

Legislative Council 立法會
Meeting on 20/8/2001 會議

Chung To 杜聰
Chi Heng Foundation 智行基金會

August 15,2001

Mr Stanley Ma Kin Hung
The Legislative Council, Hong Kong
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RE: Subcommittee to Study Discrimination on the Ground of Sexual Orientation

Dear Mr. Ma,

Chi Heng Foundation is pleased to be invited to attend the meeting organized by the Subcommittee to Study Discrimination on the Ground of Sexual Orientation to be held on August 20.

Chi Heng Foundation aims to promote equal opportunities and eliminate discrimination. With regard to eliminating discrimination on the ground of sexual orientation, we believe both public education and legislation (including an EOB) are necessary. They are not mutually exclusive and should be done at the same time.

We hereby submit a report published in the United States on legislature affecting the gay, lesbian, bisexual and transgendered people there. The report is a useful reference source for us in Hong Kong.

Should you have any questions, please do not hesitate to contact me

Thank you in advance for your assistance. I look forward to seeing you.

Sincerely,

Chung To
Email: chungto@netvigator.com
Fax: 2548 5920

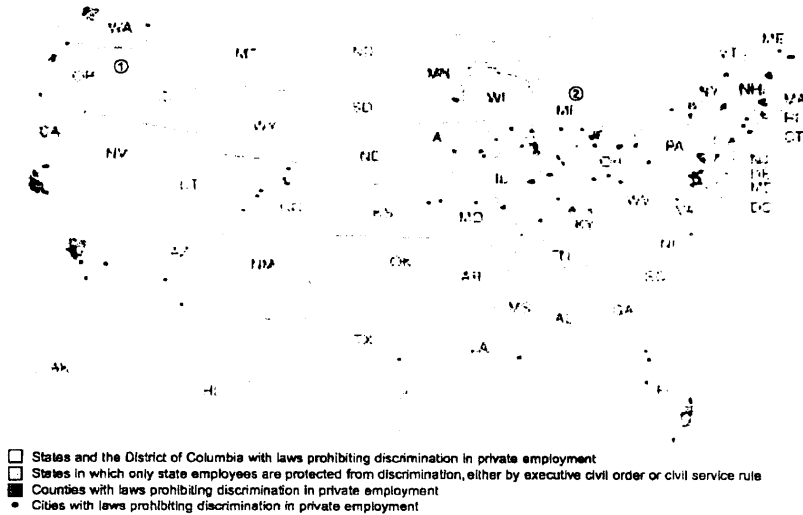
GLBT RIGHTS - A SUMMARY OF FINDINGS

Anti-Discrimination Laws

Only 11 states and the District of Columbia have adopted legislation prohibiting sexual orientation discrimination in private employment. Eighteen states and the District of Columbia prohibit sexual orientation discrimination in public employment; nine states and the District of Columbia protect against sexual orientation discrimination in public accommodations and housing. Because protection at the city and county level is also limited there are, for example, more than 170 million Americans (62% of the population) who have no legislative protection against sexual orientation discrimination in private employment at either the state or local level.

Legislating Equality is the most comprehensive report ever on the history and current scope of protection available to GLBT people focusing on local and municipal ordinances as well as state laws. Civil rights protections at the national and state levels are indisputably of great importance. However, local and municipal laws have significant potential to safeguard the well-being and dignity of GLBT people across the country. There are over 100 cities and 18 counties that prohibit discrimination in private employment on the basis of sexual

Laws Prohibiting Discrimination Based on Sexual Orientation



① Oregon has no legislation, but pursuant to the court of Appeal decision in *Tanner v. OHSU*, discrimination based on sexual orientation is prohibited.

