



Morgan Lewis

# NEW YORK EMPLOYMENT LAW YEAR IN REVIEW

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# Agenda

- New York State and City Vaccine/Masking Rules
- NY HERO Act
- NY Criminal Background Checks
- Marijuana Regulation & Taxation Act
- New Whistleblower Protections
- Potential Noncompete Legislation
- Notable Litigation – NY Manual Workers
- Just Cause Law
- End of Year Handbook Updates and Policy Review
- Wage and Hour

# **NEW YORK STATE AND CITY VACCINE/MASKING RULES**

# NYS Mask Rule (effective 12/13/2021)

- Masks required in all “indoor public places” in New York State.
- Exceptions:
  - Everyone in the place is fully vaccinated (boosters not required)
  - While working alone in an enclosed room
  - While actively eating or drinking
- “Indoor public place is defined” as any indoor space that is not a private residence and specifically includes offices and other private employer workspaces.
- Businesses that implement a proof of vaccination requirement must ensure that anyone 12 or older is fully vaccinated before entering indoors.
- Businesses can accept Excelsior Pass, Excelsior Pass Plus, SMART Health Cards issued outside of NYS, NYC COVID Safe app, a CDC Vaccination Card, or other official immunization record.
- Sunsets January 15, 2022, but subject to review and potential renewal.

# NYS Mask Rule

- Companies cannot mix and match approaches and must choose whether to implement a full-course vaccine requirement or a mask requirement, which must be followed in its entirety throughout the facility at all times.
- Whichever requirement is selected, it must apply to everyone - including staff, patrons, visitors, and guests.
- Penalties: \$1,000 per violation
- Best Practices:
  - Consider verifying proof of vaccination for employees if not done already;
  - Establish written policy on masking/vaccination and any required documentation;
  - Create protocol to ensure individuals entering the premises wear masks/are vaccinated; and
  - Consider training on how to follow the protocol and keep sensitive information confidential.

# NYC Vaccine Rule (private businesses)

- All New York City private sector employees who report to work in-person will be required to be fully vaccinated.
- Must have received first dose by 12/27/2021.
- City to release final order and additional guidance tomorrow, 12/15/2021.
- Testing for COVID-19 as an alternative is not permitted.
- Proof of documentation will be required.
- Individuals will be able to request accommodations under applicable law.
- Exceptions:
  - Individuals working remotely
  - Business has only one employee

# NYC Vaccine Rule (restaurants/gyms/entertainment)

- New rules for establishments covered by Key To NYC rules:
  - Indoor dining
  - Athletic facilities
  - Entertainment venues
- Beginning 12/27/2021, these businesses must confirm full vaccination status of all individuals age 12 or older entering the premises.
- Beginning today, 12/14/2021, these businesses must confirm that children age 5-11 entering the premises have received at least one vaccine dose.
- City to release final order and additional guidance tomorrow, 12/15/2021.

# NY HERO ACT



# NY Hero Act: Safety Plans

- Signed into law May 5, 2021.
- On 9/6/2021, Governor Hochul announced COVID-19 was designated as an airborne infectious disease, triggering workplace safety plan requirements.
- Companies must adopt and distribute compliant workplace safety plans, conduct a verbal review of these plans and employee rights under HERO Act, and add them to handbooks.
- NYDOL Standard requires mask wearing when unable to maintain social distancing.
  - DOL Model Plan provides that mask-wearing is recommended, but not required, when all individuals on the premises are fully vaccinated.
  - The Model Plan also requires social distancing “to the extent feasible”
- Designation of COVID-19 as a qualifying disease currently scheduled to end 12/15/2021

# NY Hero Act: Workplace Safety Committees

- Section 2 of the New York HERO Act requires employers with 10 or more employees to allow employees to create a joint labor-management workplace safety committee.
- The requirement took effect November 1, 2021.
- The New York DOL has not issued any regulations or guidance with respect to this requirement.
  - New York DOL guidance as to the HERO Act provides that “NYS DOL will provide additional guidance for Section 2 before [November 1, 2021].”

