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WEBINAR SERIES

CALIFORNIA EMPLOYMENT LAW YEAR IN REVIEW

SIGNIFICANT 2022 EMPLOYMENT LAW CASES

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Arbitration Agreements

Compelling Arbitration of Individual PAGA Claims: *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022)

- Does the FAA preempt the *Iskanian* rule that contractual waivers of PAGA claims are invalid?
- Two senses of "representation" in PAGA cases: (i) representing the Labor Commissioner in a type of *qui tam* action, and (ii) representing other employees.
- The FAA "preempts *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."
- The FAA does not preempt a bar on "wholesale" waivers of PAGA standing (i.e., a waiver of right to assert individual and non-individual PAGA claims).
- Based on the Court's interpretation of PAGA, once a plaintiff is compelled to arbitrate his individual PAGA claim, a trial court must dismiss the non-individual PAGA claims for lack of statutory standing.

Compelling Arbitration of Individual PAGA Claims: *Adolph v. Uber Technologies, Inc.*, Case No. S274671 (2022)

- Justice Sotomayor's dissent in *Viking River* – PAGA standing is a state court question (and the California legislature is free to modify the scope of statutory standing under PAGA).
- Currently under review in *Adolph*: Was the Supreme Court right in *Viking River* that an employee loses statutory standing to pursue non-individual PAGA claims after a court compels arbitration of individual PAGA claims?
  - To stay or to dismiss?
  - Briefing in progress.

Scope of FAA's Transportation Worker Exemption: *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (U.S. 2022)

- A ramp supervisor who trains and supervises ramp agents and frequently loads and unloads cargo alongside ramp agents falls under the FAA's transportation worker exemption (i.e., within a "class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.)
- The so-called "transportation worker exemption" covers any class of workers "directly involved" in transporting goods across state or international borders. *Saxon,* 142 S. Ct. at 1789.
  - Includes airline employees who physically load and unload cargo on and off planes travelling in interstate commerce.
  - Does not broadly cover all airline employees.
  - Does not narrowly cover only classes of workers who physically move goods or people across borders.
- Many questions remain about the scope of the exemption (e.g., workers who operate at various stages in the transportation of goods).

Waiver: *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022)

- Under the FAA, an employee is not required to show prejudice to establish waiver of the right to compel arbitration by participating in litigation.
  - In FLSA collective action, defendant engaged the machinery of litigation for nearly 8 months before moving to compel (e.g., answered the complaint and moved to dismiss).
  - The Eighth Circuit applied its own precedent on waiver, which included proof of prejudice.
- The Supreme Court: Judges may not "create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration.'"

Waiver: *Quach v. California Commerce Club, Inc.*, 78 Cal. App. 5th 470 (2022)

- Participation in litigation alone cannot support a finding of waiver, and fees and costs incurred in litigation alone will not establish prejudice to the party resisting arbitration.
  - Reversed order denying arbitration even though the defendant engaged in substantial litigation over 13 months (e.g., written discovery, posting jury fees, and taking the plaintiff's deposition).
- By contrast to *Morgan*, California law considers prejudice to be "critical in waiver determinations."
  - "Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy [supporting arbitration as speedy and unexpensive alternative] or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration."
- In August, the California Supreme Court granted review in light of *Morgan*.

Arbitration Agreement as Condition of Employment: *Chamber of Commerce of United States v. Bonta*, 45 F.4th 1113 (9th Cir. 2022)

- Labor Code § 432.6 (AB 51) prohibits requiring an agreement to arbitrate as a condition of employment, continued employment, or receipt of a benefit of employment.
- In September 2021, a Ninth Circuit panel found that Labor Code § 432.6 merely regulates pre-agreement employer behavior and does not invalidate or render unenforceable executed arbitration agreements governed by the FAA.
  - Dissent: "Like a classic clown bop bag, no matter how many times California is smacked down for violating the [FAA], the state bounces back with even more creative methods to sidestep the FAA."
- In August 2022, the Ninth Circuit voted *sua sponte* to grant panel rehearing.

