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2021 Employment Law Update for New York Employers

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Presenters

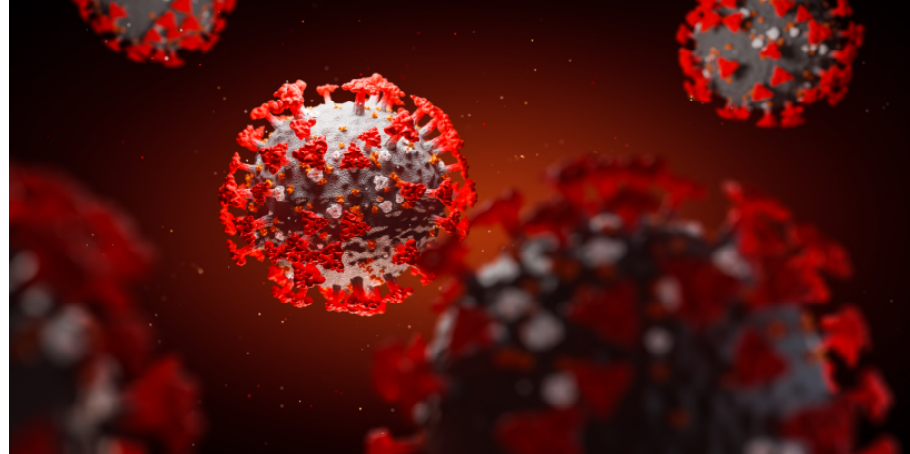
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COVID-19 in 2021: What NY Employers Need to Know



NY Related COVID-19 Compliance

- Employer obligations and re-opening guidelines differ based on a company's location and industry.
- All New York businesses that have re-opened must maintain a COVID-19 Safety Plan, which outlines how the entity will prevent the spread of COVID-19.
- New York has enacted a variety of intersecting leave laws in response to the pandemic.
- These restrictions are ever changing.

NY Related COVID-19 Compliance – Employee Testing

- Under the ADA, any mandatory medical tests of an employee must be “job related and consistent with business necessity.”
- The EEOC has determined that, at least currently, employers may use medical screening measures, including testing and inquiries about relevant COVID-19 symptoms, because the virus poses a “direct threat” to the health of others.
- This does **not** extend to antibody testing, which the CDC has indicated should not be used to make return-to-work decisions.

NY Related COVID-19 Compliance – PPE Requirements

- Employers may require employees to wear protective gear in the workplace, such as masks and gloves, or engage in other infection control measures.
 - Where an employee refuses to comply with such directives, discipline may be appropriate.
- However, reasonable accommodations should be made available where employees have a qualifying disability or religious need, unless an undue hardship exists.

NY Related COVID-19 Compliance – Caregiver Considerations

- As employees transition back to the workplace, employers should be mindful that the State and City Human Rights Laws protect against “familial status” and “caregiver” discrimination.
- Most employees with childcare obligations or those who care for family members with underlying medical conditions are protected from discrimination under these laws.
- These statutes do **not** require caregiver-based accommodations for employees.
 - However, if accommodations are provided to employees generally, they cannot then be denied to protected employees.

Update to NY Sick Leave Laws: Impact of COVID and New Employer Obligations



New York State COVID-19 Paid Sick Leave

- Effective March 18, 2020, employees who are subject to a mandatory or precautionary order of quarantine for COVID-19 are entitled to job-protected paid leave.
 - The law also covers workers whose minor dependent children are subject to such an order.
- An employee cannot qualify for leave under the COVID-19 Paid Sick Leave law for more than three orders of quarantine or isolation.
- Employees who are not symptomatic and may work remotely are **not** eligible for paid leave.

New York State COVID-19 Paid Sick Leave (Cont.)

- An employee who is subject to an order of quarantine and continues to test positive for COVID-19 after the end of such period, must not return to work.
- They are deemed to be subject to a **second** mandatory order of isolation by the NYS Department of Health and entitled to all benefits under the sick leave law.
- An employee must provide medical documentation concerning the positive test that occurred after the initial period of isolation.

