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THE FIRST 100 DAYS

HOT TOPICS IN EMPLOYEE BENEFITS: WHAT WE'RE SEEING

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EMERGENCY PENSION PLAN RELIEF ACT OF 2021 (EPPRA)

EPPRA: Financial Assistance for Troubled Plans

- The centerpiece of EPPRA is a financial assistance program for certain deeply troubled plans
- In order to qualify for financial assistance, a plan must meet both a threshold eligibility test and an economic need–based test
- The threshold eligibility test requires a plan to meet at least one of four conditions:
  - The plan is insolvent;
  - The plan has imposed a benefit suspension under MPRA;
  - The plan is in critical and declining status; or
  - The plan:
    - in critical status,
    - is less than 40% funded on a current liability basis, and
    - is has a ratio of active to inactive participants of less than 2 to 3

Financial Assistance for Troubled Plans – Continued

- If a plan meets one of the four conditions under the threshold eligibility test, the amount of assistance it will receive depends on an economic need–based test
- Under the economic need–based test, eligible plans are only entitled to assistance in an amount that would allow a plan to pay all benefits through 2051
  - Includes benefits suspended under MPRA
  - Does not include adjustable benefits that have been cut under a rehabilitation plan
- If a plan is not currently projected to be insolvent by 2051, it is not likely to qualify for any actual assistance
- The sooner a plan will become insolvent, the more relief it will be entitled to receive

Limitations on Use of Financial Assistance

- Financial assistance, and any earnings on the assistance, can only be used to make benefit payments and pay plan expenses
- Plans that previously cut benefits under MPRA will be required to:
  - restore those cuts to receive assistance, and
  - make retroactive payments of the suspended amounts
    - either in a lump sum or in installments over five years
- Plans must segregate the relief, as well as any earnings on such relief, from other plan assets
- The amount of relief must be invested in investment-grade bonds or in other investments approved by the PBGC
- The PBGC may, by regulation, impose other conditions on plans that receive assistance
  - The PBGC may restrict accrual rates, retroactive benefit improvements, reductions in employer contributions, and the diversion of employer contributions

Financial Assistance and Withdrawal Liability

- EPPRA's effect on multiemployer withdrawal liability is an open question
- The House version of the bill expressly provided that withdrawal liability would not take into account the assistance for 15 years after the plan's receipt of the assistance
  - If that provision had been included in the bill, employers that withdrew from a plan would have incurred the same withdrawal liability, whether or not the plan received assistance
- The Senate version of the bill removed that provision to avoid a procedural violation on a technicality unrelated to the merits under the reconciliation process
- EPPRA does, however, permit the PBGC to impose special withdrawal liability rules on plans that receive assistance
  - It is likely that the PBGC will issue rules or guidance that limit whether assistance can be included in the amount of unfunded vested benefits that are allocated to a withdrawn employer
    - PBGC could adopt the 15-year period that was stripped from the Senate bill
    - PBGC could require plans to disregard assistance for purposes of calculating withdrawal liability for 10 years, analogous to the requirement that plans disregard MPRA suspensions for 10 years
  - Without such rules, the withdrawal liability assessed by a plan that received assistance would be significantly lower, which could prompt employers to withdraw, deteriorating the plan's contribution base

Other EPPRA Rules

A plan may elect the same zone status that applied in the previous plan year for either the 2020 or 2021 plan year.

If a plan was in endangered or critical status, it will not be required to update its funding plan or rehabilitation plan until the plan year following the year of the election.

A plan may "smooth" the actuarial value of any investment losses in 2020 and 2021 over as many as 10, rather than five, years.

A plan may elect to treat assets as 130%, as opposed to 120%, of their fair market value when calculating the value of assets (plans are normally limited to an actuarial value of 120% over fair market value).

