

# Meridian Client Update

## California Enacts Diversity Mandate for Public Company Boards and Reporting Mandate on Pay by Gender, Race and Ethnicity

On September 30, 2020, California Governor Gavin Newsom signed into law two landmark bills. These new laws mandate that boards of public companies headquartered in California must meet certain board diversity requirements and that California businesses with at least 100 employees must annually report salary and wage information for specific job categories segmented by race, ethnicity and sex.

### Board Diversity Mandate

As we previously reported in our Client Update dated September 10, 2020, the California Assembly approved a first-in-the-nation legislation that would require public companies to include a minimum number of individuals from underrepresented communities on their boards. The mandate applies to publicly held corporations whose principal executive offices are located in California. The diversity mandate will be phased in over a multi-year period, with the first compliance milestone required by the close of the 2021 calendar year.

A subject corporation’s board of directors would be required to include at least one member from an underrepresented community by December 31, 2021. By December 31, 2022, a subject corporation’s board of directors would be required to include a minimum number of members from an underrepresented community based on the total number of board members, as shown in the following chart:

Total Number of Board Members	Minimum Number of Directors From an Underrepresented Community
9 or more	3 directors
More than 4 but fewer than 9	2 directors
4 or fewer	1 director

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 diversity mandate has already drawn litigation. On September 30, 2020, Judicial Watch filed a lawsuit in California state court seeking to prevent California from enforcing the diversity mandate. Judicial Watch contends that the mandate is unconstitutional under California law.

## Pay Reporting Mandate

The pay reporting mandate applies to private employers with at least 100 employees and who are required to file an annual Employer Information Report (EEO-1) with the Equal Employment Opportunity Commission (EEOC), which is a federal agency. This new mandate is intended to help identify discriminatory pay practices by private employers and the presence of racial and gender wage gaps, with the long-term goal of reducing such gaps.

Under the pay reporting mandate, covered employers must submit an annual pay data report to the California Department of Fair Employment and Housing (“DFEH”) that contains specific wage information. This information includes:

- The number of employees by race, ethnicity and sex in ten separate job categories, including (i) executive or senior level officials and managers; (ii) first- or mid-level officials and managers; (iii) professionals; and (iv) laborers and helpers.
- The number of employees by race, ethnicity and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics.
- The total number of hours worked by each employee counted in each pay band during the reporting year.

The first report is due on March 31, 2021, and annually thereafter.

If an employer fails to submit its annual pay data report, the DFEH may seek a judicial order requiring the employer to comply with data reporting requirements.

One issue raised by the new pay reporting mandate is its failure to define “private employers”, the 100 employee threshold and employees who are subject to the reporting mandate. At present, companies are left to speculate as to whether private employers solely relate to employers based and doing business in California or whether it also covers private employers based outside of California but who have workers within California. The principal issue raised by the 100 employee threshold is whether employees counted against the threshold must be based in California or whether employees based outside of California are also counted. Lastly, it is unclear whether the pay reporting mandate solely relates to California-based workers or whether it also includes non-California-based workers for private employers with workers in and outside California. Presumably, DFEH will issue guidance to clarify these and other related issues.

Pay data submitted to California under the new pay data reporting requirement and to the EEOC under existing federal rules are not subject to public disclosure. However, investors have shown growing interest in seeing pay data publicly disclosed. In this regard, the Comptroller of New York City and certain city retirement funds have led a campaign requesting targeted public companies to disclose private pay data submitted to the EEOC on form EEO-1. In response to this campaign, 34 public companies have agreed to publicly disclose such pay data. These companies include Citigroup, Goldman Sachs, GM, Visa, Pfizer, Morgan Stanley, PepsiCo, Starbucks, Target, MasterCard and Verizon.

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