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WEBINAR SERIES

CALIFORNIA EMPLOYMENT LAW YEAR IN REVIEW

Significant 2020 Employment Law Cases
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David v. Queen of Valley Med. Ctr., 51 Cal.App.5th 653 (2020)

- Former nurse alleged her meal and rest periods were interrupted and that her hours were not fully compensated due to the hospital's rounding policy.
- Holding:
  - Meal and rest: Charge nurses looking at the clock during Plaintiff's breaks did not constitute a direction to prematurely terminate a break.
  - Rounding: Rounding policy was **neutral on its face** because it rounded all employee time punches to the nearest quarter hour regardless of who benefitted. Policy was also **neutral in practice** because the rounding practice did not systematically undercompensate the Plaintiff.

Barriga v. 99 Cents Only Stores LLC, 2020 WL 3481717 (Cal. Ct. App. 2020)

- Certify off the clock and meal period classes. Defendant submitted employee declarations in opposition, and Plaintiff moved to strike those declarations arguing that they were obtained via coercion.
- Trial court has the duty / authority to exercise control over pre-cert communications – declarants misled or declarations not freely and voluntarily given sufficient.
- Potential coercive communications with employees include:
  - Not told declaration would be used against them;
  - Told attorneys were merely doing an internal investigation;
  - Summoned to meeting, not told they could decline to be interviewed; and
  - Employees testified they felt pressured to sign declaration
- Remanded

O'Grady v. Merchant Exchange Prods., Inc., 2019 WL 5617001 (Cal. Ct. App. 2019)

- Banquet server sued alleging that mandatory service charges constituted gratuities and were therefore controlled by Labor Code Section 350 et seq.
  - Gratuity for benefit of service staff
  - Cannot share with non-service, management, employees
- Court found that "service charge" had different meanings in different contexts and did not always constitute a tip or gratuity left for the benefit of the service staff. Recent case law does not preclude this meaning, however.
- Not clear that service charges are always distinct from gratuities, and order granting demurrer was reversed

Noori v. Countrywide Payroll & HR Solutions, Inc., 43 Cal.App.5th 957 (2019)

- PAGA wage statement claim alleging that staffing company Countrywide Payroll & HR Solutions, Inc.'s wage statements failed to accurately list the name of the legal entity that is the employer, as required by Labor Code Section 226(a)(8).
- Instead, the wage statements listed an acronym, CSSG, which stands for Countrywide Staffing Solutions Group, which is a fictitious business name in some states.
- "CSSG" was not Countrywide's registered name or a minor truncation. The fact that "Countrywide Staffing Solutions Group" was listed on the detachable check was insufficient.

Noori v. Countrywide Payroll & HR Solutions, Inc., cont'd.

- Use of truncated names or fictitious business names can satisfy the statute. Examples:

Name on Wage Statement	Legal Entity of the Employer	Case
Spherion Pacific Work, LLC	Spherion Pacific Workforce, LLC	*Elliot v. Spherion Pacific Work, LLC , et al.*, 572 F.Supp.2d 1169, 1174 (C.D. Cal. 2008), *aff'd*, 368 F. App'x 761 (9th Cir. 2010).
Farmland Mutual Insurance Co.	Farmland Mutual Insurance Company	*Mejia v. Farmland Mut. Ins. Co.*, No. 217CV00570TLNKJN, 2018 WL 3198006, at *1 (E.D. Cal. June 26, 2018).
YRC Freight (California registered fictitious business name)	YRC Inc.	*Savea v. YRC Inc.*, 34 Cal.App.5th 173 (2019).

Noori v. Countrywide Payroll & HR Solutions, Inc., cont'd.

- Severe truncations or alterations of the employer's name can violate the statute, particularly where confusion might ensue. Examples:

Name on Wage Statement	Legal Entity of the Employer	Case
SUMMIT	Summit Logistics, Inc.	*Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005).
First Transit	First Transit Transportation, LLC (where "First Transit, Inc." also exists)	*Clarke v. First Transit, Inc.,* No. CV076476GAFMANX, 2010 WL 11459323, at *1 (C.D. Cal. Nov. 4, 2010).
Wal-Mart Associates, Inc.	Wal-Mart Stores, Inc. (where multiple Wal-Mart entities shared the same address)	*Mays v. Wal-Mart Stores, Inc.,* 354 F.Supp.3d 1136 (C.D. Cal. 2019).
CSSG (an acronym of fictitious name "Countrywide Staffing Solutions Group," which was not registered in California)	Countrywide Payroll & HR Solutions, Inc.	*Noori v. Countrywide Payroll & HR Sol., Inc.*, 43 Cal.App.5th 957 (2019).

