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COVID-19 HEALTHCARE PROVIDER UPDATES

WORKFORCE AND STIMULUS

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CORONAVIRUS COVID-19



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Agenda

- Healthcare Service Provider Employee Rights and Obligations
- Privacy Issues Associated with COVID-19
- Healthcare Service Provider Stimulus

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COVERAGE OF EMPLOYERS OF HEALTH CARE PROVIDERS

The Families First Coronavirus Response Act

The Emergency Paid Sick Leave Act and the Emergency Family & Medical Leave Expansion Act

- Two new laws enacted as part of the Families First Coronavirus Response Act (FFCRA).
- **The Emergency Paid Sick Leave Act:** A free-standing law creating a new federal mandate for 10 paid sick days for specific needs arising from the COVID-19 public health emergency for employers with less than 500 employees.
- **The Emergency Family & Medical Leave Expansion Act:** An amendment to the FMLA creating a right to 12 job-protected weeks (of which 10 must be paid) for one limited COVID-19 reason for employers with less than 500 employees.
- Both laws become effective on **April 1, 2020**. But employers may begin providing paid sick leave prior to April 1 and receive a tax credit for the costs expended on such leave.

Special Coverage Rules Employers of Health Care Providers

- An employer of health care providers and emergency responders may **choose to exclude** a health care provider or an emergency responder **employee** from the **paid sick leave provisions** of the law.
- The **Secretary of Labor** has the authority, via regulations, **to exclude “certain health care providers”** from the **paid sick leave provisions and/or from the expanded FMLA provision.**
- If the Secretary of Labor excludes categories of certain health care providers, the **mandate will not apply** with regard to such employees and the **tax credit will not be available** if an employer provides paid leave to such employees on its own accord.

Reasons Paid Sick Leave May Be Taken (Six COVID-19 Reasons)

- **The Employee Cannot Work (or Telework) Because of the Employee's Own Needs.**
 - **Quarantine:** The employee is subject to a government quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine.
 - **Diagnosis:** The employee is seeking a medical diagnosis because the employee is experiencing the symptoms of COVID-19.
- **The Employee Cannot Work (or Telework) Because of the Employee's Caregiving Needs.**
 - **Quarantine:** The employee is caring for an individual who is subject to a government quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine.
 - **Child Care:** The employee needs to care for a child if the child's school or care location has been closed, or if the child's care provider is unavailable due to COVID-19.

Eligible Employees, Amount of Time and Payments

- **All full-time and part-time employees are eligible** for paid sick leave, regardless of when the employee started working.
- **Full-time employees** must be provided with **80 hours (10 days)** of paid sick leave. **Part-time employees** receive **prorated hours**, based on the average hours worked over a two-week period.
- For an **employee's own needs**, the employer must pay the employee's **full regular wage** (up to the cap below). If the employee needs leave **to care for someone else**, the employer must pay **two-thirds of the employee's wage** (up to the cap below).
- **The cap:** maximum payments will be **\$511/day** (\$5,110 in aggregate) **for an employee's own needs** and **\$200/day** (\$2,000 in the aggregate) **for an employee's caregiving needs**.

The Expanded FMLA Leave

- Available to **full-time and part-time employees** who have worked for the employer **for 30 days**.
- Available for a **limited reason**: if an employee cannot work (or telework) **in order to care for a child** if the child's school or care location has been closed, or if the child's care provider is unavailable due to COVID-19.
- **Provides 12 weeks of job-protected leave**. The first two weeks may be unpaid (payment for the first two weeks will be covered by the paid sick time) and the following **10 weeks must be paid**.
- Payment is **two-thirds** of the employee's wage but is **capped** at **\$200/day** and **\$10,000 in the aggregate**.

