

Meridian Client Update

Los Angeles County Court Strikes Down California’s Mandate on Female Board Members

On May 13, 2022, the Los Angeles County Superior Court declared California’s mandate on female board members as unconstitutional. This decision comes less than 2 months after the same court declared California’s mandate on board members based on racial or sexual orientation as unconstitutional.

Background

On September 30, 2018, then Governor Jerry Brown signed into law legislation that mandates boards of public companies headquartered in California meet the following quota on female board members by December 31, 2021 (“Gender Mandate”):

Total Number of Board Members	Minimum Number of Female Directors
6 or more members	3 female directors
5 members	2 female directors
4 or fewer members	1 female director

The Gender Mandate empowers the State of California to impose fines on subject corporations that fail to meet the foregoing quota.

Court Ruling

On May 13, 2022, the Los Angeles County Superior Court held that the state’s Gender Mandate violated the Equal Protection Clause of the California Constitution.

The Superior Court found that plaintiffs showed that men and women are treated in an unequal fashion under the Gender Mandate. As such, the Court further found that plaintiffs demonstrated that the Gender Mandate is presumptively unconstitutional.

To overcome this presumption, the State of California needed to show that the Gender Mandate could withstand “strict scrutiny” by the Superior Court, in which case the Court would uphold the Gender Mandate as constitutional. To satisfy the relatively high test for strict scrutiny, the State of California would need to show that the Gender Mandate (i) satisfies a “compelling state interest,” (ii) is necessary and (iii) is narrowly tailored.

The Court rejected California's arguments that the Gender Mandate satisfied the criteria for strict scrutiny, noting the plaintiffs failed to show the following:

- *Compelling state interest.* Despite California's claim that the Gender Mandate eliminates and remedies discrimination in the director selection process, the Court found no compelling governmental interest in remedying discrimination in the board selection process because neither the state nor the legislature identified any specific, purposeful, intentional and unlawful discrimination in the director selection process to be remedied.
- *Necessary.* Despite California's claim that the Gender Mandate is necessary to boost California's economy, improve opportunities for women in the workplace and protect California taxpayers, public employees, pensions and retirees, the Court noted that California failed to present any legal precedent that such claims were found to be a compelling state interest that justified the use of a suspect gender-based classification. Further, the Superior Court noted that California failed to present persuasive evidence of any causal link between the Gender Mandate and its claimed benefits.
- *Narrowly tailored.* The Court found that the State of California did not sufficiently prove that the use of a gender-based classification was limited in scope and duration to that which is necessary to remedy specific, unlawful discrimination against women in the selection of board members.

Since California was unable to carry its burden under strict scrutiny, the Superior Court found the Gender Mandate to be unconstitutional.

Meridian comment. The State of California has indicated that it will appeal the Superior Court's decision. It is certainly possible that the California appellate court or Supreme Court could reverse the lower court's decision.

Despite the adverse rulings, we expect that companies will continue to diversify their boards for various reasons, including increased heightened focus on diversity by institutional investors, benefits from diversity of background and experiences, and proactive compliance with Nasdaq's proposed board diversity listing requirements (see Meridian Client Update dated August 19, 2021).

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

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