Oliver v. Konica Minolta Business Solutions U.S.A., 51 Cal. App. 5th 1 (2020)

- Traveling technicians were required to drive their personal vehicles, sometimes loaded with employer tools and materials, to various work sites. Technicians were not compensated for "commute time" to first and from last appointment of the day.
- The court reversed summary judgment for the employer and identified two key issues to determine if the employees were entitled to compensation for their travel time:
  - Were employees "required" to commute with parts and tools, or was this optional?
  - If required, what volume of tools were employees required to transport?
- If technicians were required to transport such a large volume of tools that it would prevent them from using their commute time effectively for their own purposes, may be under "control" of employer during this time.

Frlekin v. Apple Inc., 8 Cal. 5th 1038 (Feb. 13, 2020)

- Supreme Court ruling on certified question from Ninth Circuit: Time employees spend on premises waiting for and undergoing mandatory exit searches is compensable as "hours worked" under California law. Court expressly stated that its holding applied retroactively.
- Apple Store retail employees alleged they were owed wages for time spent undergoing exit searches after they clocked out, but before they left the store. Searches applied to bags/packages and Apple personal technology devices that employees voluntarily brought to work for personal convenience.
  - Court declined to apply FLSA's portal-to-portal rule, under which exit search time is not compensable.
  - Court rejected argument that employees' activity must be "required" and "unavoidable" in order to be compensable; it did not matter that employees could theoretically avoid searches by not bringing a bag or Apple device to work. The determinative factor was that employees are under the employer's control while waiting to be searched or being searched.
- Ninth Circuit in Sept. 2020 ordered District Court to enter judgment for plaintiffs on certified class claim.
- Practical takeaways: Employers that require "bag checks" or exit searches should address how practically to record such time (i.e., automatic time addition, edit procedure, placing time clocks at exit location). Time employees spend waiting to be searched and undergoing searches should be factored into scheduling to avoid unintended overtime.

McPherson v. EF Intercultural Found., 47 Cal. App. 5th 243 (2020)

- Plaintiffs claimed entitlement to pay out of accrued vacation upon termination where employer never expressly defined the amount of vacation employees could take. Employees were required to notify a supervisor before taking time off, but vacation days were not tracked as being accrued or taken. Based on evidence at trial, the trial court determined the unwritten policy included an implied cap and ruled that 20 days of vacation vested annually for plaintiffs such that any unused portion must be paid out.
- Court of Appeal affirmed the ruling based on the specific facts of the case, including evidence that employees did not believe they had unlimited vacation.
- The Court provided no definitive of statement re: when vacation need not be paid out upon termination under true “unlimited” plan, but suggested such policies may be valid under certain circumstances, such as if they are in writing, administered fairly, clearly indicate employees may decide when and how much time to take off, and allows sufficient opportunities for employees to actually take vacation.

Herrera v. Zumiez, Inc., 953 F.3d 1063 (9th Cir. 2000)

- Plaintiff filed a putative class action asserting the employer failed to pay its California employees for "call in" shifts. If employee was called in and required to work he or she was paid. If not called in to work, no payment was provided.
- Employer's motion for judgment on the pleadings was denied. While an appeal to the Ninth Circuit was pending, the California Court of Appeal decided *Ward v. Tilly's Inc.,* 31 Cal. App. 5th 1167 (2019), which held that an employee need not physically report to work in order to be eligible for reporting-time pay.
- Holding that there was no "persuasive data" the California Supreme Court would decide otherwise, the Ninth Circuit affirmed the denial of the employer's motion based upon *Tilly's*. Ninth Circuit also affirmed denial of the motion as to the claim for "hours worked" based on the time employees spent calling in 3-4 times each week.
- Practical takeaways: Carefully review whether you have any policy or practice of "call in" shifts and consider discontinuing in light of federal and state appellate rulings.

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Ward v. United Airlines, 9 Cal. 5th 732 (2020)

- Pilots and flight attendants argued that United must provide them with wage statements that complied with California Labor Code § 226, even though they spent the majority of their working time outside California.
- The California Supreme Court answered two certified questions from the Ninth Circuit as follows:
  - Wage Order No. 9's Railway Labor Act exemption does not bar a wage statement claim brought under Section 226 by an employee who is covered by a collective bargaining agreement.
  - Section 226 applies if the employee's "principal place of work" is in California, which Court interpreted to mean: (1) the employee works a majority of the time in California, or (2) for interstate transportation workers whose work is not primarily performed in any single state, if the worker has his or her base of work operations in California.