Key Takeaways:



- Employers should review their time and leave policies to maintain continued compliance with these COVID-19 specific leave regulations.
- Employers should also review any COVID-19 policies related to quarantine or isolation.
 - Employers that require an employee to quarantine and miss work, even if they are **not** subject to an order of isolation, must continue to pay such employee at their regular rate of pay.

New York State Paid Sick Leave

- Most employers in New York are now required to provide **paid** sick leave to all employees, regardless of industry, occupation, part-time status, or overtime exempt status.
 - Employees began accruing leave on September 30, 2020.
 - All accrued leave became available to employees on January 1, 2021.

New York State Paid Sick Leave (Cont.)

How Much Leave is Required?

Number of Employees	Employer Sick Leave Requirements
0-4 (net income of \$1 Million or less)	Employer must provide up to 40-hours of <u>unpaid</u> sick leave per calendar year.
0-4 (net income greater than \$1 Million)	Employer must provide up to 40-hours of <u>paid</u> sick leave per calendar year.
5-99	Employer must provide up to 40-hours of <u>paid</u> sick leave per calendar year.
100+	Employer must provide up to 56-hours of <u>paid</u> sick leave per calendar year.

New York State Paid Sick Leave (Cont.)

- Employees accrue leave at a rate not less than 1-hour for every 30-hours worked.
- Unused leave carries over to the following year, unless an employer frontloads **all** paid leave required at the start of the calendar year.
- Leave may be used for a variety of reasons, including mental or physical illness, diagnosis or care of such a condition, or reasons related to incidents of domestic violence or a sexual offense (i.e. “Safe Leave”).
- Employers may require leave be used in increments (i.e. 15 minutes; 1-hour), but may not set a minimum increment of more than 4-hours.
- Employees must be paid at their normal rate of pay for paid sick leave.

New York State Paid Sick Leave (Cont.)

Conflicting Policies and Collective Bargaining Agreements:

- Employers with leave policies that meet or exceed the accrual, carryover, and use requirements of the law are unaffected and this law presents no further obligations on such employers.
- All CBAs entered into after September 30, 2020, are exempt from the above leave requirements, if they:
 1. Provide for comparable benefits and paid days off; and
 2. Specifically reference this statute, Labor Law Section 196-b.
- Recordkeeping:
 - Employers are required to maintain weekly records of the leave accrued and used by employees over the past six-years.
 - Employers may be required to provide a summary of such leave records within three business-days.

Key Takeaways:



- Be sure your clients have updated their payroll system to adjust for accrual of this new paid leave.
- Employers must also update their leave policies – and provide written notice to employees – if they want to set any restrictions on the use of paid sick leave.
 - Recordkeeping practices should also be updated to maintain compliance with the law.

COVID-19 Paid Sick Leave vs. NYS Paid Sick Leave

- COVID-19 Paid Sick Leave only applies where an employee takes leave because they (or their minor dependent child) are under a mandatory or precautionary order of quarantine due to COVID-19;
- NYS Paid Sick Leave is far more expansive.
 - Employers may be required to provide up to 56-hours of paid leave per year;
 - Paid Sick Leave may be used for any “Sick Leave” or “Safe Leave” purpose;
 - Paid Sick Leave is a separate and additional benefit to any leave provided for by the COVID-19 Paid Sick Leave Law.

Calling All NYC Employers: Additional Requirements for the 5-Boroughs



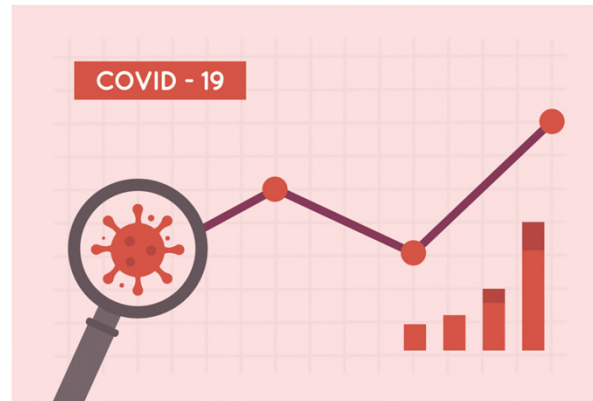
New York City – Sick and Safe Leave Amendments

