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**RETURNING TO CAMPUS –
A PRELIMINARY GUIDE FOR COLLEGES &
UNIVERSITIES**

August 5, 2020

Presenters



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Agenda



- Immigration Barriers and New Rules for Foreign Students Returning to Campus

Eleanor Pelta



- Benefits Considerations for Reopening

Gregory L. Needles



- Campus Accommodations for Faculty, Staff, and Students

A. Klair Fitzpatrick



- Looking Around the Corner: Implementing Changes under Title IX Regulations

Ami N. Wynne

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Immigration Barriers and New Rules for Foreign Students Returning to Campus

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Three Entry Bans

New Policy* Regarding
Foreign Students and
Online Classes

01

- COVID-related country and region-specific entry bans

02

- Ban or “pause” on issuance of certain immigrant visas

03

- Nonimmigrant visa entry ban

Other Developments Impacting Immigration

- U.S. consular posts not yet open for “routine visa processing,” but the State Department tweeted that they are beginning a phased-in reopening. Some consulates processing F’s, J’s and M’s as “emergency” cases
- United States Citizenship and Immigration Services (USCIS) has had a severe budget shortfall during the pandemic, asked Congress for an emergency funding of 1.2 billion and has issued furlough notices to roughly 13,000 workers
- USCIS has slowed or stopped printing of certain documents, including EAD’s and green cards

COVID-Related Travel Restrictions Persist

Past 14 Days

Travel restrictions on individuals who were physically present in certain countries for the past 14 days continue

- Countries Include:
 - UK
 - The Republic of Ireland
 - “Schengen” Countries: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.
 - Brazil
 - Iran
 - China, Hong Kong, Macau

F-1 and M-1 Visas

Administration recently announced via State Department memo to Congress that students who already have F-1 and M-1 visas may travel to the US notwithstanding these restrictions

National Interest Waiver

National interest waiver will almost automatically be given to students applying for these visas

J Visa Holders

J visa holders and applicants must apply for an exception

Proclamation 10014: Ban on Issuance of Green Cards

- In April, the White House issued a proclamation suspending entry of certain employment-based and family-based immigrants
- The April ban essentially applies to those who were completing the green card process abroad through “consular processing” in employment-sponsored and certain family-sponsored classifications, including parents and adult children of U.S citizens, siblings of citizens and immediate relatives of lawful permanent residents. There are some exceptions for certain close relatives of U.S. citizens
- This ban has now also been extended to **December 31, 2020**

Proclamation 10052: Entry Ban for Certain Non-immigrant Visa Holders

- The entry ban, which took effect on June 23 and will remain in effect until the end of the year, suspends visa issuance and entry to individuals in the following categories:
 - H-1B Specialty Occupation status, and accompanying or following to join H-4 dependent family members
 - H-2B Temporary Worker status, and accompanying or following to join dependent family members
 - J-1 status, if seeking admission to participate in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and accompanying or following to join J-2 dependent family members
 - L-1 Intracompany Transferee status (L-1A and L-1B), and accompanying or following to join L-2 dependent family members

Who is Not Permitted to Enter the U.S. Under the New Ban?

- The new ban bars admission to the U.S. in H-1B, H-2B, L-1 or J-1 status of foreign nationals who:
 - are outside the United States as of the effective date of the proclamation; AND
 - do not have a valid nonimmigrant visa as of the effective date of the proclamation; AND
 - do not have a valid and official travel document other than a visa as of the effective date of the proclamation that permits him/her to seek admission to the United States.
- The Proclamation also requires the State Department to “implement” the Proclamation, meaning that visas will be denied to persons covered by the Proclamation
- **In other words:** Per the plain language of the proclamation, if a foreign national was outside the U.S. on 12:01 Eastern Time on June 24, 2020, without a valid visa or entry document, he or she will not be able to obtain a visa and enter the U.S. as an H-1B, H-2B or L nonimmigrant, or in one of the impacted J classifications