Oman v. Delta Air Lines, 9 Cal. 5th 762 (2020)

- Flight attendants argued that Delta's compensation system failed to pay for all hours worked and that Delta must comply with California's timing-of-pay (Section 204) and wage statement (Section 226) requirements even though they spent the majority of their working time outside California.
- The California Supreme Court answered two certified questions from the Ninth Circuit as follows:
  - California's limits on "wage borrowing" permit compensation schemes that promise to compensate all hours worked at or above the minimum wage, even if particular components of those schemes fail to attribute to each and every compensable hour a specific amount equal to or greater than the minimum wage.
  - Like Section 226, Section 204 applies if the employee's "principal place of work" is in California, which Court interpreted to mean: (1) the employee works a majority of the time in California or (2) for interstate transportation workers whose work is not primarily performed in any single state, if the worker has his or her base of work operations in California.

Oman v. Delta Air Lines, cont'd.

Practical takeaways:

- The CA Supreme Court affirmed the *Armenta* line of cases, but clarified that California does not prohibit "wage averaging," only "wage borrowing" from agreed-upon wages to compensate for other uncompensated time.
- Non-traditional pay systems, like Delta's credit-based system, may comply with California's minimum wage requirements.
- To determine whether Labor Code Sections 204 and 226 apply, the test is the employee's "principal place of work" during the relevant pay period.
- Because the Supreme Court determined that Delta's compensation system complied with California law, it did not address the circumstances under which California's minimum wage law applied to employees who spent the majority of their working time outside California.

Gulf Offshore Logistics, LLC v. Superior Court, __ Cal. App. 5th ___ (Dec. 7, 2020)

- Oil rig workers operating off the coast of California sued for violations of California wage and hour law. Workers were all non-residents of California and, although docked in California ports, rarely left their vessel. Employer was headquartered in Louisiana, had employment agreements signed under Louisiana law, conducted training in Louisiana, and the vessel was registered in Louisiana.
- Court of Appeal originally held Louisiana law governed. California Supreme Court ordered reconsideration in light of *Ward* and *Oman*, following which the Court of Appeal held that work performed in California's territorial waters was subject to California employment law even though the waters were also within federal territorial boundaries and because California served as the base for the crews' work operations.
- Court rejected arguments that the FLSA and general maritime law preempted California wage and hour law.

PAGA/Class Settlements and Releases

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Kim v. Reins, 9 Cal. 5th 73 (2020)

- Holding: Employees who settle their individual Labor Code claims do not lose standing to pursue a claim for civil penalties under PAGA, on behalf of the state, based on the same alleged violations.
- The Court rejected Reins's argument that Kim was no longer an "aggrieved employee" because he accepted compensation for his injury. The Court stated that standing under PAGA is based on the employer's violation, not the injury suffered by the employee.
- The Court found that "Kim became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him. (See § 2699(c).) Settlement did not nullify these violations. The remedy for a Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself."
- The Court did not address what happens when an employee settles the employee's own PAGA claim. The settlement here expressly excluded the pending PAGA claim. The Court explained:
  - "His single complaint encompassed seven causes of action. The six claims for specific Labor Code violations were bifurcated and sent to arbitration at Reins's own urging. The seventh claim seeking PAGA penalties was stayed pending completion of the arbitration. The PAGA claim was never resolved. Indeed, consistent with the settlement agreement, Kim's request for dismissal of the individual claims specified that 'Cause of Action Seven for penalties pursuant to Lab. Code § 2699 et seq. ("PAGA") for the underlying violations . . . shall remain.' Reins cites no authority, and we are aware of none, holding that the resolution of some claims can bar the litigation of other claims that were asserted in the same lawsuit."

