

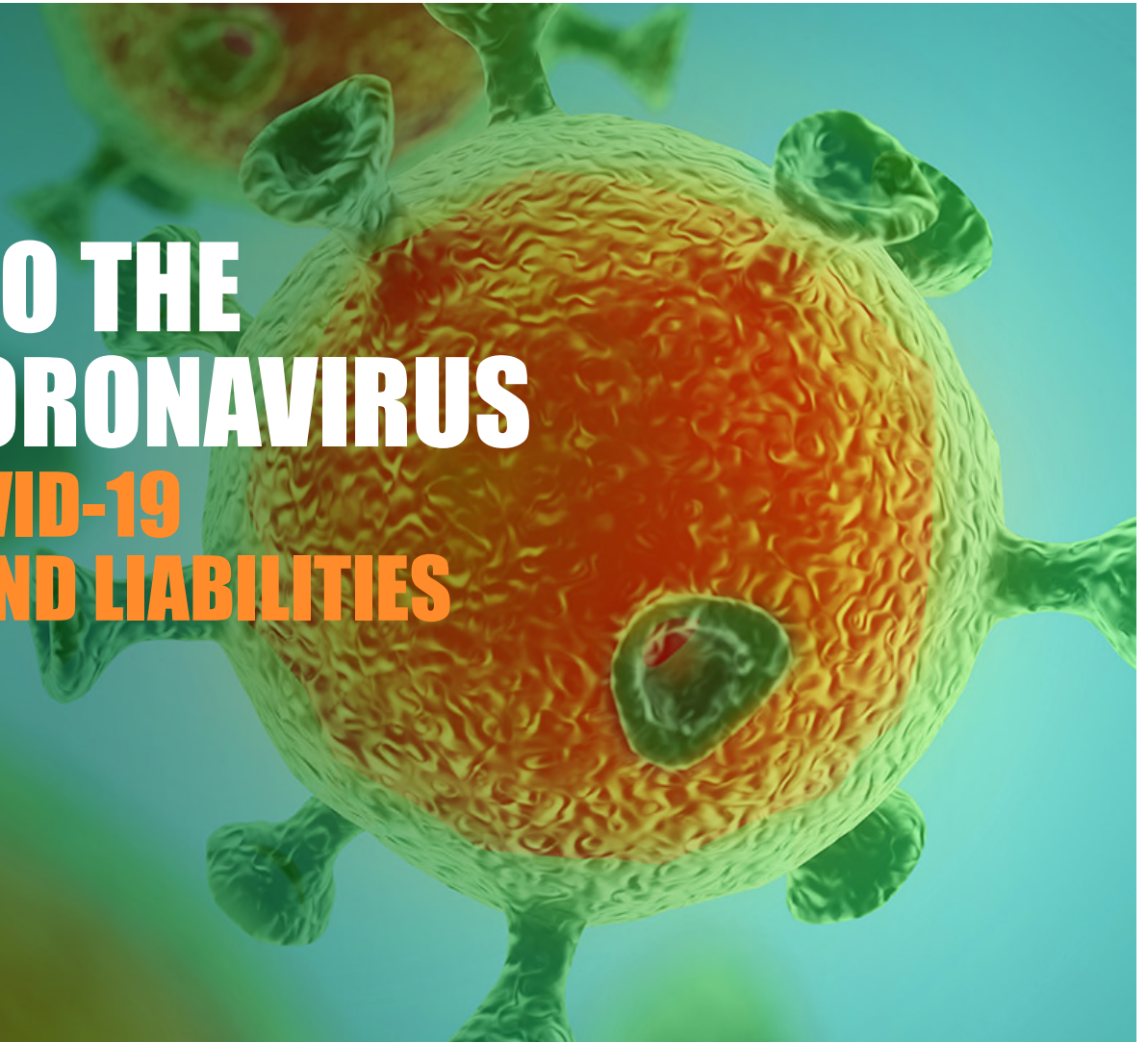
Morgan Lewis

RESPONDING TO THE 2019 NOVEL CORONAVIRUS

INSURANCE FOR COVID-19 BUSINESS LOSSES AND LIABILITIES

April 2, 2020

© 2020 Morgan, Lewis & Bockius LLP



SECTION 1:

