



Legislation Text

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**Fiscal Note**

Potential costs for this ordinance may fall into three general groupings. First, there will be some staff costs associated with contract monitoring and enforcement. The Civil Rights Director and the Purchasing Manager have both indicated that additional staff resources will be required. The additional resources necessary cannot be quantified at present, and would not be identifiable until some experience is gained with the proposed ordinance. A second economic impact may be related to the pass through of any additional benefits costs from the contractors to the City and other customers. A third economic impact may arise regarding the potential withdrawal of some contractors from the competitive bidding process.

In terms of public works contracts, most of the current contractors employ unionized workers, for whom the unions pay health insurance and other benefits. The proposed ordinance would require only that such contractors agree to propose to the unions an equal benefit provision in the next collective bargaining agreements. Non-union contractors, in contrast, would have to institute the domestic partner provisions in actual practice on July 1, 2012. In terms of service contracts, many of these are with non-union contractors who would be in a similar position. It is not known how many, if any, public works or service contractors would withdraw from the City competitive bidding process as a result of the proposed requirements. To the extent that competition is lost, contracting costs can be expected to increase.

**Title**

SUBSTITUTE Creating Sections 39.07 and 33.07(7)(k)13. of the Madison General Ordinances to require contractors to provide benefits to employees with domestic partners that are equal to the benefits offered and provided to married employees.

**Body**

DRAFTER'S ANALYSIS: This ordinance creates a new contracting requirement for doing business with the City of Madison. This ordinance would apply to service contracts over \$25,000, contracts for city financial assistance over \$25,000, public works contracts required to be bid, and certain subcontractors. Contractors would be required to provide benefits to employees with domestic partners equal to the benefits offered and provided to married employees with spouses. If a benefit would be available to the employee or spouse, the benefit shall also be made equally available to a domestic partner of that employee, or to the employee based on his or her status as a domestic partner. If, after making a reasonable effort to provide an equal benefit, the contractor is unable to provide the benefit, the contractor shall pay the employee the cash equivalent. "Benefit" under this ordinance includes all types of insurance coverage, family leave, bereavement leave, sick leave, membership discounts, moving expenses - any type of fringe benefit that a contractor currently offers to its employees. If the contractor does not currently provide a benefit to married employees, it need not provide it to employees with domestic partners. This ordinance only requires "equal" benefits to be offered. The following contracts would be exempt: contracts for goods or supplies, emergencies, sole-sources, contracts with other units of government, certain real estate transactions, contracts for net cash, contracts with bond underwriters or financial institutions, situations where no qualified bidder can comply with the requirement, and contracts with a contractor whose employees are under a collective bargaining agreement in effect prior to the ordinance effective date. In that situation, the contractor must agree to propose to the applicable collective bargaining unit(s) that an equal benefit requirement consistent with this ordinance be incorporated into the next collective bargaining agreement or future amendment, extension or modification. This ordinance would allow the contractor/employer to require proof of domestic partnership status before providing the benefit. This ordinance establishes procedure for the investigation of complaints by the Department of Civil Rights and sanctions for noncompliance. If adopted, this amendment would first take effect on July 1, 2012.

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The Common Council of the City of Madison do hereby ordain as follows:

1. Section 39.07 entitled "Equal Benefits" of the Madison General Ordinances is created to read as follows:

**39.07 EQUAL BENEFITS.**

- (1) Statement of Purpose, Findings. The purpose of this ordinance is to ensure that contractors doing business with the City under certain public works contracts, service contracts, and contracts for financial assistance provide benefits for their employees in domestic partnerships that are equal to the benefits provided for similarly-situated employees who are married. The Common Council of the City of Madison finds that the use of City funds should support employers that offer equal compensation, including benefits, to all employees, including employees in a domestic partnership. The Council finds that the equal benefit requirements of this ordinance ensure that City funds are used responsibly and with contractors who reflect values that the City shares while also meeting requirements that public construction contracts be awarded to the lowest responsible bidder. The requirements of this ordinance are for the protection and welfare of the public in the performance of all public contracts.
- (2) Definitions. In this section:
  - (a) "Benefit" means any plan, program or policy provided or offered by a contractor to its employees as part of the employer's total compensation package. This includes, but is not limited to, bereavement leave, family medical leave, sick leave, health insurance or other health benefit, dental insurance or other dental benefit, disability insurance, life insurance, membership or membership discounts, moving expenses, pension and retirement benefits, and travel benefits; and is intended to include benefits that are provided directly to an employee (such as bereavement leave) and to the employee's spouse or domestic partner (such as health insurance coverage for the spouse or domestic partner).
  - (b) "Cash equivalent" means an amount equal to the actual cost to the employer for providing the benefit in question to the spouse of a married employee.
  - (c) "City financial assistance" for purposes of this ordinance means any grant, cooperative agreement, loan contract or any other arrangement by which the City provides or otherwise makes available assistance in an amount exceeding twenty-five thousand dollars (\$25,000) in the form of:
    1. Funds;
    2. Services of City personnel;
    3. Leases of real property for less than the fair market value, or for reduced consideration;
    4. The sale and lease of, and the permission to use (on other than a casual or transient basis) other City property (other than real property) or any interest in such property, the furnishing of services without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by the sale, lease or furnishing of services to the recipient;
    5. "City financial assistance" includes, but is not limited to, capital revolving fund loans, redevelopment contracts, economic development agreements, revenue or loan agreements with an eligible participant or authorized developer under Wis. Stat. § 66.1103, contracts with developers or other entities authorized by Wis. Stat. § 66.1105(3)(e).
    6. "City financial assistance" does not include public works contracts, supply procurement contracts, professional service or other service contracts as defined herein, contracts of insurance or guaranty, or collective bargaining agreements.
    7. Subcontractors and Employees of Recipients of Financial Assistance. The equal benefit requirement of this ordinance shall apply to all employees employed in work performed under a contract funded by City Financial Assistance, or employed by a contractor of a City Financial Assistance recipient and who

- expends at least twenty (20) hours a week at the project site funded by City financial assistance, or employed by a recipient of City financial assistance in work performed at a project site funded by City Financial Assistance.
- (d) “Contractor,” for purposes of this ordinance, means a Service Contractor as defined herein, a contractor who has entered into a Public Works contract as defined herein, or a recipient of City Financial Assistance, as defined herein.
  - (e) “Employee” means any individual, who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go to or work or be at any time in any place of employment. “Employee” includes individuals whose work is permanent or temporary, or on a full-time or part-time basis.
  - (f) “Domestic partner” means an individual in a domestic partnership.
  - (g) “Domestic partnership” means two adults and their dependents, if any, that are currently registered as a domestic partnership (or equivalent) in any governmental jurisdiction offering a domestic partnership or similar registry, or who satisfy the following requirements:
    - 1. They are in a relationship of mutual support, caring and commitment and intend to remain in such a relationship in the immediate future; and
    - 2. They are not married (unless they are married to each other) or legally separated and, if either party has been a party to an action or proceeding for divorce or annulment, at least six (6) months have elapsed since the date of the judgment terminating the marriage; and
    - 3. Neither domestic partner is currently registered in a domestic partnership with a different domestic partner and, if either partner has previously been registered as a domestic partner in a domestic partnership, at least six (6) months have elapsed since the effective date of termination of that registration; and
    - 4. Both are eighteen (18) years of age or older; and
    - 5. Both are competent to contract; and
    - 6. They are occupying the same dwelling unit as a single, nonprofit housekeeping unit, whose relationship is of permanent and distinct domestic character; and
    - 7. They are not in a relationship that is merely temporary, social, political, commercial or economic in nature.
  - (h) “Person” means any individual, partnership, joint venture, corporation, limited liability company or partnership, trust, association, or other entity that may employ individuals or enter into contracts.
  - (i) “Public Works Contract” means any contract meeting the definition of “public works” in Sec. 23.01(1), if the value of such contract requires it to be let to the lowest responsible bidder under Wis. Stat. § 62.15.
  - (j) “Recipient of City Financial Assistance” means any person, including that person’s subcontractors if required by Sec. 39.07(2)(c)7. herein, successors, assignees and transferees, who enters into a contract with the City to receive City Financial Assistance as defined in this ordinance.
  - (k) “Service Contract,” for purposes of this ordinance, means: any contract with the City for the provision of services to any City department or agency with a budget under the control of the Common Council, that has a value exceeding twenty-five thousand dollars (\$25,000); this includes but is not limited to standard “Purchase of Services” contracts and contracts for purchase of human services administered by the Office of Community Services under the Community Resources Program with a value exceeding twenty-five thousand dollars (\$25,000).
  - (l) “Service Contractor” means any person who enters into a Service Contract with the City, including that person’s subcontractors (if the subcontractor is performing \$25,000 or more in work), successors, assignees, or transferees.
- (3) Equal Benefits Requirement.