Recouping the Costs of Paid Leave

- Employers will receive a **tax credit** in an amount **directly equivalent to the maximum leave amount they have paid out.**
- **Non-profit organizations** get the same tax credit against their payroll taxes.
- Employers may **retain (i.e., not send to the IRS) taxes they would have paid** for the employee and the employer share (for **all** employees) of **Social Security and Medicare** taxes, as well as **withholding for federal income taxes.**
- If the amount the employer retains is **not sufficient** to cover the amounts it is paying out for leave, the employer may seek an **expedited advance** from the IRS.
- Easy to read guidance from the IRS – <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>.

Definition of Health Care Provider

- The paid sick leave law **adopts the FMLA definition of “health care provider.”** The expanded FMLA leave law uses the same definition.
- The FMLA defines a “healthcare provider” as “a doctor of medicine or osteopathy who is authorized to practice medicine or surgery. . . ; **or any other person determined by the Secretary to be capable of providing healthcare services.**”
- The **regulations** to this definition under the existing FMLA provide that those “capable of providing health care services” include **only a specified list of providers** including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, and Christian Science Practitioners.

Definition of Health Care Provider (Continued)

- **The Secretary of Labor is not bound by the existing regulation when defining a “healthcare provider” for purposes of these two new laws.**
- Indeed, because the **purposes of the existing FMLA and the two new laws are quite different**, the regulatory definition for the new laws should seek to achieve the purposes of those laws in granting employers of health care providers more flexibility under the law.
- That purpose is presumably to ensure that employers who **need certain types of individuals** on the job **to keep a health care system operating properly** can do so.
- Those types of individuals go beyond those who are competent to provide certifications for a serious health condition.

Possible Broad Category of Health Care Providers

To achieve the purpose of the new laws, a health care provider might be defined to include:

- Doctors, nurses, clinical social workers, physician assistants, and other involved in providing direct health care
- Pharmacists and pharmacy technicians
- Administrative staff (*e.g.*, surgery schedulers, hospital admission clerks, Intensive Care Unit managers, supply and hospital procurement workers)

Category of Emergency Responders

- Paramedics
- Emergency medical technicians
- Emergency management personnel
- Law enforcement
- Firefighters
- Public safety officials
- Rescuers
- Public works personnel
- Emergency debris removal teams and tow operators.

Continued Action in Congress on Paid Leave

- H.R. 6379, Take Responsibility for Workers and Families Act, introduced on March 23, 2020.
- Covers all employers regardless of the number of employees.
- Reinserts a provision that the paid sick leave must be in addition to any existing leave offered by the employer.
- Provides expanded FMLA leave for all six reasons available for paid sick leave.
- Clarifies that use of the emergency FMLA leave does not detract from the ordinary 12 weeks of FMLA.
- **Eliminates the right of employers of health care providers to exclude employees individually, and eliminates the authority for the Secretary of Labor to exclude categories of health care providers.**
- Eliminates authority of Secretary of Labor to exempt employers with fewer than 50 employees.

Summaries and Information

- Visit these links for more information.
- These summaries are constantly being updated with information in real time.
- Keep them bookmarked!
 - <https://www.morganlewis.com/pubs/new-mandate-for-paid-sick-leave-and-long-term-leave-for-some-employers-due-to-covid-19-emergency>
 - <https://www.morganlewis.com/pubs/state-and-local-leave-initiatives-and-responses-to-the-covid-19-pandemic>

PRIVACY ISSUES DURING THE TIME OF COVID-19

HIPAA Privacy in the Time of COVID-19

- While COVID-19 is a unique public health crisis, other emergency situations also test the limits of the HIPAA Privacy Rule.
- HIPAA is not intended to be an obstacle to a healthcare organization's essential treatment, emergency response and public health functions.
- HHS Office for Civil Rights (OCR) has issued bulletins explaining how HIPAA works in the context of hurricanes, earthquakes and mass shooter incidents.
- OCR took a similar approach to COVID-19, issuing the bulletin "HIPAA Privacy and Novel Coronavirus" in February.