INSURANCE FOR COVID-19 BUSINESS LOSSES AND LIABILITIES



Charles Malaret

Partner, Los Angeles

Tel +1.213.612.7305

charles.malaret@morganlewis.com

Insurance for COVID-19 Business Losses and Liabilities

- Goals For Webinar
 - Provide An Understanding Of Potentially Available Insurance For Business Losses And Liabilities Arising From COVID-19
 - Explain Foundations For Property And Event Cancellation Coverage
 - Highlight Relevant Provisions And Exclusions That Impact Coverage
 - Provide Insights To Allow Your Company To Determine How To Proceed

Applicable Coverages in Property Policy to Business Loss

- Truths And Recommendations
 - Coverage Will Depend On Your Policy Language, The Specific Circumstances Of Your Claim, And Applicable Law
 - Filing A Notice of Claim Is Necessary To Protect Your Rights
 - Future Events May Impact Claims For Coverage – Future Regulatory Actions And Court Decisions That Are Unknown Today
 - Coverage Counsel Should Review And Provide Advice On Your Policies
 - Your Company Should Discuss The Pros And Cons Of Filing And Pursuing A Claim For Coverage

Overview of Purpose and Scope of Insurance Coverage Provided in Property Insurance Policies

- First Party Insurance Coverage – Insurance Proceeds Are Paid To Policyholder
- Insurance Is Designed To Provide Coverage For Losses Arising From Property Damage And Interruption Of Business
- Insurance Is Designed To Pay Company For Losses When Unforeseen Events Beyond The Control Of Company Impact Business

SECTION 2:

COVERAGES FOR LOST BUSINESS INCOME



Jeff Raskin

Partner, San Francisco

Tel +1.415.442.1219

jeffrey.raskin@morganlewis.com

Coverages for Lost Business Income

- Found in first-party Property Policies
- Can have several different names
 - Business Income
 - Business Interruption
 - Time Element
- Payable as one of the potential *consequences* of a covered loss to property
- Protects the insured against losses of *business income* resulting from direct loss, damage, or destruction to insured property by a covered peril

Coverages for Lost Business Income

- Pays the actual loss of business income sustained as a result of a “suspension” of normal business operations resulting from “the direct physical loss, damage, or destruction” to covered property caused by a “Covered Cause of Loss.”
 - The term “Covered Cause of Loss” is typically defined as “[a]ll risk of direct physical loss of or damage from any cause unless excluded.”
- Actual loss of business income: The insurer is required to pay the insured’s *reduction* in net income suffered as a result of either a partial or complete suspension of operations resulting from physical loss or damage at a covered property.
 - A standard formulation: “Business income includes the net income (net profit or loss before income taxes) that would have been earned or incurred by the insured and the continuing normal operating expenses incurred, including payroll.”

Coverages for Lost Business Income

- “Period of restoration”: Specifies the time period (or the time element) of the loss payable by the insurer. This is defined as the amount of time necessary to rebuild, repair, or replace the damaged or destroyed property. The standard is *objective*: What is a reasonable amount of time under the circumstances?
 - Can extend beyond the end of the policy period as long as the loss begins during the policy period.
 - Some policies include an additional 30 day period beyond the end of the “period of restoration.”
 - Some insureds elect to purchase, if offered, more than the additional 30 day period.
- “Extra Expense”: The “necessary” expense incurred during the covered period of “restoration” that it would not have incurred had there been no covered loss to property. This often is incurred to mitigate the loss of business income. Both are usually not recoverable unless otherwise provided in the policy.