Brady v. AutoZone Stores, Inc., 960 F.3d 1172 (9th Cir. 2020)

- Procedure: Plaintiff brought meal/rest period claims. District Court denied class certification. Plaintiff settled his individual claims, then appealed class cert. denial. Ninth Circuit determined the appeal was moot.
- Holding: A putative class representative who voluntarily settles his individual claims and no longer retains a personal stake in the class action renders the class claims moot.
- A class representative who settles his individual claims no longer has a legally cognizable interest in the outcome of the class claims where he has no financial stake in the outcome; if the class representative retains a financial stake, then the class claims are not moot.
- Employer Impact: When settling a putative class representative, make sure the agreement fully resolves the employee’s individual claims, including attorneys’ fees and costs, and disclaims the class claims by explicitly stating the employee is not entitled to any financial reward if the unresolved class claims are ultimately successful (i.e., no entitlement to an award enhancement fee, etc.).

Grande v. Eisenhower Med. Ctr., 44 Cal. App. 5th 1147 (2020), *review granted*, 463 P.3d 169 (Cal. S. Ct. May 13, 2020)

- Holding: The settlement of a class action between a staffing agency and its employees did not bar a subsequent action by the employees against the agency's client, where the agency and the client were not in privity, and the client was not a released party under the settlement agreement.
- The appellate court found that the earlier settlement did not bar Grande's suit against the client.
  - The court was not persuaded that the staffing agency and the client-hospital's status as joint employers meant that they were agents of each other. The pair affirmatively disavowed any agency relationship in their contract. Further, there was no evidence that the hospital ever actually acted as the staffing agency's agent, or vice versa.
  - The court also rejected the contention that the hospital was a released party under the settlement agreement. The settlement included a long list of categories of people and entities who fell within the definition of "Released Parties." That list did not include words such as clients, joint employers, joint obligors, or other similar language which could reasonably be read to include the hospitals to which the plaintiff class members had been assigned.
- On review: "The issue to be briefed and argued is limited to the following: May a class of workers bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency's agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's client?")

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Kec v. Superior Court, 51 Cal. App. 5th 972 (2020)

- Plaintiff filed a putative class and PAGA representative action for a variety of wage and hour labor code violations due to alleged misclassification.
- The parties' arbitration agreement purported to waive class actions and "other representative actions."
  - Included a provision that the class and representative action waivers were not modifiable nor severable.
  - If the class and/or representative action waivers were found to be unenforceable, then the entire arbitration agreement would be deemed "null and void" (the "blow up provision")
- The trial court found the PAGA waiver unenforceable, but severed it from the rest of the arbitration agreement and granted the employer's motion to compel arbitration of Plaintiff's individual claims.
- The Court of Appeal reversed, holding that the "blow-up" provision rendered the entire arbitration agreement null and void because the representative waiver was invalid.
- The Court of Appeal concluded that selectively enforcing the agreement would defeat its goals when the parties expressly chose not to make the representative waiver provision severable like every other term in the agreement.

Cases Pending Before the California Supreme Court

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Ferra v. Loews Hollywood Hotel, LLC, 40 Cal. App. 5th 1239 (2019)

- Issue: Did the Legislature intend the term “regular rate of compensation” in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term “regular rate of pay” under Labor Code section 510(a), which requires employers to pay a wage premium for each overtime hour?
- The California Court of Appeal and trial court held that “regular rate of compensation” and “regular rate of pay” are not synonymous, and the premium for missed meal and rest periods is the employee’s base hourly wage.
  - The question before the lower courts was whether the employer should have included nondiscretionary bonuses in its calculation of missed meal and rest period premiums.
  - After analyzing the plain language, legislative history, and persuasive federal authority, the Court of Appeal found that the Legislature intended for “regular rate of compensation” and “regular rate of pay” to have different meanings, and that meal and rest period premiums do not include any adjustments to the straight-time rate.
- Procedural Posture:
  - The case has been fully briefed.
  - Oral argument has not yet been set.

Naranjo v. Spectrum Security Services, Inc., 40 Cal. App. 5th 444 (2019)

- Security guards for a private federal detention contractor brought a class action alleging the employer's on-duty meal period policy, which did not provide the employees the option to opt out, violated California law.
- Court of Appeal held:
  - On-duty meal period policy must be in writing and include language advising employees may revoke the agreement at any time.
  - Meal and rest period premiums are not "wages," and therefore employees are precluded from pursuing derivative penalties under Labor Code sections 203 (untimely wage payments) and 226 (wage statement violations).
  - Unpaid premium wages for violations of Labor Code's meal break provisions accrue prejudgment interest at 7%.
- Review granted by California Supreme Court regarding derivative penalties and prejudgment interest.
  - The case has been fully briefed.
  - Oral argument has not yet been set.