Payment of Arbitration Fees: *Espinoza v. Sup. Ct. of Los Angeles Cnty.*, 83 Cal. App. 5th 761 (2022)

- Failure to pay arbitration fees by the statutory 30-day deadline is a material breach of the arbitration agreement and constitutes waiver of the right to arbitrate.
  - Defendant successfully compelled arbitration, but due to a clerical error failed to pay the arbitrator's fees within 30 days, in violation of C.C.P. § 1281.97.
  - Plaintiff moved to lift the stay on litigation based on defendant's failure to pay timely.
    - The trial court denied plaintiff's motion, finding the defendant substantially complied with the agreement and the delay did not prejudice the plaintiff.
- The Court of Appeal agreed with the trial court's findings but reversed its decision, holding that the statutory deadline must be strictly enforced.
- The Court of Appeal also held that C.C.P. § 1281.97 was not preempted by the FAA.
- Employers must ensure arbitration fees are paid before the 30-day deadline.

Mass Arbitration/Bellwether Arbitrations - Case to Watch: *MacClelland v. Cellco Partnership*, 9th Cir. Case No. 22-16020

- A consumer class action where the defendant filed a motion to compel the named plaintiffs into individual arbitrations.
- Bellwether provision in arbitration agreement: If 25 or more consumers file arbitrations raising similar claims and their counsel is coordinated, counsel for the parties will each select 5 cases to proceed in a bellwether proceeding. The remaining cases shall not be filed in arbitration until the first 10 are resolved.
- Trial court: Plaintiffs' counsel currently represent 2,712 consumers; average time per AAA arbitration is 7 months; unconscionable delay that favors defendant.
- On appeal to the 9th Circuit.

PAGA

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Manageability: *Wesson* and *Estrada*

- ***Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021)**
  - Misclassification case on behalf of store general managers.
  - Trial court granted a motion to strike the PAGA claim as "unmanageable" because individualized mini-trials needed to determine whether each GM was misclassified—if 6 days of trial per GM, then 8 *years* of trial to complete.
  - Held that trial courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and can strike unmanageable claims and manageability assessment must account for manageability of claims and affirmative defenses.
- ***Estrada v. Royalty Carpet Mills, Inc.* 76 Cal. App. 5th 685 (2022)**
  - Primarily a meal and rest break violation case.
  - Disapproved of *Wesson* on "manageability" requirement, but approved use of other procedural devices to limit the scope of a PAGA claim, encouraging plaintiffs to "define a workable group" "for which violations can more easily be shown."
- The California Supreme Court accepted review of *Estrada* to resolve this split.

Manageability in Federal Court: *Hamilton v. Wal-Mart*, 39 F.4th 575 (9th Cir. 2022)

- Putative class and PAGA action pending in federal court for, among other things, meal break violations and unpaid overtime for security screenings.
- District court dismissed the PAGA claims as unmanageable and for failure to comply with initial disclosure requirements.
- Ninth Circuit agreed that Rule 23 requirements do not apply to PAGA actions.
- Because Rule 23 requirements do not apply to PAGA actions, there is no “manageability” requirement for PAGA actions in federal court.

Exclusive Concurrent Jurisdiction (Copycat PAGA Cases): *Shaw v. Superior Court*, 78 Cal. App. 5th 245 (2022)

- Plaintiff filed a PAGA action for wage and hour violations that completely overlapped with another PAGA lawsuit filed one year earlier in a different county.
- Affirmed the trial court's granting of a motion to stay the second-filed action on the grounds of "exclusive concurrent jurisdiction":
  - "[W]hen two or more courts have subject matter jurisdiction over a dispute, the court that first asserts jurisdiction assumes it to the exclusion of the others."
- Rejected arguments that because PAGA does not have an express "first to file" rule, to promote Labor Code enforcement, and to discourage "reverse auction" settlements, plaintiffs should be allowed to concurrently litigate multiple overlapping PAGA actions.

