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Employment Law Developments to Expect Under President Biden & COVID-19 Developments

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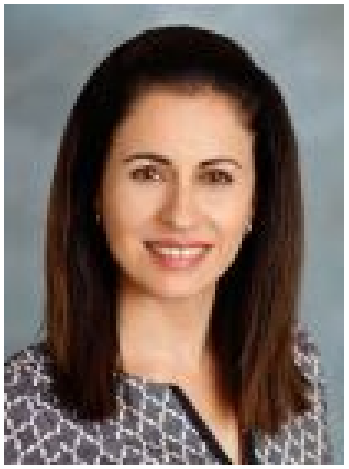

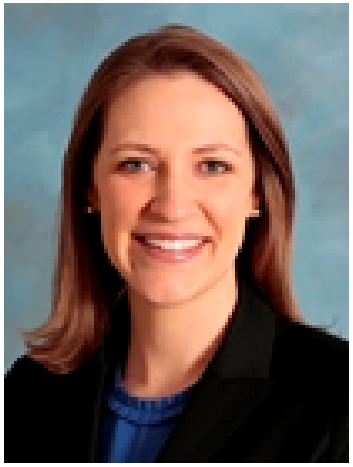

Top 10 National Developments to Expect in 2021

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Federal Minimum Wage

- Biden has pledged to gradually increase the federal minimum wage from $7.25 to $15.00 per hour by June 2025, and then adjust the minimum wage to increase at the same rate as median hourly wages.
- He also pledged to end “tip credits” under the Fair Labor Standards Act, whereby an employee must earn at least the state’s minimum wage after combining tips and wages, or the employer must increase the wage to fulfill that threshold.
- Tipped wages vary depending on each state’s minimum wage rate, and seven states pay the same minimum wage to tipped and non-tipped employees, including Alaska, California, Minnesota, Montana, Oregon and Washington.

Status:

- On February 19, House Democrats unveiled the ‘‘American Rescue Plan Act of 2021,” proposing $1.9 trillion in COVID-19 financial relief.
- Biden has previously faced resistance to raising the minimum wage in Congress, and has acknowledged that he will likely have to omit the measure from the current relief package and re-introduce it later as a separate bill.

Federal Minimum Wage (Cont'd)

FLSA "Wage Theft" Provisions:

- Biden supports legislation adding "wage theft" provisions to the federal Fair Labor Standards Act (FLSA), bringing wage enforcement more in line with similar provisions in a number of states. The provisions would increase pay transparency and require employers to issue detailed wage statements, as well as expand penalties for willful instances of wage theft, record falsification, or retaliation.
- For example, California considers an employer's failure to pay minimum wage, split shift premiums, paid sick leave, accrued vacation, unauthorized deductions, and several other types of pay as "wage theft," punishable by penalties and possible criminal conviction.

Eliminating Pay Disparity

- Biden has pledged to sign the **Paycheck Fairness Act** (H.R.7) during his term.

Current Federal Law:

- Under the Fair Labor Standards Act, an employer may pay an employee more than another if the pay disparity is based on a "factor other than sex."

Key Provisions in the Paycheck Fairness Act:

- Provides that an employer may only rely upon "a bona fide factor other than sex, such as education, training, or experience" to support pay disparity among employees performing substantially equal jobs at the same establishment.
- "Business necessity" test – "Bona fide factor" defense may be used only if the employer demonstrates that such factor:
  - (i) is not based upon or derived from a sex-based differential in compensation;
  - (ii) is job-related with respect to the position in question;
  - (iii) is consistent with business necessity; and
  - (iv) accounts for the entire differential in compensation at issue.

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Eliminating Pay Disparity (Cont'd)

- Employers cannot use the "bona fide factor" defense if:
  - the employee shows that an alternative employment practice exists that would serve the same business purpose without producing a pay disparity; *and*
  - that the employer has refused to adopt such alternative practice.
- Would prohibit employers from restricting employee communications about wage information, or from using salary history to set wages or make hiring decisions.
- By substantially limiting the ability to justify pay disparities, the Act would make it easier for employees to sue employers for alleged wage discrimination based on race, sex, or national origin.
- However, the Act brings pay equity enforcement in line with several states, such as California, which enacted similar Equal Pay Act provisions effective January 1, 2019.

Eliminating Pay Disparity (Cont'd)

Pay Data Reporting:

- No later than 18 months after enactment, would require employers to report pay data and other employment-related data (including hiring, termination, and promotion data) to the EEOC correlated to employees' race, sex, and national origin.
- Expands pay data reporting requirement beyond scope of EEO-1 reporting (100+ employees), to all employers covered by FLSA.