② Michigan legislation prohibits only discrimination based on sexual orientation and AIDS status in the provision of health care.

orientation in their local anti-discrimination laws. From the Town of Sorrento, ME with a population of 355, to New York City, with more than seven million people, there are more than 37 million Americans (14% of the total population of the US) who are only protected from sexual orientation discrimination by local laws. In other words, they live in a state without protection from discrimination based on sexual orientation but are protected by their town, city or county laws. It is clear that we, as a community, must continue our struggle for civil rights protections at the national and state levels while also paying close attention to our progress at the municipal level. It is in the service of this latter policy objective that we have engaged in this detailed analysis and reporting of local laws which prohibit discrimination against GLBT people.

Laws Prohibiting Discrimination in Private Employment Based on Gender Identity



- States with laws prohibiting discrimination in private employment
- ▣ States in which only state employees are protected from discrimination
- Counties with laws prohibiting discrimination in private employment
- Cities with laws prohibiting discrimination in private employment

① California legislation prohibits discrimination in education on the basis of gender identity

Transgendered People

Only 3 counties, 20 cities and the state of Minnesota explicitly provide legal protection from discrimination in private employment on the basis of gender identity. More and more this gaping omission has come under the scrutiny of activists working in the area of GLBT rights.

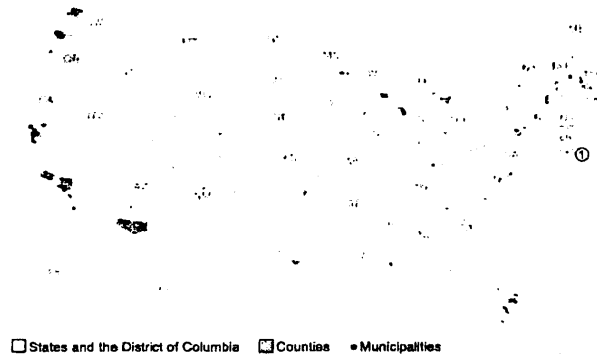
It is important to note that particularly in many of the older human rights ordinances, the protection afforded to transgendered people is limited to those who are in the process of having or have had a 'sex change operation.'

For a detailed and in depth analysis of some of the legal and policy issues facing transgendered people see, Paisley Currah, Shannon Minter and Jamison Green, *Understanding Transgender Issues A Handbook for Activists and Policymakers*, forthcoming from the NGLTF Policy Institute and the National Center for Lesbian Rights in 2000.

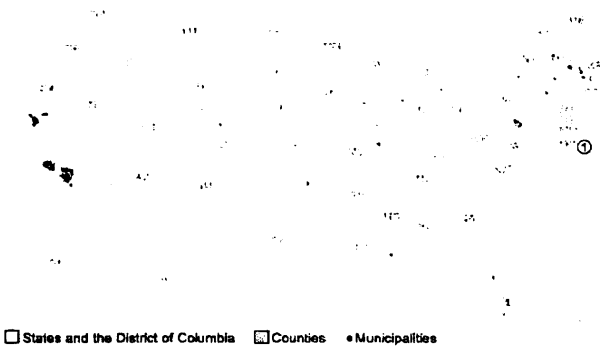
Domestic Partnership Benefits/Registries

"The traditionally defined nuclear family, consisting of a married, heterosexual couple with children under the age of 18, is no longer the norm for United States families...The movement for domestic partnership benefits is rooted in the democratic notion of equal pay for equal work. With benefits comprising approximately 40% of a worker's compensation, employees who can obtain benefits for their spouses are, in effect, paid higher than employees in relationships which are not legally recognized... Domestic partnership benefits, then, are a means of working towards greater economic justice in the workplace."¹

Domestic Partnership Benefits for Government Employees



Domestic Partnership Registries



¹ Since passage by City Council, the U.S. Congress—which exerts budgetary and other controls over the District of Columbia—has effectively blocked provision of employment benefits and maintenance of a registry by explicitly prohibiting the use of funds for that purpose.

Both the extension of domestic partnership employment benefits and the creation of domestic partnership registries constitute a form of public validation of the dignity, value and legitimacy of the approximately 4.5 million couples in the United States that are unmarried, one third of those being same-sex.²

To date there are only seven states that offer some kind of domestic partner employment benefits to all or a portion of their state employees³, and California is the only state that currently has a domestic partnership registry.