- On September 30, 2020, NYC amended its Sick and Safe Leave Law to mirror most of the State’s Paid Sick Leave Law.
- A few notable differences of the NYC law include:
 1. Employers may require up to 7-days advance notice of the need to use leave, where such need is foreseeable.
 2. Employers must provide employees with a notice of rights, both when they begin employment and when their rights change.
 3. As of January 1, 2021, employers of domestic workers or with 100 or more employees must issue a new notice of rights.
 4. Employers must provide employees with statements each pay period outlining accrued, used, and remaining leave.

Overview of New Paid Leave Laws

- COVID-19 Paid Sick Leave: Applies only to employees under a mandatory or precautionary order of quarantine.
- NYS Paid Sick Leave: Provides accrued paid leave that can be used for any “sick leave” or “safe leave” purpose. Benefits are separate and additional to any COVID-19 Paid Sick Leave.
- NYC Paid Sick and Safe Leave: Mirrors most of the State law, including the amount of leave employees must receive and reasons employees can use leave, but has additional notice and wage statement requirements.
- Families First Coronavirus Response Act (“FFCRA”): Leave benefits expired on December 31, 2020. Employers are no longer required to provide such leave.
- Interaction with current policies: The above requirements are a floor. Policies that meet or exceed the amount, accrual, carryover, and use requirements need not provide additional leave.

Other Notable COVID-19 Laws in the Northeast



Recent Developments – COVID-19 Laws in the Northeast (Connecticut)

- On June 25, 2019, Connecticut enacted the Paid Family and Medical Leave Act (“PFMLA”), which creates an employee-funded system of paid family leave.
- Employees are eligible to utilize benefits under the PFMLA starting on January 1, 2022.
- However, employers must begin taking payroll deductions from Connecticut employees to fund the program starting on January 1, 2021.
 - The rate of the deduction is capped at .5% of an employee’s wages up to the Social Security contribution base.

Recent Developments – COVID-19 Laws in the Northeast (Maine)

- As of January 1, 2021, most private employers with more than 10 employees in Maine must provide 1-hour of paid leave for every 40-hours worked, up to a maximum of 40-hours per year.
 - Seasonal businesses are exempt from the law.
 - Employees covered by a CBA as of January 1, 2021, are excluded until the CBA expires.
 - » Future CBAs must provide this benefit at a minimum.
- Accrued leave under the law may be used for any reason.
- Employees begin accruing leave on their first day of work, but cannot use the leave until after 120-days of employment.

Recent Developments – COVID-19 Laws in the Northeast (Massachusetts)

- On January 1, 2021, most Massachusetts workers will be eligible to take up to 26-weeks of paid leave per year under the state’s Paid Family Medical Leave Law (“PFML”).
- The amount of leave permitted under the law varies based on the employee’s need.
 - For example, employees may take up to 20-weeks for their own serious health condition, but only 12-weeks to bond with a child.
- Employers must also provide written notice to employees of their rights under the PFML, as well as post a copy of such rights in the workplace.

Recent Developments – COVID-19 Laws in the Northeast (New Jersey)

- Effective March 20, 2020, New Jersey prohibited any employer from firing or punishing an employee who requests or takes time off due to a medical professional's determination that they have or are likely to have, COVID-19.
 - On September 20, 2020, the NJ Department of Labor issued further guidance, which defined “medical professional” broadly and noted that employees are entitled to reinstatement to the same or equivalent position upon return from leave.
- The law only applies during the COVID-19 pandemic and related Public Health Emergency and State of Emergency declared by Governor Murphy.
- Any actions taken after the State of Emergency is lifted will not be covered.