Status:

- The bill has been introduced many times over the last decade without approval, but it has passed the House.
- Effective January 1, 2021, California enacted its own pay data reporting requirement, similar to the former EEO-1 Component 2, which is due by March 31, 2021.

Expanded Anti-Discrimination Laws

Bostock Decision

- In June 2020, the U.S. Supreme Court issued a decision in *Bostock v. Clayton County, Georgia*, (2020) 140 S.Ct. 1731, holding that discrimination on the basis of sexual orientation or gender identity is necessarily also discrimination "because of sex" as prohibited by Title VII of the Civil Rights Act of 1964.
- Broad implications for Title VII and Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally funded educational institutions.
- However, Title VII only covers employers with 15+ employees, and does not cover the military as an employer.
- Prior administration reversed protections for LGBTQ individuals in healthcare and education, and instituted a ban on transgender individuals serving in the military.

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Expanded Anti-Discrimination Laws

Executive Order Implementing *Bostock* Decision

- On January 20, 2021, President Biden signed his Executive Order on **Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation**.
- This Executive Order establishes the new administration's policy prohibiting discrimination on the basis of gender identity and sexual orientation, and directs federal agencies to take affirmative steps to secure these rights, consistent with the *Bostock* decision.
- Broad scope, prohibiting discrimination in several areas, including but not limited to: employment, education, housing, health care, and credit.

Executive Order Reversing Transgender Military Ban

- On January 25, 2021, Biden signed an executive order repealing the prior administration's ban on most transgender Americans joining the military.

Expanded Anti-Discrimination Laws

Equality Act

- Executive Orders can change with a new administration, so Biden continues to support the **Equality Act**, which was passed by the House in May 2019.
- The Equality Act would codify the Executive Order in Title VII's anti-discrimination provisions, expanding the scope to prohibit discrimination on the basis of sexual orientation and gender identity in employment, housing, public accommodations, jury service, education, federal programs and credit.
- The Act would also clarify religious exemptions, including under the Religious Freedom and Restoration Act (RFRA), and expand protections to areas not covered by Title VII, such as public accommodations.

Status

- Passed the House in May 2019, but was not put up for a vote in the previously-Republican controlled Senate. It is expected to pass the House again soon but could face issues with the narrow Democratic majority in the Senate and potential for filibuster. Biden continues to urge swift passage of the Act.

Expanded Anti-Discrimination Laws

BE HEARD Act

- Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act (**BE HEARD in the Workplace Act**).
- Would expand coverage under Title VII to all employers *regardless of size* (currently 15+ employees), and would go beyond employee protections to apply to independent contractors, volunteers, interns, fellows, and trainees.
- The bill also overlaps with the Equality Act and recent Biden Executive Orders by providing LGBTQ workers with protection from employment discrimination.
- Would depart from "severe and pervasive" standard, instead offering a detailed roadmap for judges and employers to follow in identifying what conduct does and does not constitute unlawful harassment.
- Prohibits blanket non-disclosure agreements upon accepting employment.
- Lowers the burden of proof for claims of supervisor harassment, where the supervisor does not have hiring/firing authority.
- Provides resources for employers, including model policies and trainings, best practices tailored to specific industries, and model workplace climate surveys.

Expanded Anti-Discrimination Laws

Elimination of "But for" Cause in ADEA

- In 2009, the U.S. Supreme Court held in *Gross v. FML Financial Services, Inc.* that to establish a claim for age discrimination in violation of the federal Age Discrimination in Employment Act (ADEA), the plaintiff must prove that age was the "but for" cause of the harm suffered, rather than merely a "motivating factor." Mirrors "mixed motive" theory under Title VII, allowing the plaintiff to prevail, even if the characteristics protected by the statute are not the only reasons for the employer's action.

Elimination of Class Action Waivers

- Biden has expressed support of legislation prohibiting employers from seeking class and collective action waivers, despite the 2018 decision in *Epic Systems v. Lewis* upholding such waivers in the employment context. Eliminating class action waivers would open employers to potential discrimination and harassment claims (as well as wage and hour claims under the FLSA) on a class/collective action basis.

Independent Contractor Status

- The FLSA does not define "independent contractor," and there is no bright-line test to determine independent contractor status. Instead, patchwork of federal court decisions in various jurisdictions setting forth multi-factor tests to evaluate misclassification claims.
- In January 2021, the DOL issued a Final Rule setting forth several factors to determine classification under an "economic realities" test:
  1. Nature and degree of control over the work;
  2. Individual's opportunity for profit or loss;
  3. Amount of skill required for the work;
  4. Degree of permanence of the working relationship between the individual and the potential employer; and
  5. Whether the work is part of an integrated unit of production
- The DOL reminds employers that each worker's classification must be evaluated in light of the actual practices employed by the hiring entity, rather than what appears on the contract.
- The Final Rule is scheduled to go into effect in March 2021. However, under the new administration, there may be changes to the Rule's scope or provisions.
- Note: the Final Rule only addresses employer obligations under the FLSA, not more protective state laws!