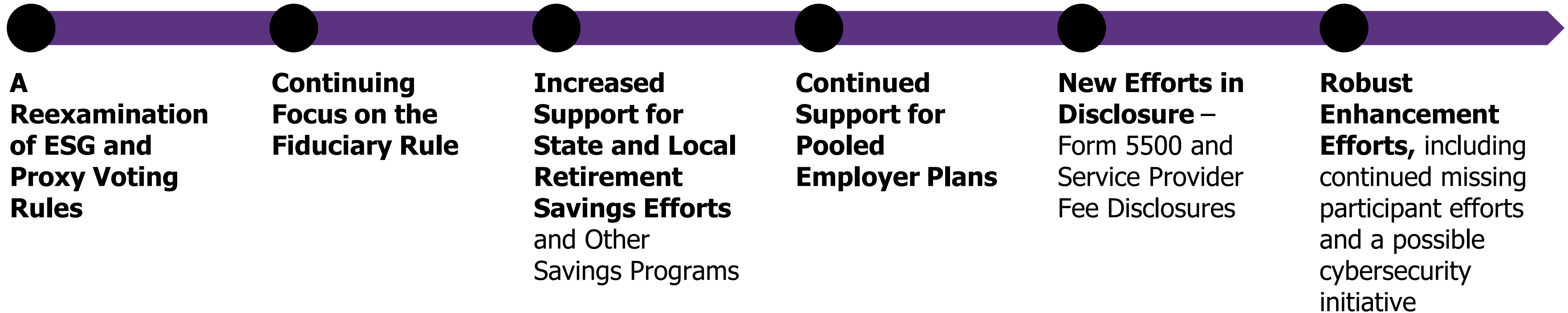
A plan may amortize over as many as 30, as opposed to 15, years the plan's 2020 and 2021 "actuarial losses."

EPPRA increases the flat rate multiemployer plan PBGC premium to $52 per person per plan year.

ERISA FIDUCIARIES UNDER A BIDEN LABOR DEPARTMENT: WHAT IS ON THE HORIZON?

What Is on the Horizon?

There are a number of issues in the ERISA fiduciary space that have already garnered the new administration's attention and there are certain clues about how a Biden Department of Labor (DOL) may impact the regulation and enforcement of ERISA's fiduciary standards.



A Reexamination of ESG and Proxy Voting

- In the final weeks of 2020, the DOL finalized two regulations regarding ERISA fiduciary duties.
  - First, the DOL finalized its rule titled "Financial Factors in Selecting Plan Investments" (the Financial Factors Rule), aka the ESG rule.
    - The crux of the Financial Factors Rule is to mandate that fiduciaries may consider only pecuniary factors when making investment decisions, subject to a few exceptions.
    - "Pecuniary" means a factor that the fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons and the plan's objectives and funding policy.
    - Some viewed the Financial Factors Rule as having a broader impact.
  - The second regulation issued at the end of the Trump administration was the proxy voting rule (officially titled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights") (the Proxy Voting Rule).

ESG and Proxy Voting: What to Do?

- In a somewhat expected development, in early March the DOL issued an enforcement statement announcing that it will not enforce either of the above two new rules.
- What should ERISA fiduciaries be doing?
  - On the one hand, for those plans that were under a current DOL investigation related to ESG usage, the DOL's announcement probably signals the end of the DOL's current enforcement effort in this area.
  - This development is also viewed as a sign that the Biden DOL will prepare a new set of regulatory interpretations in these two areas. However, it may be some time until the DOL proposes such new guidance.
  - There is also some uncertainty because a nonenforcement policy does not remove either rule.
    - As a result, one remaining risk is that a private litigant could still bring an ERISA action for noncompliance with either rule, since a nonenforcement policy leaves each rule intact.

ESG and Proxy Voting: What to Do? – Continued

- Given the possible risk of private litigation, plan fiduciaries may want to consider still reviewing and possibly seeking to comply with the standards in the Rules.
  - This approach may be particularly warranted for plans that have ESG–specific funds in the plans' lineup.
- What about adding new ESG funds, or adding more ESG factors?
  - On the one hand, it may be best to apply a wait-and-see-approach.
  - On the other hand, it may be some time before the DOL issues new guidance in this area.
    - Also, it is generally expected that a Biden DOL will look more favorably on ESG funds, and the application of ESG factors to investment decisionmaking.
    - Thus, there is a school of thought that now could be a good time to move forward on adding ESG funds (or move to incorporate more ESG factors).