# NY Hero Act: Workplace Safety Committees

- The statute provides that employers “shall permit employees to establish and administer a joint labor-management workplace safety committee.”
- A committee must include employer and employee representatives.
  - At least 2/3rds of committee members must be employee representatives selected by non-supervisory employees.
- A committee must be authorized to: (a) raise health and safety concerns; (b) review HERO Act Plans and certain other workplace health and safety policies; (c) participate in government workplace safety and health site visits; and (d) review workplace safety reports filed consistent with legal requirements.
- A committee can be limited to meeting once a quarter for up to two hours.
- Committee members entitled to attend a paid training of up to four hours on the function of the committee, the HERO Act, and an introduction to occupational safety and health

# **NEW YORK CRIMINAL BACKGROUND CHECKS**

# NYS Requirements: Article 23-A

- Prohibits an employer from basing an adverse employment action on an individual's criminal history unless:
  1. there is a **direct relationship** between the criminal offense and the position sought/held by the individual; or
  2. hiring the individual or continuing their employment would involve an **unreasonable risk** to property or to the safety of specific individuals or the general public.
- Applies to *all* adverse employment actions: protects applicants for employment **and** current employees.

# NYS Requirements: NYS Human Rights Law

- The NYS Human Rights Law (NYSHRL) has incorporated Article 23-A's requirements, such that a violation of Article 23-A qualifies as "an unlawful discriminatory practice."
- The NYSHRL also prohibits basing an adverse employment action on a record of an arrest that was resolved in the person's favor (i.e., any non-pending arrest record); youthful offender adjudications; sealed cases; and cases adjourned in contemplation of dismissal ("ACDs"). No individual should be required to provide that information either.
- NYSHRL applies not only to applicants and current employees, but also to independent contractors.

# NY City Requirements: NYC Fair Chance Act

- The NYC Fair Chance Act (FCA) was enacted in 2015. The 2015 version of the law:
  - Prohibited employers from requesting criminal information or conducting a background check until after extending a **conditional offer of employment**;
  - Required employers to conduct Article 23-A assessment, and also consider:
    - Whether the person has received a certificate of relief or certificate of good conduct; and
    - Whether the person was **25 years old or younger** at the time of the offense, which serves as a mitigating factor.
  - Prohibited making **any** reference to **any** background check requirement in **any** pre-hire materials;
  - Required that employers document their Article 23-A analysis and provide it to candidates in a “fair chance form” before making a final decision;

# NY City Requirements: NYC Fair Chance Act

- Required leaving the position open for **3 business days** while the candidate reviewed the form and to give the candidate an opportunity to provide rehabilitation information and mitigating evidence; and
- Prohibited employers from basing an adverse action the “non-convictions” set forth in the NYSHRL (e.g., arrests resolved in the individual’s favor, violations, sealed records).



# NY City Requirements: NYC Fair Chance Act

Applicant Name \_\_\_\_\_

## Fair Chance Act Notice

After extending a conditional offer of employment, we checked your criminal record. Based on the enclosed check, we have reservations about hiring you for the position of \_\_\_\_\_ and may decide to retract our job offer for reasons explained below. We invite you to provide us with any information that could help us decide to offer you the job. If you choose to provide us with additional information you have \_\_\_\_\_ days (must be at least three business days) from the date you receive this to do so.

If you wish to respond, please contact \_\_\_\_\_.

In your response, you may:

- Tell us about any errors on your criminal record;
- Give us any additional information you'd like us to consider after reviewing this notice.

The following factors were considered, as required by Article 23-A of the New York State Correction Law, before making our determination:

A.  The government encourages employers to hire people with criminal records.

B.  The specific duties and responsibilities of the job, which are:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_

C.  We believe your record impacts your fitness or ability to perform these duties and responsibilities because:

[To be completed only with respect to convictions, not pending cases.]

D.  How long ago your criminal activity, not your conviction, occurred: \_\_\_\_\_ years \_\_\_\_\_ months

E.  Your age when your alleged/convicted criminal activity (not your arrest or conviction) occurred: \_\_\_\_\_ years old

If you were 25 or younger, we consider this a mitigating factor.

F.  The seriousness of the conduct that led to your criminal record, which is:

G.  Your evidence of rehabilitation and good conduct, which is listed below.

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

If you have additional documents we should consider, please send them, including evidence that you attended school, job training, or counseling; or are involved with your community. They can include letters from people who know you, like teachers, counselors, supervisors, clergy, and parole or probation officers.

H.  Our legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public, which is:

I.  Your certificate(s) of relief or certificate of good conduct shows that you are rehabilitated. If you did not have a certificate, we did not hold that against you.