In contrast, at the local level the recognition of non-traditionally defined families has grown by leaps and bounds. There are 41 municipal governments (i.e. cities and counties) which have set up some form of domestic partnership registry and there are 83 municipal governments that offer some employment benefits to the domestic partners of their employees.

Hate-Crime Legislation Which Includes Sexual Orientation and/or Gender Identity



- States with hate crime laws specifying sexual orientation but not gender identity
- States and the District of Columbia with hate crime laws specifying both sexual orientation and gender identity

Hate Crimes

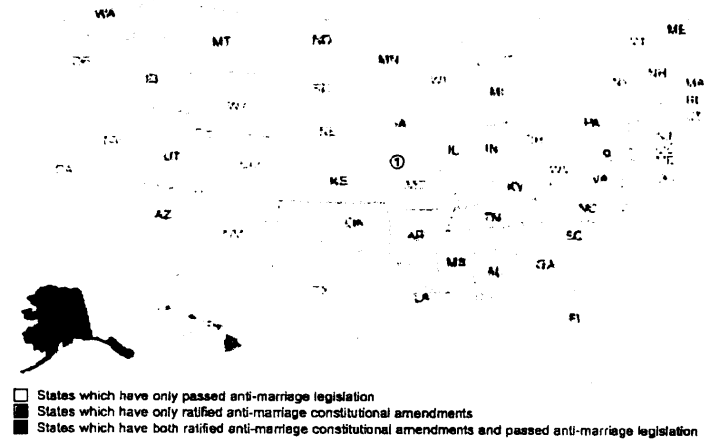
Twenty-three states and the District of Columbia have established some sort of mechanism to respond to and/or record information about hate crimes related to sexual orientation. Of these, only the states of California, Minnesota, Missouri, Vermont and the District of Columbia also identify transgender people as a protected group for purpose of hate crimes laws.

Although the federal Hate Crimes Statistics Act requires the U.S. Justice Department to collect and report on information about hate violence related to sexual orientation, recording and reporting of information by all local police agencies is not required. As such, information about hate violence motivated by sexual orientation and gender identity on a national scale is scarce. The more than 2,500 anti-GLBT incidents reported nationwide in 1998 by The National Coalition of Anti-Violence Programs are just the tip of the iceberg.⁴

Anti-Marriage Legislation/Amendments

To date 30 states have adopted some form of anti-marriage legislation and/or amendment. Sadly, divisive battles to ban same-sex marriage continue with recent ballot initiatives in Alaska and Hawaii. In March 2000, the "Knight Initiative," which if passed would declare only marriages between a man and a woman to be valid, will be put before voters in California.

Anti-Marriage Legislation and Constitutional Amendments



① In May 1998, the Missouri Supreme Court overturned the 1996 law banning same-sex marriage.

Visit Our Searchable Web-Site Containing this Information & More

All of the information contained in this publication, and much more is contained in an electronic database. This fully searchable database is now available online at www.nglrf.org in keeping with the NGLTF Policy Institute's goal to create a searchable virtual clearing house of information, progressive analyses and facts about the GLBT community and our allies.