ICE Announcement on Foreign Students and Online Courses

- On July 6, the Student and Exchange Visitor Program (SEVP) announced that nonimmigrant F-1 and M-1 students who will attend schools operating entirely online may **not** take a full online course load and remain in the United States
- Multiple lawsuits filed; various educational institutions including Harvard and MIT and seventeen states filed complaints to stop the policy
- As a result, ICE announced that the policy is rescinded
- The March 2020 policy guidance remains in place, allowing students to take a full course load online
- ICE still taking the position that foreign students may not enter the US if their study program is 100% online

Other Recent Developments

- Deferred Action for Childhood Arrivals (DACA) rescission as per Supreme Court decision in *Regents*, and reinstatement of DACA benefits as per *Casa De Maryland* District Court Decision
- DACA should be fully restored, for both extensions and initial applications
- However, recent USCIS memo states that they will only accept extensions, grant only for one year, and no Advance Parole
- Public Charge rules enjoined per recent decision by SDNY

Looking Around the Corner...

- Changes to OPT are on the regulatory agenda
- Discussions include restrictions to STEM OPT, including shortening the program and/or making the program available only to those with a certain GPA
- OPT is a “creature” of regulation only and can be changed or ended by regulation

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Benefits Considerations for Reopening

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Childcare Issues

- Dependent Care Assistance Programs (DCAPs)
 - Mid-year changes may be allowed if had a change in status or cost/coverage change
 - Examples: due to school or daycare closures, switching to in-home nanny
 - Recent IRS section 125/cafeteria plan relief
 - Optional
 - Expands opportunity to change elections mid-year prospectively
 - But no ability to get refund of prior contributions
- Consider Qualified Disaster Relief Payments
 - For expenses not reimbursed by DCAP

Qualified Disaster Relief Payments

- Code section 139, aka Stafford Act
 - Allows reimbursements or payments for “reasonable and necessary personal, family, living or funeral expenses” due to an eligible disaster
 - Tax-free to employees, deductible to employer
 - IRS implied that Section 139 can apply to coronavirus payments in its guidance on payroll tax credits on March 31
- Little guidance, so use caution if contemplating re-characterizing existing or wage-like benefits
 - No double-dipping – only payments beyond what available under another tax break
 - Example: Childcare expenses
- No substantiation requirements
 - Likely to be IRS attention later, however, so consider setting up a policy

Transportation Issues

- Transit and parking benefit programs
 - Less likely to have mass transit available
 - Employees who took mass transit may now drive
 - Qualified Disaster Relief Payment to subsidize extra-commuting expenses

Temperature Checks

Not Subject to HIPAA

- Employer is not a covered entity

State Privacy Laws

- State privacy laws to consider

General ADA & Privacy

- General ADA & privacy considerations – treat as sensitive, personal information

Onsite Testing

- Must provide free testing in group health plan, but only for plan participants
 - If offered through plan, will not affect HSA-eligibility
- For non-health plan participants, can be an excepted benefit if offered through EAP per IRS guidance
- Independent contractors may be tested as well

Treatment



ONSITE CLINICS

Triaging likely to fall under emergency exception from group health plan designation.



TELEHEALTH

Will not affect HSA-eligibility

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Campus Accommodations for Faculty, Staff, and Students

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Key Actions & Considerations

- Key Actions For Return
 - Social Distancing, Safety Measures, Enforcement/Accommodations, COVID-19 Monitoring
- Additional Considerations For Return
 - Impact of Childcare Availability and Public Transportation
 - OSHA Preparedness
 - Travel, Leave/Wellness, and Pandemic/Business Continuity Policies
 - Returning Employees From Furlough
- Litigation Risks With Return

Social Distancing

Key Actions for Reopening

- **Physical workspace modifications** (e.g., separating desks, modifying open floor plans, closing common areas)
- **Limiting in-person interactions and physical contact** (e.g., no non-essential travel, no in-person meetings)
- **Training employees** on social distancing policies and protocols, including where to go with complaints
- **Update employee schedules** (e.g., staggered scheduling, telework for less essential personnel)

