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EEOC/OFCCP

Systemic Discrimination Investigations and Enforcement
Actions After *Wal-Mart Stores, Inc. v. Dukes*

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AGENDA

- Background on EEOC/OFCCP pattern-or-practice claims
- Key pattern-or-practice rulings in *Dukes*
- Agency responses to *Dukes*
- Agency advantages in pattern-or-practice litigation
- Limitations on agency actions based on *Dukes*
- Leveraging *Dukes* and other defense arguments in pattern-or-practice litigation with EEOC/OFCCP
- Privileged risk assessments in light of uptick in agency enforcement actions

EEOC and OFCCP Pattern-or-Practice Claims

- Generally litigated under two-stage framework established in *Teamsters v. United States*, 431 U.S. 324 (1977).
- Stage 1:
 - Agency has burden of demonstrating a “pattern-or-practice of discrimination,” i.e., that discrimination was the company’s “standard operating procedure – the regular, rather than unusual practice”
 - In response, employer has burden of production to show that the agency’s proof is “inaccurate or insignificant”
 - No specific limits on nature or type of evidence but typically statistical and anecdotal evidence are critical. 431 U.S. at 360 n.46.
 - Agency retains burden of demonstrating a pattern-or-practice of discrimination by a preponderance of the evidence. If liability determined, district court may order injunctive relief

EEOC and OFCCP Pattern-or-Practice Claims

- Stage 2 under *Teamsters* framework:
 - If monetary relief sought, court must usually conduct hearings to determine the scope of the individual relief.
 - Employer bears the burden of proof at this stage to demonstrate that the individual was not subject to the pattern-or-practice of discrimination or is otherwise not entitled to relief.
 - Agency has opportunity to demonstrate that any nondiscriminatory justification offered by the company was in fact a pretext for unlawful discrimination.

Wal-Mart Stores, Inc. v. Dukes,

131 S. Ct. 2541, 2011 WL 2437013 (June 20, 2011)

- Supreme Court's decision will have far-reaching impact on efforts to certify employment discrimination class actions
- Decision will also impact OFCCP/EEOC pattern-or-practice claims
- Much of Supreme Court's analysis will apply to merits of pattern-or-practice claims
 - *Dukes*, 131 S. Ct. at 2552 (“[P]roof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a *pattern or practice* of discrimination.” (emphasis added))

Major Pattern-or-Practice Holdings in *Dukes*

- Three major pattern-or-practice holdings:
 - Rejects statistical aggregation as proof of broad pattern of discriminatory decisionmaking
 - Emphasizes importance of anecdotal evidence
 - Notes that Title VII requires consideration of individual defenses and *Teamsters* hearings

Supreme Court Rejected Aggregated Statistical Evidence

- Statistical evidence insufficient to demonstrate a pattern of discriminatory decisionmaking
 - “Information about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.”
Dukes, 131 S. Ct. at 2555 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 637 (9th Cir. 2010) (Ikuta, J., dissenting))

Importance of Anecdotal Evidence

- Anecdotal evidence not only failed to identify a “specific employment practice,” but was also “too weak to raise any inference that all the individual, discretionary personnel decisions [were] discriminatory.” *Dukes*, 131 S. Ct. at 2555-56
- Supreme Court has suggested a general proportionality standard
 - Court compared *Teamsters*, where there was one anecdote for every eight class members and accounts of discrimination came from across the company*
 - By contrast, the Court observed, there was only one anecdote for every 12,500 class members in *Dukes* and accounts were primarily from stores in six states, and many states had no anecdotal evidence at all*
 - “[A] few anecdotes selected from literally millions of employment decisions prove[s] nothing at all” with respect to a claim of a general corporate policy of discrimination *

**Dukes*, 131 S. Ct. at 2556

Individual Defenses and *Teamsters* Hearings

- Title VII requires that employers have an opportunity to raise statutory and other defenses. 131 S. Ct. at 2561
- Title VII requires *Teamsters* hearings to determine monetary relief. 131 S. Ct. at 2561

Agency Reactions to *Dukes*

- DOL, OFCCP, and EEOC will bring more systemic claims to offset any decrease in class certification as a result of *Dukes*
 - DOL Secretary Solis announced that *Dukes* would not affect OFCCP’s “ability to address pay disparities on a broad scale,” Hilda L. Solis, Sec’y of Labor, Dep’t of Labor, Remarks to National Employment Lawyers Association 22nd Annual Convention (July 1, 2011), *available at* http://www.dol.gov/_sec/media/speeches/20110701_NELA.htm
 - OFCCP will be “closing loopholes” created by *Dukes* and rescinding guidelines that complicate equal pay enforcement
 - *Increased focus on enterprisewide enforcement, push for back pay across all of a company’s locations*

