

A microscopic view of a coronavirus particle, showing its characteristic spherical shape and surface covered in spike proteins. The particle is rendered in shades of orange and yellow, with a textured surface. It is set against a light blue background with other smaller, less distinct particles visible in the distance.

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# BACK TO BASICS: CONTRACTS AND POLICIES IN THE MODERN WORKPLACE

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# Today's agenda

## **1. COVID-19: CORONAVIRUS SPECIAL**

## **2. CONTRACTS AND POLICIES**

- Statements of particulars and April's changes
- Key terms
- Terminating employment
- Changing terms
- Data privacy
- Key policies
- Leave entitlements & parental bereavement leave

## COVID-19: Key issues

Can you provide a safe working environment?

Are any amendments to existing policies or procedures required?

Considerations

Can business be conducted remotely?

Is there a reduced need for the workforce?

# COVID-19: Practical considerations

## Health and Safety

- Hygiene: protocols and guidance, increased cleaning
- Risk assessment of at risk groups

## Communication

- System or means to keep up to date with government advice
- Reliable and effective system to communicate with employees

## Remote working

- Access to IT equipment
- Reimbursement of business costs

## Absences

- Sickness absence, sick pay, employee monitoring
- Dependent leave

## Flexibility

- Modification to existing employment policies and procedures
- Support for employees, particularly mental health issues

# Coronavirus Job Retention Scheme

- Government establishing ASAP
  - Any employer eligible
  - Can apply to HMRC for grant to cover wages of furloughed staff
  - 80% of salary up to £2,500/month
  - Will cover wage costs backdated to 1 March
  - HMRC setting up relevant systems
  - First grants to be made “within weeks”
- Further detail expected

# COVID-19: Pay considerations for employers

Suspension for reasons not falling within government self-isolation advice

- If an employer sends an employee home from work to self-isolate and the employee is **able to work remotely**, the employee will be entitled to full pay.
- If an employer sends an employee home from work to self-isolate and the employee is **not able to work remotely**, the employee will still be entitled to full pay because they are willing and able to perform work in accordance with the contract.

Suspension for reasons falling within government self-isolation advice

- If an employee falls within this category they will be entitled to Statutory Sick Pay (see next slide).

An employee refuses to come into work due to fears of COVID-19 (but is not exhibiting symptoms)

- If an employee is **unable to work remotely** they will not be entitled to any pay and may face disciplinary action; employers should take care not to be overly severe or to discriminate employees.
- If an employee is **able to work remotely** the employer should accommodate this wherever possible and at full pay.

## COVID-19: Sick pay

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Employees will be entitled to their contractual or Statutory Sick Pay (SSP) in the event that they have been diagnosed with COVID-19 or exhibited symptoms.

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SSP will now be available for any person self-isolating in accordance with Public Health England guidance. (Deemed Incapacity).

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To qualify for SSP, employees who are self-isolating in accordance with government advice must be unable to work remotely.

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Employees who are only advised to practice self-distancing (including vulnerable groups) will not be entitled to SSP.

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# COVID-19: Lay-off and short-time working

## Lay-off

- Employer provides employees with no work (and no pay) for a period while retaining them as employees
- Can only be imposed if the employer has a **contractual right to do so**. If not, the employer will be in breach of contract and the employee could claim for constructive dismissal.

## Short-time working

- Provides employees with less work (and less pay) for a period while they are retained as employees.
- Can only be imposed if the employer has a **contractual right to do so**. If not, the employer will be in breach of contract and the employee could claim for constructive dismissal.

## Other options?

- **Coronavirus Job retention Scheme**
- All UK employers will be able to access support to continue paying 80% of their employees' salary for those employees that would otherwise be laid off.
- 80% of wage costs capped at £2,500 per calendar month.



# Redundancy

- Where dismissal wholly or mainly attributable to:
  - Business closure / workplace closure / reduced requirement for employees
- Collective consultation obligations
  - where 20/more at one establishment being made redundant within 90 days or less
  - must inform and consult employee representatives
  - must provide specific information
  - must consult on specific matters
  - must notify BEIS
  - penalties for breach



## Redundancy: special circumstances defence

- Limited statutory defence
- Where “special circumstances which render it not reasonably practicable”
- Applies to:
  - Timing and length of consultation
  - Requirements to provide specific information and consult on particular matters
- Must still take all steps reasonably practicable to comply
- What are ‘special circumstances’?
  - Case-specific
  - Insolvency?