Continuing Focus on the Fiduciary Rule

- Many expect a continued focus on the investment advice fiduciary standards, with a particular focus on advice to plan participants and retail investors, also known as the "fiduciary rule."
- The last regulatory action by the DOL regarding the fiduciary rule was the issuance of the "Improving Investment Advice for Worker & Retirees" class exemption (PTE 2020-02), which covers investment advice fiduciaries and was issued in the last days of the Trump administration. That exemption is now in effect, as of February 16, 2021.

Continuing Focus on the Fiduciary Rule – Continued

- This week, the DOL issued the first set of guidance related to the fiduciary rule in the form of an FAQ.
- Among the assertion that come out of the FAQ:
  - The DOL will be taking further action on the fiduciary rule, subject to a notice and comment period, specifically by: (1) amending the investment advice fiduciary regulation, (2) amending the newly effective PTE 2020-02, and (3) amending or revoking other available exemptions.
  - The DOL intends to provide new interpretations on the five-part test.
  - Indications that the DOL may be trying to assert enforcement authority over IRAs.

Increased Support for State and Local Retirement Savings Efforts and Other Savings Programs

- A Biden DOL, like with other Democratic administrations, could seek to provide more support for state and local retirement savings efforts.
  - This issue often plays out in the legal issue of preemption.
  - Seeming to confirm this is the DOL's recent withdrawal of its amicus brief (filed by the Trump DOL) supporting a challenge to the legality of California's auto-IRA program.
- At the same time, there is some expectation that there might be a Secure Act 2.0 that will contain provisions to expand savings, for example:
  - Requiring auto-enrollment
  - Student loan help

Continued Support for Pooled Employer Plans

- Pooled Employer Plans, or PEPs, are a new form of multiple employer plans made available by the 2019 SECURE Act (with broad bipartisan support), facilitating the operation of 401(k) plan arrangements for groups of unrelated employers.
  - The effective date for the PEP rules was January 1, 2021. During 2020, the DOL adopted a regulation on the registration of Pooled Plan Providers, the entities that sponsor and administer PEPs, and also requested comments on prohibited transaction issues for PEP arrangements.
  - We expect that during 2021 the DOL will continue to issue guidance on the many operational questions arising with PEPs.

Disclosures – Form 5500 and Service Provider Fee Disclosures

- A Biden DOL could continue efforts to enhance and reform ERISA-related disclosure documents, particularly related to service provider compensation.
  - Possible projects include updates to the Form 5500 annual report and a 408(b)(2) disclosure guide.
  - Additionally, Congress recently amended ERISA Section 408(b)(2) to require brokers and consultants for welfare plans to disclose information about their fees and compensation.

Robust Enforcement Efforts

- We expect that the DOL will continue the robust enforcement efforts. Possible areas of focus include:
  - Possible new focus on data and cybersecurity.
    - In fact, just this week, DOL issued new sub-regulatory guidance on the topic.
    - This seems to be a further signal that DOL investigations could be coming.
  - Continuation and possible expansion of the "missing participant" investigations.
  - Possible DOL and SEC coordinated enforcement efforts on the new investment advice exemption and Regulation Best Interest, or as noted above IRA enforcement.

EMPLOYEE RETENTION CREDIT

Employee Retention Credit

- Refundable credit based on a percentage (50% or 70%) of “qualified wages” paid by eligible employers
- Three iterations of employee retention credit (ERC)
  - 2020 (after March 12, 2020) – Coronavirus Aid, Relief, and Economic Security (CARES) Act, as amended by Section 206 of the Consolidated Appropriations Act of 2021 (CAA)
  - Q1/Q2 of 2021 – CAA Section 207
  - Q3/Q4 of 2021 – American Rescue Plan Act of 2021 (ARPA)

2020 ERC

- Credit is equal to 50% of qualified wages paid between March 13 and December 31, 2020, up to a maximum of $5,000 per employee.
- To be eligible, an employer must satisfy one of two tests in a given quarter:
  - Shutdown test: Trade or business fully or partially shut down because of a government order, such as an order requiring nonessential businesses to close
  - Gross receipts test: The employer's gross receipts decline by more than 50% compared to the same calendar quarter in 2019
    - Aggregation of all affiliates
    - If an employer satisfies the gross receipts test for a calendar quarter, the employer qualifies for the retention credit through the end of the quarter in which gross receipts rebound to more than 50% of the previous year's level