COVID-19 Vaccine Rollout: Impact on Employers



Recent Developments – EEOC Issues Guidance on Mandatory Vaccinations for Employees

- On December 16, 2020, the EEOC published guidelines, which indicate that employers can require employees to take the COVID-19 vaccine.
- The guidelines specifically note that employers may require an employee to receive a vaccination from the employer, or a third party with whom the employer contracts to administer the vaccine.
- Importantly, the EEOC clarified that requiring a vaccine, in and of itself, is **not** a “medical examination” under the ADA, and is thus permissible under the current guidance.

Recent Developments – EEOC Issues Guidance on Mandatory Vaccinations for Employees (Cont.)

Exemptions:

- An employee is **not** obligated to be vaccinated if they have:
 1. A qualifying disability under the ADA that prevents the employee from safely receiving the vaccine; or
 2. A sincerely held religious belief that prevents the employee from receiving the vaccine, and which does not impose an undue hardship on the employer.

Recent Developments – EEOC Issues Guidance on Mandatory Vaccinations for Employees (Cont.)

- **What happens if the employee cannot or will not be vaccinated?**
- The employer may exclude the employee from the workplace if:
 - No reasonable accommodation can be made **and**
 - The employer can show that there would be “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by [a] reasonable accommodation.”

Key Takeaways:



- Employers should consult with counsel before implementing a vaccination policy to maintain compliance with the law.
 - “Mandatory” vaccination policies must allow for religious and disability-based exemptions.
- Employers may request proof of vaccination, but must be cautious of both “pre-screening” and “follow-up” questions as they may implicate the ADA’s prohibition on disability-related inquiries
- Even where no accommodation is possible, employers should consider termination carefully and first determine whether any other rights apply under federal, state, or local laws.

2021 is Here! New Legislation and Impact on NY Employers



NYS Employment Law Updates – Paid Family Leave

- Beginning on January 1, 2021, New York’s Paid Family Leave Law will be expanded to provide up to 12-weeks of paid leave to covered employees.
- Leave may be used to bond with a new child, care for a family member, or assist where a family member is on active military service.
 - Leave may be taken all at once or in increments of full days.
- On January 1, 2021, Paid Family Leave benefits also increase to 67% of an employee’s average weekly wage (up to the statewide average).

Key Takeaways:

- Employers should update their leave policies to adjust for the increased amount of leave.
- Employers must also review their payroll deductions to adjust for the 2021 rates.



NYS Employment Law Updates – NY WARN

- On November 11, 2020, New York expanded its Worker Adjustment and Retraining Notification Act (“NY WARN Act”).
- Employers are covered under the act if they employ 50 or more employees within the State.
- Under the NY WARN Act, employers are generally required to provide 90-days notice in advance of qualifying mass layoffs, plant closings, and relocations.
- Under the prior law, NY WARN notices were due to the NYS Department of Labor, affected employees, union representation, and any local Workforce Investment Board.
- As amended, the law now requires additional NY WARN notices be provided to:
 1. The chief elected official of the unit or units of local government and school districts in which the WARN event occurs; and
 2. Each locality that provides police, firefighting, and emergency services to the area of the WARN event.

NYS Employment Law Updates – NY WARN (Cont.)

Comparison to the Federal WARN Act

- In general, the NYS WARN Act is broader and more encompassing than its federal equivalent.
- Some Key Differences include:

	Federal WARN	NY WARN Act
Size of Employers Covered	100 or more employees	50 or more employees
Notice Period	60-days	90-days
Coverage	Mass Layoffs and Plant Closings	Mass Layoffs, Plant Closings, and Relocations

Key Takeaways:



- Employers covered by the NY WARN Act should consult with counsel before any major reduction in force or relocation.
- Failure to provide sufficient notice – and notice to all applicable parties – may lead to substantial penalties, including back-pay and benefits to workers, as well as other civil penalties.

NYS Employment Law Updates – Minimum Wage

- Effective December 31, 2020, the NYS minimum wage increased for all private sector employees, except those who work in New York City.

Minimum Wage rates have increased as follows:

Location	Minimum Wage Hourly Rate
Long Island and Westchester	\$14.00 per hour
Remainder of New York State (except NYC)	\$12.50 per hour

- The Minimum Wage in NYC remains at \$15.00 per hour.