Suitable Seating

- ***Meda v. AutoZone, Inc*****., 81 Cal. App. 5th 366 (2022)**
  - Reversed summary judgment in favor of employer because employer (1) had not advised its workers they could use a seat and (2) did not provide seats at the employee's work stations.
  - Continues to be difficult to win summary judgment in suitable seating cases because courts often find triable factual issues around whether an employer "provided" seats.
- ***LaFace v. Ralphs Grocery Co*****., 75 Cal. App. 5th 388 (2022)**
  - Suitable seating claim on behalf of grocery store cashiers.
  - Affirmed judgment in favor of Ralphs after a bench trial finding that the wage order did not require employer to provide a seat because it would have interfered with the cashier's duties including staying busy when between checking out customers.
  - No right to a jury trial in a PAGA case.

Wage and Hour

Wage Statements: *Meza v. Pacific Bell Telephone Co.*, 79 Cal. App. 5th 1118 (June 17, 2022).

- Plaintiff alleges that employer violated Labor Code wage statement requirements by not including "rate" and "hours" for overtime true-up payments.
  - Payments were additional overtime wages paid for performance bonuses earned in earlier pay periods.
- Affirmed summary judgment in favor of employer, declining to read this requirement into Labor Code section 226(a).
- Consistent with Ninth Circuit's earlier ruling in *Magadia v. Wal-Mart Associates, Inc*, 999 F.3d 668 (9th Cir. 2021).

Applicants (Time and Expenses): *Johnson v. WinCo Foods, LLC*, 37 F.4th 604 (9th Cir. 2022)

- Putative class action on behalf of job applicants seeing wages and reimbursement of expenses for time and travel expenses for pre-employment drug tests.
- Ninth Circuit rejected plaintiff's theory that employer's control over pre-employment drug tests converted applicants into "employees."
- This does not apply to drug tests during employment and may not apply to other pre-employment activities required by the employer.

Rounding: *Camp v. Home Depot U.S.A., Inc.*, 84 Cal. App. 5th 638 (2022)

- Timekeeping system tracked "actual" time punches by non-exempt employees to the minute but rounded total shift time to the nearest quarter-hour. For Plaintiff, over 5-year period, this amount to a 7-hour difference.
- Vacated summary judgment for employer there was a triable issue of fact on whether plaintiff was paid for all time worked.
- Invited the California Supreme Court to revisit its prior holding in *See's Candy Shops v. Superior Court*, 210 Cal. App. 4th 889 (2012) that neutral time rounding is lawful in California.
- Takeaways:
  - Neutral rounding (i.e., rounding up and down) may not longer be a viable defense.
  - Simplifying wage statements not accepted as a defense because there is "no provision in California law that privileges arithmetic simplicity overpaying employees for all time worked."

Off the Clock: *Cadena v. Customer Connexx, LLC*, 51 F.4th 831 (9th Cir. 2022)

- Collective action for unpaid overtime for time call center workers spent booting up computers before logging on to employer's timekeeping system and for time spent turning off computers.
- Ninth Circuit reversed trial court's finding that boot up time was non-compensable because functional computer was integral and indispensable to workers' principal duties.
- The Ninth Circuit remanded the case to the district court to determine whether shutting down computers at the end of a shift is compensable under any other theory.
- The Ninth Circuit declined to address 2 arguments by the employer: (1) that the pre-shift time was *de minimis*; and (2) that the company should not be held liable because it was not aware of the alleged unpaid hours worked. Without ruling on either issue, the Ninth Circuit concluded these were "disputed factual questions" to be decided on remand.

Off the Clock - Case to Watch: *Huerta v. CSI Elec. Contractors, Inc.*, 39 F.4th 1176 (9th Cir. 2022)

- The California Supreme Court will decide the following issues:
  - (1) Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, having security guards peer into the vehicle, and then exit a Security Gate compensable as "hours worked?"
  - (2) Is time spent on the employer's premises in a personal vehicle, driving between the Security Gate and the employee parking lots, while subject to certain rules from the employer, compensable as "hours worked" or as "employer-mandated travel?"
  - (3) Is time spent on the employer's premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as "hours worked," when that time was designated as an unpaid "meal period" under a qualifying collective bargaining agreement?

