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PREVENTIVE STRATEGIES

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Employment, Labor, Benefits and Immigration Law for Employers

In this Issue

Supreme Court Update: Term Nears End with Just Eight Members

The 4-4 decision involving public sector labor unions and the mandatory payment of agency fees sums up the U.S. Supreme Court's predicament as it nears the end of the 2015-16 term. Sitting without a full complement, the Court demonstrated the consequences of Justice Antonin Scalia's sudden passing in February 2016 in a single-sentence opinion — "The judgment is affirmed by an equally divided court."

The President's nominee to replace Scalia, Chief Judge Merrick Garland of the D.C. Circuit Court, has been invited to talks with key U.S. Senate leaders. As of the end of May, however, the Republican majority of the Senate Judiciary Committee remained steadfast in its refusal to hold hearings and vote on Judge Garland's confirmation.

In the meantime, the Supreme Court has continued to issue opinions, many of which have been decided by a clear majority of the justices. However, when a decision of the Court ends with a tie vote, as in the public sector unions case, the judgment of the lower appellate court is simply affirmed and without precedential effect. If true to pattern, the Court waits until the end of the term to issue decisions in the cases most likely to be determined by close votes (in recent years, approximately a third of the Court's decisions have been by a single-vote majority), an eight-justice bench increases the likelihood of tie votes in those cases, with the simple affirmance of the lower court rulings.

The tie vote in the public sector unions case affirmed the ruling of the U.S. Court of Appeals for the Ninth Circuit that the California public school teachers who elected not to join the union must continue to pay an agency fee to the union as a condition of employment, even though they object to doing so as a violation of their constitutional rights. Agency fees are similar in amount to the dues paid by union members.

Ten teachers and the Christian Educators Association International had sued the California Teachers Association, the National Education Association, and others, for requiring public school teachers, as a condition of

employment, either to join the union representing teachers in their district or pay what is commonly known as a "fair share" fee for union bargaining services. The plaintiffs had argued that their First Amendment rights were violated when the government, through a collective bargaining agreement, required the payments to a union whose views they did not necessarily share.

INSIGHT

The Supreme Court's decision here is controlling only so far as it resolves the issues in this particular case, but it does not establish a precedent for future cases. In 1977, the Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209, that public-sector unions are constitutionally prohibited from using the fees of objecting non-members for ideological or political purposes not germane to the union's collective-bargaining duties. The Court, however, upheld a state law authorizing unions and government employers to enter into agency-shop agreements. Under these arrangements, a union can levy a fee on employees who are represented by the union in collective bargaining but who object to becoming union members.

The Court's ruling in the California teachers case may not be the end of the story. The teachers could ask the Court for a rehearing; success would require an affirmative vote of five justices, a rare occurrence even with a full Court. In addition, several cases that raise the same issue are working their way through the lower courts. One of them may reach the Supreme Court for a definitive ruling after the Court is restored to a full complement of nine justices (only four justices need vote to grant review of a lower court decision). For now, at least, *Abood* remains the controlling standard.

The case is *Friedrichs v. California Teachers Association*, No. 14-915 (Mar. 29, 2016).

For a more detailed discussion of the decision, see, "Supreme Court Upholds Right of Public Sector Unions to Charge Mandatory Union Fees," at www.jacksonlewis.com. Our Labor and Preventive Practices attorneys are available to assist public and private employers to develop lawful HR "best practices," to represent organizations in collective bargaining and grievance/arbitration proceedings, and to defend employers at the courts, National Labor Relations Board, and other agencies.

Demotion of Police Officer for Action Mistakenly Believed to Violate No-Politics Rule Has First Amendment Protection

By a vote of 6-2, the Supreme Court has reversed the rulings of two lower courts that had denied a police officer's constitutional challenge to his demotion based on his employer's mistaken belief that the officer had acted in violation of official policy prohibiting political activity. The Court held that when a government employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that adverse employment action under the First Amendment and Section 1983, part of the Civil Rights Act of 1876 (prohibiting the deprivation of a federal right under color of state law), even if the employer mistakenly believed the employee was engaging in political activity. In short, a government employer's actions, based on mistaken information, can result in a viable constitutional claim even where no actual constitutional violation occurred.

