



CLIENT ALERT

Navigating Compensation Governance in Uncertain Times

California Board Diversity Mandate Held Unconstitutional

A federal district court recently declared that California’s board diversity mandate is unconstitutional. The court’s decision follows an earlier ruling by a California State court that previously struck down the diversity mandate.

Background

Generally, California-headquartered public companies must include 1 to 3 directors (depending on the size of the board) from an underrepresented community on their board of directors. Directors from an underrepresented community cover individuals who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identify as gay, lesbian, bisexual or transgender. The State of California may impose fines on subject corporations that fail to meet the mandated diversity requirements.

Lawsuit Challenging Board Diversity Mandate and Court Ruling

The Alliance for Fair Board Recruitment (AFBR), a non-profit organization that seeks to promote the recruitment of corporate board members without regard to race, ethnicity, sex and sexual identity filed suit challenging California’s board diversity mandate. The lawsuit claimed that the California board mandate violates the Equal Protection Clause of Fourteenth Amendment and federal civil rights law.

AFBR moved for summary judgment, claiming that California’s board diversity mandate should be invalidated as unconstitutional on its face because the law imposes a racial quota by setting a minimum number of directors from a select racial and ethnic pool.

In opposition to the motion, the State of California argued that the law does not (i) establish a racial quota because it only sets a “flexible floor” for diversity, or (ii) create preferred racial and ethnic classes because individual board candidates must still compete with others and each candidate must go through an individualized consideration process. The State of California also argued that racial classification was permissible because it remedied past discrimination.

On May 15, 2023, the federal district court for the Eastern District of California ruled in favor of AFBR, holding that California’s board diversity mandate **is unconstitutional**. The court found that the law “requires a certain fixed number of board positions to be reserved exclusively for certain minority groups” in violation of the Equal Protection Clause.

Meridian comment. The failure of California’s two board diversity mandates (one relating to members of underrepresented communities and another relating to gender diversity) to withstand judicial scrutiny has likely discouraged the enactment of such mandates by other states. California has not indicated whether it would appeal the federal court ruling.

AFBR has also petitioned the Fifth Circuit Court of Appeals for review of the Nasdaq board diversity rule (see [Meridian Client Update dated August 19, 2021](#) for details on the rule). No ruling has been issued on this additional case.

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The **Client Alert** is prepared by Meridian Compensation Partners' Governance and Regulatory Team led by Donald Kalfen and Ron Rosenthal. Questions regarding this Client Alert or executive compensation technical issues may be directed to Donald Kalfen at 847-235-3605 or dkalfen@meridiancp.com or Ron Rosenthal at 847-235-3621 or rosenthal@meridiancp.com.

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