

**SECTION OF LABOR & EMPLOYMENT LAW
AMERICAN BAR ASSOCIATION
ANNUAL SECTION CONFERENCE**

November 11, 2020

**THE MOVEMENT TO DIVERSIFY CORPORATE BOARDS
AND HOW TO POSITION YOURSELF FOR A DIRECTORSHIP***

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This paper addresses laws in the United States and in other countries that govern or affect diversity on corporate boards.

I. Laws in the United States

A. Overview

Until recently, no federal or state laws have been passed that regulate diversity on corporate boards. That all changed in 2018 – not surprisingly, in California.

B. California – Representation of Women on Boards (SB 826)

On September 30, 2018, following the height of the #MeToo movement and an increase in gender discrimination awareness across the United States, the California Legislature passed SB

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826¹, an amendment to the California Corporations Code. Then-Governor Jerry Brown signed the bill into law, the first law in the United States mandating gender diversity on corporate boards.

Existing law generally provides for the business and affairs of corporations that transact business within California to be governed by the corporation's board of directors. The new law, SB 826, requires domestic and some foreign² publicly held corporations whose principal offices are located in California to have a minimum of one female on its board of directors by the close of the 2019 calendar year. The law also requires that, by the close of the 2021 calendar year, a corporation with five directors must have at least two female directors, and a corporation with six or more directors must have at least three female directors. Pursuant to the law, corporations must disclose these board members, and the Secretary of State can now publish various reports documenting the number of corporations in compliance with these provisions and can impose fines for violations of the law.

Soon after the bill was signed into law, local organizations – many of whom are generally against government intervention in private businesses – began pushing back against what they called “the woman quota.”³ One organization, the Pacific Legal Foundation, was particularly vocal about its disapproval of the law. In November 2019, the PLF⁴, filed a lawsuit against the Secretary of State, Alex Padilla, in the U.S. District Court for the Eastern District of California.⁵ The plaintiff in the lawsuit, Creighton Meland, is a retired corporate attorney and a shareholder of a California-based company (with an all-male board of directors); he argued that “the woman quota” would force him to discriminate when voting on board members at the shareholder election.⁶ The case sought a declaratory judgment that the statute was unconstitutional and a permanent injunction preventing its enforcement.

In its complaint, the PLF argued that SB 826 is “not only deeply patronizing to women” but also “plainly unconstitutional” under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. The plaintiff argued that the most blatant flaw of the “quota” was that it requires companies to make hiring decisions on the basis of sex. Any law that contains a sex-based classification is subject to heightened scrutiny, and the government bears the burden of justifying its differential treatment by showing that it is substantially related to an important government interest. The basis of Meland's argument was that sex-based preferences can be justified only by specific evidence of past or present discrimination, citing *Regents of Univ. of California v. Bakke*,⁷ whereas California relied solely on “generalized statistics” showing that women are underrepresented on corporate boards. Additionally, PLF argued the law is overbroad in that it

¹ Cal. Corp. Code § 301.3 (West).

² SB 826 applies to foreign corporations that are publicly held corporations to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated. Cal. Corp. Code § 2115.5 (West).

³ <https://www.axios.com/californias-women-quota-in-boardrooms-pushback-4c1f8914-1148-41f4-b48c-0ecafc3835a1.html>

⁴ The Pacific Legal Foundation is a libertarian, non-profit legal organization focused on “government overreach” and property law.

⁵ Creighton MELAND, Jr., Plaintiff, v. Alex PADILLA, in his official capacity as Secretary of State of the State of California, Defendant., 2019 WL 6037825 (E.D. Cal.)

⁶ <https://pacificlegal.org/case/creighton-meland-v-alex-padilla-secretary-of-state-of-california/>

⁷ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978)

applies to all corporate boards, regardless of the percentage of women currently working in the corporation or the history of women and discrimination in each corporation.

In April 2020, the federal district court dismissed Meland’s lawsuit without addressing whether SB 826 was constitutionally permissible.⁸ The court found that the plaintiff lacked standing because the statute imposed obligations on a company but not on its shareholders and that the action was derivative because Meland could cast his vote for any board nominee he liked. Additionally, by the time of the decision, the corporation in question had hired a woman to its board of directors, so it faced no threat of penalty or fines under the new law. The court found no harm had been caused to the company and therefore dismissed the claim.

The PLF filed an appeal of the decision in the Ninth Circuit.⁹

C. California – Representation of Underrepresented Communities on Boards (AB 979)

This year, in the throes of a national conversation about racial equity and justice, Governor Gavin Newsom signed into law AB 979 on September 30, 2020.¹⁰ AB 979 is also first of its kind in the United States; it requires that all publicly held domestic or foreign corporations with principal offices in California must include a minimum of one director from an “underrepresented community” by the end of the 2021 calendar year.

The law requires that, no later than the close of the 2022 calendar year, applicable corporations with more than four, but fewer than nine, directors to have a minimum of two directors from an underrepresented community, and such corporations with nine or more directors to have a minimum of three directors from an underrepresented community.