The police officer had worked as a detective in the

office of the city's chief of police and was personal friends with a candidate running for mayor of the city. The officer was demoted to patrol officer after he was seen at the candidate's campaign headquarters picking up a campaign yard sign, which he was retrieving at his mother's request and not out of his own interest in the political campaign. Following the demotion, the officer sued the city for violating his constitutional rights to free speech under the First Amendment and federal civil rights law Section 1983.

Making the assumption that the city had taken retaliatory action against the officer based on its policy of prohibiting political activity by employees, the Supreme Court said the officer had the right to challenge his demotion. The fact that the city had acted on a mistaken belief that the officer had violated its policy against political activity by employees did not change the fact that the officer's right to exercise free speech was protected. Neither did it excuse the city's actions in maintaining and enforcing a constitutionally unlawful policy.

The Court stated that, for purposes of its opinion, it had assumed the city had demoted the officer out of an improper motive; however, it sent the case back to the lower courts to decide in the first instance whether the city may have acted under a neutral policy prohibiting police officers from overt involvement in any political campaign and whether such a policy, if it exists, complies with constitutional standards.

The case is *Heffernan v. City of Patterson*, No. 14-1280 (Apr. 26, 2016).

For a detailed discussion, go to "Government Employer's Incorrect Belief About Employee's Activity Matters in First Amendment Analysis."

No Means No to California Courts on Refusing to Enforce Class Waivers in Arbitration Agreements

In another case out of California, the U.S. Supreme Court, by a 6-3 vote, held that a restrictive interpretation of an arbitration agreement by the California Court of Appeal is inconsistent with the Federal Arbitration Act (FAA), and that the FAA requires the arbitration agreement, including a class action waiver provision, be enforced. While this case did not arise in a workplace setting, the implication for arbitration agreements containing class action waivers in the employment arena appears strong.

California courts have looked with disfavor on the enforcement of class action waivers, and a 2005 decision by the California Supreme Court found such agreements unenforceable. That decision, however, was overturned by the U.S. Supreme Court in 2011 when it ruled that the FAA preempted the state law and required enforcement of otherwise lawful agreements containing class action waivers. Such an agreement in a consumer contract for satellite television services was in question when the California law was changed, and as the agreement was written, the company sought to enforce arbitration to settle a consumer dispute with one individual claimant, not a class of claimants.

While the outcome of the case hinged on the interpretation of the phrase "the law of your state" in the arbitration agreement, and whether the law referred to had changed in California after 2011, the result was another ruling from the U.S. Supreme Court in favor of the FAA as controlling the enforceability of arbitration agreements including class action waiver provisions. Although opposition to class action waivers in California and elsewhere is unlikely to abate, the Supreme Court has made it clear that it will scrutinize anti-arbitration decisions that are based on contract interpretation or issues of contract formation that single out arbitration agreements for special treatment, either directly or indirectly.

INSIGHT

Nothing in this decision affects the viability of actions brought under California's Private Attorney Generals Act (PAGA) as an avenue to avoid the effects of a class waiver. A PAGA claim is a type of government enforcement action where the representative employee acts as the state's proxy. Given this "loophole," the number of PAGA class actions probably will increase as plaintiffs' counsel include such claims in their complaints, if for no other reason than to avoid arbitration.

The case is *DirecTV, Inc. v. Imburgia, et al.*, No. 14-462 (Dec. 14, 2015).

For a detailed discussion, go to "Supreme Court Rejects California Limitation on Arbitration Agreements with Class Action Waivers." Our Class Actions and Complex Litigation attorneys are available to assist employers to develop and implement lawful and effective arbitration agreements containing class waivers, as well as defend against class claims and multiple plaintiff litigations.

Refusal of Settlement Offer by Named Plaintiff in Class Action Does Not End Dispute

Another decision by the U.S. Supreme Court involving a class action claim that arose outside the employment context has implications for employers. In a 6-3 decision, the Court resolved a split of opinion among the federal appellate courts and held that an "unaccepted settlement offer has no force," and cannot thereby eliminate the basis for the claim of the individual plaintiff or the class of plaintiffs. Relying on "basic principles of contract law," the Court said a mere offer, even if one of full relief, absent an acceptance, has "no continuing efficacy." The offer remains only a nonbinding "proposal" and, further, under the express provisions of procedural rules for class action litigation, if an offer is not accepted within 14 days, it is "withdrawn."