Independent Contractor/ Joint Employer

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Gonzales v. San Gabriel Transit, Inc., 40 Cal.App.5th 1131 (2019)

- Holding: The Court reversed the lower court's denial of class certification, with instructions to apply the ABC test to determine if the requirements of commonality and typically for the purposes of certification of a class action were satisfied.
  - Plaintiff sought to represent a class of 500 delivery drivers who were classified by San Gabriel Transit as independent contractors.
  - The trial court denied Plaintiff's motion for class certification, finding that he failed to demonstrate there was a community of interest or typicality among the drivers.
  - The court ultimately reversed in light of the California Supreme Court's decision in *Dynamex.*
- Review was granted by the California Supreme Court on January 15, 2020.

Salazar v. McDonald's Corp., 939 F.3d 1051 (9th Cir. 2019)

- Plaintiffs sought to hold McDonald’s liable for wage and hour violations allegedly committed by its franchisee.

  The franchisee selected, interviewed, hired, trained, supervised, disciplined and fired employees for its franchises, set their wages and schedules, and paid the employees; but Plaintiffs presented evidence that the franchisee was required to use certain of McDonald’s computer systems and voluntarily used others, including McDonald’s proprietary timekeeping software, managers were trained at McDonald’s Hamburger University, and employees were required to wear McDonald’s standard uniforms.

  Plaintiffs alleged that McDonald’s timekeeping system caused many employees who worked more than 8 hours in a 24-hour period to miss out on overtime pay that they earned.

  Relying on California Supreme Court precedent, the Ninth Circuit affirmed the district court’s grant of summary judgment in favor of McDonald’s, concluding that it <u>was not</u> a joint employer because:

  (1) it did not control the wages, hours, or working conditions of the workers and did not retain “a general right of control” over “day-to-day aspects” of work at the franchises;

  (2) it did not “suffer or permit” the franchise employees to work, because it did not have the power to cause or prevent class members from working; and

  (3) it could not be held liable under an ostensible-agency theory

ADA, Discrimination, FEHA, EPA

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Anthony v. TRAX Int'l Corp., 955 F.3d 1123 (9th Cir. 2020)

- Holding: After-acquired evidence can be used to show that an ADA plaintiff was not a "qualified individual."
- Plaintiff Sunny Anthony suffered from mental health conditions and was terminated by Defendant TRAX when she could not return to work after a LOA. She then filed an action alleging she was terminated because of her disability, and that TRAX failed to engage in the statutorily required interactive process to find a reasonable accommodation for her employment.
- During the course of litigation, TRAX discovered that the plaintiff falsely indicated on her employment application that she had a bachelor's degree, which was a requirement for the plaintiff's position based on specific government contracts.
- TRAX argued that without the required degree, the plaintiff was not qualified for the position.
- The district court granted summary judgment in favor of TRAX; reasoning that in light of the after-acquired evidence, the plaintiff was not a "qualified individual" within the protections of the ADA.
- The Ninth Circuit affirmed the district court ruling and further held that the employer was not required to engage in the interactive process as the plaintiff was not "otherwise qualified."

Glynn v. Superior Court, 42 Cal. App. 5th 47 (2019)

- Holding: Employees need not prove discriminatory animus to establish a claim for disability discrimination. An employer's mistaken belief as to an employee's ability to return to work with or without accommodation, even if reasonable and in good faith, constitutes direct evidence of disability discrimination.
- Summary: Plaintiff went on an approved medical leave of absence. While on leave, Plaintiff was terminated by HR personnel due to a misunderstanding of the Company's leave policies. HR mistakenly believed that Plaintiff had applied and been approved for long-term disability ("LTD") benefits, at which point Company policy required termination. Plaintiff had not applied for LTD benefits and, instead, sought to be reassigned to a vacant position as an accommodation in accordance with company policy.
  - After he filed suit, the employer's Chief HR Officer conceded to Plaintiff that he should not have been terminated and offered to reinstate him, with full back pay and benefits, while the Company determined a proper job reassignment and accommodations. Plaintiff declined, asserting that no alternative position was offered and his belief that the company would fail to place him in an open position.
- In reaching its decision, the Court noted that the consequences of an employer's mistaken belief as to an employee's ability to safely perform the essential functions of a job should fall on the employer and not the employee.