February OCR Bulletin

- The February bulletin reminds providers that HIPAA protections are not set aside during an infectious disease or other emergency situation.
- Disclosure of protected health information (PHI) is still permitted
 - For treatment purposes
 - To a public health authority, such as the CDC or a state or local health department
 - To persons at risk of contracting or spreading a disease or condition ***if other law, such as state law, authorizes*** the covered entity to notify such persons as necessary to prevent or control the spread of the disease ***or otherwise to carry out public health interventions or investigations***

Disclosures to Family, Friends and Others Involved in Care

- A covered entity may share PHI with a patient's family members, relatives, friends or other persons ***identified by the patient*** as being involved in care.
- Covered entities may also share information about a patient as necessary to identify, locate and notify family members, guardians or anyone else responsible for the patient's care, of the patient's location, general condition or death.
 - This may include, where necessary, to notify family members or others, the police, press, or the public at large
- Covered entities may also share PHI with disaster relief organizations, like the American Red Cross, to coordinate notification of family members, or other persons involved in care, of the patient's location, general condition, or death.

Disclosures to Media

- Generally, HIPAA does not permit disclosure of PHI to the media about the treatment of an identifiable patient, such as specific tests, test results or details of a patient's illness.
 - Without written authorization from the patient
 - Except for the limited exception noted on the previous slide (where necessary to identify, locate or notify family members)
 - Rules regarding limited disclosures for facility directories still apply
- During the early days of the COVID-19 outbreak, there was intense curiosity about the first deaths from the virus, but these HIPAA rules were observed.

To Prevent a Serious and Imminent Threat

- Healthcare providers may share patient information ***with anyone***
 - As necessary
 - To prevent or lessen a ***serious and imminent threat*** to the health and safety of a person or the public
 - Consistent with applicable law (such as state statutes, regulations or case law) and the provider's ethical standards
- Can permit disclosures to family, friends, caregivers or law enforcement if standard is met
- COVID-19 would appear to constitute a serious and imminent threat at this time, and HIPAA defers to a provider's professional judgment regarding the severity of a threat to health and safety.

HIPAA Waiver During a National Emergency

- March: President Trump declares COVID-19 a nationwide emergency.
- January 31, 2020: HHS Secretary Alex Azar declares COVID-19 a public health emergency.
- Secretary Azar exercised his authority to waive sanctions and penalties against a ***covered hospital*** that does not comply with certain provisions of the HIPAA Privacy Rule.
- Waiver became effective March 15.
- Waiver only applies for up to 72 hours from the time the hospital implements its disaster protocol.

Waived Provisions

- The requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care
- The requirement to honor a request to opt out of the facility directory
- The requirement to distribute a notice of privacy practices
- The patient's right to request privacy restrictions
- The patient's right to request confidential communications

Notification of Enforcement Discretion Regarding Telehealth Communications

- March 17, 2020: OCR announces, effective immediately, that it will exercise its enforcement discretion and waive potential HIPAA violations against healthcare providers that serve patients through “everyday communications technologies” during the COVID-19 nationwide public health emergency.
- Applies to widely available communication apps like FaceTime and Skype
 - When used in good faith
 - For any telehealth treatment or diagnostic purpose
 - Regardless of whether the treatment service is directly related to COVID-19

OCR Guidance for First Responders

- March 24: OCR issues guidance on how covered entities may disclose PHI about an individual infected with or exposed to COVID-19 to law enforcement, paramedics, other first responders, and public health authorities in compliance with HIPAA.
- Reiterates principles outlined in the February bulletin
- Example: A hospital may provide a list of names and addresses of all individuals it knows to have tested positive, or received treatment, for COVID-19, to an EMS dispatch for use on a per-call basis. The EMS dispatch would be allowed to use the information on the list to inform EMS personnel who are responding to an emergency call so that they can take extra precautions or use personal protective equipment (PPE).

Hypothetical: Infected Patient

- A hospital patient has tested positive for COVID-19.
- Can the hospital disclose the identity of the patient to
 - Family members that may be infected?
 - Public health agencies?
 - Law enforcement?
 - Media?