The Court's decision effectively eliminates a strategy sometimes used by defendants to resolve class action litigation. In the case before the Court, the named plaintiff was seeking $100 million to settle class claims resulting from unauthorized and unlawful automatic texting on behalf of Navy recruitment efforts. The nonconsensual texting was a violation of federal law and carried a maximum penalty of $1,500, the amount offered to the named plaintiff to settle the claim. She rejected the offer, but the defendants sought to dismiss the case on the basis of the offer of full relief. Both the trial court and the federal appeals court agreed with the plaintiff that the offer had not rendered the claims moot.

INSIGHT

While agreeing with the lower courts in this case, the Supreme Court left open the question of whether the result would have been different if the defendant had sent a check for the full amount to the plaintiff or deposited it with the district court, instead of merely making an offer of judgment to the plaintiff for the full relief available. The next round in the battle between plaintiffs' class action lawyers and the companies they target will be whether a case becomes moot when a defendant, instead of merely offering full relief, actually pays it. Such a case may be just around

the corner. For now, however, the lower courts will have to wrestle with these questions.

The case is *Campbell-Ewald Co. v. Gomez*, No. 14-857 (Jan. 20, 2016).

For a detailed discussion, go to "Supreme Court Weighs in on Class Action 'Pick Off' but Leaves Significant Questions Unanswered." Our Class Actions and Complex Litigation attorneys are available to assist employers to develop and implement lawful and effective strategies for defending class actions and multiple-plaintiff litigations.

Representative Sampling of Group as Evidence of Compensable Time Meets Class Action Requirements

In a case involving whether workers at a pork processing plant were entitled to overtime compensation under the Fair Labor Standards Act for time spent putting on and taking off protective gear, the U.S. Supreme Court ruled 6-2 in favor of the workers. The decision affirmed the rulings of the lower courts, which had accepted evidence of the workers' donning and doffing time based on a representative sampling of the class members, not individual evidence of each worker's time.

To satisfy the requirements for a class action, a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." The parties agreed that the most significant question common to the class was whether donning and doffing protective gear is compensable under the FLSA. The company argued that individual inquiries into the time each worker spent donning and doffing were necessary to support the common claims. The workers argued that individual inquiries were unnecessary, because it could be assumed for purposes of establishing liability that each employee donned and doffed for the same average time.

To show the amount of time the workers spent donning and doffing, the plaintiffs relied on a study done by an industrial-relations expert (the employer did not keep records of this time). A majority of the Court found that, on the facts of this case, the "representative evidence," which was not explicit as to each individual worker, had met the requirement for the common claims of the workers and that they were entitled to overtime compensation for the time spent donning and doffing the protective gear.

INSIGHT

This decision is notable in its limited holding. The Court's reasoning applies only to cases in which the lower courts have determined that the representative evidence offered by the plaintiffs is a statistically valid sample that can be extrapolated to show the amount of time for the class as a whole. Where such a sample is not sufficient, it remains a burden of the plaintiffs to show individual evidence of their claims.

The case is *Tyson Foods v. Bouaphakeo*, No. 14-1146 (Mar. 22, 2016).

For a detailed discussion, go to "U.S. Supreme Court Finds Representative Statistically Valid Evidence Supports Wage-Hour Class Certification." Our Wage and Hour attorneys are available to counsel employers about wage and hour issues, perform wage and hour compliance reviews, and defend related litigation and government agency investigations.

Other recent Supreme Court decisions of note for employers:

1. A 6-2 decision that certain state reporting mandates for employee benefit plans are preempted by the Employee Retirement Income Security Act of 1974 (ERISA). ERISA established a uniform plan administration system that would be frustrated by multi-jurisdictional mandates that impose conflicting administrative obligations, resulting in wasteful administrative costs and subjecting plans to wide-ranging liability. *Gobeille v. Liberty Mutual Ins. Co.*, No. 14-181 (Mar. 1, 2016). See, "ERISA Preempts Vermont Health Plan Reporting Law (Self-Funded Plans Take Note)."

