Morgan Lewis

California Employment Law Year in Review

Significant Cases and Employment Law Trends

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ARBITRATION AND CLASS ACTION WAIVERS

Class Action Waivers

DO YOU HAVE AN ARBITRATION AGREEMENT WITH A CLASS ACTION WAIVER?

Iskanian v. CLS Transportation

59 Cal. 4th 348 (2014)

- The California Supreme Court ruled that class action waivers in arbitration agreements are enforceable, but a waiver of the right to bring a representative action under the Private Attorneys General Act (PAGA) is not.
- A Petition for Review has been filed with the United States Supreme Court.
- The court rejected the NLRB's position in *D.R. Horton* that class action waivers violate the NLRA.
- As a result of this decision, we are seeing more PAGA-only lawsuits.
- So far, four federal courts have rejected the decision, finding that *Iskanian*'s rule against PAGA waivers is preempted by the FAA.

Iskanian v. CLS Transportation Practical Implications

- **Should employers without arbitration agreements adopt arbitration agreements with waiver provisions?**
- California law has very specific requirements on what an arbitration agreement can and cannot state.
- Difficulties in rolling out arbitration agreements for existing employees:
  - Consideration (Continued employment is sufficient in California but not in all states. Consider making it a condition of bonus plans or some other package.)
  - Morale
  - What do you do if employees refuse to sign?

Iskanian v. CLS Transportation
Practical Implications

- There also are challenges to rolling out arbitration programs while class, collective, or representative actions are already pending.
- Unclear whether PAGA representative claims are arbitrable, and whether PAGA claims should be stayed pending completion of an employee's individual arbitration.
- Weigh the pros and cons of arbitration in general against the benefits of a class action waiver.

Iskanian v. CLS Transportation Practical Implications

- **For California employers that already have an arbitration agreement with a class, collective, and representative action waiver:**
  - Consider waiting to see what happens in the U.S. Supreme Court
  - Make sure there is clear language stating that a court, not arbitration, is the forum for a PAGA representative action if the waiver is unenforceable.
  - Consider language clearly stating that the court, not the arbitrator, decides the enforceability of the waiver provision.
  - Make sure the arbitration agreement clearly states that it is governed by the FAA.

Ninth Circuit Arbitration Cases

- *Davis v. Nordstrom*, 755 F.3d 1089 (9th Cir. 2014). Ninth Circuit allowed unilateral modification to arbitration agreement to add class action waiver by sending notice to employees and waiting 30 days to implement. Employer was not required to notify employees that continued employment constituted acceptance of the new policy.

- *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014). Employee was given 30 days to opt out of arbitration agreement. Ninth Circuit held that class action waiver did not violate the NLRA, given the opt-out right.

Pros of Arbitration

- Eliminate or reduce class actions
- Avoid risk of large jury verdicts
- Less spent in attorneys' fees
- More confidential
  - Less true in California due to new law on searchability of arbitration decisions
- Can be quicker and more flexible in scheduling

Cons of Arbitration

- Very limited appellate review
- Must be mutual
- Employers must pay costs of arbitrator
  - Can be expensive for employers in small cases
- Difficult to get dismissals and summary judgment
- Baby-splitting more likely
- Arbitrators are often liberal on allowing discovery and tangential evidence
- Quality of arbitrators can be inconsistent

Sandquist v. Lebo Automotive
Network Capital Funding v. Papke

- For employers that have arbitration agreements that are silent on whether they preclude arbitration of class, collective, and representative actions:
  - The U.S. Supreme Court in *Stolt–Nielsen S.A. v. AnimalFeeds International Corp*. held that employers could not be compelled to arbitrate class actions unless they expressly agreed to do so. 559 U.S. 662 (2010)
  - Who decides whether the arbitration agreement encompasses class and collective claims – the court or the arbitrator?
    - In the *Sandquist* case, the court held that the *arbitrator* decides.
    - In the *Network Capital* case, the court held that the *court* decides unless the parties "clearly and unmistakably" agree to have the arbitrator decide the question.