REVIEW OF THE TYPES OF LAWS INCLUDED IN THIS REPORT AND A GUIDE TO UNDERSTANDING HOW THEY ARE PRESENTED

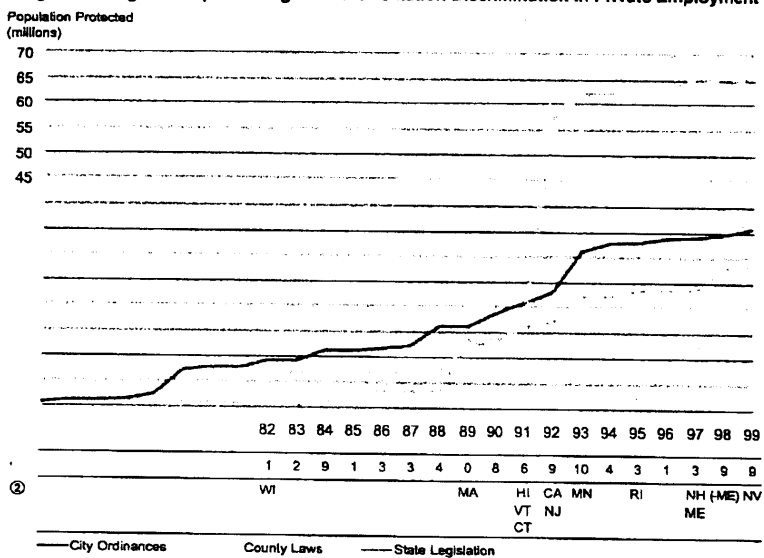
In this section we provide a brief introduction to how these laws generally operate and important information about how we have interpreted and reported on these laws.

In this publication we provide the most detailed overview of laws affecting the rights of GLBT people currently available in a single text. As such, we have had to present the information in a compact format which may not be readily understandable without reference to these introductory and explanatory notes.

1. Laws Prohibiting Discrimination at the Municipal & State Levels

In this report, unless otherwise indicated we have only listed laws which explicitly prohibit discrimination on the basis of sexual orientation. Where gender identity is also a protected class, we have made special note of that fact. In other words, states and municipalities that have anti-discrimination laws, but ones which do not include protection from discrimination

Progress of Legislation prohibiting Sexual Orientation Discrimination in Private Employment



① Number of city ordinances passed (not including those subsequently repealed)

② States and the District of Columbia passing legislation (including those repealed)

Laws prohibiting discrimination against GLBT people take a great variety of forms, are open to a range of interpretations, and often contain a number of exemptions and/or limitations. Therefore, it is important to note that although we have tried to be specific in our reporting about the nature and extent of coverage of anti-discrimination protections, we have not included descriptions of any of the limitations and exceptions which may be attached to these protections.

Nevertheless, despite the complexity of anti-discrimination laws, they tend to have certain characteristics which are fairly consistent. Chief among these is the explicit identification of their scope or coverage, or categories of protection. Put simply, an anti-discrimination law, whether it be at the national, state or local level, will usually specify whether it prohibits discrimination in public employment, public accommodations, private employment, education, housing, credit and union practices. Again, in this publication unless otherwise indicated we have only listed categories of protection which include sexual orientation and/or gender identity. What follows is a general description of these categories:

Public Employment: This category refers to the employment policies or practices of the city/county/state as an employer itself. Generally speaking, it prohibits consideration of irrelevant personal characteristics, such as sexual orientation, in decisions regarding the hiring, firing or promotion of people employed with the city/county/state.

In the area of public employment, the doctrine of 'sovereign immunity' may affect the reach of the statute or ordinance. Sovereign immunity, in its simplest terms, prevents a state (which can include the municipalities and counties of a state) from being sued in its own courts, unless the state consents to the suit. The doctrine and how explicit a state's consent must be varies from state to state. Within this category where we indicate:

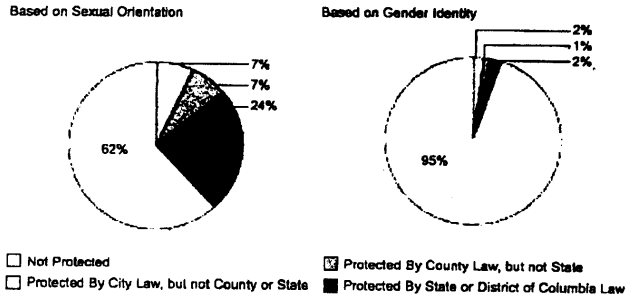
- ▶ "Government employer expressly covered": the statute or ordinance expressly states that the anti-discrimination law applies to the government entity enacting the law, indicating that the government has waived its sovereign immunity;
- ▶ "Any employer or all employers covered": indicates that a broad term such as "all employers" has been used but with no express reference to government entities. While the plain meaning of the statute or ordinance would cover public employers, the broad term may not be sufficiently explicit to withstand a defense of sovereign immunity if raised by the government entity;
- ▶ Where none of the above appears this indicates that we were unable to obtain and review the actual language of the prohibition (see *Research Methodology*).