On-Premises Meal Breaks: *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685 (2022)

- Employees brought PAGA action against employer for purported meal and rest period violations. At issue was employer's on-premises meal policy, under which employees were relieved of duty and paid wages during their 30-minute meal periods, they were not free to come and go as they pleased.
- Employer's on-premises policy was non-compliant because it prevented employees from leaving the facility during their 30-minute meal periods. Thus, employees were entitled to premium pay for meal period violations.
- Takeaways: Employers must afford employees uninterrupted half-hour meal periods in which they are relieved of any duty or employer control and are free to come and go as they please.
- California Supreme Court granted the employer's petition for review, but review is limited to the issue of whether FRCP Rule 23(b)(3)'s manageability requirement applies to PAGA claims.

Derivative Penalties for Meal Beak Violations: *Naranjo v. Spectrum Sec. Servs.*, 13 Cal. 5th 93 (2022)

- Failure to pay meal break premiums triggers waiting time penalties and wage statement penalties.
- The Court reasoned that meal break premiums are wages that must be reported on wage statements and paid out on termination.
- Takeaways:
  - Confirm that your wage statements separately itemize break premiums, describe the payment accurately (identifying it as a premium for meal or rest breaks, as applicable), and list the total pay of premiums, rate of pay at which the premiums are made (i.e., the regular rate), and how many hours of premiums are being paid.
  - *Naranjo* further increases the types of penalties available for meal/rest break violations. Thus, it is a good time to take updated or additional compliance measures to prevent break violations.

Class Certification (Predominance): *Bowerman v. Field Asset Services,* 39 F.4th 652 (2022) – Damages/Class Cert.

- Alleged misclassification of independent contractor vendors retained by the defendant to perform pre-foreclosure property preservation services. Ninth Circuit reversed the district court's grant of class certification, partial summary judgment, and an award of attorneys' fees. Petition for en banc review filed; not decided yet.
- Takeaways:
  - Failure to establish either liability or resulting damages by common evidence precludes class certification: The class had failed to show that damages could be determined *without excessive difficulty*.
  - While a question about "the calculation of damages" might not be enough to defeat class certification, a question about "the existence of damages in the first place" could do so.
  - The ABC Test under both *Dynamex* and AB 5 does not apply to joint employment claims.
  - Prior to 2020 (AB 5's effective date), in federal court, *Borello* applies to Labor Code § 2802 expense claims for insurance, cellphone charges, and mileage/fuel.
  - However, judges in state court actions are not required to follow *Bowerman* and there is conflicting state court California authority with some courts broadly holding that expense claims are subject to the ABC test, not *Borello*.

Releases and Staffing Companies: *Grande v. Eisenhower Medical Center*, 13 Cal. 5th 313 (2022)

- A nurse at Eisenhower Medical Center settled with her staffing agency employer and then brought a second action against Eisenhower, which sought to bar the action, citing the release in the first action.

- The California Supreme Court held that because Eisenhower Medical Center was not named as a released party in the FlexCare [the staffing company] settlement with Grande, Eisenhower Medical Center could not use the judgment against FlexCare as a shield (res judicata) against Grande's subsequent claims.

- The Court further held that FlexCare and Eisenhower Medical Center did not have "'an identity or community of interest'" in the first lawsuit and that Eisenhower Medical Center and FlexCare could not rely on the indemnification provision in their contract or the agency relationship between them.

- Takeaways: Carefully review releases in joint employer and/or staffing agency situations.