## Emergency Volunteer Leave

- Two, three or four weeks' consecutive leave
- Employees need 'emergency volunteer certificate'
- Employees must give 3+ days' notice
- Protected from detriment and dismissal
- Government setting up compensation fund

# Unlawful discrimination: potential issues

## Requiring employees in a vulnerable category to attend work/remain at home

Any guidelines on attending work or not attending work should be carefully applied on a principled (rather than ad-hoc) basis

Government guidance: individuals who are older or have underlying health conditions may fall into protected categories

Indirect discrimination/Discrimination arising from disability – defence if a proportionate means of achieving a legitimate aim

## Making reasonable adjustments for home workers

Consider whether it is practicable to replicate workplace adjustments at home

Mental health/isolation- are there any additional adjustments that need to be made?

Consult with the employee and if possible take into account specialist medical advice

## Requiring employees to report travel and/or COVID-19 symptoms

All employees should be asked to report where they have been, irrespective of ethnicity/nationality and where they have been

Employers should avoid being selective if they wish to ask employees whether experiencing symptoms

# Unlawful discrimination: potential issues

## Selection Issues

Employers need to take care not to "furlough" employees or make them redundant on the grounds that they are already part-time

The usual principles will apply: non-discriminatory selection criteria, reasonable adjustments and special protection for employees on maternity leave

## Employer liability where an employee is harassed by other employees or customers

Harassment of Asian employees or those employees perceived to be older/have an underlying medical condition (i.e. disability)

Employers will be liable for harassment or discrimination by their employees towards other employees, except where they have taken reasonable steps to prevent the conduct

E.g. a well-publicised discrimination and harassment policy, training and evidence of inappropriate behaviour being tackled

# Data privacy considerations

- The GDPR and UK Data Protection Act 2018 require a lawful processing ground to collect and use personal data, e.g. on travel, health, use of systems and devices when employees work from home
- **Employee travel data**
  - Legitimate interest to check travel information to monitor the potential risks of COVID-19
- **Employee health data**, e.g. positive test for COVID-19 or symptoms of COVID-19
  - Special category of personal data, additional restrictions apply
  - Public health lawful processing ground
  - Further considerations:
    - ✓ Limit collection to what is strictly necessary
    - ✓ Restrict access internally and sharing in the employer's group or externally
    - ✓ Keep data secure
    - ✓ De-identify data to protect an individual's identity if possible
    - ✓ Where necessary to disclose the identity (e.g. to promote workplace safety and public health), do so on a strictly confidential, "need to know" basis
    - ✓ Delete data once no longer required
    - ✓ Consider whether a data privacy impact assessment is required



**ICO Guidance confirms:**

- Employers need to comply with data protection laws but can still request health and travel information;
- employers should keep staff informed of positive cases but unlikely to need to name individuals
- employers can share health data with authorities for public health reasons

# Employee WFH monitoring

- Employers may need to monitor their staff working from home for various reasons e.g. to ensure that employees are performing their duties, check the transmission of confidential information to external sources, monitor quality of work product and deal with complaints and internal investigations
- Types of monitoring includes review of email content and traffic, internet use and use of work-provided devices
- Engaging in employee monitoring practices or introducing a new piece of monitoring technology carries additional data protection responsibilities for employers
- Under the GDPR, employers will need to rely on a lawful basis for monitoring employees and must be transparent about the monitoring in a privacy notice and IT policy
- Employers should ensure that:
  - Monitoring is limited, targeted and time-restricted and that the personal data is kept secure
  - The employee privacy notice accurately deals with monitoring at home as a form of legitimate interest processing
  - If new technology creates a potential for high risk process, e.g. it is invasive, a DPIA may be needed before it can be implemented



# Temperature screening of staff

## Can employers impose temperature screening as a condition for entering workplace?

- Employer cannot generally conduct health checks on workers without their consent
- Employer must take reasonable steps to look after the health, safety and welfare of staff
- In the circumstances this arguably includes collection of employee temperature information
- Testing is likely to constitute a reasonable management instruction, so requirement to obtain employee consent can be avoided