- (a) Applicability. This ordinance shall apply to the following types of contracts: Service Contracts, contracts for City Financial Assistance, and Public Works Contracts, as defined herein, subject to the exemptions in Sec. 39.07(3)(c).
- (b) Requirement to Provide Equal Benefits. All Service Contractors, their subcontractors if the value of the subcontracted work is \$25,000 or more, Recipients of City Financial Assistance (as defined herein), and contractors under a public works contract and their subcontractors if the value of a subcontractor's work exceeds the single-trade minimum set forth in Sec. 33.07(7)(b)5., (hereafter, "Contractors"), shall offer and provide benefits to employees with domestic partners that are equal to the benefits offered and provided to married employees with spouses. If a benefit would be available to the spouse of a married employee or to the employee based on his or her status as a spouse, the benefit shall also be made equally available to a domestic partner of that employee, or to the employee based on his or her status as a domestic partner. If, after making a reasonable effort to provide an equal benefit as required by this paragraph, the contractor is unable to provide the benefit, the contractor shall provide the employee with the cash equivalent of the benefit.
- (c) Exemptions. The following contracts shall be exempt from the requirements of this ordinance:
1. Contracts for the purchase of goods or supplies only.
  2. Contracts necessitated by or resulting from an emergency and thus will not permit the delay required to assure compliance with this ordinance;
  3. A contract with a contractor whose employees are under a collective bargaining agreement that was in effect prior to the effective date of this ordinance, however, the contractor must agree to propose to the applicable collective bargaining unit(s) that an equal benefit requirement consistent with this ordinance be incorporated into the next collective bargaining agreement or into the existing agreement upon amendment, extension or other modification that occurs after the effective date of this ordinance.
  4. Contracts for donations to the City.
  5. Contracts With Other Municipalities. For purposes of this ordinance, "municipalities" shall include all units of government listed in Wis. Stat. § 66.0301, inclusive of future amendments.
  6. Contracts with the State of Wisconsin, the University of Wisconsin, and the Area Board of any Vocational, Technical and Adult Education District.
  7. Contracts with the United States of America and individual agencies of the U.S. government.
  8. Contracts for the sale or purchase of real property, and relocation-related contracts, except those that fall under the definition of City Financial Assistance herein. Relocation-related contracts are contracts for City payment of the costs of the relocation or modification of another person's facilities required when the City acquires a real property interest or modifies a railroad crossing, usually arising out of a relocation order, transportation project plat, or order of the Commissioner of Railroads.
  9. Contracts under which the City receives net cash, including, but not limited to contracts where the City leases real property, and sells or leases goods or services for cash; except contracts with the City's depository banks, which shall not be exempt.
  10. Agreements with bond underwriters and agreements with financial institutions where the agreement relates to the City's borrowing.
  11. "Sole Source" Service Contracts. A contract may be exempt from this ordinance if the services are determined to be available from only one person or firm under Sec. 4.26(4)(a)2., MGO, or a consultant who has provided services in this past

