

Wage & Hour Issues for Public Employers.

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Agenda

- Introduction to Speakers
- Basics of FLSA in the Public Sector
- Compensatory Time (Comp Time)
- “On-Call” Time/Standby Time
- 7(k) Exemption
 - Police & Fire
- “Moonlighting” & Dual Employment
- Donning and Doffing
- 7(p) Substitutions

Speakers



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Basics of Fair Labor Standards Act (FLSA) in the Public Sector



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What is the FLSA?

- The FLSA establishes basic wage and hour standards, including minimum wage, overtime pay, record keeping requirements, and child labor standards.
- It applies to full-time and part-time workers in the private and ***public sectors***.
- The FLSA is administered and enforced by the Wage and Hour Division of the U.S. Department of Labor (DOL).

An Old Law with Big Teeth...

- The FLSA was passed in 1938 as remedial social legislation
- In 1966, Congress amended the FLSA to extend coverage to State and local government employees engaged in the operation of hospitals, nursing homes, schools, and mass transit systems
- In 1972, the Education Amendments further extended coverage to employees of public preschools
- In 1974, the FLSA Amendments extended coverage to virtually all of the remaining State and local government employees who were not covered as a result of the 1966 and 1972 legislation

Basics

- Minimum Wage
 - \$ 7.25 Federal
 - \$11.00 Florida
- Overtime
 - Time and one half
- Exempt/Non-exempt
 - Exempt – no overtime
 - Non-exempt - overtime

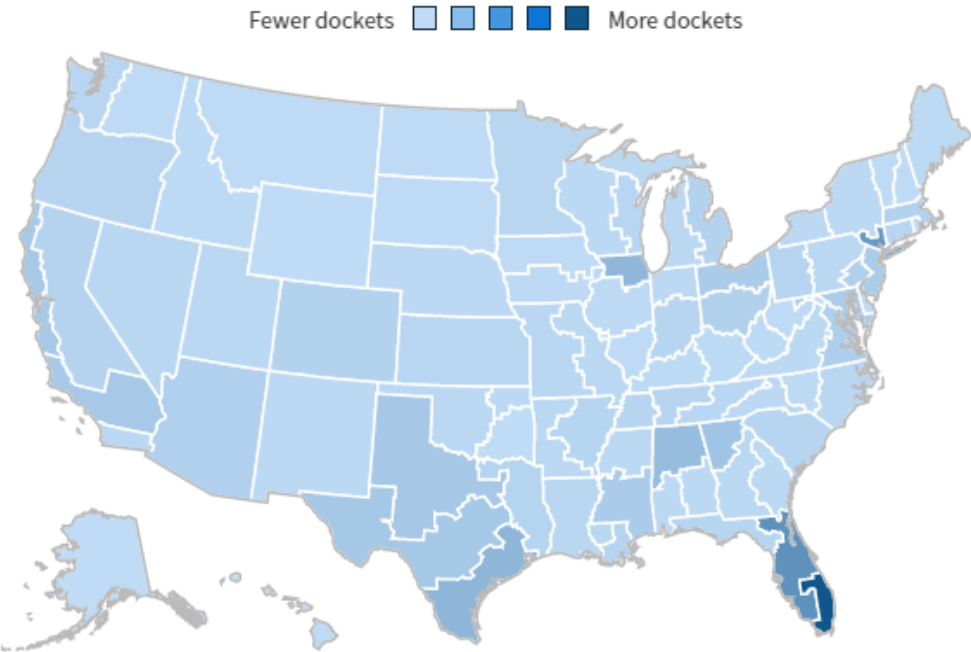
Off-The-Clock Work



- Uncompensated "*off-the-clock*" time occurs when employers fail to pay for *work performed*:
 - Before and after a worker's scheduled shift,
 - During an employee's scheduled meal period; and
 - While employees are attending staff meetings and compensable training sessions.

