necessary. Telephone Interview with Edward Mechmann, supra note 213. Mr. Mechmann also pointed out the expense involved and the fact that election is an irrevocable measure. Id.; see also 26 C.F.R. § 1.410(d)-(1)(b) (2005).
246. The initial question of whether ERISA preempts EBOs, at all, is far from settled. For example, counsel for the Mayor of New York City used Catholic Charities of Maine and Air Transport as persuasive, rather than mandatory, authority, in his memorandum supporting a motion for preliminary injunction. Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction at 15-19, Mayor of N.Y. v. Council of N.Y., No. 403336/04 (N.Y. Sup. Ct. 2004); see also supra note 43 (explaining the mayor's opposition to the bill).
court is bound by it or has reached the same conclusion. Exemption from an EBO, therefore, is far from a settled area of law and will require litigation, unless legislative compromises are achieved.

B. Legislative Solutions

Even if other courts rule in the same way as the District of Maine, EBOs still pose a problem to religious organizations for which 410(d) election is not practicable. Also, EBOs pose a problem to all religious organizations if and to the extent that offering non-ERISA benefits to domestic partners constitutes unacceptable material cooperation. In these instances, legislative measures are the only real option.

1. Religious Exemptions

Religious organizations have consistently, yet unsuccessfully, sought religious exemptions from EBOs. To date, only one jurisdiction has granted an explicit exemption for religious organizations. The

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247. See supra note 163 and accompanying text.
248. See Levada, supra note 217, at 14. It was the prospect of litigation, “a lengthy, expensive, and contentious process,” that induced Archbishop Levada to accept the San Francisco compromise. Id.
250. See supra text accompanying note 208.
251. See supra notes 196, 213.
252. An EBO could also be held unenforceable on other grounds, such as preemption by another applicable federal or state law. For instance, the plaintiffs in Air Transport presented arguments that San Francisco’s EBO, as applied to them, was preempted by the Federal Airline Deregulation Act. This claim, however, was unsuccessful. See supra note 114. The plaintiff in S.D. Myers alleged that San Francisco’s EBO contradicted California state law regulating domestic partnership registration. S.D. Myers, Inc. v. City & County of S.F., 253 F.3d 461, 472-73 (9th Cir. 2001). However, the Ninth Circuit remanded the issue to the district court, id., and ultimately upheld the district court’s holding that the EBO did not conflict with the state law, S.D. Myers, Inc. v. City & County of S.F., 336 F.3d 1174, 1180 (9th Cir. 2003).
objective of EBOs is to equalize treatment of same-sex unions, and obviously, religious exemptions impede this goal by allowing religious organizations to distinguish between spouses and domestic partners. Nevertheless, state and local governments should grant complete religious exemptions, because losing the services of organizations like Catholic Charities poses a much greater harm to their communities than does some disparity in employee compensation.  

Furthermore, most EBOs already contain waivers for certain types of contracts. For instance, San Francisco's EBO allows an exception for contracts with public entities when the goods or services "are not available from another source" or when "the proposed contract . . . is necessary to serve a substantial public interest." The millions of dollars worth of services that Catholic Charities and similar organizations provide serve a very "substantial public interest." Furthermore, given the large scale on which Catholic Charities operates, other organizations and the state government would be hard-pressed to provide the same services. Therefore, the services that Catholic Charities provides are not readily "available from another source." For legislatures to allow exceptions for public works but not for religious organizations shows a deplorable disregard for religious beliefs and for the needs of the community.

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255. See, e.g., SEATTLE, WASH. ORDINANCE, NO. 119748 (Nov. 23, 1999), available at http://www.cityofseattle.net/contract/equalbenefits/cb-ordinance.htm ("[I]t is the city's intent, through the contracting practices outlines herein, to equalize the total compensation between similarly situated employees with spouses and employees with domestic partners . . . .").

256. James Cloutier, former mayor of Portland, Maine, explained that under Portland's EBO, "we have one rule that applies to everybody: You can't practice discrimination." Huang, supra note 14.

257. See supra note 236 and accompanying text. But cf. ROGERS & DUNHAM, supra note 22, at 30 ("[O]ne must weigh the legal costs and the other added costs of the Ordinance against the successful fulfillment of a philosophical commitment . . . ." (emphasis added)).