2. A per curiam opinion (*i.e.*, by the court as a whole, rather than in a signed opinion) that set out a specific, stringent pleading standard that reversed the U.S. Court of Appeals for the Ninth Circuit for the second time. The lower court had failed to apply the proper strict pleading standard for claims alleging breach of the duty of prudence against fiduciaries who manage employee stock ownership plans (ESOPs). *Amgen Inc. v. Harris*, No. 15-278 (Jan. 25, 2016). See, "Supreme Court Rebukes Ninth Circuit's Disregard of Prudence Precedent of Employee Stock Ownership Plans."

3. An 8-1 decision that when an employee plan participant has spent all the settlement proceeds from a personal injury claim that could have been used to reimburse the medical expenses already paid by the plan, and the plan fiduciary has not identified the precise funds in the participant's possession at the time of the claim as part of those proceeds, the plan fiduciary may not reach the participant's other assets as a broader means of recovery. *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*, No. 14-723 (Jan. 20, 2016). See, "ERISA Plan Cannot Recovery Settlement Funds That Have Already Been Spent."

4. A 5-to-3 decision that federal law enforcement may not freeze an accused's assets needed to pay criminal defense lawyers if the assets are not linked to a crime. *Luis v. United States*, No. 14-419 (Mar. 30, 2016). See, "Law Enforcement Cannot Seize Assets Not Tied to Crimes."

5. An 8-0 decision that a defendant/employer in an Equal Employment Opportunity Commission class action complaint alleging sexual harassment may be entitled to an award of attorney's fees even in the absence of a decision on the merits of the case in favor of the employer. The case was settled after the class claims were dismissed twice at the trial court level, and the subsequent appeals by the EEOC failed. *CRST Van Expedited, Inc. v. EEOC*, No. 14-1375 (May 19, 2016). See, Fee Wars: Supreme Court Eases Defendants' Burden for Attorneys' Fees in Baseless Discrimination Actions.

Jackson Lewis will continue its coverage of the 2015-16 term of the U.S. Supreme Court in future reporting and on our website, www.jacksonlewis.com.

Labor Department Rule on New Reporting Requirements Leaves Many Questions

The United States Department of Labor in March published its final rule on "persuader" activity under the federal Labor-Management Reporting and Disclosure Act (LMRDA). Under the DOL's new interpretation, employers/clients, as well as consultants/attorneys, would be required to report to the DOL all arrangements in which an "object" (directly or indirectly) of the services provided by the consultant/attorney is to persuade employees about the manner of exercising the employees' "right to organize and

bargain collectively through representatives of their own choosing" under federal labor law.

The final rule became effective on April 25, 2016; however, DOL has clarified that it will not apply the rule to arrangements or agreements entered into prior to July 1, 2016, or payments made pursuant to such arrangements or agreements. Consequently, the rule does not require reporting prior to July 1, 2016, for activities not presently subject to reporting, or require filing new Forms LM-10 or LM-20 for any purpose prior to July 1. See, "Labor Department: Changes to Interpretation of Advice Exemption Apply Only to Agreements, Arrangements Entered Into After July 1."

LMRDA Reporting Requirements

Under the pertinent parts of the LMRDA, Sections 203(a) and (b), employers and their "labor relations consultants" must report to the DOL:

> [a]ny agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing ....

The rule as it has been interpreted for decades has applied to: (1) direct persuasive communications between consultants (or attorneys) and employees; and (2) indirect communications that did not meet the broad definition of the "advice exception," which exempts from the reporting requirements "the services of such [consultant] by reason of his giving or agreeing to give advice to such employer...." Section 203(c).

This interpretation of the statutory reporting requirements has been easily understood and simply applied. Direct persuasive communications between a consultant (or attorney) and an employee must be reported. However, communications between a consultant (or attorney) and an employer, manager, or supervisor (although persuasive) is deemed advice and is not reportable so long as the client may review, revise, or reject the advice.

The New DOL Reporting Rule

In its new rule, the DOL takes the position that the "advice exemption" still applies to an arrangement where the consultant/attorney "exclusively provides legal services."

Despite this apparent safe harbor, it is widely believed the DOL's new "persuader activity" rule will make it more difficult for employers to exercise their free speech rights under the National Labor Relations Act in communicating facts and opinions on labor relations matters to employees without incurring the reporting obligation. It is also widely anticipated that the rule may interfere with an employer's right to obtain legal advice and preserve the confidentiality of attorney-client communications on labor relations matters. This advice often is necessary when employers speak to their employees to avoid unlawful or objectionable conduct under the NLRA.

