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August 2, 1991

William L. Jarocki, Executive Director  
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3314 Grace Street  
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Application of the Idaho Human Rights Act to Cities

Dear Mr. Jarocki:

You have asked whether Idaho Code § 67-5901, as amended in 1991 by S.B. 1064, applies to cities. If the answer is "yes," you have then asked if the definition of "discrimination" found in this section extends to situations where cities provide employee benefits, and how it applies.

The answer to your first question is "yes." The Idaho Human Rights Act prohibits discrimination based upon race, sex, color, national origin, and religion in the areas of employment, public accommodations, educational services, and real estate transactions. In the area of employment, discrimination based upon age (over 40) and handicap are also prohibited.

The statutory definition of "employer" appears in Idaho Code § 67-5902(6). As of July 1, 1991, that definition is as follows:

"Employer" means a person, wherever situated, who hires five (5) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year whose services are to be partially or wholly performed in the state of

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Idaho, except for domestic servants hired to work in and about the person's household. The term also means:

(a) a person who as contractor or subcontractor is furnishing material or performing work for the state;

(b) any agency of or any governmental entity within the state; and

(c) any agent of such employer. (emphasis added.)

Cities are covered employers under § 67-5902(b) since they are "governmental entities within the state."

Your question suggests that SB 1064, adjusted by the 1991 Legislature, affected the status of cities under the Human Rights Act. It did not. That amendment reduced from ten to five the number of employees which a private employer must have in order to be covered by the act. Both before and after July 1, 1991, governmental entities were considered to be "employers," regardless of the number of employees.

It should also be noted that § 67-5902(5) defines a "person" to include any "governmental entity" as well. This means that not only do cities have a duty not to discriminate as employers, but they are also obliged not to discriminate in the giving of services under § 67-5905(5).

Your next question is whether the duty not to discriminate reaches the offering of employee benefits. Once again, the answer is "yes."

Idaho Code § 67-5909(1) prohibits discrimination against a person based upon race, color, religion, sex, national origin, age or handicap, in all areas of the employment relationship including the terms, conditions or privileges of employment. The offering of employee benefits is clearly a term, condition or privilege of employment. Thus, benefits may not be offered on a basis that prefers one gender, race, etc. over another.

Your main concern appears to be whether cities are legally obligated to offer maternity benefits. The answer to that question requires reference to Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, which is the federal counterpart of the Idaho Human Rights Act, prohibiting discrimination in employment.

We are not aware of any law which requires an employer to offer health insurance to its employees. Title VII, however,

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does require an employer who chooses to offer health insurance to include maternity benefits. To refuse such coverage is a form of illegal sex discrimination. See EEOC v. Wooster Brush Co., 727 F.2d 566 (6th Cir. 1984.) Title VII applies to employers, including cities, who have at least 15 employees.

Title VII has a definition of sex discrimination which makes it very clear that "sex discrimination" includes discrimination on the basis of pregnancy. 42 U.S.C. 2000e(k) reads as follows:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

For Idaho employers who are too small for Title VII coverage, the Idaho Human Rights Act may still be applicable and clearly is applicable in the case of cities. To our knowledge, no court has yet ruled on the specific question of whether it is illegal sex discrimination under state law, as it is under federal law, to offer health insurance but refuse to offer maternity coverage.

State law does not have the same language quoted from Title VII above. In fact, it does not include a definition of sex discrimination at all. It does state, however, that one purpose of the Idaho Human Rights Act is to "provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, as amended." See Idaho Code § 67-5901(1). Also, our state courts have been guided by Title VII in interpreting other provisions of the Idaho Human Rights Act. See for example, O'Dell and the Idaho Human Rights Commission v. John Basabe and J.R. Simplot Co., \_\_\_ Idaho \_\_\_, 810 P.2d 1082 (1991); Hoppe v. McDonald, 103 Idaho 33, 644 P.2d 355 (1982); and Bowles v. Keating, 100 Idaho 808, 606 P.2d 458 (1979).

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It is likely that a court would rule that "sex discrimination" has the same meaning under state law as it has under federal law. If so, then any employer offering health insurance as a benefit of employment to its employees should include maternity coverage.

An alternative to purchasing such insurance is for the employer to self-insure for maternity coverage. This may be a viable option for employers with small workforces and known low risk for pregnancies. An employer who self insures would be liable for the costs which would have been paid by insurance if it had been purchased.

It is our understanding that the Idaho Human Rights Commission and the Department of Insurance are jointly developing more detailed interpretations of the law in order to help small employers comply. Both departments should be available to discuss options with you.

Sincerely,

*Leslie L. Goddard*  
AG

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Deputy Attorney General

LLG/mkf