12. No Bidders Can Comply. If a competitive selection process was used for a contract to which this ordinance applies (or applications sought for city financial assistance) and the responses demonstrate that none of the bidders or applicants can comply with this ordinance, and one or more of the bids or applications would have been responsive if compliance with this section was not required, the contract may be re-bid or new applications sought without the requirements of this ordinance. If a contract is awarded as a result of a re-bid (or call for new applications) under this paragraph, that contract will be exempt from the requirements of this ordinance.
  13. Pre-Existing Contracts. Contracts to which this ordinance would apply that were in effect prior to the date this Sec. 39.07 first takes effect.
  14. Renewals. A renewal or extension of a contract to which this ordinance applies that was executed prior to the date this Sec. 39.07 first takes effect, if the contractor is providing an essential service or work that, in the opinion of the Purchasing Division or City Engineer, is not available from any other contractor. Examples include but are not limited to renewal of a support or maintenance contract for proprietary software that was purchased prior to the date this ordinance first takes effect, or an extension of time or change order on a public works contract signed prior to the date this ordinance first took effect.
- (4) Proof of Domestic Partner Status. Contractors with employees who reside in Wisconsin may require those employees to sign and file a Declaration of Domestic Partnership in conformance with Wis. Stat. ch. 770 and register accordingly with their local County Clerk, as a prerequisite to providing equal benefits under this ordinance. Contractors with employees who reside outside of Wisconsin may require those employees to provide proof of an equivalent registration or other procedure in the jurisdiction where the employee resides, if available. If none is available in the jurisdiction where the employee resides, the Contractor shall recognize a domestic partnership meeting the definition of domestic partnership in this ordinance.
- (5) Mandatory Contract Language. All contracts to which this ordinance applies shall include the following language:

“Equal Benefits Requirement (Sec. 39.07, MGO) For the duration of this Contract, the Contractor agrees to offer and provide benefits to employees with domestic partners that are equal to the benefits offered and provided to married employees with spouses, and to comply with all provisions of Sec. 39.07, Madison General Ordinances (MGO). If a benefit would be available to the spouse of a married employee, or to the employee based on his or her status as a spouse, the benefit shall also be made available to a domestic partner of an employee, or to the employee based on his or her status as a domestic partner. “Benefits” include any plan, program or policy provided or offered to employees as part of the employer’s total compensation package, including but not limited to, bereavement leave, family medical leave, sick leave, health insurance or other health benefits, dental insurance or other dental benefits, disability insurance, life insurance, membership or membership discounts, moving expenses, pension and retirement benefits, and travel benefits.

Cash Equivalent. If after making a reasonable effort to provide an equal benefit for a domestic partner of an employee, the contractor is unable to provide the benefit, the contractor shall provide the employee with the cash equivalent of the benefit.

Proof of Domestic Partner Status. The Contractor may require an employee to provide proof of domestic partnership status as a prerequisite to providing the equal benefits. Any such requirement of proof shall comply with Sec. 39.07(4), MGO.

Notice Posting, Compliance. The Contractor shall post a notice informing all employees of the equal benefit requirements of this Contract, the complaint procedure, and agrees to produce records upon request of the City, as required by Sec. 39.07, MGO.

Subcontractors (Public Works Contracts Only). Contractor shall require all subcontractors, the value of whose work exceeds the single-trade minimum set forth in Sec. 33.07(7)(b)5., MGO, to provide equal benefits in compliance with Sec. 39.07, MGO.

Subcontractors (Recipients of City Financial Assistance Only). This requirement also applies to employees of contractors hired by the Recipient who expend at least twenty (20) hours a week at the project site funded by City financial assistance.

Subcontractors (Service Contracts Only). Contractor shall require all subcontractors, the value of whose work is twenty-five thousand dollars (\$25,000) or more, to provide equal benefits in compliance with Sec. 39.07, MGO.

(6) Monitoring and Enforcement.