Coverages for Lost Business Income

- Related Coverages
 - “Contingent Business Interruption”: Covers the insured’s business income loss resulting from damage to the property of others. Typically, these are persons or companies upon whom the insured relies to supply goods or services and upon whom the insured relies receive its goods or services manufactured. The property damage to these persons or companies must be of a type that would be covered by the insured’s policy had the damage happened to the insured’s property.
 - Civil or Military Authority: Covers the insured’s business income loss during the time in which access to its premises is prohibited by order of civil authority following damage to the property of others (of the type covered by the insured’s policy) in a defined vicinity of insured property. It is typically limited by amount and by time. The time element is often no more than 30 consecutive days. The policy may also contain a “waiting period” before coverage begins, usually between 1 to 3 days.
 - “Leader” Property: Covers the insured’s business income loss resulting from physical loss to the property of a business within a vicinity defined in the policy that attracts business to the insured, such as an “anchor” store in a shopping mall.

Application to COVID-19 Business Suspensions

- Triggering requirement for **all coverages**: Physical loss or damage to property of the kind covered under the policy.
 - Mere “loss of use” is not sufficient. This is often reinforced by a “loss of use” exclusion in the policy.
 - Defining identifying “physical loss” or “physical damage” is not necessarily as easy as it seems. There may also be a fine line between mere “loss of use” and “direct physical loss”:
 - *Board of Education of Township High School No. 211 v. International Insurance Co.*, 308 Ill.App.3d 597 (1999): Friable asbestos fibers met the coverage requirement in a property policy of “physical loss or damage” to property.
 - *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 708-710 (E.D. Va. 2010): Noxious gases emitted from drywall was direct physical damage under a property policy.
 - *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009): An unpleasant odor was physical injury to property under a property policy.
 - *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34 (1968): Gasoline fumes which rendered church building unusable constituted physical loss.
 - *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or.App. 6 (1993): Cost of removing odor from methamphetamine lab constituted a direct physical loss.
 - *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477 (1998): Home rendered unusable by increased risk of rockslide suffered direct physical loss even in the absence of structural damage.
 - *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 544 (2009): Widespread blackout following a power grid’s incapability of supplying power for several days was a physical loss, even though the grid suffered no “physical damage.” The court: “from the perspective of the millions of customers deprived of electric power for several days, the system certainly suffered physical damage, because it was incapable of providing electricity.”

Application to COVID-19 Business Suspensions

- *French Laundry Partners v. LP v. Harford Fire Insurance Co.*, Filed March 25, 2020 in Napa County Superior Court:
 - Policy contains “Civil Authority” coverage providing for the actual loss of business income sustained, and the actual necessary and reasonable extra expense incurred when access to insured premises is prohibited by an order of a civil authority as a direct result of a covered cause of loss to property in the immediate area of the insured’s premises.
 - On March 18, 2020, the health office of Napa County issued a shelter-in-place order based, in part, on evidence of damage to property in the immediate area of the insured’s properties.
 - As a direct, proximate result of the order, access to the insured’s properties has been prohibited.
- Complaint only seeks declaratory relief:
 - A declaration that the order of a civil authority constitutes a prohibition of access to the insured’s covered property.
 - A declaration that the prohibited access is the type of prohibited access that triggers business interruption or time element coverage under the insured’s policy.
 - A declaration that there is no provision in the policy that excludes coverage resulting from the order prohibiting access to the insured’s property.
 - A declaration that the policy provides coverage to the insured for current and ongoing civil authority closures of its business due to physical loss or damage to local property and that, as a result, the policy provides lost business income coverage to the insured.
- Complaint states specifically that it does not seek a declaration that the COVID-19 virus is present at its premises or the amount of damages.