Pregnant Workers Fairness Act

- Federal law currently protects pregnant workers against discrimination under the Pregnancy Discrimination Act and Americans with Disabilities Act, but there is no federal law providing the right to a reasonable accommodation.

- The proposed **Pregnant Workers Fairness Act** (PWFA) (H.R. 2694) would require employers with 15+ employees to provide reasonable accommodation to employees limited by pregnancy, childbirth, or a related condition. Reasonable accommodations would likely include granting short breaks for employees to express breast milk (already required under federal law) or even temporarily modifying job duties.

- Similar to other federal legislation proposed by Biden's administration, some states have already enacted laws requiring employers to make such accommodations. For example, California lists pregnancy as a protected class in the Fair Employment and Housing Act and includes pregnancy related conditions under its definition of disability for purposes of providing reasonable accommodation.

Status:

- The House proposed the PWFA in September 2020, and the bill has since been referred to the Committee on Health, Education, Labor, and Pensions.

Federal Paid Family Leave

- Now that the FFCRA expired on December 31, 2020, federal law does not provide for paid family leave. Biden has expressed support for providing up to 12 weeks of paid family and medical leave, although the specific leave provisions are unclear.
- Additionally, it is unclear whether Biden will support the Family and Medical Insurance Leave (FAMILY) Act (S. 463) proposed by Democrats in 2019, and reintroduced by both House and Senate Democrats this month. The FAMLY Act would require employers of all sizes to provide up to 12 weeks of partial income (up to 66%) to an employee for the following:
  - Their own serious health conditions, pregnancy, and recovery from childbirth;
  - The serious health condition of a child, parent spouse, or domestic partner;
  - The birth or adoption of a child; or
  - Particular military caregiving and leave purposes.
- Some state laws already provide for paid family, such as California, which administers Paid Family Leave benefits through the California Employment Development Department (EDD).

Status:

- Currently, the bill has been referred to the House Committee on Ways and Means and to the Senate Committee on Finance.

NLRB and Labor Unions

- Biden has promised to sign the **Protecting the Right to Organize (PRO) Act**, which passed the House in February 2020 but stalled in the Senate. The PRO Act would make sweeping changes to the National Labor Relations Act, enabling unions to organize workers more easily.

Key Provisions:

- Imposes penalties against employers for interfering with workers' organizing efforts;
- Compels mediation in first contract negotiations if agreement is not reached within 90 days;
- Bans employers from holding mandatory meetings with their employees, including "captive audience" meetings;
- Reinstates Obama administration's controversial "persuader rule," requiring employers to report activities of third-party consultants managing employer anti-union campaigns;
- Expands "joint employer" rule following Browning-Ferris and the 2014 representation election rule with shorter union election timelines; and
- Permits workers to engage in secondary boycotts and prevent employers from permanently replacing strikers.

Status:

- Despite Biden's support, the PRO Act faces significant opposition (and likely filibuster) in its current form, due to its pro-worker emphasis.

NLRB and Labor Unions (Cont'd)

- **Pro-labor Board** – The President appoints new members to the five-member National Labor Relations Board (NLRB) for terms of five-years, with Senate approval. Currently, one seat is vacant, and another will be vacated in August 2021 by a Republican. Therefore, the House will likely secure a Democratic majority on the Board. Notably, Biden also took the unprecedented action of terminating NLRB General Counsel Peter Robb, who declined to resign before his term expired in November 2021, and we can expect that the termination will be tested in court, particularly since the General Counsel has significant influence over the NLRB regions' prosecutorial priorities and agenda.

- **Reversal of NLRB decisions** – Under the previous administration, the NLRB issued several precedent-setting decisions employee access to employer IT systems for organizing activity, employer handbook rules and workplace policies, and unilateral actions by employers concerning mandatory subjects of bargaining, all of which are now subject to change or reversal by a Democrat-majority NLRB.

- **Reversal of NLRB regulations** – The Board has taken a rule-making approach over the past few years, rather than developing regulations by deciding NLRB cases. Such rules include a more stringent "joint employer" rule, revised its election rules, and proposed a final rule rejecting the "employee" status of graduate student teachers and research assistants at colleges and universities, among others. We can expect that a Democrat-majority Board might decide to revoke or reverse these rules.