- (a) Posting of Notice. While the contract is in effect, all contractors or recipients of City financial assistance to which this ordinance applies shall post notices explaining the equal benefits requirement under the contract and the procedure for filing a complaint under this ordinance, in prominent locations at the workplace where it can be viewed by all employees.
- (b) Complaints. Any person may file a complaint with the City of Madison Department of Civil Rights that a contractor is in violation of the terms of the contract or this ordinance. The Department of Civil Rights shall receive complaints and investigate the merits of such complaints, with assistance from the Human Resources Department.
- (c) Record-Keeping and Production of Records. All contractors and recipients of City financial assistance shall keep full and accurate records of benefits provided or cash equivalents paid to employees under this ordinance. If a complaint is filed with the City under sub. (b), the Contractor shall provide upon the City's request access to all records relevant to compliance with this ordinance and shall require their subcontractors to allow the same access. Contractors shall provide such records to the office of the Department of Civil Rights within ten (10) business days of the date requested in writing and shall permit the City access during normal business hours to the above records, as well as access to persons who may have information relevant and necessary to ascertain compliance with this ordinance, within ten (10) business days of the date requested in writing.
- (d) Violation, Remediation and Sanctions. The City shall inform the contractor if a complaint has been filed under this ordinance or a violation has been determined to exist, and in addition to examining the contractor's records, the City may discuss the violation with the contractor. The purpose of the discussion is to encourage the contractor to change its practices to achieve compliance. The City may at its sole option prescribe appropriate measures for the contractor to take in order to comply with the Ordinance and may agree, in writing, to a compliance plan which shall be incorporated as an amendment to the contract. If the Contractor or subcontractor fails to comply with this ordinance as made applicable through the contract, the City at its option may do any or all of the following:
  - 1. Cancel, terminate, suspend or non-renew the contract in whole or in part.
  - 2. Declare the contractor ineligible for further City contracts and/or disqualify the contractor from bidding or submitting proposals on City contracts or applying for city financial assistance.
  - 3. Recover on behalf of the City from the prime Contractor 0.5 percent of the

contract award price for each week that such party fails or refuses to comply, in the nature of liquidated damages, but not to exceed a total of five percent (5%) of the contract price, or five thousand dollars (\$5,000), whichever is less. Under public works contracts, if a subcontractor is in noncompliance, the City may recover liquidated damages from the prime Contractor in the manner described above. The preceding sentence shall not be construed to prohibit a prime Contractor from recovering the amount of such damage from the non-complying subcontractor.

- (e) Submission of False Information. Any person who has been found by the City to have submitted any false, misleading or fraudulent information to the City regarding compliance with this ordinance during the term of this contract or an investigation of a complaint under this ordinance may be subject to any of the above sanctions.
- (f) No Waiver. Nothing in this subsection shall be construed as a waiver or limitation of the City's remedies under an existing contract or other remedies available at equity or at law.
- (7) Effective Date and Applicability to Existing Contracts. This ordinance shall take effect on July 1, 2012, and apply to contracts executed, extended, or renewed by the City on or after that date. No existing contract to which this ordinance applies shall be extended or renewed on or after July 1, 2012, unless the requirements of this ordinance are incorporated into the contract or the contract is determined to be exempt under Sec. 39.07(3)(c).
- (8) Penalty. In addition to any of the sanctions set forth elsewhere in this ordinance, any person who violates any portion of this ordinance or fails to comply with any of its requirements shall, upon conviction hereof, be subject to a forfeiture of not less than one-hundred dollars (\$100) and not more than one thousand dollars (\$1,000), plus applicable costs. Each day or portion thereof that such violation continues shall be considered a separate offense. Prosecution of a forfeiture action for a violation of this ordinance shall not preclude imposition of other sanctions listed above, nor shall the imposition of such sanctions be construed as a limitation on prosecution."

2. Paragraph 13. of Subdivision (k) entitled "Required Certifications" of Subsection (7) entitled "Best Value Contracting" of Section 33.07 entitled "Board of Public Works" of the Madison General Ordinances is created to read as follows:

"13. Comply with the City's Equal Benefit Ordinance, Sec. 39.07."