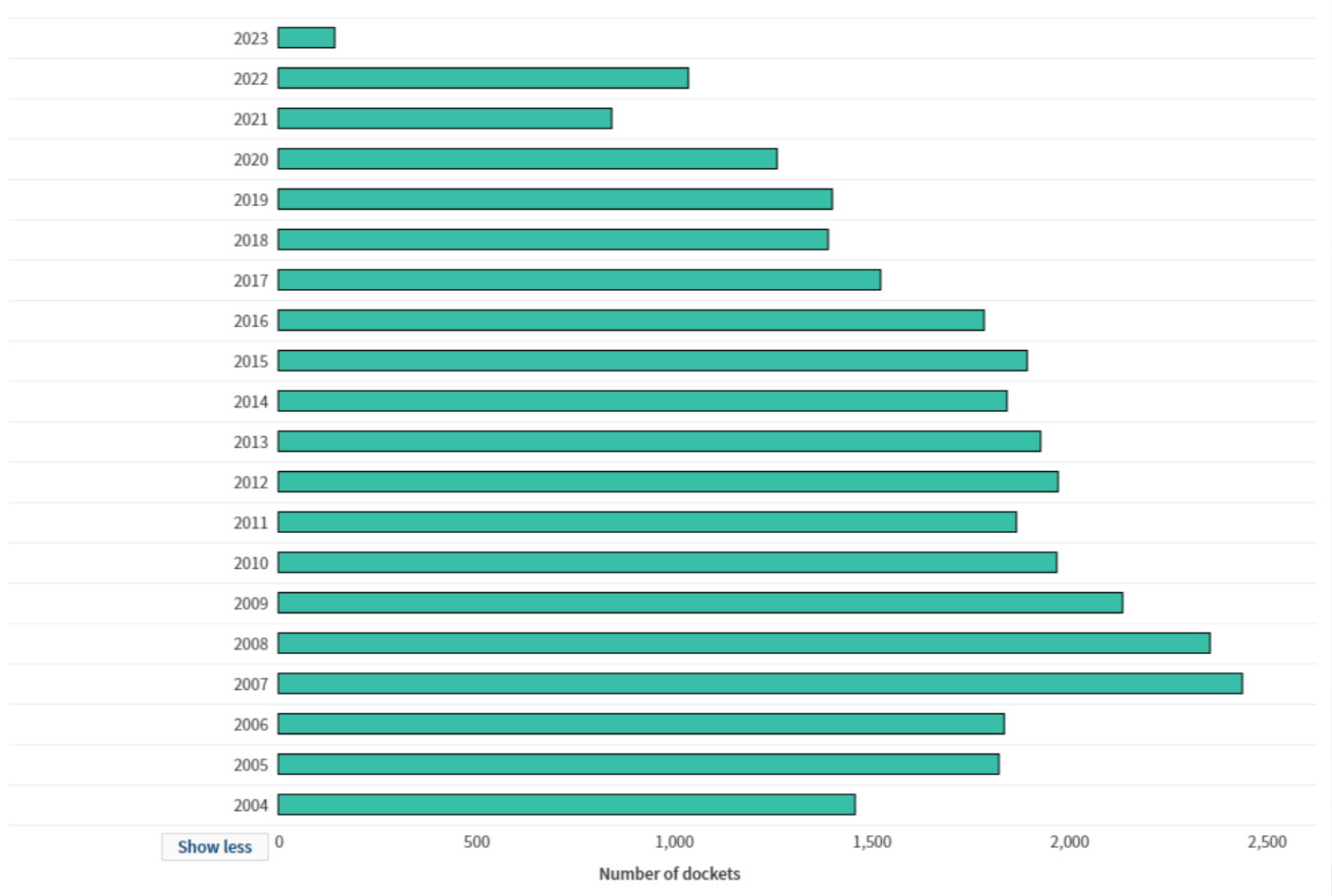
By the Numbers

Courts



Top federal district courts	Dockets
United States District Court, S.D. Florida	23,468
United States District Court, M.D. Florida	12,851
United States District Court, S.D. New York	11,653
United States District Court, E.D. New York	10,845
United States District Court, S.D. Texas	6,523

Dockets in Florida since 2004



Compensatory (Comp) Time



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Comp Time

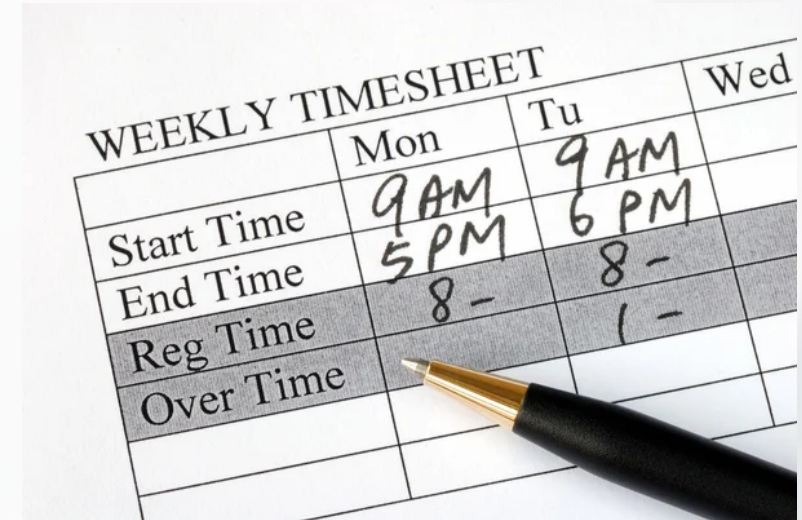
- Instead of Over Time
- Employees of state & local governments
- 1 ½ hours of comp time for each OT hour worked instead of cash pay