258. See supra text accompanying notes 50-51.


260. See supra note 236 (describing the services provided by Catholic Charities).

261. See supra note 236 (explaining that Catholic Charities is the largest non-government provider of many social services).

262. See supra note 237.

263. Congressman Frank Riggs (R-Cal.) pointed out that San Francisco granted waivers to "Blue Cross, Encyclopedia Britannica, the U.S. Tennis Association, Lawrence Hall, Paramount, [and] the large corporation that operates two amusement parks in the
2. Federal Legislation

If state and local governments do not acquiesce to the plea of Catholic organizations, federal legislation could provide alternate relief. Congress could protect church plans from state and local EBOs without requiring them to elect into ERISA. Congress passed the Church Plan Parity and Entanglement Prevention Act of 1999 on behalf of church plans. This Act amended ERISA in order to deem church plans


Allowing religious exemptions to important state policies, furthermore, is not unknown, at least not in California. California recently passed the Women's Contraceptive Equity Act (WCEA), requiring all employers to include contraceptive coverage in their prescription drug plans. See CAL. HEALTH & SAFETY CODE § 1367.25 (West Supp. 2005), CAL. INS. CODE § 10123.196 (West Supp. 2005). The Act sought to remedy the inequality in the price of health care for women, yet it allowed this inequality to continue for the employees of certain religious organizations. See Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 84-85 (Cal.), cert. denied, 125 S. Ct. 53 (2004). A religious exemption to an EBO, like the exemption to the WCEA, would recognize that even the most important state policies must not disadvantage the other important state objectives that religious organizations fulfill. See supra text accompanying note 236. However, Catholic Charities of Sacramento is an example only of the possibility of religious exemptions, not the acceptability of the exemption contained in the WCEA. The religious exemption in the WCEA would be insufficient in an EBO, because it does not include most religious employers, such as schools, hospitals, or social outreach organizations like Catholic Charities. See Catholic Charities of Sacramento, 85 P.3d at 75-76 (explaining the religious exemption and why it did not cover Catholic Charities).

264. See infra text accompanying notes 265-75.

265. Indeed, Congress has come to the aid of church plans in the past. In 1980, Congress expanded the definition of church plan. This amendment expanded the definition of church plans to include “a plan maintained by an organization . . . if such organization is controlled by or associated with a church or a convention or association of churches.” Multiemployers Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407, 94 Stat. 1208, 1304 (codified at 29 U.S.C. § 1002(33)(c)(i) (2000)). Previously, “church plans” included only those maintained “by a church or by a convention or association of churches.” 29 U.S.C.S. § 1002 (1998) (LexisNexis 1998) (showing the original language of 29 U.S.C. § 1002(33)(C)(ii)).

266. Church Plan Parity and Entanglement Prevention Act, Pub. L. No. 106-244, 114 Stat. 499 (2000). The bill’s sponsor, Senator Jeff Sessions (R-Ala.), explained,

[T]oday I am introducing legislation to protect the health and pension benefits of thousands of clergy and lay workers. This legislation clarifies the regulatory status of church benefit programs and allows service providers to continue contracting with church plans.

Unfortunately, state insurance statutes, in all but three states, fail to address the legal status of these benefit programs. Thus, under some interpretations of state insurance law it is possible to conclude that these employer plans are subject to regulation as insurance companies. This uncertain legal status has caused service providers to refuse to contract with church plans—leaving these programs without the necessary tools to maximize benefits and reduce costs.

Recently, the Insurance Department of South Dakota informed the church benefits community that either federal or state legislation is necessary to exempt
compliant with certain state insurance laws. Congress could pass a similar act that would deem church plans compliant with EBOs without offering domestic partner benefits. Alternately, the federal government could censure state and local governments that enact EBOs without religious exemptions. Representative Frank Riggs (R-Cal.) attempted this course of action in 1998 with a proposed amendment to withhold federal housing money from San Francisco. The explicit purpose of the amendment was to prevent federal funds from being "used to force or to coerce private groups and businesses to adopt policies that they find morally objectionable." The amendment passed by a narrow margin in the House but was dropped from the final

their programs from their state's insurance laws. With the possibility that 46 more states could make the same request, I believe the only practical solution is for Congress to clarify the status of these plans. That is what my legislation does. 145 CONG. REC. 14,912 (1999) (statement of Sen. Sessions).