Sonic-Calabasas A. Inc. v. Moreno (Sonic II)

57 Cal. 4th 1109 (2013)

- The California Supreme Court held that arbitration agreements can preclude employees from pursuing claims before the California Department of Labor Standards Enforcement (the DLSE or Labor Commissioner), so long as they provide employees with an accessible and affordable arbitral forum for resolving wage disputes.
- Employers should decide whether they prefer arbitration of typically small damage claims over the DLSE forum, particularly when employers must pay the fees of the arbitrator and any arbitration association selected by the parties.

BYOD

Hypothetical

- One of your employees uses her personal cell phone for work as well as for personal use. She has unlimited minutes and unlimited texting, so it costs her nothing extra to use her phone for business use. Must you pay her something for her cell phone use? If yes, how much?

- Does it make a difference if the employer provides a PDA or Smartphone to the employee for free, but the employee prefers to use her own smartphone?

Cochran v. Schwan Home Services

228 Cal. App. 4th 1137 (2014)

- California Labor Code Section 2802 requires employers to reimburse employees who are required to use personal cell phones for work-related calls for a reasonable percentage of their cell phone bills, ***even when the employees did not incur any additional expenses for using the devices for work purposes***, such as when employees have cell phone plans with unlimited minutes or the plans are paid for by third parties.
- The court held that it would be a windfall for employers if they didn't have to reimburse a reasonable percentage of the cost.
- Review by California Supreme Court has been requested.
  - Filed September 19, 2014
  - California Supreme Court has 60-90 days to decide whether to grant review

Cochran v. Schwan Home Services Unanswered Questions

- How should an employer determine what is a "reasonable percentage" of each employee's monthly cell phone bill?
- Must the employer reimburse a data plan?
- Must the employer contribute toward the cost of the purchase of the cell phone or other device?
- When is an employee "required" to use a personal cell phone?

Cochran v. Schwan Home Services Best Practices

- Reconsider whether to allow employees to use personal devices for work, particularly nonexempt employees and employees with access to confidential information
- Offer employees the option of a company-provided device
- Make a good-faith effort to determine a fair reimbursement rate
  - Particularly hard for data use

Cochran v. Schwan Home Services
Adopt a BYOD policy

- Define user responsibilities
- Data ownership issues: who owns what?
- Monitoring compliance
- Disciplinary action for noncompliance
- Explain legal holds and possible confiscation of device
- Define support provided by company
- Password protection
- Autolocking
- Have ability to wipe device
- Define company access to device
- Define privacy expectations
- Provide training to employees
- Have expense reimbursement strategy

WAGE AND HOUR CLASS ACTIONS

Duran v. U.S. Bank

59 Cal. 4th 1 (2014)

- How do you try a class action?
- Can the plaintiff rely on statistics and sampling to prove classwide liability?
- The issue in *Duran* was whether 260 loan officers were properly classified as exempt under the outside sales exemption.
- *Duran* was one of the only cases in California history to go to trial on an exemption case.
- The trial court selected 21 loan officers to testify. Based on this small sample, the court found that the entire class was misclassified.
- No other employees or managers were allowed to testify.

Duran v. U.S. Bank
59 Cal. 4th 1 (2014)

- Led to $15 million judgment against U.S. Bank
- California Supreme Court reversed:
  - The court's trial methods violated Defendant's entitlement to due process of law. Any trial plan must allow the defendant to litigate its affirmative defenses.
  - Trial courts considering certification need to focus not only on whether there are common questions (and presumably common answers to those questions) but also on whether it is "feasible to try the case as a class action," i.e., what is the trial plan?
  - If employees in the class have to individually prove liability, it would have to be an "extraordinary situation" to justify a class action in the first instance.
  - The court did not decide whether statistical sampling can ever be used in a misclassification case to prove class-wide liability.

Duran v. U.S. Bank
59 Cal. 4th 1 (2014)

- Will likely lead to an increased focus on a common company policy or consistent practice to prove liability (and therefore increased importance on companies having legally compliant policies.)
- Take-away: Review your policies and practices for compliance with California law.