Agency Reactions to *Dukes* cont'd

- Pamela Coukos now leads pay discrimination issues at OFCCP
 - Formerly a plaintiffs' attorney at Mehri & Skalet
 - Co-authored article in favor of statistical aggregation with William Bielby: *Statistical Dueling' with Unconventional Weapons: What Courts Should Know about Experts in Employment Discrimination Class Actions*, 56 EMORY L. J. 1563 (2007), available at http://www.law.emory.edu/fileadmin/journals/elj/56/6/Bielby___Coukos.pdf.

National Equal Pay Enforcement Task Force

- EEOC, DOJ, DOL, and OPM
- Issued report in July 2010
(http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf)
- Recommended aggressive enforcement policies and burdensome data collection from employers

OFCCP Data Collection Tool

- Advanced Notice of Proposed Rulemaking (ANPRM) issued August 10, 2011
 - Comment period ends October 11, 2011
 - Morgan Lewis will submit comments in opposition
- Would impose substantial new burdens on contractors
- Companywide pay audits triggered by profile of submitted pay data

Proposed Revisions to OFCCP Scheduling Letter Compensation Request

- Proposes request for extensive compensation data in every audit:
 - Employee-specific data versus aggregate data
 - ID, job title, time in title, AAP job group, EEO-1 occupational category, detailed race/ethnicity, gender, and compensation detail, including base salary or wage rate and hours worked and other compensation or adjustments to salary (such as bonuses, incentives, commissions, merit increases, locality pay or overtime) as of February 1 (of the most recent year)

EEOC Studying Options for Pay Data Reporting Requirement

- Commissioned study by National Academy of Sciences
- Report due this fall

“The panel will evaluate currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data. The panel will consider suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access issues. It will issue a report with findings and recommendations on what data the EEOC should collect to enhance wage discrimination law enforcement efforts, which will assist the Equal Employment Opportunity Commission (EEOC) in formulating regulations at the conclusion of an 18-month study.”

Significant Advantages to EEOC/OFCCP of Pursuing Systemic Discrimination Claims

- No requirement to obtain class certification under Rule 23. *General Telephone Company of the Northwest, Inc. v. E.E.O.C.*, 446 U.S. 318 (1980)
- Imprimatur and resources of the government
- Ability to generate adverse publicity
- Ability to develop claims and theories during investigation phase when employer may not be aware of significant risks hidden in its data

Advantages to OFCCP of Pursuing Systemic Discrimination Claims

- OFCCP cases: political supervision of ALJs by ARB
- OFCCP may argue that *Daubert* is inapplicable to expert evidence in administrative proceedings
- Unclear standard of review for statistical aggregation issues
 - Question of law reviewed de novo?
 - Mixed question of law and fact subject to “substantial evidence” standard
- Leverage litigation costs
- Threaten de facto termination of federal contracts or debarment

But *Dukes* Is Binding on EEOC and OFCCP Under Title VII

- EEOC has no substantive rulemaking authority to interpret Title VII
 - See *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-57 (1991)
- OFCCP lacks authority to allege systemic pay discrimination in a manner inconsistent with Title VII
 - See generally *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by Congress and subject to limitations which that body imposes.”); see also *United States v. E.Tex.Motor Freight Sys., Inc.*, 564 F.2d 179, 185-86 (5th Cir. 1977) and *United States v. Transp. Mgmt. Inc.*, 662 F.2d 36, 42-45 (D.C. Cir. 1981) (holding that OFCCP cannot assert that a bona fide seniority plan violates E.O. 11246 under a disparate impact theory of discrimination, because such action conflicts with Section 703(h), which declares such plans not to be unlawful under Title VII)

Historical EEOC/OFCCP Arguments Run Headlong Into *Dukes*

- Preference for Aggregated Statistical Analysis
- Downplay Anecdotal Evidence
- Formula Relief

Statistical Aggregation

- Rescission of Current OFCCP Compensation Standards
 - Notice of Proposed Rescission issued January 3, 2011
 - OFCCP likely to issue Notice of Rescission late in 2011
 - In Notice of Proposed Rescission, OFCCP took issue with two critical aspects of current Systemic Compensation Discrimination Standards, arguing that:
 - *Regression analysis not required to establish a pattern-or-practice of pay discrimination*
 - *Anecdotal evidence not required either*