2020 ERC – Continued

Qualified Wages

- Wages for FICA purposes (generally)
- Paid during calendar quarter in which employer is eligible for ERC
- If averaging more than 100 full-time employees in 2019, then qualified wages are limited to wages paid for a period in which the employee is not working at, or is working part time but is paid more than a ratable portion of his or her compensation
- Includes PTO, sick leave, and health insurance (employer's share and employee's pre-tax share)
- Capped at $10,000 per employee (meaning ERC is capped at $5,000 per employee)

Paycheck Protection Program (PPP) loan recipients may be eligible for ERC

- May not double benefit by claiming the ERC on wages that the employer paid with PPP loan proceeds that the Small Business Administration (SBA) has forgiven
- May claim the ERC on qualified wages that were funded through other means, including with PPP loan proceeds that are not forgiven
- Note that fully forgiven PPP loan provides a more favorable economic benefit than a 50% ERC

Methods for claiming ERC:

1. Reduce federal employment tax deposits
2. File IRS Form 7200 requesting advance payment
3. Claim a refund on IRS Form 941

ERCs for Q1/Q2 of 2021

- Increased ERC from 50% to 70% of qualified wages
  - $10,000 cap on qualified wages now applies to each quarter rather than all quarters (as was the case in 2020)
    - Maximum ERC of $7,000 per employee per quarter
- Gross receipts eligibility threshold lowered from 50% decline to 20% decline compared to same quarter in 2019
- Gross receipts test may be applied by comparing the prior calendar quarter, compared to the corresponding calendar quarter in 2019
  - Notice 2021-23 (released on April 2) indicates that an employer can use this rule to qualify for the ERC in Q1 and Q2 of 2021 based solely on a decline in gross receipts during Q1

ERCs for Q1/Q2 of 2021 – Continued

- Permits employers with up to 500 employees (previously 100 employees) to claim ERC on all wages paid—rather than just on wages paid for not working—during an eligible period
- Eliminates advance payment (Form 7200) of ERC for employers with more than 500 employees. Methods available:
  - Reduce federal employment tax deposits
  - Claim ERC on IRS Form 941
- Removes cap on qualified wages for increased pay
  - For 2020, eligible employers with more than 100 full-time employees during 2019 could not claim the ERC on wages in excess of the amount an employee would have received for working an equivalent duration during the 30 days immediately preceding the shutdown or the decline in gross receipts

ERCs for Q1/Q2 of 2021 – Continued

Expands advance of payment of ERC for employers with 500 or fewer employees

- Eligible employer may elect to receive an advance payment of up to 70% of the average quarterly wages (FICA/RRTA) paid by the employer in 2019
- For seasonal workers, an eligible employer may elect to calculate the advance payments based on actual wages paid for the corresponding calendar quarter in 2019
- No $10,000/employee cap on advance payments – employers may be able to obtain advance payments that far exceed the projected ERC for the quarter

Eligible employers expanded to cover certain public entities

- Colleges and universities
- Entities whose principal purpose or function is providing medical or hospital care
- Certain tax-exempt corporations organized under act of Congress as an instrumentality of the United States (e.g., the Central Liquidity Facility, Resolution Trust Corporation, Resolution Funding Corporation, and Patient-Centered Outcomes Research Institute)

Expands denial of double tax benefit

2020:

- IRC Section 45S (employer credit for paid family and medical leave)
- Employee for periods in which the employer is entitled to a credit under IRC Section 51 (work opportunity credit)

2021 additions:

- Section 41 (credit for increasing research activities)
- Section 45A (Indian employment credit)
- Section 45P (employer wage credit for employees who are active-duty members of the uniformed services)
- Section 1396 (empowerment zone employment credit)

ERCs for Q3/Q4 of 2021

- Largely the same as ERCs for Q1/Q2 of 2021
  - ERC amount will be 70% of qualified wages (as opposed to 50% in 2020)
  - Maximum amount of "qualified wages" that may be taken into account per employee is $10,000 for each calendar quarter in 2021 (rather than for the whole year, as was the case in 2020)
  - Employers with up to 500 employees (rather than up to 100 employees, as was the case in 2020) may claim the credit on all wages paid, rather than solely wages paid for nonworking periods.
- Several differences discussed ahead