Safety Measures

Key Actions for Reopening

- **Create infectious control procedures** (e.g., require frequent hand washing, limit sharing of equipment)
- **Regular screening protocols for employees, customers/visitors** (e.g., symptom, temp screening)
- **PPE procedures** (e.g., require workers and visitors to wear face coverings)
- **Workplace sanitization procedures** (e.g., provide hand sanitizer, require frequent sanitization of high-touch areas)
- **Follow current/updated guidelines** of local DOH, reopening orders, CDC, and OSHA for maintaining a clean and safe workplace

Enforcement/ Accommodations

Key Actions for Reopening

- **Develop/update accommodations** policy for vulnerable employees including alternative work arrangements
- **Develop policy** for employees who fear returning to work or refuse to return to work
- **Develop PPE enforcement policy** including discipline for those who refuse to wear face covering
- **Update/develop complaint procedures and training** on enforcement/discipline/accommodations

COVID Monitoring

Key Actions for Reopening

- **Establish procedure to address workplace exposure** (e.g., separate and send home workers who appear to have symptoms consistent with COVID-19, clean and disinfect workplace)
- **Develop procedures for contact tracing/notification** of known exposure consistent with ADA or state law

Additional Considerations for Reopening

- Childcare and Public Transportation
- Pandemic/Business Continuity Policies/Plans
- Travel Policy
- Wage and Hour/Compensation Plans
- OSHA Preparedness

Childcare and Public Transportation

Leave/ Wellness Policies

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Additional Considerations for Reopening

- **Consider impact from lack of childcare availability**
- **Consider alternatives to public transportation** or stipends for parking to limit need for public transportation
- **Consider leave entitlements for employees remaining home and unable to work remotely** as well as updates to policies going forward, including ensuring continued compliance with applicable and recently enacted sick-leave laws
- **Evaluate existing Wellness and EAP programs** for COVID-19 specific issues

Pandemic/Business Continuity Policies/Plans

Travel Policy

Additional Considerations for Reopening

- **Review and revise current pandemic response plans** in order to respond to another potential outbreak of the virus
- **Develop management/HR succession** in the event that any leadership team is sidelined
- **Consider whether to require vaccination** once a vaccine is developed

- **Revise/implement new travel policy consistent with federal/state/local requirements** (e.g., what will be considered essential travel?)
- **Procedures for monitoring travel and quarantine procedures** for return from travel
- **Consider monitoring personal/vacation travel**

Wage and Hour/ Compensation Plans

Additional Considerations for Reopening

- **Compensable time for wait time** for symptom/temp screening, temperature taking at home, building ingress/egress, and continuous workday issues
- **Reporting time and/or predictive scheduling obligations** when announcing/adjusting schedules and sending employees home from work
- **Potential inclusion of additional incentive pay in regular rate**
- **Preserving exemptions**, including of remote workers whose duties have been modified or exempt workers covering nonexempt work resulting from lack of hourly workers
- **Expense reimbursement** for masks/safety equipment and internet/cell phone for teleworking employees
- **Evaluate effect of shutdown periods** on existing bonus/incentive plans

OSHA Preparedness

Additional Considerations for Reopening

- **Anticipate increased employee safety complaints and OSHA activity** (e.g., onsite inspections and informal complaint letters)
- **OSHA will ask for employers' written pandemic response plan** (if any), pandemic response training records, and PPE hazard assessment
- **Respond to informal letters** with steps taken to protect employees from COVID-19 including supporting documents (receipts for masks/gloves; sanitation procedures, training records on social distancing policies, etc.)
- **Evaluate OSHA safety procedures** and preparedness for dealing with citations, OSHA inspections, etc.
- **Healthcare industry, emergency responder organizations, and correctional institutions** will be held to stricter standards with increased enforcement on injury and illness recordkeeping for COVID-19

Returning Employees from Furlough

Additional Considerations for Reopening

- **Evaluate state laws on preference for furloughed employees**
- **Review furlough notices** to determine promises and expectations for return
- **Consider impact of timing of return** and any salary reductions for wage/hour impact
- **Consider impact on health and welfare benefits** and vacation time
- **If employer participated in Paycheck Protection Program**, consider who to return based on forgiveness of loan considerations
- **Furloughed employees may need to reenroll or update** benefit information and consider any impact on 401(k)
- **Employees responsible for premium payments** during furlough may be obligated to repay, but there are complications due to state deduction restrictions

Potential Legal Claims

Workplace Safety/Nuisance Claims

(litigation for alleged violation of safety/health standards or state laws requiring safe workplaces and related whistleblower/retaliation complaints)

Workers' Comp or Tort Claims (including whether WC laws will be exclusive remedy, possible wrongful death claims and third party liability claims from visitors, customers, employees' family members, etc.)