## Options for employer if staff member refuses to be tested

- Would likely to be a reasonable management instruction to send an employee home if refuse to be tested – though efforts should be made to persuade the employee to be tested
- If employee can work from home, should be paid as usual
- If employee cannot work from home and have unreasonably refused to be tested, may withhold pay (but risk of unlawful deduction from wages and constructive unfair dismissal claims)
- Assess on a case-by-case basis

## Disciplinary action

- May be grounds for disciplinary action if employee disobeys a reasonable instruction
- In the circumstances, we recommend exercising caution – screening is an invasive assessment from a data privacy perspective



## COVID-19: Annual leave

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Workers may wish to take annual leave as an **alternative** to SSP or nil pay.

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Employers are entitled to require workers not to take statutory annual leave on certain dates and can **require workers to take leave at certain times**

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If a worker who is in self-isolation wants to reschedule a holiday they should be able to do so and be treated as any other worker **absent due to ill health**.

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The position is less clear where a worker is self-isolating as it is arguable that a period of **self-isolation** would not be regarded as a period during which the worker can enjoy leisure and relaxation.

## Bonus – Key legal issues

Do employees have a contractual right to receive a bonus?

If yes, employees will need to consent to changes

Can the employer change the payment date or performance targets?

Potential legal claims: breach of contract or constructive unfair dismissal

## Bonuses – Practical considerations

### Timing

- Consider delaying date of payment
- Are there any contractual restrictions on timing?

### Employees

- Delaying grants or bonus payments may de-motivate employees
- Employers should carefully craft employee communications

### Setting targets

- Consider delaying setting future performance targets until the market is less volatile

### Existing targets

- Consider adjusting targets in light of the impact of COVID-19
- Are there any contractual restrictions on target adjustments?

### Flexibility

- Bonus schemes should be discretionary and retain flexibility for employer
- Consider updating contractual terms to increase flexibility in the future

## COVID-19: new government measures

- The government introduced three new measures on 23 March 2020:
  1. Requiring people to stay at home, except for very limited purposes.
  2. Closing non-essential shops and community spaces.
  3. Stopping all gatherings of more than two people in public.
- Relevant authorities, including the police, will be given powers to enforce the new measures including through fines and dispersing gatherings.
- Effective immediately for three weeks.

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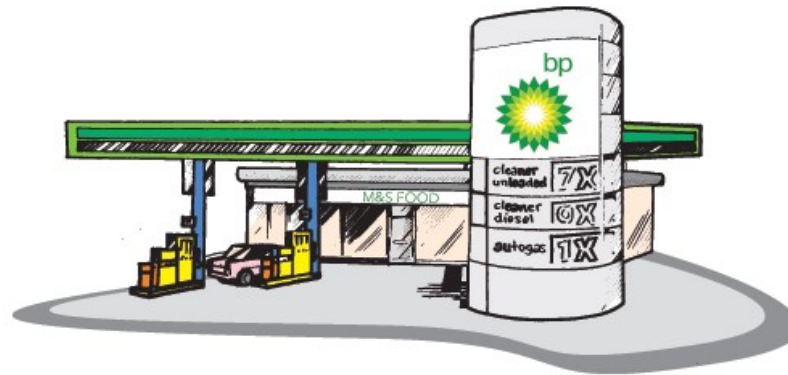


## COVID-19: new government measures

- In addition to pubs, restaurants and cinemas, the government have now asked the following businesses to close:
  1. All non-essential retail stores (this will include clothing and electronics stores; hair, beauty and nail salons; and outdoor and indoor markets, excluding food markets.
  2. Libraries
  3. Indoor and outdoor leisure facilities
  4. Places of worship (except for funerals attended by immediate family)
  5. Hotels
- Public gatherings will still be allowed to occur where the gathering is essential for work purposes.
- All those able to work from home to do so, unless their work is essential.