Based on these factors, we may deny you the job because (choose one or both below):

We believe there is a direct relationship between your criminal record and the job we offered to you, and the factors listed above do not lessen that relationship because:

Your criminal record creates an unreasonable risk to specific persons, the general public, or our property because:

# NY City Requirements: NYC Fair Chance Act

Amendments to the FCA became effective on July 29, 2021. The most significant changes include:

- Providing a strict definition of “conditional offer of employment”;
- Updating the factors that an employer should consider when evaluating pending charges and/or convictions that arise during an individual’s employment;
- Extending the amount of time that an employer must leave a position open from 3 business days to **5 business days**;
- Prohibiting employers from **requesting** non-conviction information (and recommending language to ensure that employers do not inadvertently obtain that information); and
- Confirming that the FCA’s protections also apply to interns, freelancers and independent contractors.

# NY City Requirements: NYC Fair Chance Act

- “Conditional Offer” is now defined as an offer that can be revoked **only** because of:
  1. The results of a criminal background check, after the fair chance process has been followed;
  2. The results of a medical exam as permitted by the ADA; or
  3. “Other information the employer could not have reasonably known before making the conditional offer”.

# NY City Requirements: NYC Fair Chance Act

*What qualifies as "other information the employer could not have reasonably known"?*

- Guidance from the NYC Commission on Human Rights indicates that reviewing **any** information that the employer could have **conceivably** collected and reviewed before extending the conditional offer at the post-offer phase violates the FCA.
- Employers who request and review non-criminal information (e.g., reference checks, educational history) are now instructed to **separate** their background check processes into **two different stages**.
- This means they should request one non-criminal report at the pre-offer stage and then, after reviewing that report, extend a conditional offer and conduct the criminal background check. Other non-criminal contingencies (e.g., drug tests) should also be conducted at the pre-offer stage

# NY City Requirements: NYC Fair Chance Act

*Are there exemptions to the FCA, including its conditional offer requirements?*

- Yes, **if** the employer is **required by law** or regulation (including a rule issued by a self-regulatory organization) to conduct a background check or if the employer is prohibited from hiring someone convicted of a particular crime (e.g., a “crime of dishonesty”).
- Exceptions are **position specific**, and the NYC Commission on Human Rights has stated that it will not assume that an entire employer or industry is exempt; rather, it will investigate how an exemption applies to a particular position or role.
- Exceptions are **narrowly construed**: even if a position is covered by an exception, an employer must still comply with any FCA requirements that does not conflict with another law, regulation, or SRO rule.
- Best practices... an employer invoking an exemption should:
  - Compile an “exemption log” that details (among other information) which exemption is claimed and why the position fits the exemption; and
  - Inform applicants and employees of the exemption they believe applies to them.

# **MARIJUANA REGULATION AND TAXATION ACT & ITS UPDATES TO NYLL**

# New York Marijuana Regulation and Taxation Act

## Marijuana Regulation and Taxation Act:

- Effective March 31, 2021;
- Legalized recreational cannabis for individuals age 21 and older in New York State; and
- Modified New York Labor Law Section 201-d, which generally prohibits employers from discriminating against employees for engaging in legal recreational or political activities outside of work, to also protect an individual's lawful use of cannabis, so long as it is:

*"outside work hours, off of the employer's premises, and without use of the employer's equipment or other property."*

# New York Marijuana Regulation and Taxation Act

## Subsection 4-a of NYLL:

- Provides that an employer may only prohibit off-duty use or base an adverse employment action on an individual's off-duty use is:
  - The employer is/was required to take such action by state or federal statute, regulation, or ordinance, or other state or federal governmental mandate;
  - The employer would be in violation of federal law if it failed to do so;
  - The employer would lose a federal contract or federal funding if it did not do so; or
  - The employee, *while working*, manifests specific “articulable symptoms” of cannabis impairment that decrease *or* lessen the employee's performance of the employee's tasks or duties or that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws.



# New York Marijuana Regulation and Taxation Act: NYS Labor Guidance

## October 2021 – NYS DOL Guidance:

- Interprets “**articulable symptoms of impairment**” as **objectively observable** indications that the employee’s performance of the duties of the position of their position are decreased or lessened.” The guidance provides that employers **may not** base their determination that an employee was impaired at work due to cannabis use solely on the results of a positive drug test or an odor of cannabis.
- States that an employer **cannot test** an employee for cannabis unless (i) the employer is required to do so by state or federal statute, regulation, ordinance, or other state or federal governmental mandate; (ii) the employee is “impaired” during working hours; or (iii) failing to test for cannabis would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.