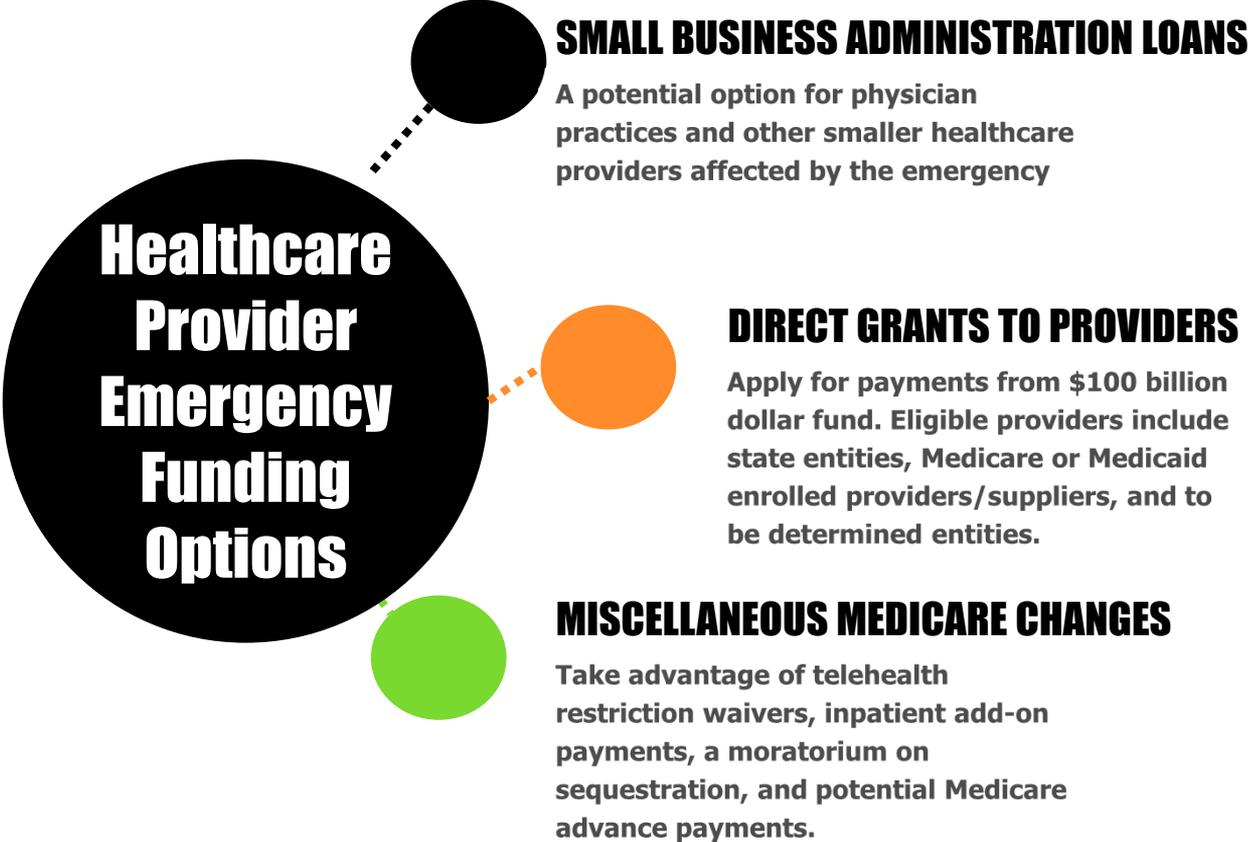
Hypothetical: Infected Healthcare Worker

- A member of a hospital's workforce has tested positive for COVID-19.
- Can the hospital disclose the identity of the employee to
 - Fellow employees?
 - Public health agencies?
 - The media?
- Remember that medical information received by the hospital in its capacity as an employer (rather than as a healthcare provider) is not PHI and is not governed by the HIPAA privacy rules.

HEALTHCARE SERVICE PROVIDER STIMULUS

How can providers get relief now?