It is important to note that although this type of prohibition is often incorporated into a City/County Code, it may also exist as an administrative or personnel policy which is separate of municipal law. Although some of these policies have been identified in this publication, they are generally beyond the scope of this report. Readers may therefore wish to contact City/County Personnel Departments to get more information about local policies.

Private Employment: This category refers to the employment practices of private employers. It is usually limited to those employers who operate or otherwise conduct business within the city/county/state limits. Sometimes it applies even more narrowly only to those private employers who do contract work for the city/county/state. Generally, it is the intent of this category to forbid employers from considering irrelevant personal characteristics, such as sexual orientation, in hiring, firing or promotion decisions.

Unless specifically indicated in this report, prohibition of discrimination based on sex-

Protection from Discrimination in Private Employment as a Percentage of Total U.S. Population



ual orientation in employment practices does not mean that the law requires the extension of domestic partnership benefits to employees.

Union Practices: This category refers generally to the practices, policies and decisions of unions or labor organizations. Its aim is usually to prohibit unions or labor organizations from considering irrelevant personal characteristics, such as sexual orientation, in its policies, practices and/or decisions regarding, for example, union membership. Alternatively, it is also often included within the broader section dealing with prohibited practices in employment.

Public Accommodations: This category, often called "Business Practices," is perhaps more than any other open to a great range of different definitions and interpretations. For example, the Ypsilanti, MI City Code contains one of the more detailed definitions of "Place of Public Accommodation":

An educational, governmental, health, day care, entertainment, cultural, recreational, refreshment, transportation, financial institution, accommodation, business or other facility of any kind, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public, or which receives financial support through the solicitation of the general public or through governmental subsidy of any kind.

On the other end of the spectrum, the Urbana, IL City Code defines "Public accommodations" simply as: "All places, businesses or individuals offering goods, services or accommodations to the general public."

Regardless of the specific definition attached to this category, generally speaking, it prohibits discrimination based on personal characteristics, such as sexual orientation, in the provision of services by businesses and/or other services which are generally open to the public. So, for example, it would usually protect people in their everyday activities such as buying groceries, eating at a restaurant, going to the movies or booking a room in a hotel.

It is important to note that depending on the definition and/or interpretation of the category of "public accommodations", the activities of educational institutions and of those businesses which provide credit services may also be encompassed.

Education: This category generally encompasses the practices of educational institutions such as high schools, colleges and universities.³ When it is part of state and/or municipal law, this category usually prohibits the consideration of sexual orientation in decisions or practices regarding admission, expulsion and access to educational facilities. This type of law or policy often also prohibits harassment within educational institutions. In this report this category will only be reported as protected if it is explicitly identified either as a type of "public accommodation" or specified as an independent category of protection.

There is extensive policy making on these issues by school boards, which are beyond the scope of this publication. Moreover, the needs of students extend well beyond the prohibition of discrimination and harassment, and include, for example, access to GLBT sensitive educational materials and the provision of sensitivity training for teachers and other students. We recommend that if you are interested in obtaining more information about these types of policies you contact your local school district or the Gay, Lesbian and Straight Education Network (GLSEN), 121 West 27th Street, Suite 804, New York, N.Y. 10001, Telephone: (212) 777-0135.

Credit: This category refers generally to credit or lending practices, and the decisions and policies of financial institutions.⁴ Protection related to credit prohibits consideration of irrelevant personal characteristics, such as sexual orientation, in decisions regarding the extension of credit.⁵ In this report this category will only be reported as protected if it is explicitly identified either as a type of "public accommodation" or as an independent category of protection.