ERCs for Q3/Q4 of 2021 – Continued

- For Q3 and Q4 of 2021, the statute of limitations on IRS assessment for the credit has been extended from three years (applicable to Q1 and Q2 of 2021) to five years.
  - There is no income tax deduction for the wages for which a credit was claimed.
  - If the IRS reduces the amount of credit claimed after the expiration of the statute of limitations applicable to refund claims (which is generally three years, shorter than the IRS's extended period for assessments for Q3 and Q4 of 2021), the employer would lose both the forgone deductions and the credit.
  - **Employers should file protective refund claim with the federal income tax return for 2021.**
  - A protective refund claim preserves the taxpayer's right to claim a refund where that right is contingent on future events that may not be determinable until after the statute of limitations has expired.

ERCs for Q3/Q4 of 2021 – Continued

- For "severely financially distressed employers," all wages paid to employees are qualified wages
  - These are employers that exceed a gross receipts reduction of more than 90% as compared to the same quarter in 2019.
- For a "recovery startup business," ERC is limited to $50,000 per calendar quarter for an eligible employer
  - This is an employer that (a) began operations after February 15, 2020 with average annual gross receipts for a three-taxable-year period ending with the taxable year that precedes such quarter does not exceed $1 million; and (b) satisfies the shutdown test or the gross receipts test.

THE AMERICAN RESCUE PLAN ACT AND SECTION 162(M)

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Background

- Section 162(m) of the Internal Revenue Code (Code) generally limits the deductibility of compensation paid to certain "covered employees" of a publicly held corporation to $1 million per year
- Before the Tax Cuts and Job Acts of 2017 (TCJA), payments of qualified performance-based compensation made to covered employees were exempt from the $1 million annual limitation
- TCJA eliminated the qualified performance-based compensation exemption and expanded the group of individuals who would qualify as covered employees
  – Final regulations under TCJA expanded the definition of "covered employee" to include the CFO, and the CEO (principal executive officer), and the three highest paid officers

American Rescue Plan Act (ARPA)

- On March 11, 2021, the ARPA was signed into law and increases the number of “covered employees” subject to the limit on a corporation’s deduction for executive compensation set by Section 162(m)

Covered Employees

- ARPA expands the definition further to include not only the CEO, CFO, and next three highest-compensated employees as “covered employees” (Top 5 Covered Employees) but, starting in the 2027 tax year, also the next five highest-compensated employees
- Determination of who will be treated as a “covered employee” is without regard to whether he or she is an officer
- Under TCJA, once an employee is considered a covered employee for any tax year beginning after December 31, 2016, he or she is always a covered employee
  - However, only the Top 5 Covered Employees are subject to the “once a covered employee/always a covered employee” rule under 162(m)
- The next five highest-compensated employees under ARPA’s expansion will not necessarily continue to be subject to Section 162(m) if they are no longer includible in that class of “covered employees” in a subsequent tax year

Action for Companies

- Publicly held corporations subject to Section 162(m) should review their compensation arrangements to determine how this expansion of Section 162(m) in 2027 may affect the structure of current and future compensatory programs.
- While the deferred effective date of ARPA's Section 162(m) expansion presents opportunities for strategic planning, it also gives Congress, the Treasury Department, and the IRS ample time to narrow or expand this rule.

ARPA COBRA SUBSIDY

ARPA COBRA Subsidy

- Fully-subsidized COBRA premium subsidy from April 1, 2021 through Setpember 30, 2021
- Assistance Eligible Individuals
  - Involuntarily terminated
  - Reduction in hours
- Available to anyone who is enrolled in COBRA
- Avaialble to anyone who is within his/her 18 months off COBRA covereage period who has not elected COBRA or whose coverage was terminated due to nonpayment

ARPA COBRA Subsidy – Continued

- Subsidy terminates if the eligible individual qualifies for other group health plan coverage or Medicare
  - Other than excepted benefit
  - Note, eligible individuals are not covered
- Notice Requirements: DOL–Issued Model Notices
  - Notification of COBRA premium subsidy to those individuals enrolled in or who become eligible for COBRA
  - Second-chance notice to those who didn't elect COBRA or whose coverage terminated due to nonpayment
  - Notice of early termination of the subsidy prior to September 30, 2021