Dilts v. Penske Logistics
(9th Cir. 2014)

- Drivers brought a class action alleging violations of California's meal and rest break laws.
- Ninth Circuit held that federal law governing motor carriers (Federal Aviation Administration Authorization Act) does **not** preempt California law requiring that employees be provided meal and rest breaks.
- Ninth Circuit found no preemption, because meal and rest break laws are "normal" rules that apply to almost all California employers and are not "related to" prices, routes, or services.
- *Godfrey v. Oakland Port Services*, 2014 Cal. App. LEXIS 980 (Cal. App. 1st Dist. Oct. 28, 2014), reached the same conclusion.

Peabody v. Time Warner Hypothetical

- A commissioned inside sales employee is paid $800 in salary every other week and monthly commissions once a month.
- The sales employee is classified as exempt under the commissioned employee exemption and not paid overtime.
- If commissions are added to the salary, the employee earns more than 1.5 times the minimum wage for each hour worked and at least 50 percent of the total compensation comes from commissions.
- Is the employee properly classified as exempt?

Peabody v. Time Warner
Commissioned Sales Employees
59 Cal. 4th 662 (2014)

- Commissioned inside sales representatives in California are entitled to earn overtime unless:
  - Total compensation exceeds 1.5 times the minimum wage ($12) for each hour worked during the pay period; and
  - At least 50 percent of the person's total compensation comes from commissions.
- The issue in *Peabody* was whether the employee must meet the first requirement **for each pay period**.
- The California Supreme Court said yes. The fact that the employee met the requirements of the exemption for the month was not sufficient.

Quezada v. Con-Way Freight, Inc.
(N.D. Cal. Jan. 16, 2014)

- Are drivers who earn a piece rate for driving tasks paid minimum wage if their earnings per hour equal the minimum wage, but they are not paid an additional amount for non–piece rate tasks, such as waiting time, conducting inspections, and doing paperwork?
- Court held that drivers had not been paid minimum wage, even if they earned more than the minimum wage for every hour worked.
- Court found that employees must be paid minimum wage not just for every hour worked, but also for every part of the hour.

Rhea v. General Atomics

227 Cal. App. 4th 1560 (2014)

- An employer can deduct from an exempt employee's leave banks for partial-day absences of any length
  - There is no requirement that the partial-day absence be for at least four hours in duration
- Employers should still carefully consider how to implement a partial-day deduction policy, particularly for exempt employees
- Does not permit employers to deduct from employees' salaries for partial-day absences

INDEPENDENT CONTRACTORS

Ruiz v. Affinity Logistics

754 F.3d 1093 (9th Cir. 2014)

When is an independent contractor really an employee?

- Ruiz filed a class action lawsuit against Affinity, alleging that Affinity misclassified its drivers as independent contractors rather than employees and thereby deprived them of benefits afforded to employees, including sick leave, vacation, holiday, and severance wages, and improperly charged them workers' compensation fees.
- The drivers signed an independent contractor agreement, were paid a flat rate per delivery, and had a fictitious business name, a business license, and a commercial checking account.

Ruiz v. Affinity Logistics
When is an independent contractor really an employee?

- Reversing the district court, the Ninth Circuit held that the drivers were employees, not independent contractors, primarily based on the degree to which Affinity had the right to control the manner and means by which the work was accomplished.
- Once the plaintiffs showed that they rendered services, the burden of proof was on the employer to show that they were independent contractors, not employees.
- Here, Affinity controlled the rates, schedule and routes, pay per stop, and days worked. Affinity provided the trucks, the jobs did not require substantial skills, and drivers often stayed with Affinity for years.

Ayala v. Antelope Valley Newspapers, Inc.

59 Cal. 4th 522 (2014)

- Newspaper carriers brought a class action alleging that they were misclassified as independent contractors.
- The California Supreme Court stated that the case could proceed as a class action if there is a common way to show the extent of the hirers "right to control" the workers.
- The court overturned the trial court's denial of class certification, which had focused on the individualized issues of how the hirer exercised control.
- Thus, the focus is not on how much control the hirer exercised, but how much control the hirer has the right to exercise.
- Will make class certification easier, since it will focus on the contract and policies on right to control.