Application to COVID-19 Business Suspensions

- Of note: The Office of the Mayor for New York City has issued a series of executive orders to address the COVID-19 threat:
 - Emergency Exec. Order No. 100 (March 16): Orders were issued, in part, “because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage.”
 - Emergency Exec. Order No. 103 (March 25). States that the Orders were issued “because of the propensity of the virus to spread person-to-person and also because the actions taken to prevent such spread have led to property loss and damage”

Application to COVID-19 Business Suspensions

- *Big Onion Tavern Group, LLC v. Society Insurance Co.*, Filed March 27, 2020 in the Northern District of Illinois.
 - Several restaurant and movie theaters ceased operations as a result of shelter-in-place orders issued by the State of Illinois, and suffered substantial losses.
 - Actual or alleged presence of COVID-19 is “physical loss or damage” to property under *Board of Education of Township High School No. 211 v. International Insurance Co.*
 - Insureds seek lost business income, extra expense and Civil Authority coverage. “The continuous presence of the coronavirus in an around Plaintiffs’ premises has rendered the premises unsafe and unfit for their intended use and therefore caused physical property damage or loss under the Policies.”
 - Complaint seeks declaratory relief and damages.

SECTION 3:

**COMMUNICABLE/NOTIFIABLE DISEASE
AND VIRUS COVERAGES AND EXCLUSIONS**



Jay Konkel

Partner, Washington, DC

Tel +1.202.739.3711

gerald.konkel@morganlewis.com

Communicable/Notifiable Disease Time Element Coverage Extensions

Interruption by Communicable Disease Time Element Coverage Extension:

If a **location** owned, leased or rented by the Insured has the **actual not suspected presence of communicable disease** and access to such **location** is limited, restricted or prohibited by:

- 1) an order of an authorized governmental agency regulating the **actual not suspected presence of communicable disease**; or
- 2) a decision of an Officer of the Insured as a result of the **actual not suspected presence of communicable disease**,

this Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such **location** with the actual not suspected presence of **communicable disease**.

This Extension will apply when access to such **location** is limited, restricted, or prohibited in excess of 48 hours.

INTERRUPTION BY COMMUNICABLE DISEASE Exclusions: As respects

INTERRUPTION BY COMMUNICABLE DISEASE, the following additional exclusions apply:

This Policy **does not insure loss resulting from**:

- 1) the enforcement of any law or ordinance with which the Insured was legally obligated to comply **prior to the time of the actual spread of communicable disease**.
- 2) loss or damage caused by or resulting from **terrorism**, regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any sequence of loss.

...

Communicable/Notifiable Disease Time Element Coverage Extensions

“NOTIFIABLE DISEASE” TIME ELEMENT COVERAGE EXTENSION:

This **Section** is extended to include loss resulting from interruption of or interference with the **Business** carried on by the **Insured** at the **Premises** in consequence of:

- a. the occurrence of any **Notifiable Disease** (as defined below) either **at the Premises** or attributable to food or drink supplied from the **Premises**,
- b. the **discovery of any organism at the Premises** likely to result in the occurrence of a **Notifiable Disease**,

...

which causes restrictions on the use of the **Premises** on the order or advice of the competent local authority

...

provided that:

- i. the **Company** shall not be liable for the first seven (7) days of any interference with the **Business**;

...

- iii. the **Company** shall only be liable for the loss arising at those **Premises** which are directly affected by the occurrence, discovery or accident;

...
Notifiable Disease means illness sustained by any person resulting from

...

any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them, **but excluding** Acquired Immune Deficiency Syndrome (AIDS) or any AIDS related condition, Legionnaires' Disease or Avian Influenza and /or Influenza A (H5N1) or any mutant variation thereof or Swine Influenza and /or Influenza A (H1N1) or any mutant variation thereof or **Severe Acute Respiratory Syndrome (SARS)** and/or Atypical Pneumonia **or any mutant variation thereof.**

Virus and Pollutant and Contaminant Exclusions

ISO Virus Exclusion Form CF-2006-OVBEF:

EXCLUSION OF LOSS **DUE TO VIRUS OR BACTERIA**

. . .