Statistical Aggregation cont'd

- Differences between current and proposed approaches
 - Currently, OFCCP conducts separate regressions for each job title or similarly situated employee group (SSEG)
 - Proposed aggregated approach will conduct a single regression (for each AAP location) that covers all employees and controls for job title/function/family/grade
 - May attempt to aggregate across FAAPs or entire company

Statistical Aggregation cont'd

- In *Dukes*, the Supreme Court rejected contention that statistical analysis aggregated on a *national or regional basis* showed a pattern of discriminatory decisionmaking across stores. 131 S. Ct. at 2555.
- OFCCP's attempt to conduct nationwide pay audits using aggregate regression models is contrary to *Dukes*

Anecdotal Evidence

- OFCCP generally downplayed need for anecdotal evidence
 - See *OFCCP v. Bank of America*, 1997-OFC-16 at n.11 (Jan. 21, 2010) (clarifying that OFCCP is not required to proffer anecdotal evidence of intentional discrimination because statistical evidence alone is sufficient)
 - See 76 Fed. Reg. 62, 63 (Jan. 3, 2011) (criticizing current OFCCP compensation standards’ “strong preference” for anecdotal evidence as not required by Title VII)

Anecdotal Evidence cont'd

- OFCCP's lack of anecdotal evidence should be a key defect after *Dukes*
 - ALJs and the ARB must grapple with the proportionality standard suggested in *Dukes*
- But OFCCP's recent cohort analysis reviews will train some agency investigators to develop anecdotal evidence

Formula Relief

- Federal Contract Compliance Manual recommends formula relief “wherever it is impossible or impractical to determine individual relief”
- OFCCP and EEOC have historically argued for formula relief, which precludes an employer from offering individual proof
 - See, e.g., *Dep’t of Labor v. Harris Trust & Savings Bank*, 78-OFC-2 (ALJ Jan. 10, 1989) (consent decree incorporating formula relief); Brief Of The Equal Employment Opportunity Commission As Amicus Curiae In Support Of Plaintiffs On Rehearing En Banc, in *Dukes v. Wal-Mart Stores, Inc.*, No. 04-16688 (9th Cir. filed March 19, 2009)

Using *Dukes* to Defend Against Formula Relief Arguments

- *Dukes* recognizes statutory right to demonstrate that each affected class member not subject to pattern-or-practice discrimination and not entitled to relief
 - Title VII remedial scheme limits relief if employer can prove that employment action was taken for a reason other than discrimination, 42 U.S.C. § 2000e-5(g)(2)(A)
 - *Dukes* clarifies that “individualized determinations” of each class member’s eligibility for monetary relief, and *Teamsters* hearings to make such determinations, are required, 131 S. Ct. at 2561

Other Post-*Dukes* Defense Strategies in EEOC/OFCCP Actions

- Leverage *Dukes*, OFCCP Compensation Standards, and prior OFCCP settlements against aggregation and highlight lack of anecdotal evidence
- Manageability arguments
 - Any Other Factor Defense
 - Mixed Motives Defense
 - *Teamsters* Hearings
- Limits on EEOC actions under Sections 706 and 707 of Title VII
- Limitation on scope of claims

Daubert Applies to EEOC and OFCCP Enforcement Actions

- FEDERAL RULE OF EVIDENCE 702 and *Daubert* clearly apply to EEOC pattern-or-practice actions. *E.E.O.C. v. Bloomberg L.P.*, 2010 WL 3466370 (S.D.N.Y. Aug. 31, 2010) (excluding EEOC’s statistical expert under Rule 702).
- *Dukes* us persuasive authority that *Daubert* applies in administrative proceedings. 131 S. Ct. at 2553-54 (“doubting” district court’s conclusion that *Daubert* does not apply at class certification stage).
- ARB held that *Daubert* applies in administrative adjudications. See *In Matter of Evergeen Forestry Serv., Inc.*, 2006 WL 535428 (DOL Adm. Rev. Bd.) (“Expert opinion is admissible if it will assist the judge as the trier of fact, 29 C.F.R. § 18.702 (2005), *cf.* Fed. R. Evid. 702, and his/her methods are sufficiently reliable. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993).”).

OFCCP Standards and Precedent

- Even after current Systemic Compensation Standards are rescinded, OFCCP has no plans to replace them with a substantive alternative promulgated through notice and comment procedures. Though perhaps not binding, the rescinded standards can still be used against OFCCP in litigation.
 - OFCCP’s litigation positions or informal guidance will not receive substantial deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (explaining that “an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view” (internal quotations and citations omitted)).