Individual Liability for Labor Code Violations: Labor Code Section 558.1

- *Espinoza v. Hepta Run, Inc*., 74 Cal. App. 5th 44 (2022): The court held that "an owner's or officer's approval of a corporate policy that violates the Labor Code is sufficient to find that individual caused the Labor Code violation within the meaning of section 558.1."
- Section 558.1 is a relatively newer statute (passed in 2016) intended to expand liability for wage and hour violations and discourage business owners from rolling up their operations and walking away from their debts to workers and starting a new company.
- Evidence that the sole owner of the defendant company had approved the company policy establishing the challenged method of driver compensation supported the trial court's finding the owner was liable under the statute.

Discrimination

Websites and Title III Claims: *Martinez v. Cot'n Wash Inc.*, 81 Cal. App. 5th 1026 (2022)

- Purely digital retail website sued for discrimination under the ADA, claiming the website was inaccessible to the plaintiff, who was blind.
- Two part holding:
  - (1) the discriminatory effect of a facially neutral policy or action is not alone a basis for inferring intentional discrimination under the Unruh Act; and (2) a website not connected with a physical place of business is not a "place of public accommodation" for purposes of Title III of the Americans with Disabilities Act.
  - Why: Evidence of disparate impact may be probative of intentional discrimination, but it cannot alone establish such intent under the Unruh Act.
  - Takeaway: While there is a split of authority on this issue in federal court, under California law, purely digital retail websites are not "places of public accommodation."

Workers Comp and FEHA Claims: *Kaur v. Foster Poultry Farms LLC*, 83 Cal. App. 5th 320 (2022)

- A decision by the Workers' Compensation Appeals Board (WCAB) denying an employee's claim for disability discrimination under Labor Code section 132(a) does not mean that the employee cannot also sue in court for disability-related claims under FEHA.
- The issues decided by the WCAB were not "identical" to the issues implicated in the employee's FEHA disability discrimination claim. Rather, the employee's FEHA claims involved entirely different inquires and issues rather than her claims under Labor Code section 132(a) and involve a range of affirmative duties and other requirements applicable to the employer.
- Takeaway: If there are differing applicable legal standards, employees can bring FEHA claims regardless of results of WCAB claims depending on the facts/issues in the different forums; issue preclusion does not automatically apply.

Evidence Standard for Whistleblower Retaliation Claims Under Section 1102.5: *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703 (2022)

- Takeaway: The evidentiary standard set forth in Labor Code 1102.6 applies to whistleblower claims under Labor Code 1102.5, not the federal *McDonnell Douglas* burden-shifting standard.
  - Applicable Evidentiary Standard:
    - (1) The employee must show by a preponderance of the evidence that the employee engaged in whistleblowing activity that was a "contributing factor" to an adverse employment action.
    - (2) Then, the employer must show by clear and convincing evidence that it would have taken the same action for legitimate reasons independent of the employee's whistleblowing activities.

Short-Term Impairments Actionable Under ADA: *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218 (9th Cir. 2022)

- Former employee brought ADA action alleging failure to accommodate disability and discharge because of her disability.
  - The district court dismissed on the ground that employee had failed to plead facts sufficient to establish she had an "impairment" or any "permanent or long-term effects for her impairment."
  - The Ninth Circuit reversed, noting that that both the ADA and the applicable EEOC regulations had been updated and broadened to encompass protection for the "effects of an impairment lasting or expected to last fewer than six months."
- Takeaway: Physical or mental impairments can be substantially limiting for a "disability" under the ADA without showing of long-term effects of the impairment.

California Equal Pay: *Allen v. Staples*, 84 Cal. App. 5th 188 (2022)

- Female employee, a field sales director whose employment was later terminated, brought action against employer alleging violations of the Equal Pay Act (EPA) and gender discrimination, sexual harassment, and retaliation under the Fair Employment and Housing Act (FEHA).
- Trial court granted summary judgment in favor of the employer, but the Court of Appeal reversed, holding a factual issue as to whether a $22,000 pay disparity between the female plaintiff and one male colleague in the same position was permitted by one of EPA's four statutory exceptions precluded summary judgment on employee's gender-based EPA claim.
- Takeaway: When challenged, courts will look for defendant employers to provide evidence to support the "specific factors" in support of a pay disparity to establish that it is non-discriminatory.