- A. The exclusion set forth in Paragraph B, applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. We will not pay for loss or damage **caused by or resulting from** any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease. . . .

Virus and Pollutant and Contaminant Exclusions

PERILS EXCLUDED

...
Except as otherwise provided under the Additional Coverages, Additional Time Element Coverage or Global Coverage Extensions . . . we do not insure loss or damage caused directly or indirectly by any of the following.

...

The **actual, alleged or threatened release, discharge, escape or dispersal** of **pollutants or contaminants**, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any **covered cause of loss** under this Policy.

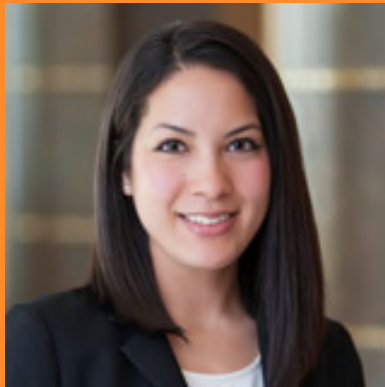
However, this exclusion shall not apply to direct physical loss or damage to **covered property** from **pollutants or contaminants** caused by a **covered cause of loss** at the **covered location** . . .

...

Pollutants or contaminants means any solid, liquid, gaseous or thermal irritant or **contaminant**, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, **including, but not limited to**, bacteria, **virus**, or hazardous substances. . . .

SECTION 4:

**REGULATORY AND LEGISLATIVE ACTIONS
THAT MAY IMPACT COVERAGE**



Teri Diaz

Associate, Washington, DC

Tel +1.202.739.5632

teri.diaz@morganlewis.com

New York DFS Requires COVID-19 Explanations from Insurers

- DFS Letter: “Call for Special Report Pursuant to Section 308, New York Insurance Law: Business Interruption and Related Coverage Written in New York” (March 10)
 - “Does the insured's policy provide ‘business interruption’ coverage? If so, provide the ‘covered perils’ under such policy. Please also indicate **whether the policy contains a requirement for ‘physical damage or loss’** and explain **whether contamination related to a pandemic may constitute ‘physical damage or loss.’** Please describe **what type of damage or loss is sufficient for coverage** under the policy.”

New York DFS Requires COVID-19 Explanations from Insurers

- Office of the Mayor Bases for Executive Orders re “Property Loss and Damage”
 - Emergency Exec. Order No. 100 (March 16) – “because of the propensity of the virus to spread person to person and also because **the virus physically is causing property loss and damage.**”
 - Emergency Exec. Order No. 103 (March 25) – “because of the propensity of the virus to spread person-to-person and also because **the actions taken to prevent such spread have led to property loss and damage . . .**”
- DFS Insurance Circular Letter No. 5 (2020) – “Preparedness Plans”

State Commissioners of Insurance Encourage Insurer “Flexibility”

- AK, AR, GA, MS, OR, WA, CA, WI, and MA
- Wisconsin Office of the Commissioner of Insurance bulletin: “Insurers are encouraged to offer flexibility to insureds who are incurring economic hardship. This flexibility can include offering non-cancellation periods, deferred premium payments, premium holidays and acceleration or waiver of underwriting requirements.”

States Propose Business Interruption Legislation

- A number of states are considering legislation impacting the responsiveness of business interruption coverage for businesses employing less than 100 people in their states:
 - New Jersey Assembly A-3844
 - Massachusetts Senate Docket No. 2888
 - Ohio House Bill 589
 - New York Assembly Bill A10226
 - Louisiana House Bill 858
- The Massachusetts bill, for example, provides that “no insurer in the commonwealth may deny a claim for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (even if the relevant insurance policy excludes losses resulting from viruses); or (ii) there being no physical damage to the property of the insured or to any other relevant property.”