ARPA COBRA Subsidy – Continued

- DOL FAQs:
  - Eligible individuals must opt in to receive the COBRA subsidy
    - Most surprising part of the guidance
    - Suggests that plan sponsors are not required to automatically provide subsidy
    - Opt-in model form issued that contains a provision for plan sponsors to deny the request if the plan sponsor believes the individual is ineligible for the COBRA subsidy
- The EBSA Disaster Relief suspension of timeframes related to COBRA do not apply to the notices or elections related to COBRA subsidies under ARPA

ARPA COBRA Subsidy – Continued

- Employer Tax Credit
  - Employer will receive a credit for the COBRA premium subsidy through a payroll tax credit against the employer's quarterly taxes
  - If the credit exceeds the amount of the payroll taxes due, the credit will be refundable when the employer submits its quarterly federal tax return
- Next Steps:
  - IRS guidance on the mechanics of the employer tax credit
  - Work with COBRA vendor to provide notices
  - Build an administrative process to manage COBRA subsidy forms from individuals requesting the subsidy who may not be eligible

QUESTIONS?

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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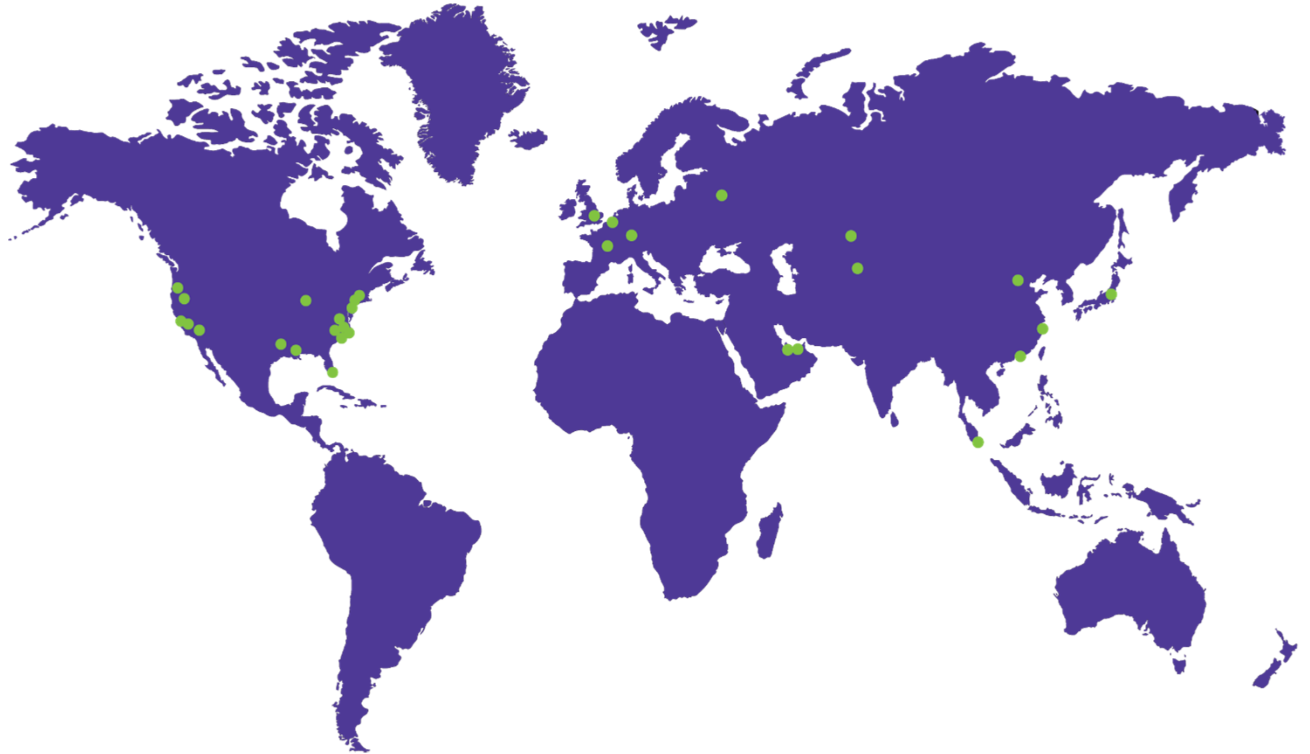

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