NYS Employment Law Updates – Minimum Salaries for Executive and Administrative Exemptions from Overtime

- Effective December 31, 2020, the minimum salary for exempt “executive and administrative” employees increased as follows:

Location	Minimum Weekly Salary Threshold
Long Island and Westchester	\$1,050.00 per week
Remainder of New York State (except NYC)	\$937.50 per week
New York City	\$1,125.00 per week

NYS Employment Law Updates – Tip Credit Changes

- Effective December 31, 2020, employers may **not** apply a tip credit to employees previously covered by the State’s “Miscellaneous Industries and Occupations Wage Order.”
- The wage order previously covered, among other jobs:
 - car wash attendants;
 - nail salon workers;
 - tow truck drivers,
 - dog groomers;
 - valet parking attendants; and
 - hairdressers

NYS Employment Law Updates – Tip Credit Changes (Cont.)

- Tip credits are still available to employers in the Hospitality Industry, however the specific rates for those credits have changed this year as well.

Other Limitations:

- Employers may not utilize a tip credit where an employee works for more than 2-hours (or 20% of their shift) doing non-tipped work;
- Employers may not utilize tip credits during weeks where an employee's average hourly tips fall below certain thresholds.

Key Takeaways:



- All employers outside of NYC should review their payroll practices to comply with the new minimum wages, and exempt salary requirements.
- Employers who previously utilized a tip credit pursuant to the “Miscellaneous Industries and Occupations Wage Order” must update their payroll practices immediately.
- For employers in the Hospitality Industry, tip credits are still appropriate, but must be updated to maintain compliance with the new laws.

NYS Employment Law Updates – NYC Fast Food Workers

- On December 17, 2020, the NYC Council approved two bills that will prohibit termination of Fast Food Workers, except for “just cause.”
- The laws also provide for arbitration procedures, and a private cause of action, through which employees can dispute their termination as without “just cause.”
- Layoffs are also limited to “bona fide economic reasons,” which the law defines as a full or partial closing of business operations or organizational changes that result in reduced sales, profit, or production.
 - Where such layoffs do occur, they must be done in inverse order of seniority.

NYS Employment Law Updates – NYC Fast Food Workers (Cont.)

- The bills also identify specific factors for a reviewing entity to consider when evaluating whether a termination was for “just cause.”
 - Notably, the bills specify that a termination shall **not** be for “just cause” where an employer fails to utilize progressive discipline or where the conduct at issue occurred more than one-year prior to termination.
- Furthermore, employers must provide a terminated employee with a written explanation stating the exact reasons for their termination.
 - A reviewing entity is prohibited from considering any reasons for termination that are omitted from this written notice.

Key Takeaways:



- These bills will come into effect 180-days after their expected signature by Mayor De Blasio.
- Employers should develop and prepare written disciplinary policies that include clear standards of performance and provide for progressive discipline.
 - Training measures should be increased to provide notice to employees of the conduct for which they may be disciplined.
- Employers must also be ready to provide terminated employees with a written explanation for their termination, as only items in such notice may be relied upon to establish “just cause.”

Recent Updates to the New York State Human Rights Law



New York State Human Rights Law Updates

- The New York State Human Rights Law (“SHRL”) has been subject to numerous expansions over the past few years, including amendments requiring the law to be “liberally construed,” and without reference to any more restrictive federal law, as well as expanded coverage to protect against harassment based on any protected class.
- In 2020, the SHRL was also updated to include:
 - Effective January 1, 2020: Prohibitions on settlement agreement terms that would prevent a Complainant from speaking with an attorney, the SDHR, the EEOC, any local human rights commission, or law enforcement entity;
 - Effective February 8, 2020: Expanded application to all employers within New York State, even those with fewer than 4 employees; and
 - Effective August 12, 2020: A three-year statute of limitations for filing with the SDHR, in all cases involving sexual harassment allegations in employment.

Key Takeaways:



- The New York State Human Rights Law has been broadly expanded to mirror much of its NYC equivalent.
- Employers should review their current EEO policies – particularly their policies prohibiting sexual harassment – to make sure they maintain compliance with the law.