UNDOCUMENTED WORKERS

Salas v. Sierra Chemical Co.

59 Cal. 4th 407 (2014)

- In California, there are estimated to be 2.55 million unauthorized immigrants, constituting 6.8% of the state's overall population and 9.7% of California's workforce.

- Can an employee, who used someone else's Social Security number when applying for a position because the employee was not legally authorized to work in the United States, sue the employer for discrimination and recover damages for lost wages?

Salas v. Sierra Chemical Co.

59 Cal. 4th 407 (2014)

- Yes, according to the California Supreme Court, for the period before the employer discovered the employee was not authorized to work in the United States.
- Federal immigration law (IRCA) does not preempt California law (Labor Code Section 1171.5), which protects individuals regardless of immigration status.
- The equitable doctrines of after-acquired evidence and unclean hands are not a complete defense, though they do limit the employee's remedy.
- Reaches a different result than the US Supreme Court reached in *Hoffman Plastic Compounds Inc. v. NLRB,* which did not allow recovery of back pay to undocumented immigrants. 535 U.S. 137 (2002)

DISCRIMINATION

DFEH v. American Pacific Corporation
Cal. Super. Ct. (Sacramento)

- First lawsuit by DFEH alleging discrimination against an employer that required a transgender employee to use the female locker room and restroom facilities until the employee's gender transition to male was "complete" after sex reassignment surgery. Cal. Super. Ct. (Sacramento), No. 34-2013-00151153-CU-CR-GDS (2014).

EEOC Issues New Religious Accommodation Guidelines

- There were 3,721 charges of religious discrimination filed with the EEOC in 2013, an increase of more than 100% since 1997.
- New guidelines focus on religious dress and grooming policies.
- Employers are obligated to accommodate an employee's reasonable request for modification of dress and uniform policies, absent undue hardship.
- Employers are permitted to request verification of the sincerity or religious nature of an employee's beliefs.
- Employers must accommodate sincerely held beliefs, even when they deviate from commonly followed tenets of an employee's religion.

EEOC Issues New Religious Accommodation Guidelines

- Customer preference (real or perceived) is not sufficient to establish an undue hardship, nor is decreased employee morale or jealousy from coworkers who are not excused from standard dress and grooming policies.
- A requested accommodation can be denied where it would impose a health, security, or safety risk.

UNEMPLOYMENT INSURANCE

Paratransit, Inc. v. California Unemployment Insurance Appeals Board

59 Cal. 4th 551 (2014)

- The California Supreme Court held that an employee's refusal to sign a disciplinary notice did not disqualify him from unemployment benefits
- The disciplinary notice did not require the employee to admit guilt, but the employee refused to sign it anyway
- The employee was terminated for insubordination for refusing to sign the disciplinary notice
- The California Supreme Court held that he had a genuine belief that signing the notice would be an admission of the disputed allegations and thus did not constitute misconduct within the meaning of the Unemployment Insurance Code

Irving v. California Unemployment Insurance Appeals Board

229 Cal. App. 4th 946 (2014)

- Can an employee who exceeded his break times on four separate occasions and then falsified his time sheets recover unemployment benefits?

Irving v. California Unemployment Insurance Appeals Board

229 Cal. App. 4th 946 (2014)

- Not even California allows the employee to recover unemployment benefits in this situation.
- The court held that the employee was terminated for misconduct.
- The fact that other employees took excessive breaks was irrelevant.

LEAVES OF ABSENCE AND DISABILITY

Escriba v. Foster Poultry Farms

743 F.3d 1236 (9th Cir. 2014)

- Employee can decline to exercise his/her FMLA rights even when the reason the employee is taking time off would qualify for FMLA purposes.
- Employee took a two-week vacation to care for her sick father. She failed to return to work after two weeks and was terminated for violating the three-day no-call, no-show policy.
- Employee claimed that because the employer knew why she was off work, it should have automatically triggered FMLA protection and she should have been granted an FMLA leave.
- Held: employee could not be forced to take FMLA leave, but could choose to decline it and preserve it for future use

Escriba v. Foster Poultry Farms
Best Practices

- If an employee asks to use accrued vacation time or other paid accrued time off without reference to a CFRA-qualifying purpose, an employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.
- Provide the FMLA/CFRA forms when you acquire knowledge that the leave may be for a qualifying reason.
- **Document** any conversations — including specifically the fact that the employee was notified of his/her FMLA rights and his/her FMLA leave was denied.
- Train supervisors on how to recognize when a request might be because of a FMLA/CFRA-qualifying event.