Housing: This category, also called "Real Estate Practices" in many laws, generally refers to rental, leasing and selling practices related to commercial and/or residential property. Housing protection usually prohibits the consideration of irrelevant personal characteristics, such as sexual orientation, in making decisions regarding the rental, leasing or sale of real estate and/or housing. Interestingly, this category is often explicitly defined to include the credit or lending practices of financial institutions in relation to financing of real estate and housing transactions.

One very common exclusion or limitation of this category of protection is that it not apply to decisions regarding the rental of rooms within single dwelling households in which the person renting or leasing also resides.

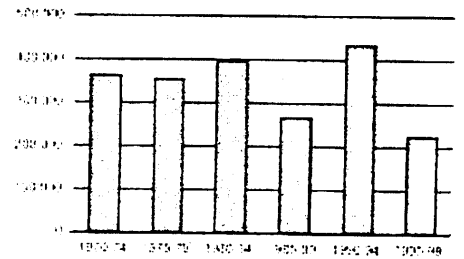
Laws which do not specify coverage: There are some anti-discrimination laws that do not specify any protected classes or list specific areas of coverage. Where this is the case we have tried, wherever possible, to include the actual language used by that law to prohibit discriminatory practices generally.

For more information: To find out more about the civil rights or anti-discrimination laws in your city, town or county, you should contact your local government. If you want to obtain a copy of these laws, call your City or Town Hall, or the County Government Office and ask for the City, Town or County Clerk's office—make sure you tell the person you speak with that you do not want a court clerk. You should also find out if your city, town or county has an agency in charge of enforcing or monitoring discrimination and call them for information.

If you want more information about any of your state's laws you should call your State Legislative Information Office for information—refer to Capital Gains and Losses for the number of your State Legislative Information Office. Again, you should also find out if your state has an agency in charge of enforcing or monitoring discrimination within your state.

Contact phone numbers and web-site addresses for all of the City, Town and County Clerks, as well as for State Legislative Information Offices are also available on the searchable web version of this publication—www.ngitf.org.

Average Size of Cities Enacting Protection From Sexual Orientation Discrimination*



*Not including those subsequently repealed

2. Hate Crimes Laws

Few cities have enacted laws dealing with bias-motivated crimes;⁴ hate crime laws are usually enacted at the national and state levels. In this report we have included some information about the hate crime laws, or the absence of such laws, for all states. The information provided can be summarized in this way:

1. If a state's hate crime law(s) identifies sexual orientation as a potential basis for a hate crime a citation and summary description of the law(s) is given; and/or,
2. If a state's hate crime law(s) also identifies gender identity as a potential basis for a hate crime, special note is made of this fact; or,
3. It is noted if the state has a hate crimes law that does not include sexual orientation and/or gender identity as a protected class; or,
4. It is noted if the state has no hate crimes law at all.

These laws take a variety of forms and deal with bias motivated crimes in a number of different ways. In responding to crimes motivated by hate, a single jurisdiction may have laws which do one, some or all of the following:

- > "Separate Crime/Sentence Enhancement": Create a separate crime or penalty for crimes motivated by particular kinds of hate and/or provide for enhanced penalties (sometimes mandatory and other times discretionary) for crimes motivated by hate;
- > "Aggravating Factor": Stipulate in its general sentencing provisions that a finding that a crime was motivated by hate can/must be considered an "aggravating factor" in sentencing; and/or,
- > "Data Collection": Require local law enforcement agencies to collect and keep information about hate motivated crimes (usually also requiring that this information be forwarded to a state agency for analysis).

Another important feature of anti-hate crimes laws is the way in which the motivation for hate crimes is described. The designation:

- > "Because of" may narrow protection to the actual status of the victim; whereas,
- > "Actual/Perceived" or "Motivated by" may apply more broadly to the perceived status of the victim. For example, it does not matter if a victim of a hate motivated crime actually is gay; it only matters that the perpetrator was motivated by hate to commit a crime based on a perception that the victim was gay.