OFCCP Standards and Precedent cont'd

- Likewise, OFCCP has adopted generally reasonable regression models in numerous pay discrimination settlements:
 - Wyeth, AstraZeneca, Boeing, Coca-Cola, Wachovia/First Union
 - OFCCP may act arbitrarily by rejecting similar regression models without providing a reasonable basis for departing from past practice
- The EEOC Compensation Manual has not been rescinded, imposes a similarity standard, and approves controls for legitimate factors including pay grade, performance, and red-circle situations. *E.E.O.C. v. Bloomberg L. P.*, 2011 WL 3599934, at *8 (S.D.N.Y. Aug. 16, 2011) (citing EEOC Compliance Manual regarding importance of statistical evidence in pattern-or-practice claims)

Manageability Arguments

- Even though Rule 23 does not apply, action must at a practical level be manageable and district court has inherent authority to evaluate and address manageability issues
 - *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 173 (N.D. Cal. 2004) (“The Court agrees that it must very carefully assess the manageability issues presented by this unique case. While courts possess wide discretion to flexibly respond to manageability issues that may arise during the course of a class action, this court must be confident that such issues will not be of such a magnitude as to defy its ability to oversee this case in a responsible and reasonable manner.”)
- Force of manageability arguments directly proportional to the size of the affected class for whom EEOC/OFCCP seeks relief
- Arguments likely to find traction with some district courts and ALJs if EEOC and OFCCP pursue expansive systemic pay discrimination claims

Manageability Arguments – *Teamsters* Hearings

- *Dukes* held that it violates Title VII to preclude an employer from raising individualized defenses to each class member's entitlement to, or scope of, relief. 131 S. Ct. at 2561
- *Dukes* also suggests that there is a statutory right to *Teamsters* hearings in most, if not all, pattern-or-practice cases. 131 S. Ct. at 2561

Limits on EEOC Actions Under Sections 706 and 707 of Title VII

- Two statutory provisions authorize litigation by the EEOC
 - Section 706 (actions on behalf of aggrieved persons)
 - Section 707 (pattern-or-practice actions)
- Important differences between Sections 706 and 707
 - *Teamsters* framework only applicable under § 707. *E.E.O.C. v. Cintas Corp.*, 711 F. Supp. 2d 782, 794-95 (E.D. Mich. 2010)
 - Compensatory and punitive damages only available under § 706. *Cintas*, 711 F. Supp. 2d at 785

Limits on EEOC Actions Under Sections 706 and 707 of Title VII

- But EEOC will typically file pattern-or-practice suits relying on Sections 706 and 707
 - “This action is authorized and instituted pursuant to Sections 706(f)(1) and (3) and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) and 2000e-6.”
 - See, e.g., Complaint, E.E.O.C. v. Kaplan Higher Educ. Corp., No. 1:10-CV-2882 (N.D. Ohio Dec. 21, 2010); Amended Complaint, E.E.O.C. v. O'Reilly Automotive Inc., No. H-08-2429 (S.D. Tex. Sept. 11, 2008)
- Some courts have significantly modified *Teamsters* framework when EEOC litigates claims pursuant to both sections 706 and 707
 - See *E.E.O.C. v. JBS USA, LLC*, 2011 WL 3471080 at *4 (D. Colo. Aug. 8, 2011)

Limits on EEOC Actions Under Sections 706 and 707 of Title VII

- District courts are divided (and circuit courts have not addressed) question of whether § 707 incorporates the 300-day charge filing requirement of § 706
 - Most district courts have limited the EEOC to obtaining relief for those affected class members harmed during the timely charge period
 - See, e.g., *E.E.O.C. v. Kaplan Higher Educ. Corp.*, 2011 WL 1775746, *5, (N.D. Ohio May 10, 2011); *E.E.O.C. v. Freeman*, 2011 WL 337339 (D. Md. Jan. 31, 2011); *E.E.O.C. v. O'Reilly Automotive Inc.*, 2010 WL 5391183, *10 (S.D. Tex. Dec. 14, 2010)
 - But see *E.E.O.C. v. L.A. Weight Loss*, 509 F. Supp. 2d 527 (D. Md. 2007); *E.E.O.C. v. Sterling Jewelers, Inc.*, No. 08-CV-706, 2010 WL 86376 *4-5 (W.D.N.Y. Jan. 6, 2010)
 - “Continuing violations” theories have been rejected
 - See *Kaplan*, 2011 WL 1775746 at *4-5; *EEOC v. Bloomberg, L.P.* (S.D.N.Y. Oct. 25, 2010)); *O'Reilly*, 2010 WL 5391183 at *10
- Decisions will be helpful for employers, particularly where EEOC seeks to expand investigation to add new claims, theories, and claimants