# **NEW WHISTLEBLOWER PROTECTIONS**

# New York Labor Law Section 740

Effective January 26, 2022, revisions to New York Labor Law Section 740 will substantially enhance employee whistleblowing protections, making New York one of the most pro-employee whistleblowing jurisdictions in the country. The amended law:

- Expands statutorily covered protected activity to include employee disclosures related to any activity, policy, or practice of an employer that the employee reasonably believes is a violation of a federal, state, or local law, rule or regulation— even if the employee is acting outside of the scope of their job duties.
- Expands the definition of employee to include current and former employees as well as current and former independent contractors (who do not have employees of their own).
- Expands the definition of retaliation to include not only the discharge, suspension, or demotion of an employee, but also any other action or threat that would adversely impact a current or former employee's current or future employment.

# New York Labor Law Section 740

- Expands prior notification exceptions. Notice to employers is not required when there is an imminent and serious danger to public health or safety.
  - Additionally, no notice is required if the employee reasonably believes the supervisor is already aware of and will not correct the illegal activity, or if reporting the illegal activity would result in (1) the destruction of evidence or concealment of the illegal activity; (2) child endangerment; or (3) physical harm to the employee or any other person.
- Expands litigation-related protections. The statute of limitations for filing a claim will increase to two years. A covered employee will be entitled to a jury trial and may seek injunctive relief, reinstatement, front pay, compensation for lost wages and benefits, punitive damages, a civil penalty up to \$10,000, and attorney fees.
- Requires employers to post a notice of employees' rights under the new law.

# POTENTIAL NON-COMPETE LEGISLATION

# Proposed New York Non-Compete Legislation

- New York legislators have introduced several proposals to limit or eliminate non-competition agreements.
  - Senate Bill S734: would only make non-compete agreements enforceable when they: (a) are no greater than required for the protection of a legitimate employer interest; (b) do not impose an undue hardship on the employee; (c) are not injurious to the public; and (d) are reasonable in time period and geographic scope.
  - Senate Bill S6425: would prohibit any non-compete agreement that proscribes or restricts an employee from obtaining employment after the conclusion of employment, or which restrains an employee from engaging in a lawful profession, trade or business of any kind.
- None of the proposals have passed the Senate or Assembly.
- The next New York legislative session starts in January 2022

# **NOTABLE LITIGATION— NY MANUAL WORKERS**

# New York Manual Worker Classification Issues

- New York Labor Law § 191 requires manual workers to be paid on a **weekly basis**, and Department of Labor guidance and case law nonspecifically defines manual laborers as those performing more than 25% manual work.
- In September 2019, an appellate court in New York (First Department) held both that (1) there is a private cause of action for failure to pay timely wages under Labor Law § 191, and (2) the measure of recovery to prevailing plaintiffs is liquidated damages—or repayment of late-paid wages. *Vega v. CM and Associates Construction Management, LLC*.
- Employers of nonexempt workers paid less frequently than weekly should review whether employees could be categorized as manual workers and consider adjusting their payroll or seeking an exemption from the DOL.
- Statute of limitations for a NYLL 191 claim is 6 years – potential liability adds up quickly.



# Uptick in “Frequency of Pay” Cases

- Following the decision in *Vega*, increase in litigation against a wide range of employers in New York who pay their employees bi-weekly or semi-monthly.
- Allegations that employees who are not traditionally considered “manual workers” – such as clerks in retail stores – nevertheless spend at least 25% of their time doing manual labor (i.e., stocking shelves) and must be paid weekly.
- Some have even claimed that “standing for long periods of time” is physical labor.
- The nonspecific definition of “manual worker” makes early dismissal nearly impossible on grounds that employees are not “manual workers.”
- Employers have continued to argue in post-*Vega* motions to dismiss that there is no private right of action for NYLL 191 claims and that “late” payments are not “underpayments.” No one has been successful.