- **Federal Government Contracts** – Biden indicated he will instruct federal agencies to award contracts only to employers who sign neutrality agreements promising not to oppose unionization of their workforces. Additionally, he will reinstate Obama's Executive Order requiring businesses awarded a federal contract to hire the employees of the previous company that held the contract, and determining eligibility for federal contracts on the employer's compliance with labor and employment laws.

EEOC Developments

Increased EEOC Funding:

- The Biden administration advocated for doubling funding for the Equal Employment Opportunity Commission (EEOC) to hire more investigators and "fulfill its mission and address workplace discrimination." Thus, employers can expect an increase in EEOC activity and investigations.

EEO-1 Reporting:

- The EEOC delayed data collection of 2019 Employer Information Component 1 (EEO-1) Reports and the 2020 EEO-3 and 2020 EEO-5 Data Collections on May 8, 2020 in light of the COVID-19 public health emergency, but will now open four data collections in 2021, including the 2019 and 2020 EEO-1 Component 1 Data Collection as well as the 2020 EEO-3, 2021 EEO-4, and 2020 EEO-5 Data Collections. The collections are scheduled to open in April 2021 for private sector employers.

Proposed Revisions to EEOC Guidance Manual on Religious Discrimination:

- Title VII provides for reasonable accommodation of an employee's sincerely held religious beliefs, except when such accommodation poses an undue hardship on the employer. In January 2021, the EEOC proposed revisions to its Guidance Manual, indicating it would continue to define "religion" under Title VII, and addressing reasonable accommodations, undue hardship, the interactive process, religious organizations' exemption from Title VII, and recent Supreme Court decisions expanding the "ministerial exception," for qualified religious institutions to avoid coverage under all federal anti-discrimination employment laws when making determinations about key employees that perform vital religious duties. (*See* discussion of ministerial exception in *Our Lady of Guadalupe Sch. v. Morrissey-Berru* (2019) 140 S.Ct. 679; *see also Hosanna-Tabor Evangelical Lutheran Church v. EEOC* (2012) 565 U.S. 171.)

COVID-19 Leaves of Absence

American Rescue Plan:

- Paid leave for reasons related to COVID-19 under the Families First Coronavirus Response Act (FFCRA) expired at the end of 2020. In January 2021, President Biden unveiled a proposed $1.9 trillion COVID-19 relief package, the **American Rescue Plan** (the Plan).
- The Plan would restore paid sick and paid FMLA leave for certain COVID-19-related absences under the FFCRA, as currently employers may provide paid leave and receive associated tax relief, but are not required to do so.
- The Plan would also provide other employment-related benefits, including, but not limited to:
  - Expanding covered employers to include nearly all employers regardless of size, to workers employed at businesses with more than 500 employees and less than 50, as well as federal workers who were excluded from the original program.
  - Expanding paid leave to provide over 14 weeks of paid sick and family and medical leave to help parents with additional caregiving responsibilities in light of school closures, caregiving for people with COVID-19 symptoms, or quarantining due to exposure; and for people needing to take time to get the vaccine.
  - Limiting tax credits for FFCRA leave payments to employers with fewer than 500 employees.
  - Raising the federal minimum wage to $15.00 per hour.
  - Encouraging employers to provide back hazard pay to essential frontline workers.
  - Extending unemployment benefit programs through September 2021, and include a $400 per week supplement to paid benefits.

COVID-19 Mandatory Vaccine Guidance

- The EEOC issued a decision in December 2020 stating employers can require employees to receive a COVID-19 vaccine.
- Exceptions to a mandatory vaccine include the following:
  - The employee has a disability under the ADA that prevents the employee from being vaccinated; and/or
  - The employee has a sincerely held religious practice or belief that prevents them from being vaccinated.
- Employees who cannot or will not be vaccinated may be excluded from the workplace if:
  - No reasonable accommodation can be made; and
  - The employer can show 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."**
- Mandatory vaccine is permissible under *Jacobson v. Massachusetts*, (1905) 197 U.S. 11, holding that an individual cannot claim they are exempt from a vaccination law if they cannot show they are "not a fit subject of vaccination" and/or could only contend that "'quite often,' or 'occasionally,' injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated." (*Id.* at 36-37.)

QUESTIONS?