Case to Watch: *Raines v. U.S. Healthworks Medical Group*, 28 F.4th 968 (9th Cir. 2022)

- Question certified to the CA Supreme Court by the Ninth Circuit: Does FEHA permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination? CA law not clear on the answer.
- In this case, third party screeners employed by the defendant asked questions of prospective applicants that were allegedly invasive and unrelated to the jobs for which they were applying. The trial court dismissed the action, finding that FEHA does not impose direct liability on third parties who act as employers' agents and screen prospective employees.
- The Ninth Circuit stated certified the question as follows: "whether the (FEHA) allows employees to hold a business entity directly liable for unlawful conduct when the business entity acted only as the agent of an employer, rather than as an employer itself." A decision is expected next year.

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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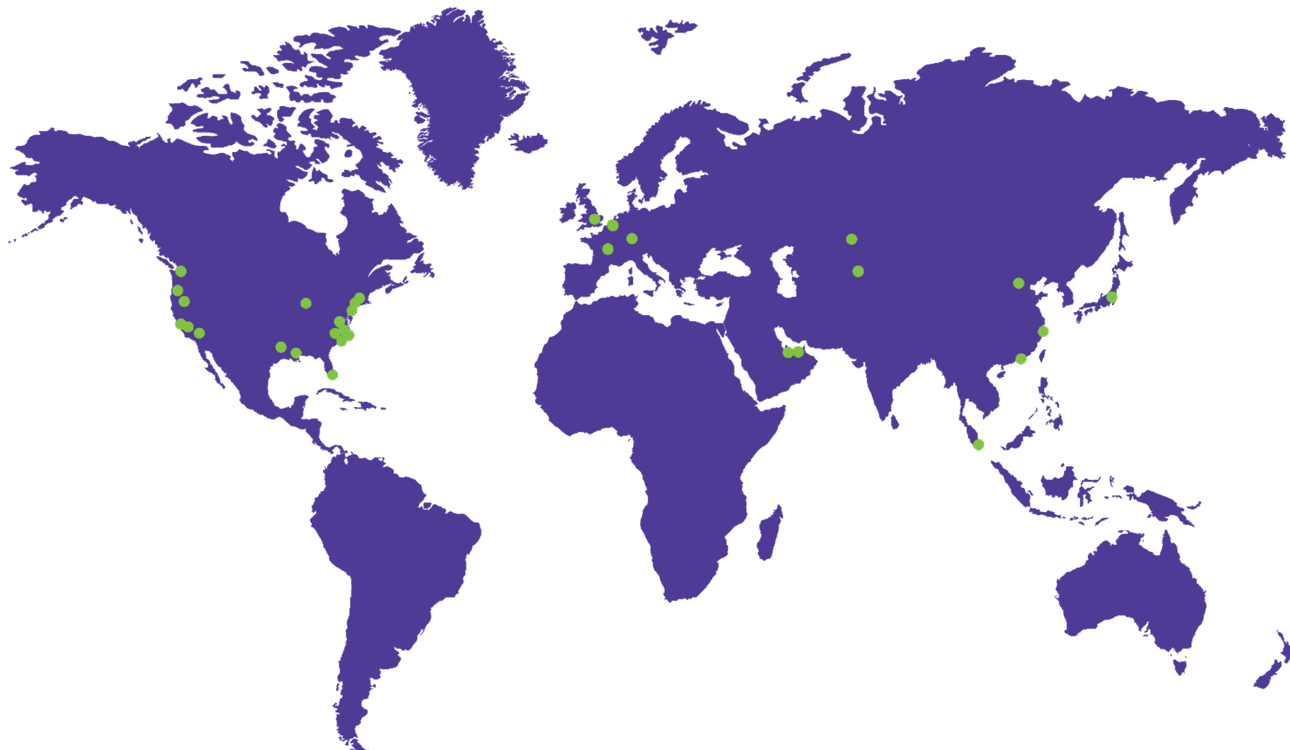

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