Recent Updates to the New York City Human Rights Law



New York City Human Rights Law Updates – Hair Discrimination

- Effective January 30, 2021, the New York City Human Rights Law (“CHRL”) will be amended to include enhanced protections against discrimination based on hair.
- The rule shall include prohibitions on hair discrimination tied to any race, creed, or religion, and covers any hair textures, hair styles, or hair length, including the use of head-coverings.
- Employers are also required to provide reasonable accommodations for religious hair textures, hairstyles, and hair length, unless an undue hardship exists.
 - Employers are required to engage in a cooperative dialogue with any applicant or employee who requests a religious accommodation concerning hair.

New York City Human Rights Law Updates – Fair Chance Act Amendment

- The New York City Fair Chance Act (“FCA”), which is incorporated by reference in the CHRL, prohibits employers from inquiring about, or considering, the criminal history of job applicants until **after** extending a conditional offer of employment.
 - If an employer later chooses to withdraw a conditional offer, it must provide an applicant with its analysis of the “Fair Chance Process,” as defined in the statute.
- Effective July 29, 2021, the FCA shall also prohibit inquiry into pending arrests or criminal accusations.
- The amendments also provide protections to current employees, in addition to job applicants.

Key Takeaways:



- Employers should review their Employee Handbook to note that discrimination based on hair is prohibited by law.
 - Accommodation policies must also be updated to provide for religious accommodations related to hair or head-coverings.
- Employers should also update trainings for all supervisors to incorporate the new amendments to the FCA and maintain compliance with the “Fair Chance Process.”

Upcoming Legislation to Watch



Proposed Legislation – New York Biometric Privacy Act

What is the Proposed Law?

- On January 6, 2021, New York proposed a "Biometric Privacy Act," which would provide a private right of action related to an individual's biometric information.
- "Biometric Information" includes any information used to identify an individual, regardless of how it is obtained, stored, or shared, which is based on biometric identifiers such as a retina, iris, hand, or face scan, or fingerprints.
- The proposed law would set forth comprehensive rules for companies that possess, capture, or store a person's biometric information, including:
 - Requiring the development of publicly available policies concerning the retention and destruction of biometric information;
 - Requiring written consent prior to disclosure of such information; and
 - Prohibiting companies from profiting from a person's biometric information.

Key Takeaways:



- Employers should anticipate a flood of litigation related to the proposed law and begin preparing compliance measures immediately.
 - The nearly identical Illinois Biometric Privacy Act led to thousands of class action complaints brought by employees and consumers alleging that their biometric information had been improperly collected for timekeeping, security, and consumer transactions.
- The law also provides for stiff penalties, including damages of \$1,000 for each negligent violation or \$5,000 for each intentional or reckless violation – in addition to reasonably attorney’s fees and costs.

Proposed Legislation – New York Adult Survivors Act

- The New York Adult Survivors Act (“ASA”) would create a 1-year ‘look-back window’ during which any time-barred adult who was the victim of sexual assault in New York State could file a retrospective civil lawsuit, regardless of the statute of limitations.
- The ASA would permit civil, but not criminal, suits to proceed against both the alleged abuser, as well as any “negligent institution,” who knew, or should have known, about the abuse.
- The law would apply only to individuals who were 18 or older when they were assaulted. After the 1-year ‘look-back window’ the existing statute of limitations would come back into effect.

Key Takeaways:



- Employers should prepare for a flood of litigation related to the ASA.
 - The Child Victims Act, which set up a similar ‘look-back window’ for survivors of child sexual abuse, led to over 4,000 lawsuits against both alleged abusers and negligent institutions.
- Employers should also review their insurance coverage, including past policies, to determine how ASA suits may be treated.

Proposed Legislation – COVID-19 Still At Issue

- On December 8, 2020, New York Lawmakers proposed a bill that could require mandatory COVID-19 vaccinations in some situations.
 - The law would provide for a medical exemption from any vaccine requirement.
- Lawmakers have also proposed further legislation that would modify the general obligations law to deem any prior agreements that exempted employers from liability for negligence related to COVID-19 as void and unenforceable.