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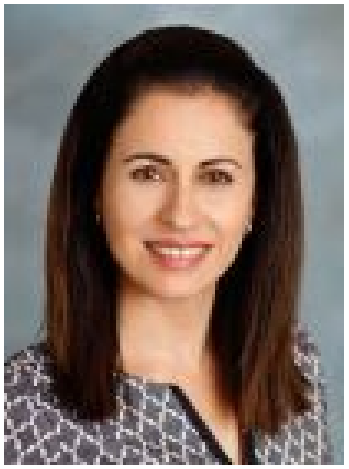

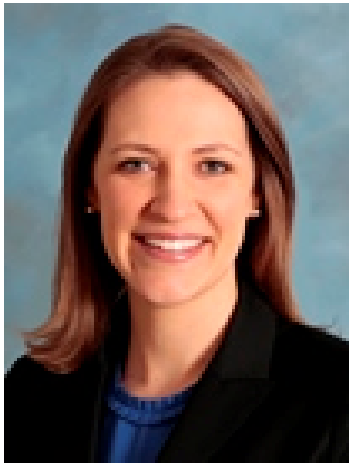

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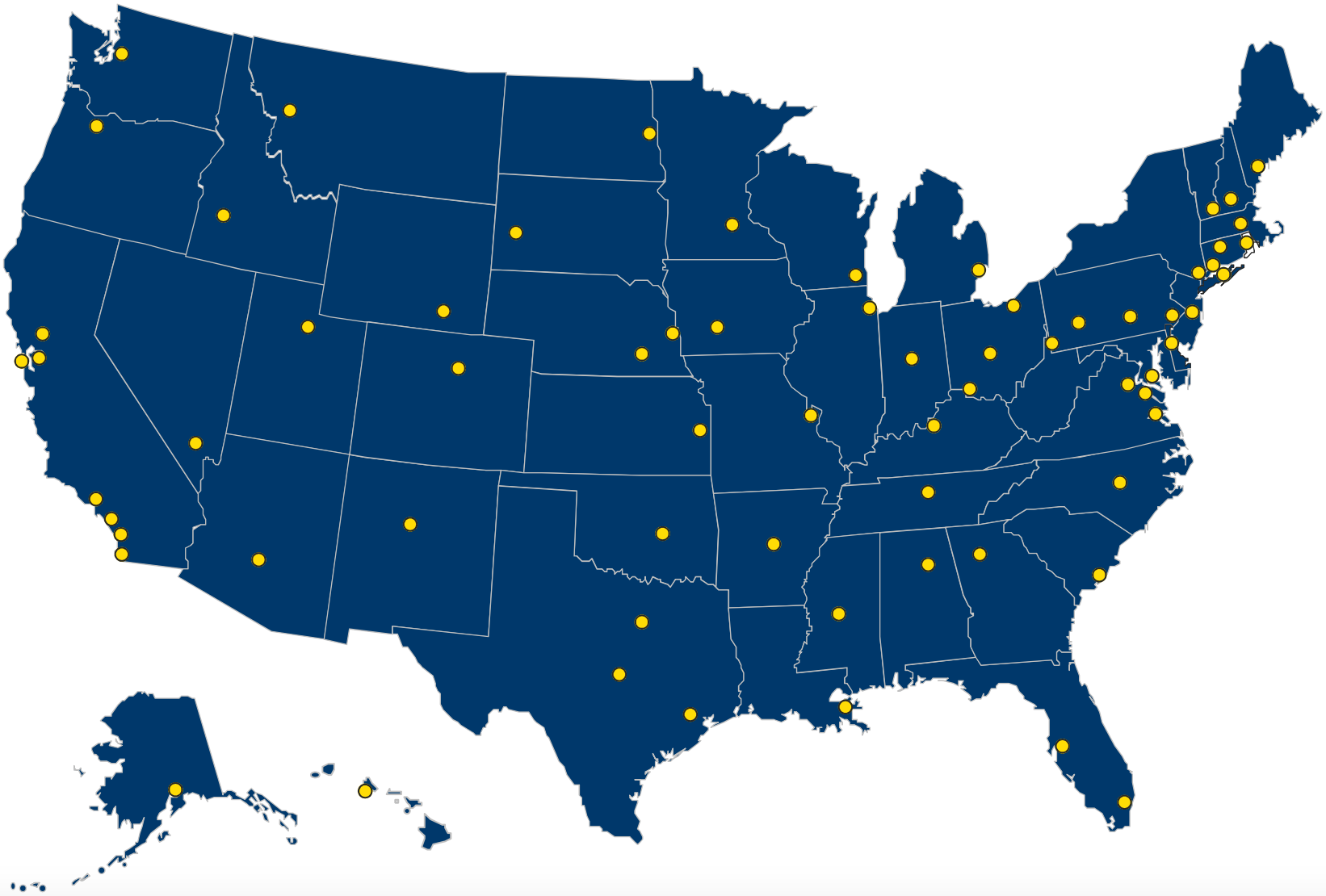

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