

NYC Controller Launches "Rooney Rule" Initiative, But Is It Legal In California?

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John Jenkins yesterday [wrote](#) about the New York City Controller's initiative asking boards of directors to adopt a policy "*requiring* that the initial lists of candidates from which new management-supported director nominees and chief executive officers (CEOs) are chosen include qualified female and racially/ethnically diverse candidates (an arrangement sometimes referred to as the "Rooney Rule") . . ." (emphasis in original). The question arises, however, whether such a policy would run afoul of state laws guaranteeing equal treatment by businesses.

The California Unruh Civil Rights Act is one such law. It provides:

"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Cal. Civ. Code § 51(b). The Act protects "all persons" and is not limited to categories of "protected persons".

Violations of the California Act can be costly. Section 52 of the Civil Code provides that anyone who denies, aids or incites a denial, or makes any discrimination or distinction contrary to the Act is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than \$4,000, and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in the Act. Section 52 also provides that the Attorney General, a district or city attorney or the person aggrieved by the prohibited conduct may bring a civil action seeking preventative relief, including a temporary restraining order or injunction. Actions under Section 52 are independent of other remedies and procedures available to the aggrieved party.

In this [press release](#) announcing the initiative, the NYC Controller has said that he will file shareholder proposals at companies without apparent diversity. If this is considered to constitute a threat, intimidation or coercion, then the Controller himself could be subject to a civil action for

injunctive and other appropriate equitable relief. Cal. Civ. Code § 52.1.

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National Law Review, Volumess IX, Number 289

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