Key Takeaways:

- COVID-19-related laws will continue to dominate the employment landscape next year and beyond.
- Employers should continue to utilize workplace safety policies even as regulations are lifted.



Questions?

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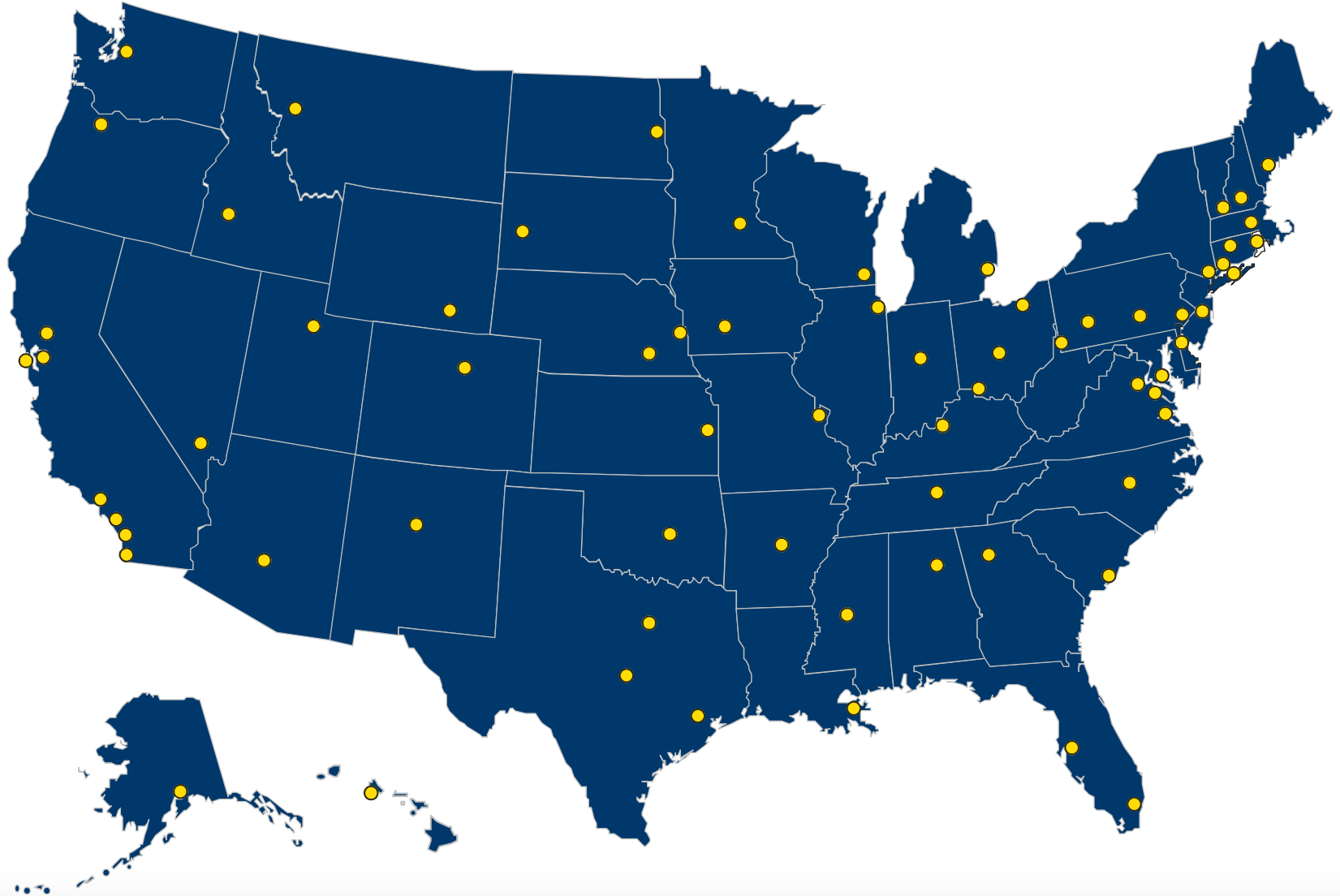
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