Weaving v. City of Hillsboro
763 F.3d 1106 (9th Cir. 2014)

- The Ninth Circuit held that a police officer was not disabled, because his ADHD—and associated abrasive behavior toward colleagues—did not substantially limit him in the major life activities of working or interacting with others.
- May be helpful for employers that want to terminate disruptive employees.
- Continuing issue of what to do with an employee whose misconduct is caused by a disability.

MISCELLANEOUS

Mendoza v. Western Medical Center Santa Ana

222 Cal. App. 4th 1334 (2014)

- An employee complained that his supervisor sexually harassed him. The supervisor claimed that the sexual banter was consensual.
- The company fired both employees for engaging in inappropriate and unprofessional behavior.
- The plaintiff sued, claiming that he was fired for making a complaint of sexual harassment and was awarded $283,000 by a jury.
- The Court of Appeal criticized the employer for not conducting a more thorough investigation.
  - Interviewing the complainant and accused together
  - Not interviewing coworkers
  - Not using an impartial trained investigator

Ellis v. U.S. Security Associates
224 Cal. App. 4th 1213 (2014)

- An employment application contained “Conditions of Employment” that shortened the statute of limitations to file claims to six months after the date of the employment action, waiving “any statute of limitations to the contrary.”
- The court held the limitation period unenforceable.

Montague v. AMN Healthcare, Inc.

223 Cal. App. 4th 1515 (2014)

- An employee poisoned a coworker after a workplace dispute.
- The employer was not liable because the employee's act did not have a "causal nexus" to her work, and it was not foreseeable that she would poison her coworker.

Muniz v. United Parcel Service

738 F.3d 214 (9th Cir. 2013)

- An employee successfully sued her employer for various discrimination and retaliation claims, and the jury awarded her $27,280
- The employee requested $1.9 million in attorneys' fees
- The trial court awarded her $698,000
- The Ninth Circuit affirmed, holding that California law does not require a district court to reduce the disparity between a jury award and attorneys' fees

JURY VERDICTS

Kathy Lee v. West Kern Water District

Kern Cnty. Super. Ct., Case No. 277481

- Supervisors staged an armed robbery to see how the employees would react to a life-threatening situation
- $360,000 verdict to the plaintiff for emotional distress
- The jury rejected the argument that workers' compensation was the only remedy

Nickel v. Staples

Los Angeles Super. Ct., Case No. BC370870

- The jury awarded $26,107,328, including back pay, front pay, and punitive damages
- The plaintiff, age 64 at the time of his termination, had been called “old coot” and “old goat” at staff meetings
- Staples had acquired the plaintiff’s employer, and the plaintiff was paid more than Staples employees.
- The plaintiff’s managers noted that they needed to “get rid of” older, higher-paid employees.
- When the plaintiff refused to resign, he was written up and suspended for “stealing,” after taking a bell pepper valued at 68 cents from the company cafeteria.
- A coworker claimed she had been ordered by management to provide a false statement about the plaintiff, but she refused.

Doe Psychiatrist v. California Department of Corrections & Rehabilitation

San Diego Super. Ct., 37-2012-00100860

- $1.6 million verdict in San Diego County Superior Court on claims of failure to accommodate and failure to engage in the interactive process.
- The plaintiff alleged that she had ADHD and major depressive disorder and asked for workplace accommodations. She wanted a quiet place to work to complete her paperwork.