Policies' Liberalization Clauses

Typical Liberalization Clause:

If during the period that insurance is in force under this Policy, any filed rules or regulations affecting the same are revised by statute so as to broaden this insurance without additional premium charge, such extended or broadened insurance will inure to the benefit of the Insured within such jurisdiction, effective the date of the change specified in such statute.

Congress Urges Insurers to Recognize COVID-19 Business Interruption Coverage and Insurers Respond

- **Letter from Congress:** “Business interruption insurance is intended to protect businesses against income losses as a result of disruptions to their operations and recognizing income losses due to COVID-19 will help sustain America’s businesses through these turbulent times, keep their doors open, and retain employees of payroll”
- **Trade Association Leaders Response:** “Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19. The U.S. insurance industry remains committed to our consumers and will ensure that prompt payments are made in instances where coverage exists.”
- **NAIC Statement:** “Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk.”

Calls for Partially Federally-Funded Business Interruption Insurance

- National Restaurant Association Letter
- Draft Bill of Pandemic Risk Insurance Act

SECTION 5:

**EVENT CANCELLATION COVERAGE/
LIABILITY COVERAGE**



Brad Nes

Partner, Washington, DC

Tel +1.202.739.5579

brad.nes@morganlewis.com

Event Cancellation Coverage

- **May provide coverage for losses from a cancelled event because of COVID-19.**
 - This type of insurance is specially purchased for a specific event.
 - Typical language – “We will indemnify you for your loss as a direct result of cancellation, abandonment, curtailment, postponement, or relocation of the insured event to which this insurance applies.”
 - Before and after cancelling an event, a policyholder should review its cancellation insurance policy to make sure that it is complying with the requirements of the policy.
 - Also, before purchasing special event coverage in the future, one needs to review the policy as insurers have started placing exclusions that will preclude losses from a cancellation based on COVID-19.

Applicable Liability Coverage

- **General Liability**
 - General liability insurance covers liability for bodily injury and property damage.
 - The insurance also typically provides a defense obligation.
 - If a lawsuit is filed alleging bodily injury from exposure to COVID-19 on your business premises, the lawsuit should be tendered for coverage to your general liability insurer.
- **Directors & Officers (D&O) Insurance**
 - Potential claims arising out of stock drops, public disclosures, and fiduciary issues.
 - Securities class actions or shareholder derivative claims alleging officers and directors mismanaged or failed to act in response to the COVID-19 outbreak.
- **Workers' Compensation**
 - Workers' compensation insurance covers employees who suffer injury or illness in the workplace.
 - This coverage extends to injuries "arising out of or in the course of employment," meaning that claims for compensation must allege work-related losses.

Insurance for COVID-19 Business Losses and Liabilities – Conclusions and Recommendations

- Consult With Coverage Counsel On Your Company's Potential Insurance Coverage For Business Interruption Losses Arising From COVID-19 And Civil Authority Actions
- Analyze The Pros And Cons Of Filing A Claim And Pursuing Insurance For Business Losses
- Each Company Needs To Make A Decision In Its Own Self Interest
- There Is Urgency In Deciding To File A Claim Because Delay In Filing A Claim May Be Used As A Policy Defense To Deny Coverage

Coverage Counsel

Contacts: **Charles Malaret**, Los Angeles, charles.malaret@morganlewis.com
 Jay Konkel, Washington, DC, gerald.konkel@morganlewis.com
 Jeff Raskin, San Francisco, jeffrey.raskin@morganlewis.com
 Brad Nes, Washington, DC, brad.nes@morganlewis.com
 Teri Diaz, Washington, DC, teri.diaz@morganlewis.com

Morgan Lewis

**CORONAVIRUS
COVID-19**



[VIEW OUR CORONAVIRUS COVID-19 RESOURCE PAGE >](#)