Jimenez v. U.S. Continental Mktg., Inc., 41 Cal. App. 5th 189 (2019)

- Holding: Employer may have FEHA liability if it exercised direction and control over temporary worker.
- Elvia Jimenez worked for Ameritemps (staffing agency). Ameritemps placed Jimenez with USCM. She worked at USCM for 5 years, performed a supervisory role, oversaw 30 workers, reported to a USCM employee, was subject to USCM's employee handbook, and received USCM training. Ameritemps hired her, tracked her time, paid her, and provided her benefits. USCM terminated her following an investigation of alleged bullying. Then Ameritemps terminated her.
- Jimenez sued both for FEHA violations. Jury found USCM was not her employer.
- Court of appeal held USCM was Jimenez's employer. Issue was a question of *USCM's* direction and control over the terms, conditions, and privileges of her employment. Matters handled by Ameritemps were irrelevant - inquiry is considered individually and not in relation to Jimenez's direct employer. Analysis still turns on "the totality of the circumstances" (no bright-line test).

Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020)

- Holding: under the Equal Pay Act (EPA), reliance on a female employee's prior salary can not justify a salary differential with her male colleagues, whether or not the prior salary was considered with other factors.
  - Any salary differential between a female employee and her male colleagues must be justified by a job-related factor. Job-related factors include:
    - experience;
    - educational background;
    - ability; or
    - prior job performance.
  - Prior salary is not job-related.
  - Prior salary potentially reflects a discriminatory marketplace.

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.

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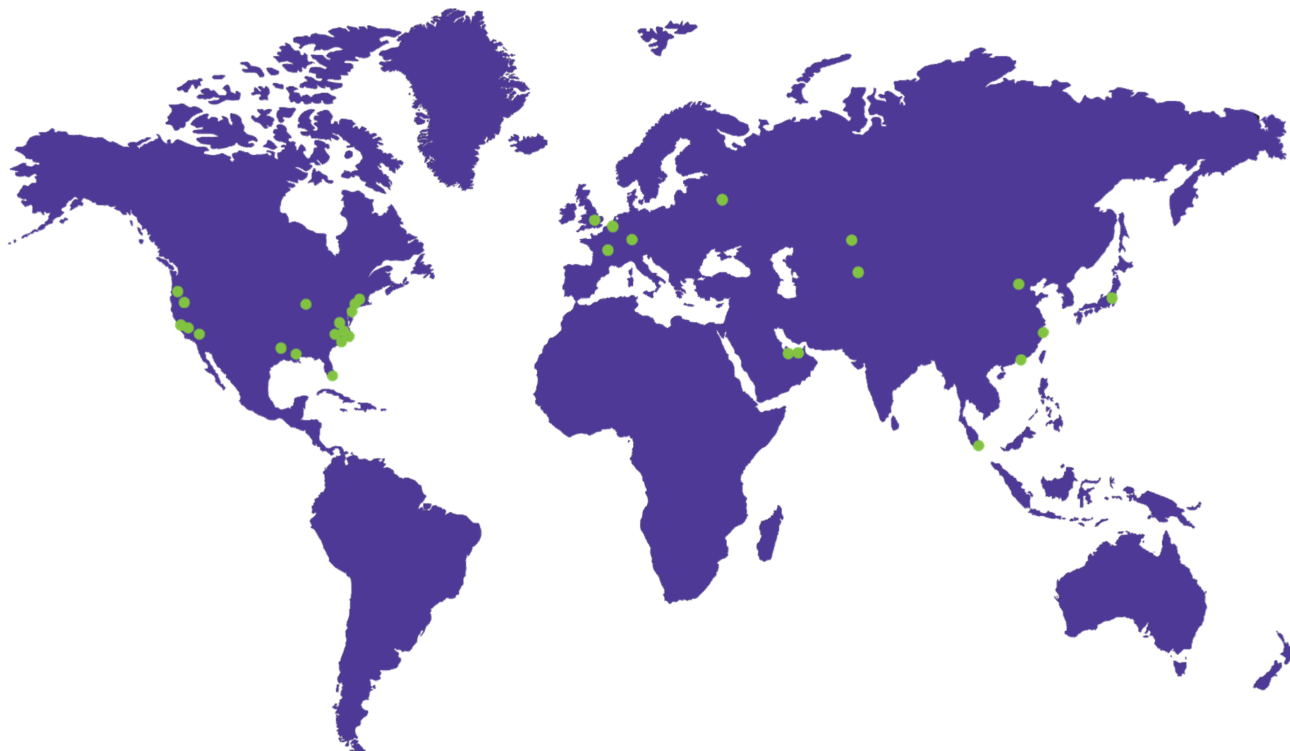

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