# COVID-19: new government measures

- Exceptions for employers who perform essential functions including:
  - Pharmacies
  - Banks
  - Dry cleaners
  - Hardware stores
  - Pet shops
  - Newsagents
  - Petrol stations
  - Garages



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**CONTRACTS  
&  
POLICIES**

## Written statements of particulars

- Currently:
  - Must give employees who will be employed for more than a month a written statement covering terms of employment
  - A '*Section 1 statement*' or '*written statement of particulars*'
  - Must be provided within 2 months of starting job
  - Potentially provide in instalments / across different documents
  - Limited redress available





# Good Work

The Taylor Review of Modern  
Working Practices

## Recommendations

- Improve clarity, certainty and understanding of terms
- Extend right to written statement beyond just employees
- Provide standalone right to claim compensation for failure to provide statement

July 2017

# UK Government's response



# Terms to be provided

Name of employer and employee	Commencement date	Date for continuous employment	Pay (and intervals of pay)	Holiday entitlement
Sickness and sick pay	Notice periods	Job title / description	Place of work and employer address	Work outside UK for more than a month?
Pension	Collective agreements?	Disciplinary & grievance procedures	Fixed-term? Period and end date	

## Additional terms to be provided

### Working pattern

- Must state days of week and normal hours of work **AND**
- Whether or not hours/days variable (and if so, how determined)

### Probationary period

- Is there one?
- What are the terms of the probationary period?

### “Any other paid leave”

- Other than annual leave and holiday pay
- Think: maternity leave, paternity leave, etc.

### Any other remuneration / benefits

- Provided by the employer
- E.g. health insurance, dental insurance, life insurance, etc.

### Training

- To which employee entitled
- Which employee is required to do

## Key terms & issues

Job title

Duties

Salary /  
Bonus

Notice  
Period

Confidentiality  
& IP

Garden leave  
& restrictive  
covenants

## How to change employment terms (1)

Do you need to change the contract at all?

Room for Interpretation?

Specific flexibility clause?

General flexibility clause?

## How to change employment terms (2)

If you do need to change the contract...

Express  
agreement

Implied  
agreement  
(Risky)

Impose  
change  
(Risky)

Dismiss &  
re-engage  
(‘Nuclear’)

## Key policies



- Disciplinary\*
- Grievance\*
- Sickness\*
- Pensions\*
- Health & safety\*\*
- Whistleblowing (potentially)\*\*\*

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*\* Unless stated in s.1 statement*