Duffy v. City of Los Angeles

Los Angeles Super. Ct., Case No. 454369

- $3.25 million verdict (plus attorneys' fees) in an action by a 63-year-old white gardener who claimed discrimination and harassment on the basis of race, ancestry and national origin, and retaliation, and also claimed discrimination and harassment on the basis of age and physical and mental disability.
- The plaintiff claimed that his Hispanic foreman constantly gave him bad assignments, said "I hate white people," didn't promote him, and forced him to retire.
- The plaintiff claimed that he complained repeatedly but no action was taken.

U.S. SUPREME COURT CASES TO WATCH IN 2015

EEOC v. Abercrombie & Fitch
731 F.3d 1106 (10th Cir. 2013)

- Was a Muslim woman who was denied a job at a clothing store because she wore a headscarf (hijab) required to specifically request a religious accommodation?

- Cert. granted October 2, 2014

Busk v. Integrity Staffing
713 F.3d 525 (9th Cir. 2013)

- Must employers pay employees for time spent going through security clearances at the end of their shifts?
- U.S. Supreme Court heard argument on October 8 and will likely decide the case soon.
  - *Integrity Staffing Solutions v. Busk*, Docket No. 13-433
- Decision may have less impact in California, which does not follow the Portal to Portal Act.

CALIFORNIA SUPREME COURT CASES TO WATCH IN 2015

California Supreme Court Decisions to Watch

- *Mendiola v. CPS Security Solutions* (Case No. S212704):
  - Are security guards entitled to compensation for all nighttime "on call" hours, or may the employer deduct sleep time?
- *Richey v. AutoNation* (Case No. S207536):
  - Is an employer's honest belief that an employee was violating company policy or abusing medical leave a complete defense to the employee's claim that the employer violated CFRA?
  - What is the correct standard of review from an arbitrator's decision?

TRENDS AND HOT TOPICS

Trends

- PAGA representative actions
- Whistleblower cases
- Systemic employment litigation
- Fair Credit Reporting Act class actions, background check issues/ban the box
- Wellness programs
- Independent contractor and joint employer issues
- Minimum wage issues, when employees paid on piece rate or commissions

Hot Topics

- Update on CFRA regulations
- New DOL overtime regulations for white collar exemptions
- SF Flexible Workplace
- San Francisco Bay Area businesses with more than 50 full-time employees must offer commuter subsidies
- Make sure your policies are legally compliant under California law, including updating them with 2014 laws.
- Vehicle policies – employees who use company or own cars for work
  - Conflict between regulating the employees' use but not paying those employees for commute time, and not being responsible for accidents caused by the employees when they are not working

THE NLRB

The NLRB

- Continues to file complaints against employers who adopt class action waivers
- Continues to file complaints against employers that terminate employees who criticize their employers on social media

Plaza Auto Center, Inc. and Nick Aguirre

360 NLRB No. 117 (May 28, 2014)

- After a car salesman complained about his pay to a sales manager, the owner called him into a meeting in the sales manager's office. During this meeting, the employee was told that he needed to follow the employer's policies and procedures, that he should not be complaining about his pay, and that he did not need to work for the employer.
- After the employee lost his temper, yelling at the owner and calling him a "f**king mother f**ker," a "f**king crook," and an "a**hole," the owner terminated the employee.
- The NLRB held that the employee's outburst was protected activity and the employer violated the NLRA by terminating the employee for such behavior, and ordered him reinstated with back pay.

Plaza Auto Center, Inc. and Nick Aguirre

360 NLRB No. 117 (May 28, 2014)

- The NLRB ruled in favor of the employee because:
  1. the outburst occurred in a closed-door meeting in a manager's office;
  2. the discussion concerned the employee's protected conduct;
  3. the outburst was provoked because it would not have occurred but for the employer's unfair labor practice of inviting the employee to quit if he did not like the employer's policies, and
  4. the employee did not engage in menacing, physically aggressive, or belligerent conduct because he made no specific threats of physical harm, had no history of committing or threatening violent acts during his employment, and did not hit, touch, or attempt to hit or touch the owner.

Richmond District Neighborhood Center

Case No. 20-CA-091749 (Oct. 28, 2014)

- Even though the NLRB usually concludes that employees' activities on social media complaining about their working activities is concerted protected activity, in this case the NLRB found that the employees' comments encouraging insubordination were so severe that the NLRA did not protect them

Thank You!