INSIGHT

Unless halted or delayed by litigation, government action, or the next Administration, the new DOL rule will compromise the advice exception. In short, the rule's revised interpretation will attempt to convert into "persuader activity" some of what is now accepted as legal advice and protected by the attorney-client privilege and confidentiality standards.

To date, at least three lawsuits have been filed challenging the DOL rule. In addition, the U.S. House of Representatives has passed a joint resolution (H.J. Res. 87) expressing congressional disapproval and seeking to block implementation of the final rule.

The rule is Department of Labor, Office of Labor-Management Standards, "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; Final Rule."

For a detailed discussion of the final rule, go to DOL's Rule Redefining LMRDA 'Advice Exception' and Expanding Types of Activities Considered Persuasive, Reportable is Finalized – Effective Late April 2016, "Changes to Interpretation of 'Advice' Exemption Apply Only to Agreements, Arrangements Entered into After July 1," and "Congress Seeks to Block Persuader Rule."

Patchwork of Paid Leave Laws Grows as More States, Local Governments Enact Legislation

Similar to the trend among state and local governments in enacting minimum wage laws that best the federal requirement of $7.25 per hour for nonexempt employees (with certain limited exceptions), a growing array of state and local paid leave laws have been enacted to overlay the federal Family and Medical Leave Act, which does not mandate paid leave. Paid sick leave laws have been passed in California, Connecticut, Massachusetts, Oregon, and Vermont, with California recently enacting legislation that increases benefits to 60-70 percent of income. New York City recently has issued new FAQs on its Earned Sick Time Act updating and clarifying a number of that law's provisions.

Paid leave laws remain an East Coast-West Coast phenomenon: east of the Mississippi are state and local laws in Connecticut, the District of Columbia, Massachusetts, New Jersey, New York City, Maryland, Philadelphia, and Puerto Rico; west of the Mississippi are state and local laws in California, Oregon, and Washington.

On Labor Day 2015, President Barack Obama signed Executive Order 13706, requiring certain federal contractors to provide employees with up to seven days of paid sick leave. The Department of Labor recently published proposed rules to implement the order, which requires final regulations be issued by September 30, 2016.

Boosting the trend, a growing number of large employers require contractors doing business with them to provide paid leave to employees.

INSIGHT

The federal Family and Medical Leave Act is enforced by the Wage and Hour Division of U.S. Department of Labor. For detailed information, go to http://www.dol.gov/whd/fmla/. For Jackson Lewis coverage of the patchwork of state and local paid leave laws, go to the Disability, Leave & Health Management Blog:

"The Evolving Paid Sick Leave Patchwork: 2016 Update"

"New New York City PSL FAQs; Pittsburgh PSL Law Not Dead Yet"

"New York City Earned Sick Time FAQs Updates"

"Spokane PSL on the Way"

Jackson Lewis Disability, Leave & Health Management attorneys are available to help employers reduce the risk of employment litigation, decrease the costs associated with absent and under-productive employees, contain health care-related expenses, and promote employee health, safety, and wellness.

Jackson Lewis News

Our attorneys in the Collegiate and Professional Sports practice area have garnered a ranking for Jackson Lewis as one of the top 20 law firms serving the professional sports team industry. "While they are different in size and specialty, what these practice groups have in common would make any law firm a success – experience in the field and passion for the work," says the publication, "Professional Sports and the Law." For more information about Jackson Lewis services in the area, go to "Collegiate and Professional Sports" practice page or contact practice group leaders Gregg Clifton or Paul Kelly.

Jackson Lewis Named a 'Top BigLaw Firm for Female Attorneys'

In a ranking as part of Law 360's "2016 Glass Ceiling Report," Jackson Lewis has ranked second in the list of "Top 10 BigLaw Firms for Female Attorneys" and 18th in the list of "100 Best Law Firms for Female Attorneys." The rankings are based on female representation at the partner and non-partner levels and total number of female lawyers in a survey of more than 300 firms with a U.S. presence.