An individual from an underrepresented community includes “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.”¹¹ Similar to SB 826 relating to gender diversity, companies that violate AB 979 can face severe penalties and fines.

D. Impact of California Statutes

As reported in the Wall Street Journal, “ninety-three California-based members of the Russell 3000—an index that includes most public companies on major U.S. stock exchanges—had all-male boards when SB 826 was signed in September 2018, according to Equilar, a corporate governance-data firm.”¹² As of November 22, 2019, about one year later, that number drastically dropped from 93 to only 17 boards with all-male directors. Additionally, as another year-end deadline approached, more corporations were reporting an increase in female directors.

⁸ *Meland v. Padilla*, No. 2:19-CV-02288-JAM-AC, 2020 WL 1911545, at *1 (E.D. Cal. Apr. 20, 2020)

⁹ CREIGHTON MELAND V. ALEX PADILLA, 20-15762

¹⁰ 2019 California Assembly Bill No. 979, California 2019-2020 Regular Session.

¹¹ Cal. Corp. Code § 301.4 (West).

¹² Rachel Feintzeig, *California Law Spurs Companies to Add Female Directors*, The Wall St. Journal, Dec. 18, 2019.

The new laws led not only to more women recruited to corporate boards but also affected how investors choose to fund corporations. Some venture capital firms now focus on funding companies that have at least one female founder or C-level executive and/or that are willing to recruit top female talent to its Board of Directors. And as a testament to the 2020 amendment to California's Corporate Code, "Goldman Sachs Group Inc. has announced it would no longer take companies public without at least one board director from an underrepresented group."¹³

E. Other States

As with other novel laws in California (especially related to employment law), what starts in California can likely spread nationally. A few states have started introducing bills that, while not replicas of SB 826 and AB 979, promote diversity on corporate boards in their states.

For example, Illinois now requires domestic and foreign corporations with principal offices in Illinois to disclose publicly in their annual filings the corporation's process for evaluating nominees to board positions, including whether and how demographic diversity will be a point of consideration, as well as the steps the corporation will take that year to promote diversity in all levels of the corporation's managers and employees.¹⁴

A recent New York law, A 6330/S 4278, signed by Governor Cuomo on December 30, 2019, requires corporations to report the number of directors sitting on their board and how many of those directors are women, as part of the corporation's routine filing statement.¹⁵ The law requires a study to be done on the proportion of women on the boards of corporations authorized to do business in New York; the law does not prescribe penalties.

In Maryland, a new law titled "Gender Diversity in the Boardroom" requires corporations, and some non-profits, doing business in the state to have at least 30% women on their boards by the end of the calendar year 2022.¹⁶

Several states, including Hawaii, Massachusetts, Michigan, New Jersey, and Washington, seem to have legislation in the works that closely mirrors the recent laws in California, though the timing and definitions of "underrepresented" individuals may vary.¹⁷ It is unclear whether these bills will be ratified into law.

¹³ <https://www.jdsupra.com/legalnews/new-california-law-mandates-corporate-23838/>

¹⁴ 805 Ill. Comp. Stat. Ann. 5/8.12 (2019).

¹⁵ <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-york-to-require-corporate-reporting-on-women-on-the-board.aspx>

¹⁶ Md. Tax-Prop. Code Ann. § 11-101 (2020).

¹⁷ <https://cooleypubco.com/2020/02/13/states-follow-california-board-gender-diversity-mandates/>

II. Laws in Other Countries

Many countries in Europe – and elsewhere have implemented quotas for women on corporate boards. Such quotas have had a powerful impact on boosting the number of women on boards.¹⁸

Norway became the first European country to institute a board quota for women in 2003, when it set a requirement of 40% female participation on corporate boards.¹⁹ Since then, numerous other countries, including Spain, Iceland, France, Italy, Belgium, the Netherlands, Germany, Austria, Portugal, Israel, Greece, Malaysia, India, UAE, and Denmark, have instituted similar quotas.²⁰ As Elin Myrmed-Johansen, Director of Communications for the Norwegian savings and insurance company, Storebrand, explained, the quotas were difficult to stomach at first, but they are paying off – “Gender [parity] is about strengthening business, not about being nice.”²¹

In the United Kingdom, a private effort to increase the number of women on boards has garnered some success. In particular, Great Britain does not have legislated boardroom quotas, but through a group called the 30% club,²² Helena Morissey, a money manager, has persuaded major British companies to double the percentage of women on their boards, raising the percentage to percent in 2015.²³

¹⁸Alison Smale & Claire Cain Miller, *Germany Sets Gender Quota in Boardrooms*, New York Times (March 6, 2015), available at <http://www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html>.

¹⁹Alina Dizik, *Do quotas for corporate boards help women advance?* Capital Ideas Magazine, Spring 2015, available at <http://www.chicagobooth.edu/capideas/magazine/spring-2015/do-quotas-for-corporate-boards-help-women-advance>.

²⁰*Id.*

²¹*Id.*

²²See <http://30percentclub.org/>

²³*Infra* at n.22.