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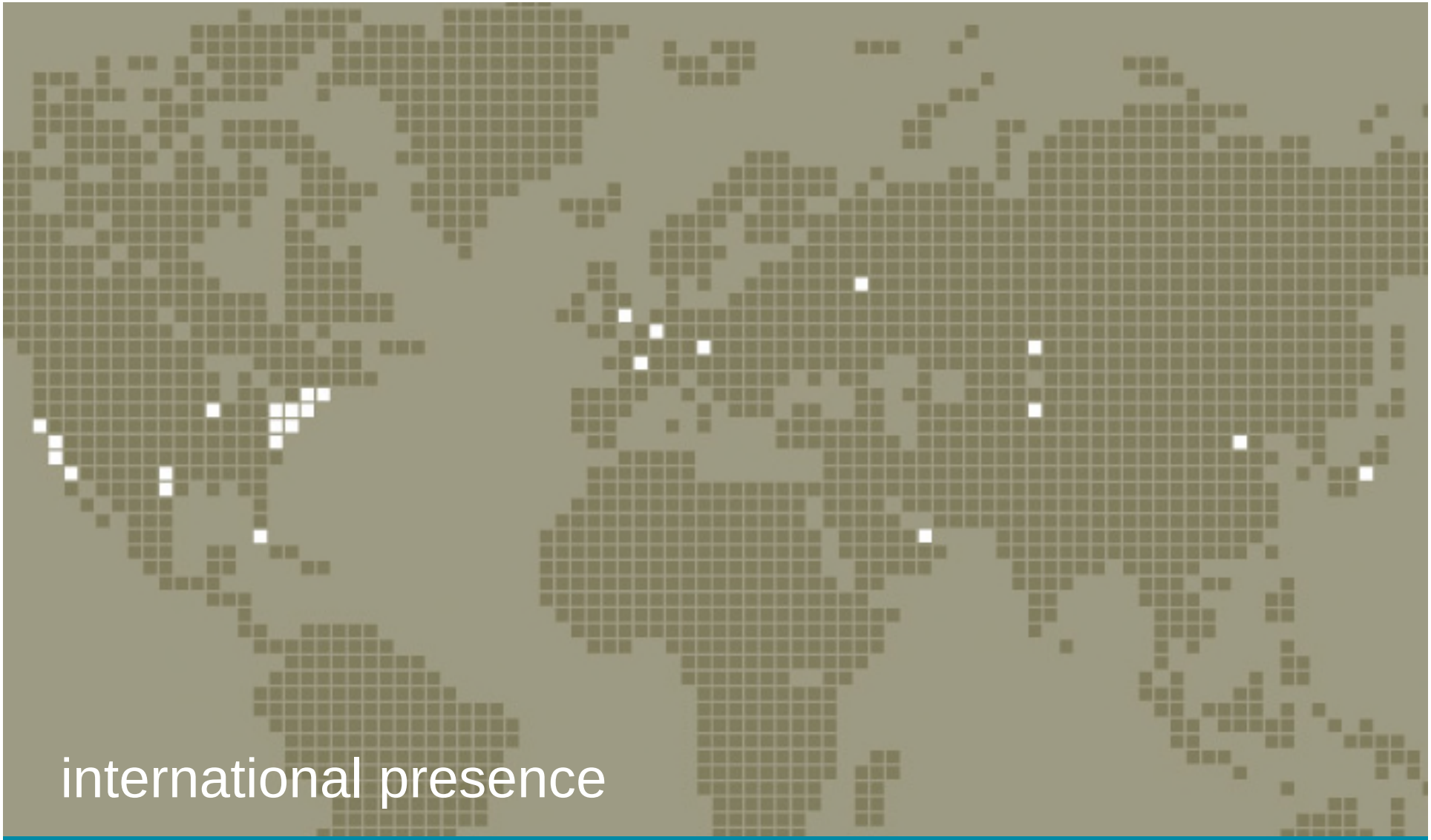

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