"The achievement of women within our firm has been a key to Jackson Lewis' growth and success over the years, and it is a direct result of our firm-wide inclusive mindset," said Samantha N. Hoffman, Office Managing Principal for the Orange County office and member of the firm's 10-person Board of Directors. "Right now 36% of our Office Managing Principals and 25% of our Practice Group Leaders are women," said Ms. Hoffman. "We tell our clients every day that a diverse workforce is a better workforce, and we practice what we preach."

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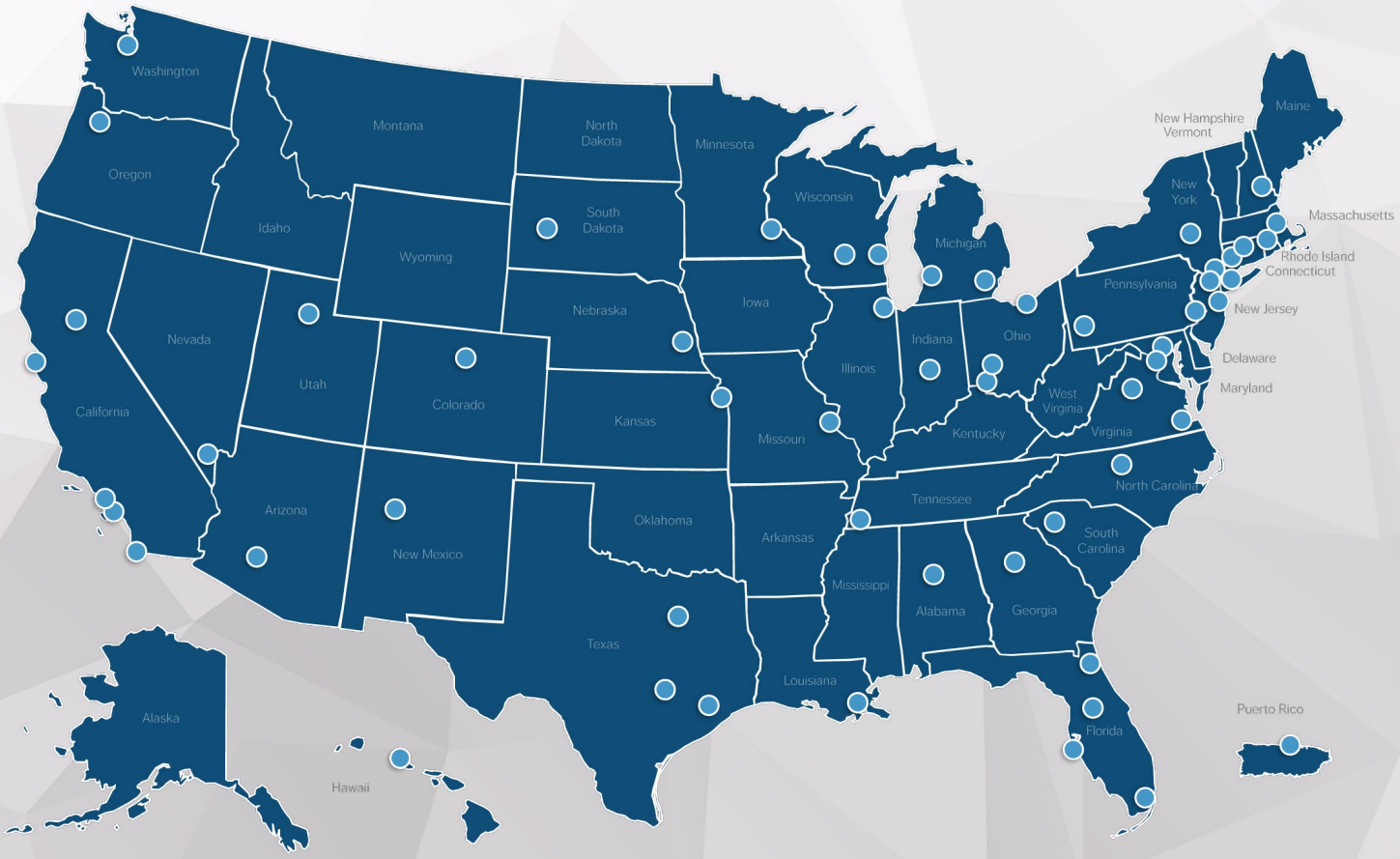

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