Failure to Accommodate Claims (Is fear of coronavirus a disability? Is the provision of private transportation a reasonable accommodation?)

Wage and Hour Claims (e.g., reimbursable expenses; overtime/meal breaks when working from home; being "on-call"; time waiting for medical screens and temperature checks; wage reduction claims)

Claims Arising Under Local, State, and Federal Leave Laws

Labor Claims (e.g., violations of collective bargaining agreements, failure to negotiate actions taken in response to the virus, failure to abide by collective bargaining provisions relating to recall rights)

Furlough and Layoff Claims (e.g., failure to provide WARN notice, failure to pay timely final payments, or failure to provide timely termination/benefit eligibility notices)

Invasion-of-Privacy Claims (e.g., disclosure of confidential medical information; disclosure of confidential customer information by employees to family members or otherwise during remote working periods, etc.)

Discrimination and Retaliation Claims (e.g., claims challenging process or decision-making for furloughs, layoffs, salary reductions, etc.; claims relating to employees' actual or perceived disabilities, etc.)

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Looking Around the Corner: Implementing Changes Under Title IX Regulations

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Introduction

- **Background**
 - November 2018 Notice of Proposed Rulemaking; May 2020 Final Amended Regulations
- **Major Changes/Requirements**
 - Narrower Definition of Sexual Harassment
 - Limit Circumstances Where Institutions Obligated to Respond
 - Mandate Initial Response to all Reports of Sexual Misconduct
 - Require Presumption of Innocence
 - Require Equal Access to all Relevant Evidence
 - Permit Institutions to Choose Standard of Evidence
 - Prohibit Single Investigator Model
 - Require Live Hearing with Cross-Examination (post-secondary institutions)
- **Considerations for Title IX Policies and Practices**

High-Level Background

- In November 2018, Department of Education (“DOE”) issued notice of proposed rulemaking, proposing to amend Title IX regulations
- Received over 124,000 comments in response
- On May 6, 2020, 18 months later, DOE issued legally binding amended regulations governing response to allegations of sexual misconduct
- Deadline to implement changes necessary to comply is August 14, 2020

Major Changes/Requirements

Narrowing Definition of Sexual Harassment

- Quid pro quo harassment (conditioning educational opportunity, aid or benefit on granting sexual favors)
- Hostile educational environment (unwelcome conduct determined by reasonable person to be so severe, pervasive, and objectively offensive to deny equal access)
- Sexual assault (as defined by the Clery Act, or dating violence, domestic violence, or stalking)

Narrowing Circumstances Requiring Response

- Post-secondary institutions must respond to reports or complaints of sexual harassment if they have actual knowledge of prohibited conduct
- Only required to respond to alleged sexual harassment that occurs (1) on a campus within the United States; and/or (2) at a school-sanctioned event
- Cannot be held liable for failing to respond to known allegations of sexual harassment unless act with deliberate indifference (clearly unreasonable in light of the known circumstances)

Major Changes/Requirements

Prompt Initial Response

- Contact complainant confidentially to offer and discuss available supportive measures
- Let complainant know that supportive measures are available regardless of whether file formal complaint
- Consider complainant's wishes with respect to supportive measures
- Explain process for filing formal complaint to complainant
- Contact respondent and offer supportive measures
- Document any decision not to provide supportive measures

Obligation to Investigate

- If investigation is necessary for safety reasons
- Institutions' are only obligated to initiate grievance process when formal complaint is filed
- Formal complaint must be in writing and must include: respondent(s) name; description of the incident(s), including the date(s), location(s), and the presence of any witnesses; and complainant's signature
- If Title IX Coordinator believes investigation is necessary for safety reasons, may sign formal complaint to initiate investigation

