COVINGTON

California Becomes First State to Require Women on Corporate Boards

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Corporate Governance

On September 30, 2018, California Governor Jerry Brown signed Senate Bill 826 into law making California the first state to require corporations to include women on their boards of directors. At the same time, but not discussed in this Client Alert, Governor Brown also signed into law several other landmark bills aimed at addressing the #MeToo movement by strengthening sexual harassment protections in the workplace.

Senate Bill 826 requires publicly held domestic or foreign corporations listed on a major U.S. stock exchange with principal executive offices located in California to have at least one female director on their board by the end of 2019 and by no later than the end of 2021 to implement the following change depending on the size of their board:

- At least one female director for boards with four or fewer board members.
- At least two female directors for boards with five board members.
- At least three female directors for boards with six or more board members.

The law defines "Female" as an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth. Violations of the new law carry fines of $100,000 for first offenses and $300,000 for subsequent offenses. Companies may increase the number of directors on their board to comply with the new law. The law also requires companies to report their board composition to the California Secretary of State or face a fine of $100,000.

"Given all the special privileges that corporations have enjoyed for so long, it's high time corporate boards include the people who constitute more than half the 'persons' in America," Gov. Brown wrote in a signing message. Among companies listed in the Russell 3000 Index, 485 or 17 percent had all-male boards in the second quarter of 2018, according to Equilar, a research firm that gathers data on executives and boards. Among these 485 companies, 86 had principal executive offices in California.

Many European countries, including Spain, Belgium, Italy, France, and Germany, already impose a mandate on corporations to fill at least a certain percentage of board seats (mostly in the 30 percent to 40 percent range) with women. Norway enacted one of the more stringent requirements in 2007 introducing a 40 percent female representation requirement on corporate boards of listed companies and forcing companies to seek dissolution if they failed to comply. As a result, the number of women directors on company boards in several European nations, including France, Italy, and Germany, has tripled and, in some cases, quadrupled in recent years as corporations are forced to take action to stay legally compliant.

Business groups have questioned the legality of the state government's reach if the new law is enforced against corporations incorporated outside of California solely due to headquarters being located in California. For example, more than 80 percent of the Russell 3000 companies with California headquarters are incorporated in Delaware. There are also opposition coalitions that argue the new law violates existing law and constitutional rights at both the state and federal levels because it will displace existing members or appoint new members to the board of directors solely on the basis of gender. "I don't minimize the potential flaws that indeed may prove fatal to its ultimate implementation," Gov. Brown wrote in a signing statement. "Nevertheless, recent events in Washington, DC — and beyond — make it crystal clear that many are not getting the message."

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