Comp Time

Regulations

- Limit comp time accrual
- Impose conditions on use of comp time
- Set requirements for payouts
- Must be agreement or understanding PRIOR to work performance
- Available to exempt and non-exempt employees



Comp Time

Limits

- Police, firefighters, emergency response personnel, and employees engaged in “seasonal activities”
 - 480 hours
- Other public sector employees
 - 240 hours

“On-Call” Time



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On-Call Time



Compensable Time

If the employee is required to remain on the premises OR the employee's time is so restricted that it interferes with personal pursuits, the time is compensable.

Non-Compensable Time

If the employee is allowed the option to remain at home, receive forwarded messages, use a cell phone, or leave a telephone number where s/he can be reached, the waiting time, *generally*, need not be counted as working time

On-Call Time (Cont.)

- If any additional restrictions are placed on the employee while s/he is required to remain at home
 - i.e., the employee must also remain ready to respond (within five minutes to any call), the time will generally be found to be working time
 - The degree of restrictions must be considered in each situation



Example:

- A sewer system repair employee is on-call and must remain in uniform and ready to be in the city if needed within twenty minutes.
- Is this compensable time?



On-Call/Standby Time

- Need not be included as FLSA hours worked
- Exception to this rule when standby time imposes restrictions that prevent employee from using time for personal purposes



On-Call Time – Special Public Sector Rules

“Waiting to be engaged” versus “engaged to wait”

To reduce the likelihood that on call time will be deemed compensable, employers should:

1. Send on-call employees off premises
2. Make sure the employees have a reasonable amount of time to respond to call-ins
3. Publicize and schedule on-call periods
4. Provide a written on-call policy to employees

7(k) Exemption

Special Rules for Police & Fire



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7(k) Exemption

- The 7(k) exemption exists for public agencies whose employees are engaged in either **fire protection services or law enforcement activities**.
- Fire protection
 - are trained in fire suppression;
 - have the legal authority and responsibility to engage in fire suppression;
 - are employed by a fire department of a municipality, county, fire district, or State; and
 - are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

7(k) Exemption

- The 7(k) exemption exists for public agencies whose employees are engaged in either **fire protection services or law enforcement activities**.
- Law enforcement
 - empowered by State or local ordinance
 - to enforce laws designed to maintain peace and order,
 - protect life and property, and
 - to prevent and detect crimes
 - who have the power to arrest; and
 - who have undergone training in law enforcement.

Some "Special Rules" for Police & Firefighters: The "7(k) Exemption"

- May establish "alternative work periods" for police officers and firefighters
- Fire Fighters can work up to 212 hours/28 days
- Police can work up to 171 hours/28 days
- What is that period –
 - how is it defined?

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

Some "Special Rules" for Police & Firefighters: The "7(k) Exemption" (Cont.)

- This means that covered employees in such departments are not entitled to FLSA overtime until they have exceeded the "7(k)" thresholds
- 80/20 rule: 80% of an employee's time must be spent either on fire protection activities themselves, or on activities related to or incidental to fire protection activities (or you lose the exemption)

What about EMTs?

- EMT or EMS/Paramedics employees whose sole function is performing emergency medical services do not have a statutory exemption
 - Should receive regular OT unless the employer can prove that EMS employees should fall under the 7(k) exemption
 - Employees who perform only EMS functions--that is, who have training and responsibilities for medical but not firefighting duties--will not meet this test and cannot be brought within the 7(k) exemption on the ground that they are firefighters

EMTs may be covered under 7(k) if:

- (1) the employee forms an integral part of the fire protection activities
- (2) the services are substantially related to fire protection activities and:
 - the employees receive training in the rescue of fire, crime, and accident victims or firefighters injured in the line of duty AND
 - the ambulance/rescue service employees are regularly dispatched to fires, crime scenes, accidents, natural disasters, etc.