Major Changes/Requirements

Grievance Process: Standards and Presumptions

- Respondent must be presumed not responsible until determination is made and appeals are expired
- Institutions have discretion to choose evidentiary standard – preponderance of the evidence or clear and convincing evidence
- Must conclude grievance process, including informal resolution processes and appeals, within reasonably prompt time frame

Grievance Process: Notice and Investigation

- **Written Notice.** Upon receipt of formal complaint, institutions must provide all known parties with written notice that provides sufficient detail of the allegations and explains the grievance process.
- **Investigation.** Investigator is responsible for gathering evidence, but must permit all parties equal opportunity to present witnesses and evidence and to inspect, review, and respond to evidence.
- **Investigator Report.** Once information and evidence is gathered, and parties have chance to respond to evidence, investigator prepares report fairly summarizing relevant evidence

Major Changes/Requirements

Grievance Process: Live Hearing and Determination

- Postsecondary institutions are now required to hold live hearings, either in person or virtually, and allow cross-examination of witnesses
- Decision-maker with extensive training in Title IX and who is not Title IX Coordinator or investigator must preside over hearing
- Decision-maker analyzes all relevant evidence and reaches conclusion of responsibility by applying standard of proof
- Decision-maker issues written determination to both parties at the same time

Grievance Process: Appeals

- Must offer both parties opportunity to appeal determinations regarding responsibility or institution's dismissal of formal complaint
- Can appeal on three bases:
- Procedural irregularity affected outcome
- New evidence not reasonably available when determination or dismissal was made could have affected outcome
- Title IX Coordinator, investigator, or decision-maker had conflict of interest or bias that could have affected outcome

Considerations/Recommendations

Review and update definition of sexual harassment, while considering definitions and requirements set forth in other applicable employment laws

Decide whether institution will limit responses to alleged conduct that occurs in the United States during school-sanctioned events, or to create separate procedures for addressing anything not required

Review any organizations and events, including off-campus events and locations, that the institution funds, promotes, or sponsors or that could be deemed "education program or activity" to determine potential coverage

Documents who has authority to "institute corrective measures"

Revise policies and procedures to ensure single investigator model is not used (e.g., different decision-makers at each step)

Determine evidentiary standard to be used and ensure that is the same standard for all similar complaints

Revise policies and procedures to include live hearings with cross-examination

Develop and implement training for all individuals involved in the Title IX complaint, investigation, resolution, and appeals process

Confirm compliance with applicable record retention requirements

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QUESTIONS?

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Biography



Gregory L. Needles

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Greg counsels tax-exempt, governmental, and multinational employers on a range of complex employee benefit and executive compensation matters. He advises on establishing and terminating benefit plans, as well as plan administration issues involving ERISA, the Internal Revenue Code, the Affordable Care Act, COBRA, and HIPAA. He also advises on employment agreements and deferred compensation arrangements for executives. Greg works closely with clients to establish and implement benefit plan and executive compensation strategies. He also advises clients' boards of directors and plan committees on their fiduciary duties. He also represents employers and executives in the negotiation of executive employment agreements. [Read More.](#)



Biography



A. Klair Fitzpatrick

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Klair's professional career has focused on helping companies navigate employment laws. Before law school, she worked as a human resources consultant. Today she defends employers in a wide range of employment disputes, with a focus on class and collective actions involving systemic discrimination claims, complex multi-plaintiff matters, including ERISA matters, and harassment and discrimination cases. Klair also handles sensitive internal investigations involving alleged sexual harassment, workplace misconduct, and claims by whistleblowers based on purported violations of the Sarbanes-Oxley Act, Dodd-Frank Act, False Claims Act, and Foreign Corrupt Practices Act. In connection with her work on internal investigations, counseling, and class actions, Klair regularly works with statisticians and other experts to analyze large data sets. [Read More.](#)



Biography



Eleanor Pelta

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Eleanor counsels clients on legal and strategic issues arising from the international movement of key personnel, from the individual transfer of high-ranking executives to high-volume transfers of expert staff. A recognized leader in immigration and nationality law, her experience includes the use of blanket visa programs and the qualification of companies as “treaty investor” or “treaty trader” entities. Additionally, Eleanor counsels businesses on the immigration implications of corporate changes, such as mergers, acquisitions, downsizings, reductions in force, and salary-level changes. [Read More.](#)