It is important to note that both anti-discrimination and hate crimes laws do not only protect members of, for example, ethnic, religious or sexual minorities. These laws protect all people from hatred and unfair treatment based upon, for example, a person's race, religion and sexual orientation. For example, a heterosexual person who was assaulted, or discriminated against, because of his/her sexual orientation, would also be protected under these laws.

For a more detailed discussion of anti-hate crimes laws refer to Hector Vargas, NGLTF State Legislative Lawyer, *State by State Hate Crimes Laws at a Glance*. To obtain a copy of this document, contact the National Gay and Lesbian Task Force at (202) 332-6483.

3. Criminalization of Consensual Sexual Activity

Currently, 19 states criminalize private consensual sexual activity between adults in a number of ways. Criminal offenses of this type may be generally worded to cover what is called "unnatural" sex acts or "crimes against nature," or may single out "sodomy" (which is usually defined as including oral and anal sex) in particular. The penalties available for offenses such as these range from 30 days to life imprisonment.

In this publication, where a state currently criminalizes consensual sex between adults in private, a citation for the offense is provided along with an indication as to whether it applies to both opposite and same-sex conduct or only same-sex conduct. There are currently 5 states (AR, KS, MO, OK and TX) which have laws which specifically criminalize only same-sex consensual sexual activity. The remaining 13 states which criminalize consensual sexual activity do so for certain acts - such as oral or anal intercourse - regardless of the sex of the parties.

Where a state's law prohibiting sodomy or other consensual sexual activity in private and between adults has been repealed by the legislature we will indicate the year in which the law was repealed. Where the law was invalidated by judicial decision we will provide a full case citation.

4. Anti-Marriage Legislation & Constitutional Amendments

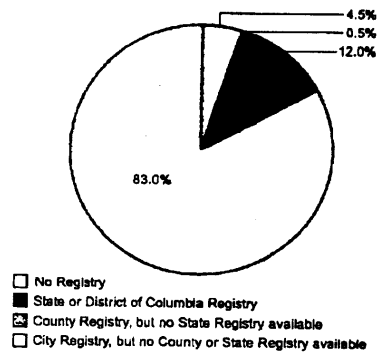
At the time of publication of this report there were 30 states with laws that specifically prevented the recognition and/or performance of same-sex marriages. Two of these - the states of Alaska and Hawaii - have gone so far as to amend their constitutions: Alaska to define marriage as exclusively opposite-sex, and Hawaii to permit but not require the state legislature to limit marriage to people of the opposite-sex. Laws of this type accomplish their discriminatory goals in two ways:

1. Preventing the solemnization (i.e. performance) of same-sex marriages within the state.
A state may:
 - > "define marriage as opposite-sex" thus making that institution exclusively available to opposite-sex couples; and/or it may,

- > "prohibit performance" of same-sex marriages, which is a prohibition directed at officials who solemnize marriages; and/or a state may simply
- > "prohibit same-sex marriages"
- 2. Preventing the recognition of same-sex marriages even though they were performed legally in another state or country. A state may,
 - > "declare void", "invalid" and/or "against public policy" same-sex marriages within the state; and/or it may,
 - > "prohibit recognition" of same-sex marriages by the local state and other officials.

In this publication we have provided a citation for these types of laws and a brief description (using the short hand quoted immediately above) of the mechanism(s) by which the recognition and/or performance of same-sex marriages has/have been prevented.

People Who Live in a State, County, or City which has a Domestic Partner Registry as a Percentage of Total US Population



5. Domestic Partnership Registries and Employment Benefits

This category generally refers to laws that promote recognition of the social value and economic well-being of domestic partnerships. Although "domestic partner(ship)" is defined in municipal and state law in many different ways, based upon several variables, it can be generally described as an ongoing relationship between two adults who are the same or opposite sex:

1. unmarried
2. sharing a residence,
3. over the age of 18,
4. emotionally interdependent, and
5. intend to reside together indefinitely.