**JUST CAUSE LAW**

# “Just Cause” Added to NYC Fair Workweek Law

- Int. No. 1396-A (“Fast Food Employee Layoffs”) and Int. No. 1415-A (“Just Cause Termination”) eliminated at-will employment for fast food employers in NYC.
- They import standards commonly used in collective bargaining agreements.
- Fast food employers prohibited from terminating an employee without “just cause” (failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the employer’s legitimate business interest).
- In order to meet “just cause” standard, must (among other obligations):
  - Maintain and apply a progressive discipline policy which is “reasonable and applied consistently” and with a look-back period of no more than one year (*i.e.*, the employer cannot rely on discipline issued more than one year ago to support termination)
  - Provide a written explanation of the precise reason for termination within five days of the termination

# “Just Cause” Added to NYC Fair Workweek Law

- Fast food employers are prohibited from laying off employees without a “bona fide economic reason.”
- A “bona fide economic reason” means “the full or partial closing of operations or technical or organizational changes to the business, resulting in the reduction in volume of production, sales, or profit.”
- The employer must be able to support the bona fide economic reasons via business records.
- If layoffs are permitted, they must be done in reverse order of seniority based on length of service.
- An employer would be required to make “reasonable efforts” to offer reinstatement or restoration of hours to any employee laid off based on an “bona fide economic reason” within the previous 12 months before hiring any new employees or offering or distributing shifts to current employees.
- An employee’s weekly schedule (including on-call shifts) is not be allowed to vary by more than 15% from the shifts on the employee’s regular schedule, unless the employee requests the changes or consented to them in writing.

# Enforcement of NYC Fair Workweek Law

- Employees can pursue one of three options:
  - Administrative charge through the City (like Fair Workweek investigations)
  - Private lawsuit, or
  - **Binding private arbitration** (starting Jan 1, 2022)
    - Employer must participate.
    - DCWP can designate a representative party to bring a class arbitration.
    - DCWP will maintain a panel of 8 arbitrators. Panel will be selected by a committee comprised of fast food employees, employers, “employee advocates” and “employer advocates.” If the parties cannot jointly agree on selecting an arbitrator from the panel, the DCWP will select the arbitrator from the panel.
    - The American Arbitration Association (“AAA”) rules will govern the proceeding, and the employer would be required to pay the costs of an arbitration proceeding if the employee prevails.

# **END OF YEAR HANDBOOK UPDATES AND POLICY REVIEW**

# End of Year Review Topics

- **Handbook Updates:**
  - NY HERO Act Safety Plan
  - Reproductive Rights Decision Making
  - Lactation Accommodations
- **Reasonable Accommodation Policy Updates**
  - Consider referencing the NYC “cooperative dialogue”
  - Victims of domestic violence, sexual offenses, and stalking
- **Updated Sick Leave Policies**
  - NYS and NYC general sick leave (up to 56 hours)
  - Vaccine Sick Leave (4 hours per shot, plus time off to take children to get vaccinated)
- **Notice of Email Monitoring** (effective May 7, 2022)
  - Notice to all new employees upon hiring + acknowledgment of receipt
  - Posted conspicuously (physical location or company intranet)

# WAGE AND HOUR



# NYS Minimum Wage and Minimum Exempt Salary Increases

- New York has passed laws to gradually increase minimum wage and minimum exempt salary statewide.
- New York DOL officially announced that, effective December 31, 2021, the minimum wage outside of New York City, Long Island (Nassau/Suffolk) and Westchester will increase to **\$13.20**.
- Per statute, the minimum wage in on Long Island and Westchester will increase to **\$15.00**.
- This year is the first year that the Upstate minimum wage was set “at the percentage by the sum of the annual growth rates for the Consumer Price Index for all Urban Consumers and labor productivity, as defined by real output per hour of all persons in the nonfarm business sector, where annual growth is measured for the period ending in June of the prior calendar year.”
- The \$15 minimum wage in New York City, Long Island and Westchester will remain for the foreseeable future, while the minimum wage in the rest of New York State will be adjusted annually.