**[SUBSCRIBE TO RECEIVE OUR DAILY DIGEST OF CORONAVIRUS
COVID-19 ALERTS >](#)**

Our Global Reach

Africa

Asia Pacific

Europe

Latin America

Middle East

North America

Our Locations

Abu Dhabi

Almaty

Beijing*

Boston

Brussels

Century City

Chicago

Dallas

Dubai

Frankfurt

Hartford

Hong Kong*

Houston

London

Los Angeles

Miami

Moscow

New York

Nur-Sultan

Orange County

Paris

Philadelphia

Pittsburgh

Princeton

San Francisco

Shanghai*

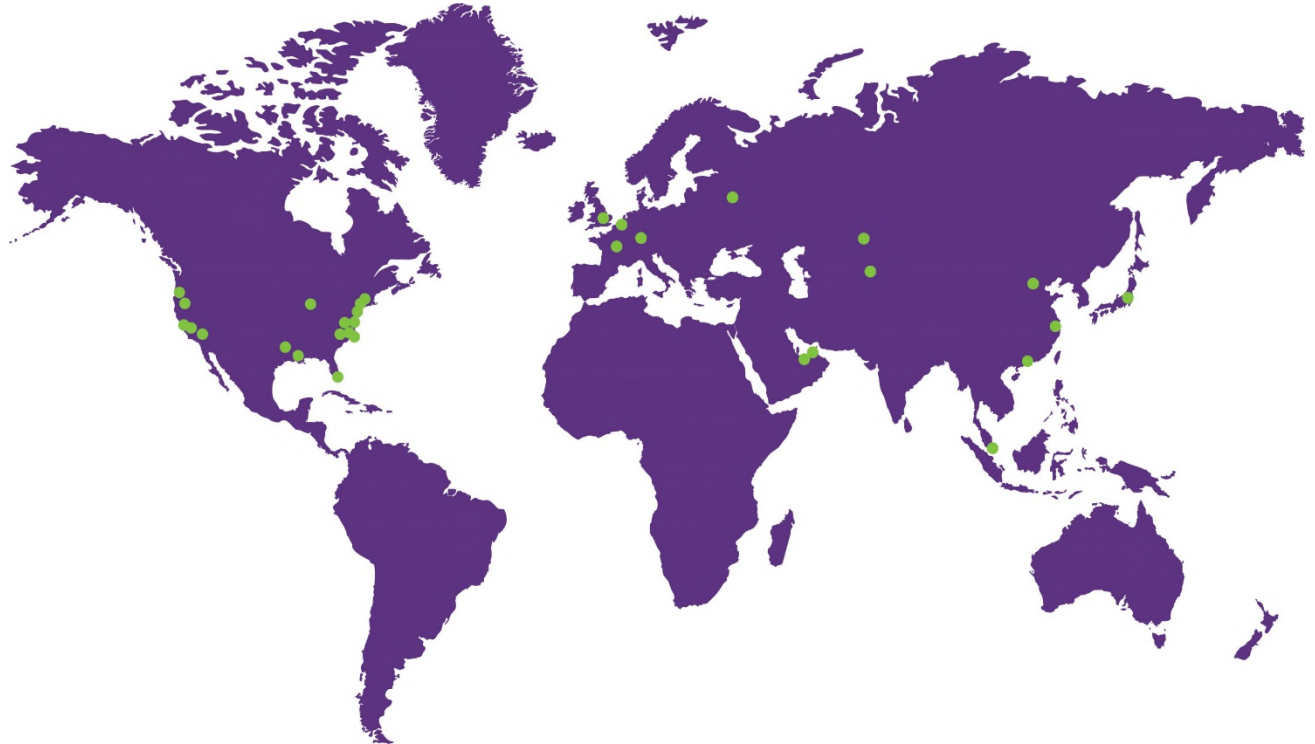
Silicon Valley

Singapore*

Tokyo

Washington, DC

Wilmington



Morgan Lewis

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2020 Morgan, Lewis & Bockius LLP
© 2020 Morgan Lewis Stamford LLC
© 2020 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.

Morgan Lewis