*\*\* If 5 or more employees*

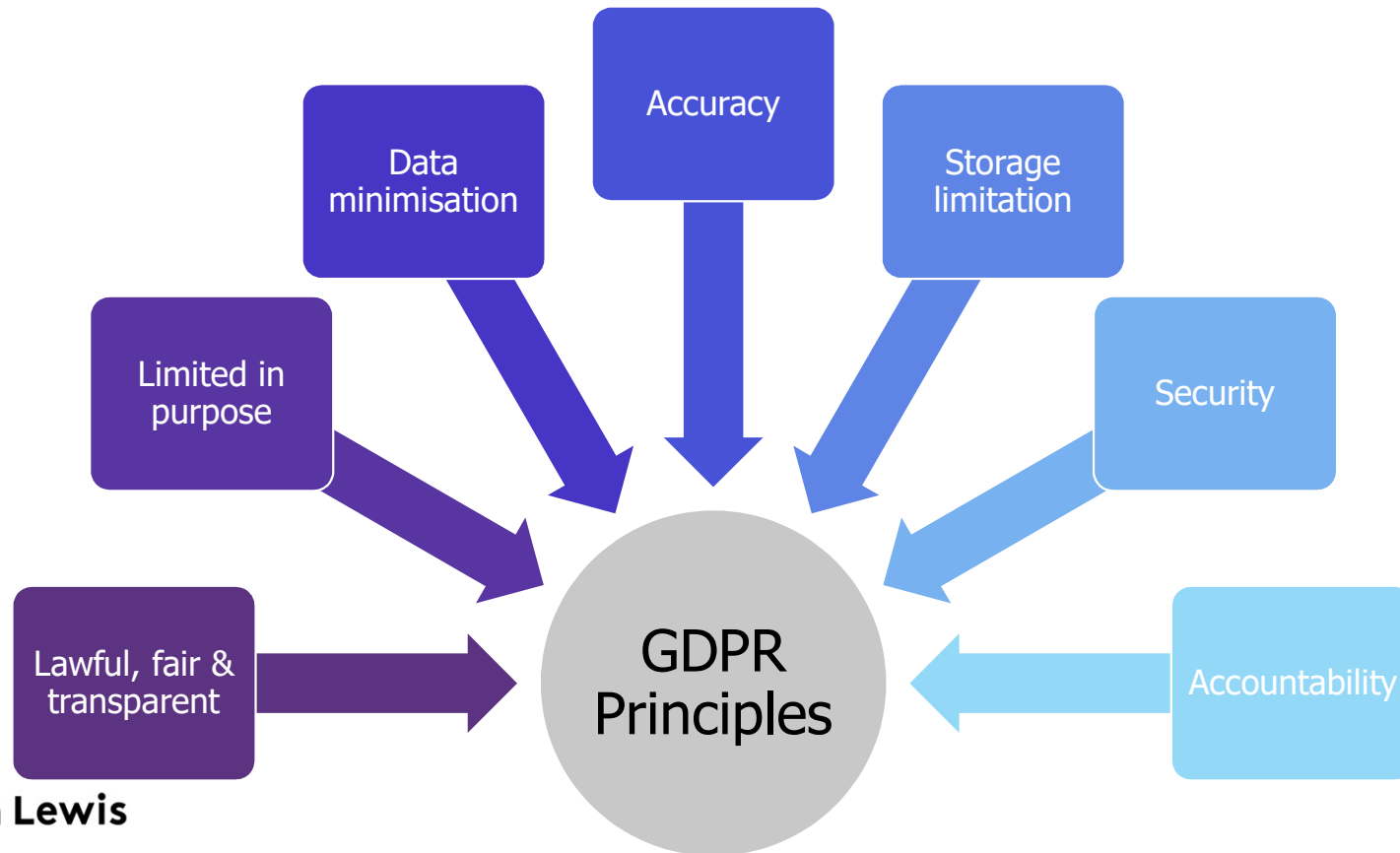
*\*\*\* Typically by regulation / code*



## Key policies

- Strongly recommended:
  - Anti-bribery
  - Equal opportunities
  - Data protection
  - Whistleblowing (if not required by law)
  - Family leave
  - Other paid leave

# Data privacy



## Data privacy

- Audit the personal data being processed
- Understand the lawful basis on which that data is being processed
- Take steps to amend policies and procedures to reflect the GDPR principles
- Put in place privacy notices for employees, workers and candidates
- Be aware of individual's data rights (e.g. rights to access / correction / erasure)
- Know your data breach reporting obligations
- Monitor compliance and embed ongoing GDPR training

# Leave entitlements

## Annual Leave

- 5.6 weeks per year
- If off sick, can convert to sick leave
- Holiday continues to accrue during family leave
- Roll-over *mostly* at each employer's discretion, but important exceptions
- Cannot pay in lieu (other than on termination)



## Leave entitlements

Family leave

Antenatal /  
Adoption  
appointments

Parental

Time off for  
dependants

Compassionate  
leave

Time off for  
public duties

# Parental bereavement leave

- Jack's law
- Statutory right to two weeks' leave for employed parents if:
  - Lose child under the age of 18
  - Suffer stillbirth from 24 weeks of pregnancy
- Leave to be used within 56 weeks of bereavement
- No minimum service requirement for entitlement to leave
- Right to statutory parental bereavement leave if employed for 6 months or more and have normal weekly earnings of at least the lower earnings limit

## Presenters

- Please do not hesitate to contact any of our presenters directly regarding any of the issues discussed today. Contact details are provided on the following slides.

## Biography



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As practice group leader for Morgan Lewis's labor and employment practice in London, Matthew Howse represents clients in the financial services, media, legal, and insurance industries in High Court and employment tribunal litigation and in class actions, collective actions, and group litigation. His experience includes employment law as well as privacy and cybersecurity law. In addition to litigating both contentious and non contentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

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Pulina Whitaker's practice encompasses both labor and employment matters as well as data privacy and cybersecurity. She manages employment and data privacy issues in sales and acquisitions, commercial outsourcings, and restructurings. Pulina provides day-to-day advisory support for multinationals on all employment issues, including the UK's Modern Slavery Act and gender pay reporting requirements. She also advises on the full spectrum of data privacy issues, including compliance with the General Data Protection Regulation.