OFCCP Enforcement Litigation Process

- Proceedings before an ALJ
- Either party may appeal to ARB
- Employer may seek review under Administrative Procedure Act (APA) in federal district court
- Either party may appeal district court determination to federal court of appeals
- Either party may petition for certiorari in Supreme Court

ALJs May Preclude OFCCP From Expanding Scope of Claims

- OFCCP may attempt to expand allegations and seek additional discovery to cover employees in additional pay grades
- ALJ ruled in *Wyeth* that scope of OFCCP's enforcement action was limited to the affected class identified in the Notice of Violations (NOV)
 - See Pre-Hearing Order No. 4, in *OFCCP v. Wyeth, Inc.*, 2003-OFC-00007 (ALJ Feb. 17, 2004)
- ALJ's ruling may be persuasive to other ALJs considering an attempt by OFCCP to expand the scope of the claims beyond those alleged in the NOV

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Importance of Interlocutory Review in OFCCP Enforcement Actions

- Risk for employers after ALJ makes pattern-or-practice finding
 - Could order immediate changes to pay systems or face debarment
 - Possible order of fixed term debarment
 - Cost and expense associated with litigating *Teamsters* hearings works both ways

Interlocutory Review

- Interlocutory review should be granted when immediate order imposing sanctions is entered
 - 28 U.S.C. § 1292(a)(1) (permitting appellate jurisdiction over interlocutory orders “granting, continuing, modifying, refusing or dissolving injunctions...”)
 - See *Henrietta D. v. Giuliani*, 246 F.3d 176, 182-83 (2d Cir. 2001) (appellate jurisdiction triggered when “plaintiffs are granted at least part of the ultimate, coercive relief they seek.”); *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 632 (2d Cir. 1995) (order must be “directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought by a complaint”)
- If no immediate order of injunctive relief is entered, difficult to obtain interlocutory review
 - Three-part standard: “(1) That the order involves a controlling question of law, (2) there is a substantial ground for difference of opinion in resolving the issues presented by the order, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation.” *OFCCP v. Bank of America*, 1997-OFCCP-16, at *5 (Apr. 29, 2010)

Interlocutory Review cont'd

- OFCCP has successfully opposed employer attempts to obtain interlocutory review
 - *Dep't of Treasury v. Harris Trust & Savings Bank*, 78-OFCCP-2 (May 10, 1979) (rejecting the “classic attempt to obtain an appellate ruling on an unappealable interlocutory order”)
 - *Bank of America*, 1997-OFCCP-16 (noting ARB’s “strong precedent against permitting interlocutory review”)
- Employers should attempt to obtain interlocutory review under this standard by positioning controlling questions of law within the stage 1 proceedings

Privileged Risk Assessments

- Significant revision of risk assessment approaches warranted by *Dukes*?
- Three key areas to consider:
 - Continued advisability of using aggregate models to forecast risk?
 - Identifying common pay practices or policies and studying for adverse impact
 - Identifying pay decisionmakers and analyzing outcomes of their decisions

Possible New Risks of Using Aggregate Analyses to Forecast Risk?

- Not addressed in *Dukes* decision, but raised by Chief Justice Roberts and Justice Kennedy during oral argument
- *Monell* liability standard
 - Local government entities not vicariously liable for tortious conduct of employees under § 1983, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)
 - Liability will attach if official with policy-making authority acquiesced in a longstanding practice or custom which constitutes the “standard operating procedure” of the local government
- Court could apply a *Monell*-type liability standard based on high-level knowledge of race or gender pay disparities
- Risk of claim that common practice is the fact that high-level executives refused to correct race- or gender-based disparities

Statistical Analysis of Common Policies and Practices

- Identify any common pay policies or practices with widespread use
 - *E.g.*, reliance on prior pay to determine pay at hire
- Conduct statistical analysis to study whether common policies or practices had adverse impact on pay of women or minorities