Healthcare Provider Emergency Funding Options



SMALL BUSINESS ADMINISTRATION LOANS

A potential option for physician practices and other smaller healthcare providers affected by the emergency

DIRECT GRANTS TO PROVIDERS

Apply for payments from \$100 billion dollar fund. Eligible providers include state entities, Medicare or Medicaid enrolled providers/suppliers, and to be determined entities.

MISCELLANEOUS MEDICARE CHANGES

Take advantage of telehealth restriction waivers, inpatient add-on payments, a moratorium on sequestration, and potential Medicare advance payments.

Healthcare Provider Stimulus

- Small Business Assistance Loans
- Employee Retention Credit
- Moratorium on Medicare Sequester
- Medicare Add-On Payment for Inpatient Care
- New Telemedicine Provisions
- Funding for Personal Protective Equipment (PPE)
- Direct Payments to Providers who Participate in Medicare & Medicaid

Small Business Assistance Loans

- Creates a new \$349 billion Paycheck Protection Program for the period between February 15, 2020 through June 30, 2020
- The Small Business Administration is authorized to provide 100% federally-guaranteed loans up to a maximum like payroll support, paid sick or medical leave, mortgage, rent, health benefits, insurance premiums, and utilities.
- No collateral or personal guarantees are required.
- Interest rates are capped at no more than 4%
- Loan issuer has no recourse against loan recipients for non-payment unless the recipient uses loan proceeds for unauthorized purposes.

Small Business Assistance Loans (continued)

- Applies to small businesses with less than 500 employees or the applicable size standard for the industry as determined by the SBA
- Maximum loan amounts of up to \$10 million through December 31, 2020 and provides a formula tying the loan amount to payroll costs incurred to determine size of loan
- Recipients of Paycheck Protection Program Loans cannot also receive an Economic Injury Disaster Loan through SBA for the same purpose.
- Borrowers with EIDL Loans unrelated to COVID-19 can apply for a PPP loan, however, and refinance the EIDL Loan into a PPP loan.
- The \$10,000 cap on EIDL grant awards would be subtracted from the PPP amount.

Small Business Assistance Loans (continued)

- Borrowers must certify the PPP Loan:
 - Is necessary due to the uncertainty of current economic conditions caused by COVID-19;
 - The Borrower will use the funds to retain workers and maintain payroll, lease, and utility payments; and
 - The Borrower is not receiving duplicative funds for the same uses from another SBA program.
- Loan payments can be deferred for at least 6 months but not more than a year.
- Loans can be forgiven if employers retain their workforce. The amount forgiven will be reduced proportionally by any reduction in employees.

Unemployment Insurance Provisions

- Creates a temporary Pandemic Unemployment Assistance Program through 12/31/2020 to provide payment to independent contractors, self-employed and others not traditionally eligible for UI.
- Nonprofits, government agencies, and Indian tribes can be reimbursed for half the costs they incur through December 31, 2020 to pay unemployment benefits
- Recipients of Unemployment Insurance or Pandemic Unemployment Assistance receive an additional \$600 per week for up to four months.
- States can elect to pay UI recipients as soon as they become unemployed instead of having to wait one week for eligibility.

Unemployment Insurance Provisions (continued)

- Unemployment Recipients can receive an additional 13 weeks of unemployment benefits through the end of 2020 to help those who are still unemployed after state unemployment benefits are no longer available.
- Includes funding for short-time compensation programs, where employers reduce employee hours instead of laying off employees. Employees with reduced hours are eligible to receive a pro-rated unemployment benefit to pay 100% of the costs incurred in providing short-time compensation through the end of 2020.