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Lee Harding has a broad and versatile practice that goes beyond the provision of traditional legal services. Lee's practice is focused on the myriad legal implications arising out of a rapidly changing workplace: flexible working, five generations in the workplace, giving workers a voice, and the crossover between employment and the regulatory environment, to name but a few. The nontraditional legal services that Lee offers require a proactive approach to managing workplace issues before they escalate. He engages with a wide range of stakeholders to deliver sophisticated and actionable solutions that resonate across the entire business.

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Louise Skinner provides sophisticated, strategic advice on all aspects of employment law, with particular focus on regulatory employment matters. Described as “truly exceptional and insightful” by clients in The Legal 500 UK guide, Louise advises on issues including investigations, contractual disputes, whistleblowing, discrimination and restraint of trade. Louise has particular experience in the financial services, life sciences, and sports, media and entertainment sectors.

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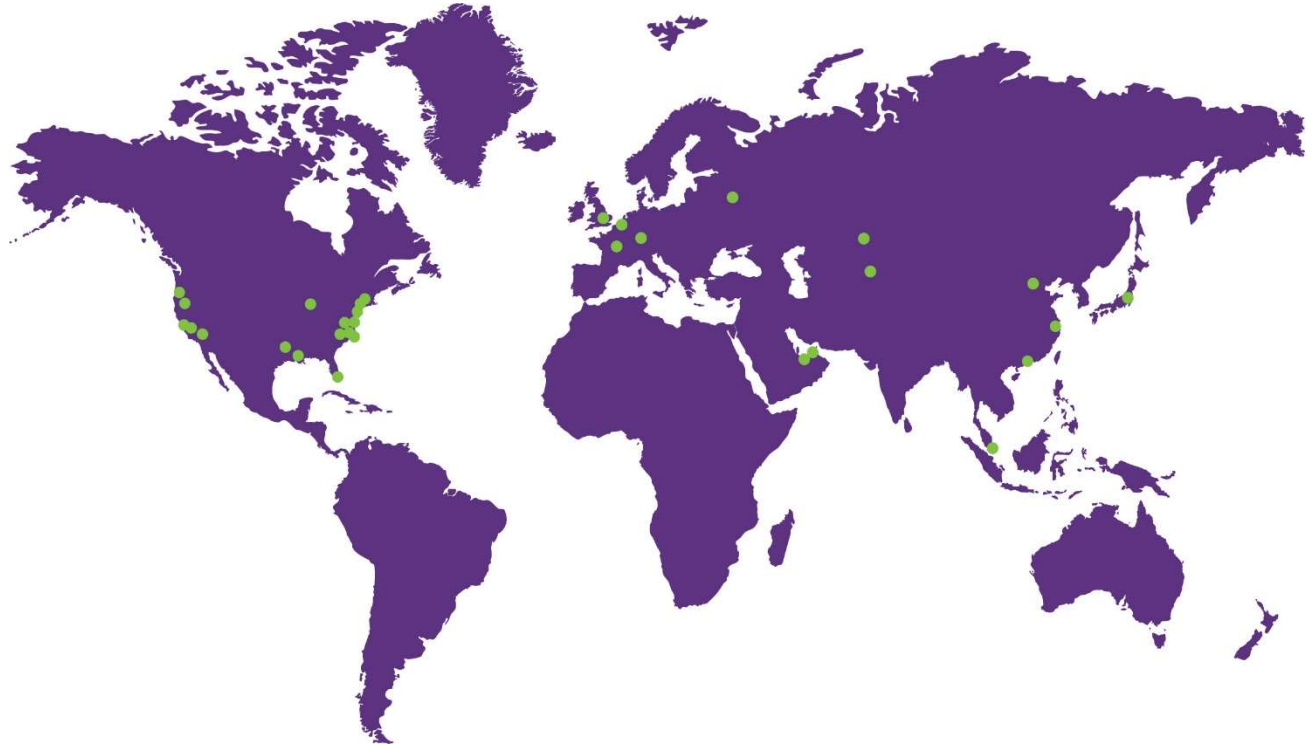
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