Beyond this basic framework—which itself is not universal—cities, counties & states usually define "domestic partner(ship)" to specifically exclude two adults who are related by blood such that they would not be able to marry.

A common variable in the definition of "domestic partner(ship)" is whether it is available to:

- > "Opposite & same-sex" couples; or,
- > "Same-sex only." Generally, the policy objective behind the limitation of "domestic partner(ship)" to same-sex couples is that opposite-sex couples have the option to get married, and by so doing get the same or a greater level of benefits as that available to domestic partners.

There are three main types of laws dealing with "domestic partner(ship)s":

Domestic Partnership Registry: This type of law generally authorizes a City/County Clerk or the Secretary of State to operate and keep a public record of domestic partnerships. Registering a domestic partnership normally involves making a declaration of the existence of a domestic partnership and a commitment to inform the Clerk should that relationship come to an end. Generally, only those people who either live or work in a city/county/state may join its registry; where this is not the case that fact is specifically noted.⁹

Some registries create certain rights that are attached to being in a publicly recognized and recorded domestic partnership. Commonly, domestic registry laws will:

- > "Facilitate visits to...": municipal laws often specify that domestic partners must be given the same right as spouses to visit a partner in a jail and/or medical facility, or to have access to the school or records of a partner's child. Otherwise there may be
- > "No Rights Specified": registries may not specify or create rights themselves other than the right to register the relationship. One of the values of these registries is that they create a public record of the existence of a domestic partnership which may be referred to by employers who extend employment benefits to the domestic partners of their employees.

Domestic Partnership Benefits: This type of law or policy is one that extends or authorizes the extension of employment related benefits to city/county/state employees who have domestic partners. Occasionally there is no law, per se, which authorizes the extension of benefits; benefits are sometimes simply extended by a policy which has not been formally ratified by a law-making body and/or have been extended incrementally through different labor agreements.

Employment benefits can be broken down into two categories, often referred to as "soft" and "hard":

- > "Soft Benefits" are lower cost, non-health benefits that may include, among other benefits: bereavement and sick leave, parental leave, adoption assistance, relocation benefits & participation in employee assistance programs.
- > "Hard Benefits" are generally insurance benefits that may include: medical benefits, dental and vision care, dependent life insurance, long-term care & day-care.

Equal Benefits Ordinance: Only the cities of San Francisco, Sacramento, Davis and Seattle and the County of Broward have municipal laws of this type.¹⁰ These laws either require or encourage private employers to extend employment benefits to employees with domestic partners.

- > Davis, CA requires all employers operating in the city to offer "family care leave" and "bereavement leave" to employees with domestic partners if it is offered to employees with spouses to whom they are married.

- Sacramento, CA requires private employers who operate within Sacramento to provide "unpaid related person leave" (such as "family care leave" or "bereavement leave") to employees with domestic partners if it does so for employees with spouses to whom they are married.
- San Francisco, CA requires those private employers with which it contracts to extend both hard & soft benefits to employees with domestic partners at the same level as it does for employees with spouses to whom they are married.
- Seattle, WA requires those private employers holding contracts with the city which have an estimated value of \$33,000 or more to extend both hard and soft benefits to employees with domestic partners at the same level as it does for employees with spouses to whom they are married. However, to the extent that the cost of providing employment benefits to the domestic partners of employees exceeds the cost of providing those same benefits to the spouses of employees (or vice versa) the employee is required to make up the difference.
- Broward County, FL offers a bidding preference in the amount of 1% to those private employers that offer employment benefits to employees with domestic partners at the same level as it does to employees with spouses to whom they are married.

Because of the rarity of this type of law a separate field has not been created. Information regarding these types of laws can be found in either or both of the "Notes" sections of the records for these cities.

For a more detailed discussion of domestic partnership arrangements and suggestions for advocating for their recognition, refer to Sally Kohn, *The Domestic Partnership Organizing Manual For Employee Benefits* published by the NGLTF Policy Institute. The publication is available at www.nglrf.org/pubs/dp_pub.html or by calling (202) 332-6483.

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