Employee Retention Credits for Employers Subject to Closure

- Employers whose operations were fully or partially suspended due to a COVID-19 related shut-down order OR who had gross receipts decline by more than 50 percent in the same quarter compared to the previous year can receive a refundable payroll tax credit for 50 percent of wages paid to employees during the COVID-19 crisis.
- The credit is provided for the first \$10,000 of compensation (including health benefits) paid to an eligible employee.
- For employers with more than 100 employees, only those who are not providing services due to the emergency are considered qualified wages.
- For employers with less than 100 employees, all employee wages qualify for the credit regardless of whether the employer is open for business or shut down due to the emergency.
- The credit applies to wages paid or incurred from March 13, 2020 through December 31, 2020.

Medical Supplies, Testing Services, Preventive Services

- Manufacturers of personal respiratory protective equipment (e.g., masks, respirators) can receive permanent liability protection in order to incentivize production and distribution.
- Requires testing for COVID-19 be covered by commercial insurance plans without cost-sharing to the patient, including tests without an FDA emergency use authorization (EUA).
- Insurers are required to pay either the rate agreed to in a contract between an insurer and provider for testing. If the provider does not have a contract with the insurer, insurers would pay a cash price posted by the provider.

Support for Healthcare Providers

- Community Health Centers are eligible for \$1.32 billion in supplemental funding for testing and treating patients for COVID-19
- Reauthorizes HRSA grant programs to promote telehealth technologies
- Limits liability for physicians who provide volunteer medical services during the COVID-19 public health emergency
- Removes Medicare telehealth requirement that a patient needs to have treated by the telehealth provider in the previous 3 years.
- Qualified hospitals have the ability to request up to a 6-month advanced lump sum or periodic payment based on net reimbursement represented by unbilled discharges or unpaid bills.
 - Most hospitals would be eligible to receive up to 100% of the prior period payments
 - Critical Access Hospitals (CAHs) are able to receive up to 125%
 - Qualifying hospitals would not have to pay down the loan for four months and would have at least 12 months to complete repayment without any interest.

Support for Healthcare Providers (continued)

- The legislation creates a 20% add-on payment for inpatient treatment
- Puts a moratorium on Medicare sequestration through the end of 2020
- An additional \$100 billion has been made available for the Public Health and Social Services emergency Fund to prevent, prepare for, and response to COVID-19.
- This funding would provide reimbursement to eligible healthcare providers for healthcare related expenses or lost revenues attributable to COVID-19.
- Eligible healthcare providers include:
 - Public entities
 - Medicare or Medicaid enrolled suppliers and providers
 - For-profit or Not-for-Profit entities that may be specified by HHS and that provide diagnosis, testing, or care for individuals with possible or actual cases of COVID-19

Support for Healthcare Providers (continued)

- How will healthcare providers receive access to the \$100 billion?
 - Most likely route is HHS contracts with a third-party claims processor (similar to Medicare Administrative Contractors) who will use criteria HHS will develop to determine:
 - A provider's eligibility for funds
 - Whether the amount requested is justifiable
 - The amount of the claim;
 - Payment of the claim
 - We anticipate an administrative appeals process could be developed but many of the details will have to be provided in emergency rulemaking and/or departmental guidance.

Biography



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Named Texas' 2018 Lawyer of the Year, Susan Feigin Harris concentrates on the regulatory, business, corporate, governance, compliance, and contracting needs of a diverse group of healthcare clients. She regularly addresses federal and state healthcare regulations, and works with state and federal healthcare agencies involving Medicare and Medicaid licensing, certification, reimbursement, compliance, enforcement, and recoupment actions. Susan's clients include hospitals, physician groups, lab companies, post-acute providers, and healthcare innovations companies.

Biography



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Chai R. Feldblum helps companies and organizations create safe, respectful, diverse, and inclusive workplaces. Chai served as a commissioner of the Equal Employment Opportunity Commission (EEOC) from 2010 to 2019. As a director of Workplace Culture Consulting at Morgan Lewis, Chai helps employers implement preventive strategies to eliminate harassment and enhance workplace productivity. Chai's policymaking background and insights on the EEOC's enforcement processes inform her counseling of employers on compliance with employment anti-discrimination laws and her investigations of complaints of harassment and discrimination.