# NYS Minimum Wage Increases

## Hourly Minimum Wage Increases

Effective Date	NYC	Downstate (Nassau, Suffolk, and Westchester counties)	Remainder of State (outside of NYC and downstate counties)
12/31/2018	\$15.00	\$12.00	\$11.10
12/31/2019	-	\$13.00	\$11.80
12/31/2020	-	\$14.00	\$12.50
12/31/2021	-	\$15.00	\$13.20

# NYS Minimum Salary for Exempt Employee Increases

## Minimum Weekly Salary Increases (administrative and executive employees)

Effective Date	NYC	Downstate (Nassau, Suffolk, and Westchester counties)	Remainder of State (outside of NYC and downstate counties)
12/31/2018	\$1,125 (\$58,500/year)	\$900 (\$46,800/year)	\$832 (\$43,264/year)
12/31/2019	-	\$975 (\$50,700)	\$885 (\$46,020/year)
12/31/2020	-	\$1,050 (\$54,600/year)	\$937.50 (\$48,750/year)
12/31/2021	-	\$1,125 (\$58,500/year)	\$990.00 (\$51,480/year)***

\*\*\*NY has yet to promulgate a regulation setting forth the 2022 salary basis for the remainder of NY outside of NYC, Nassau, Suffolk and Westchester Counties. However, NY did set the minimum wage for the remainder of NY at \$13.20/hour, and the weekly salary basis in NY has been calculated by multiplying the minimum wage by 75. Further, DOL FAQs indicate it will be \$990.

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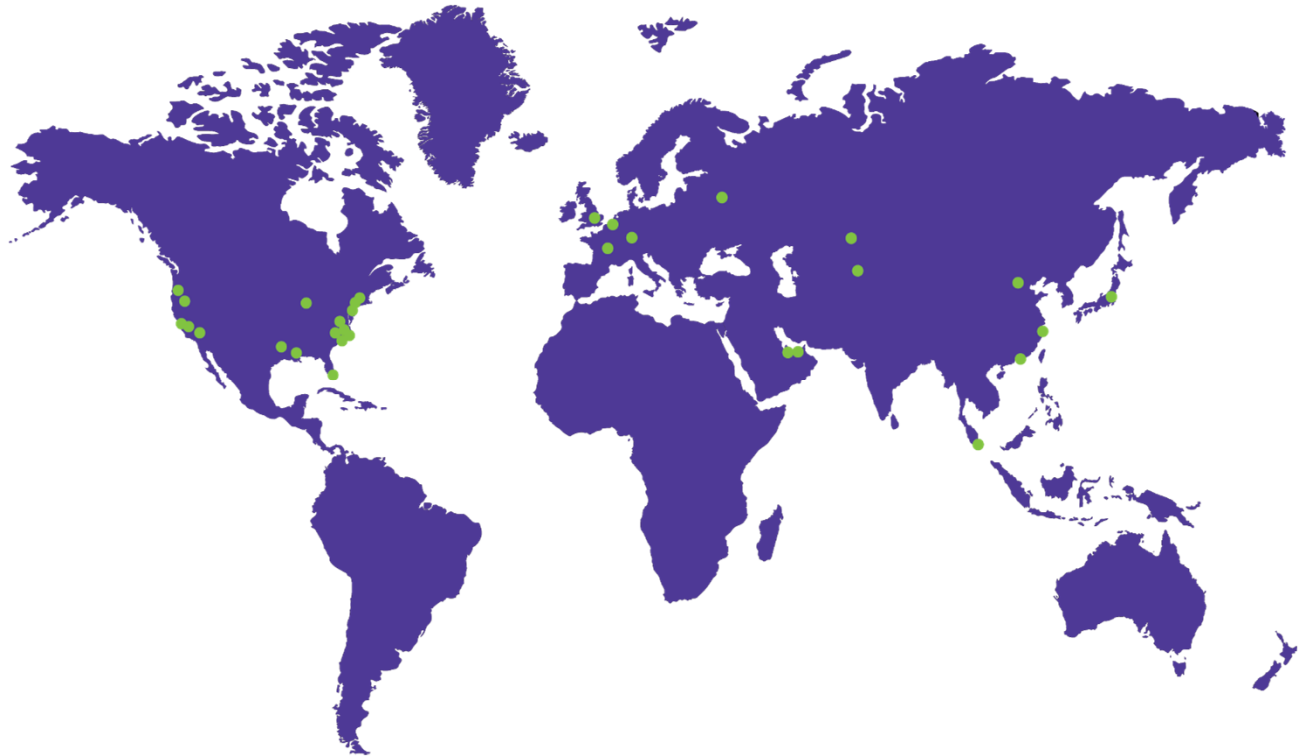
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