267. Church Plan Parity and Entanglement Prevention Act, Pub. L. No. 106-244, 114 Stat. 499 (2000) ("An [a]ct [i]o amend title I of the Employee Retirement Income Security Act of 1974 to provide for the preemption of State law in certain cases relating to certain church plans."). Professor Sulentic explains that under this law, "church plans are deemed to be in compliance with state insurance laws regarding licensure and insolvency. Administrators of non-electing church welfare plans need no longer fear that state insurance laws will require the financial securities that are expected of true insurance companies." Sulentic, supra note 72, at 49 (footnote omitted).

268. The Minneapolis EBO already has a similar provision. A contractor automatically is deemed in compliance if it is a "religious or denominational educational institution" or a "religious or denominational organization." MINNEAPOLIS, MINN., CODE OF ORDINANCES § 18.200(f)(6)-(7) (2005). http://www.municode.com/resources/code_list.asp?StatelD=23 (follow "Minneapolis Code of Ordinances—1991," then follow "Title 2 Administration," then follow "Chapter 18 Purchasing").

269. See infra notes 270-72 and accompanying text.

270. The Amendment stated simply, "None of the funds appropriated by this Act may be used to implement section 12B.2(b) of the Administrative Code of San Francisco, California." H.R. 4194, 105th Cong. § 433 (as received in Senate, July 30, 1998). See also 144 CONG. REC. 17,812 (1998).


I am here on behalf of Catholic Charities and Salvation Army, two venerable organizations. They have longstanding relationships with the city and county of San Francisco government that have found themselves suddenly forced to accept this policy or lose its [sic] city contracts.

In the case of Catholic Charities, they were able to work out apparently an agreement that is a slight variation of the city law. But in the case of the Salvation Army, which refused to buckle to the city policy, the Salvation Army forfeited $3.5 million of its $18 million budget.

Id.

272. Id. at 17,821-22; see also Carolyn Lochhead, Gay Republicans Venture Deep Into Enemy Territory; Log Cabin Holds Convention in Dallas, S.F. CHRON., Aug. 13, 1998, at A1 ("The House passed an amendment last month . . . punishing San Francisco for its policy requiring city contractors to provide domestic partner benefits.").
version of the bill.273 Opponents of the measure criticized it as a violation of local autonomy.274 However, current White House officials have expressed support for religious organizations affected by EBOs and have indicated willingness to apportion federal funding in similar ways.275

IV. CONCLUSION

Equal benefits ordinances have become increasingly popular with state and local governments throughout the country as a means to equalize the treatment of domestic partnerships and marriage within the workplace. While advancing a policy of equal pay for equal work, the ordinances also jeopardize the ability of religious organizations to carry out valuable service programs with the use of government funding without compromising their moral beliefs. Recent case law indicates that ERISA limits the enforceability of these ordinances against most private employers and religious employers who have opted out of church plan status. However, EBOs likely will have a disparate impact on religious organizations that have not elected out of the church plans exemption of ERISA.

Cities and states enacting EBOs have offered very limited deference to religious organizations, despite the value of the services offered by such organizations. For those organizations that are able to meet the federal standards, the best tactic is to elect their employee benefit plans into ERISA and challenge the ordinances under federal preemption. Ultimately, only legislative solutions, whether on the local, state, or federal level, can solve this dilemma with regard to all benefits and all organizations.

Equal benefits ordinances indeed show a dark side of rights. An attempt to end discrimination against same-sex couples in this way can also end meals-on-wheels for the poor and elderly, counseling for the mentally disabled, immigrant services, college scholarships, and a host of other valuable, faith-based community services. State and local governments should heed the plight of religious organizations that offer

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275. President George W. Bush's Office of Faith-Based and Community Initiatives issued "equal treatment" principles directing that federal funding not discriminate against religious organizations. Jim Towey, director of the Office of Faith-Based and Community Initiatives, stated that the Department of Housing and Urban Development is "studying what to do when local ordinances discriminate against faith-based organizations like they do... in Portland [Maine]." Huang, supra note 14.
so much to their communities or else the quest for equality will leave all of its citizens equally disadvantaged.