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W. Reece Hirsch co-heads the firm's privacy and cybersecurity practice and counsels clients on a wide range of US privacy issues, specializing in healthcare privacy and digital health. Reece counsels clients on development of privacy policies, procedures and compliance programs, security incident planning and response, and online, mobile app, and Internet of Things privacy. In a Chambers USA ranking, Reece was recognized by his peers as "a consummate expert in privacy matters."

Biography



Eric J. Knickrehm focuses his practice on healthcare transactional matters as well as regulatory counseling and compliance. He advises private equity funds, practice management companies, physician group practices, healthcare trade associations, pharmacies, and post-acute care providers on a wide variety of healthcare regulatory issues.

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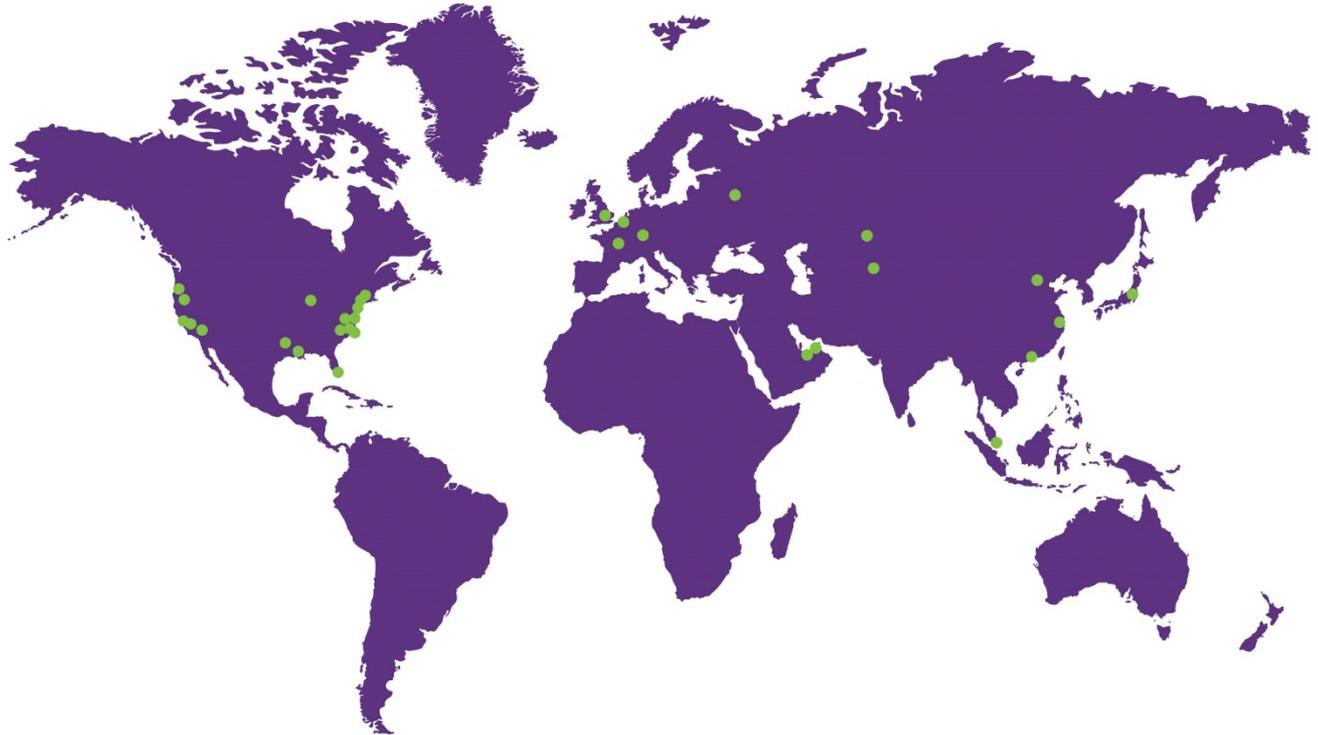
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