Statistical Analysis of Pay Decisions of Common Decisionmaker

- Identify decisionmakers and conduct statistical assessment of each decisionmaker's pay decisions while controlling for job title, experience, and other relevant factors
 - Expect litigation over *who* is decisionmaker
 - *Final approver? initial recommender? or somewhere in between?*
 - In many cases, answer may be the individual who had authority and was close enough to have knowledge to actually make decision
 - *Would probably not be the final approver*

Risk Assessments to Prepare for OFCCP Audits

- Prepare for OFCCP compensation evaluations by conducting privileged compensation risk studies
 - Develop better foundation for arguments against statistical aggregation
 - Correct misclassifications and other harmful data errors
 - Improve statistical results through appropriate pay adjustments

Thank You

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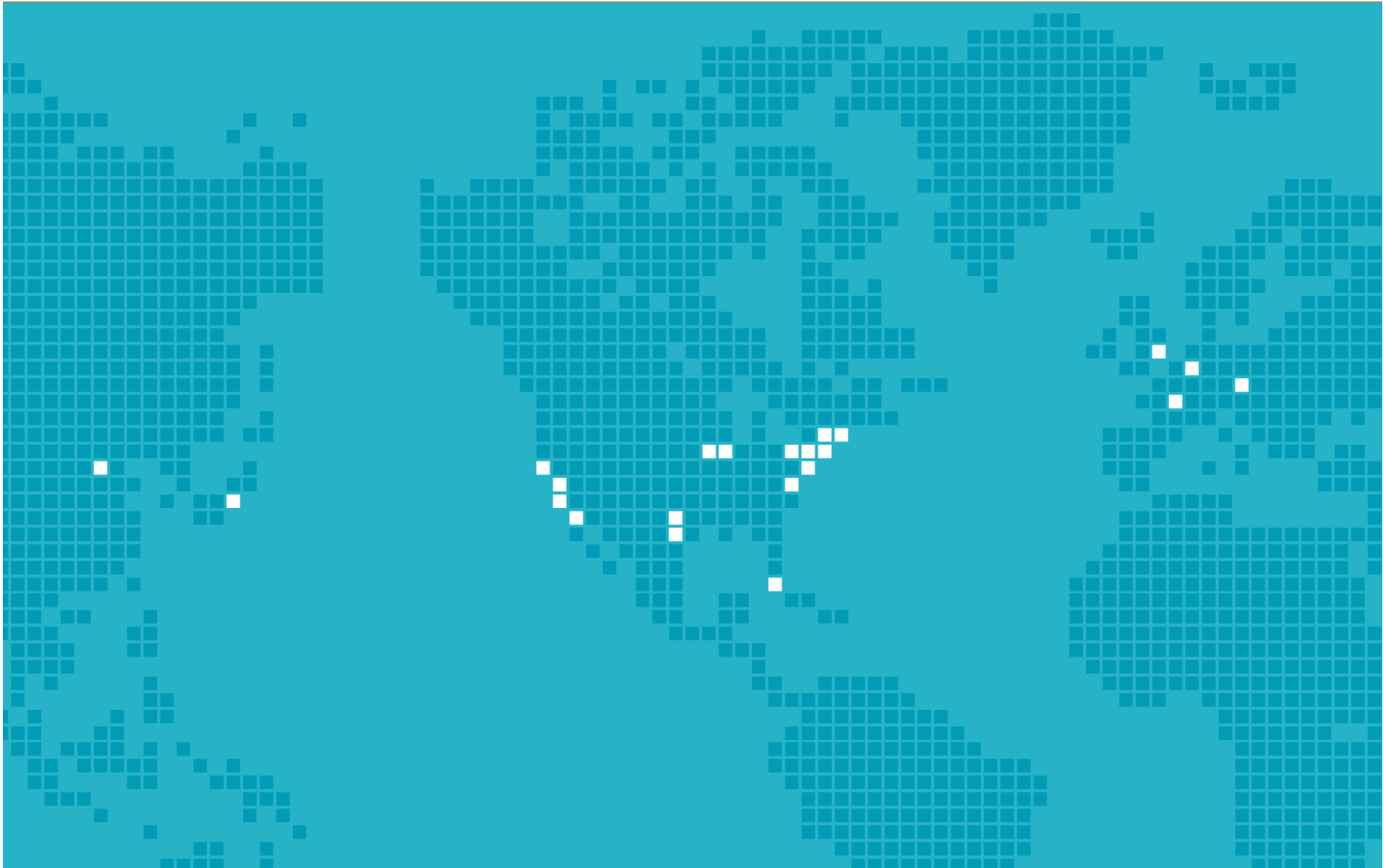
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