Biography



Ami N. Wynne

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Ami's practice focuses on a wide range of employment matters, from litigation, to internal investigations and strategic employment counseling, to executive compensation and corporate transactions work. She regularly defends employers in employment discrimination, contract disputes, and employment-related cases in state and federal courts. A significant part of her practice also involves internal investigation, whistleblower, and related matters. Ami also counsels employers of all sizes with respect to their most important Human Resources initiatives, including matters involving workplace culture, diversity and inclusion, compensation reviews, and numerous other employment-related matters. She advises on labor and employment matters arising in a broad range of corporate transactions, including issues surrounding reductions in force and facility closings, terminations and other personnel decisions. [Read More.](#)

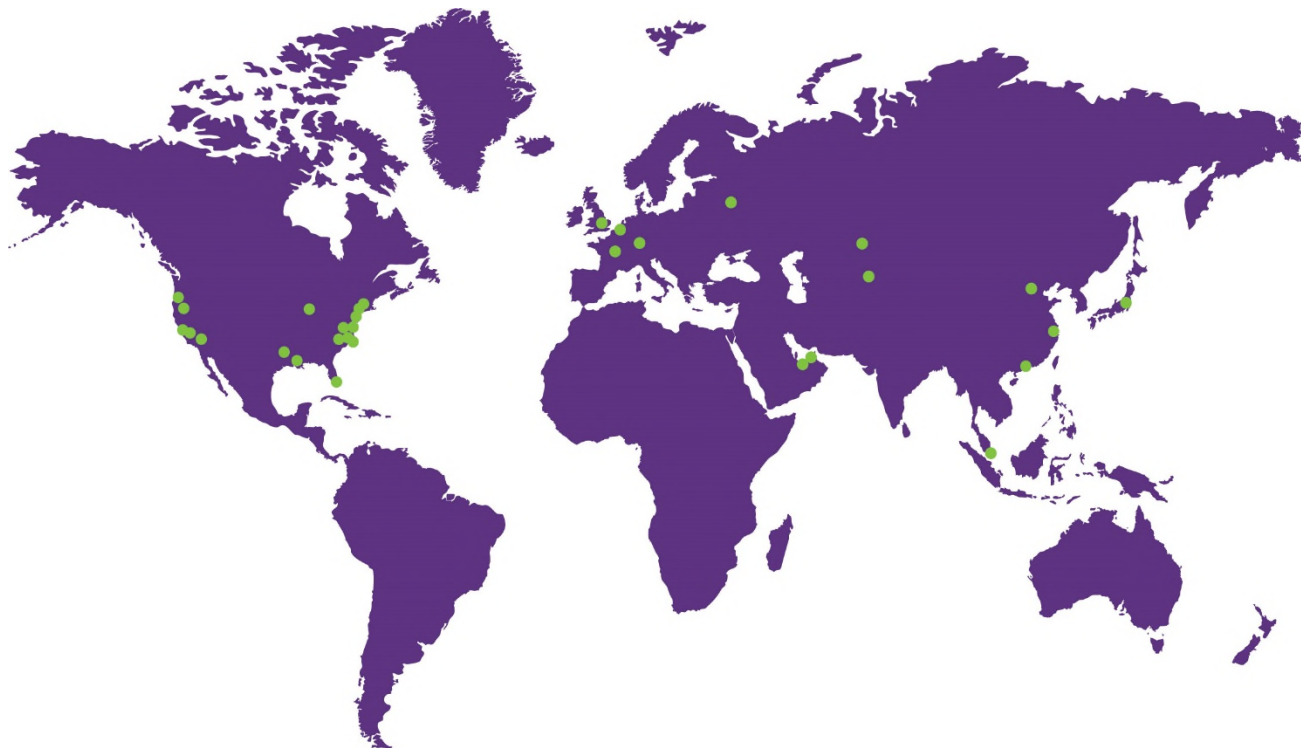


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