ARE THEY EXEMPT UNDER 7(K)?

- Certified EMTs were employed by the county fire department
- Also certified firefighters (receive regular training)
- Assigned to the EMS division, rather than fire division, of the department
- No separation within the department's administration between EMS and firefighters (same systems of pay, promotions, pensions)
- EMS employees may work shifts as firefighters when the need arises (rotated through units to fill personnel requirements for shifts)
- EMS units respond to every medical emergency call, many of which did not involve dispatch of fire
- When dispatched to fires, they can engage in fighting fires **if** no medical services are needed

ARE THEY EXEMPT UNDER 7(K)?

- Firefighters at airport (not in station)
- Performed fire suppression duties
- Were employed by the County

Moonlighting & Dual Employment



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“Moonlighting” & “Dual Employment”

- Employees may not volunteer to do similar work for their employer without the time being counted as FLSA time
- “Two jobs” for same employer must be aggregated
- Employees may moonlight for a separate employer without aggregating hours

Some "Special Rules" for Police: Off The Clock Work

- Most common police FLSA overtime claims involve "off-the-clock" work
- The following activities may be compensable when performed during "off-the-clock" time:
 - Care and maintenance of police equipment (e.g., police dogs, vehicles, guns, uniforms)
 - Work performed before or after regular shifts
 - Police-related paperwork and telephone calls
 - Working through meal periods, training time (to the extent such hours are not included in regular pay)

Some "Special Rules" for Police: K-9 Handlers

- Police K-9 handlers recovered
- Substantial FLSA overtime for off-the-clock time
 - feeding
 - exercising
 - training
 - grooming
 - cleaning up after police dogs

Some "Special Rules" for Police Detectives and Investigators

- Most police detectives and investigators are “nonexempt”
- Therefore eligible for overtime under the FLSA

Compensable or not?

- City police officer sued for overtime pay for:
 - donning and doffing police uniform and related gear at the station
 - writing incident reports
 - preparing for court appearances
 - missed lunch breaks
 - pre-shift work

Court **granted** summary judgment to City... because Plaintiff's testimony didn't support her allegations – she never worked overtime and was NOT paid!

Compensable or not?

- As to:
 - uniform maintenance
 - firearm maintenance
 - off-duty physical fitness training

Court **denied** summary judgment to the City – based on questions of fact and remanded to the lower court.

Donning & Doffing



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Compensable or Not?

- Former sheriff deputies claimed the departments violated FLSA for failure to compensate for time spent “donning and doffing” police gear at home.
- “Even though donning and doffing protective gear may arguably be “indispensable,” we hold that it is not “integral” to the deputies’ principal activities.”
- “The donning and doffing of such generic protective gear is not different in kind from changing clothes and showering under normal conditions, which are not covered by the FLSA. Here, donning and doffing is an entirely separate activity from the deputies’ principal law enforcement duties.”

Compensable or Not?

- Employer generally required to compensate for time getting dressed and undressed
- City not required to compensate for donning and doffing when employees are allowed to do it at home
- Summary judgment granted to City

7(p) Substitution

Shift Exchange



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“Substitution” - Shift Exchange

- Section 7(p)
- Section 7(p)(3) of the FLSA provides that
 - two individuals employed in **any** occupation by the same public agency may agree, solely at their option and
 - with the approval of the public agency,
 - to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.

“Substitution” - Shift Exchange

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Provisions of section 7(p)(3)

- 7(p)(3) apply only if
 - employees' decisions to substitute for one another are made freely and without coercion, direct or implied
 - An employer may suggest that an employee substitute or “trade time” with another employee working in the same capacity during regularly scheduled hours, **but**
 - each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision
 - Made at his/her sole option when it has been made
 - (i) without fear of reprisal or promise of reward by the employer, and
 - (ii) exclusively for the employee's own convenience.

Additional Provisions of section 7(p)

- A public agency which employs individuals who substitute or “trade time” under this subsection is not required to keep a record of the hours of the substitute work
- An agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency.
- The agency be aware of the arrangement prior to the work being done, i.e.,
 - the employer must know what work is being done, by whom it is being done, and where and when it is being done.
 - Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary

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The firm has more than 950 attorneys located in 55 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.



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- Harness technology and innovation to better serve your interests
- Communicate in a timely and effective manner
- Provide quality representation with exceptional value



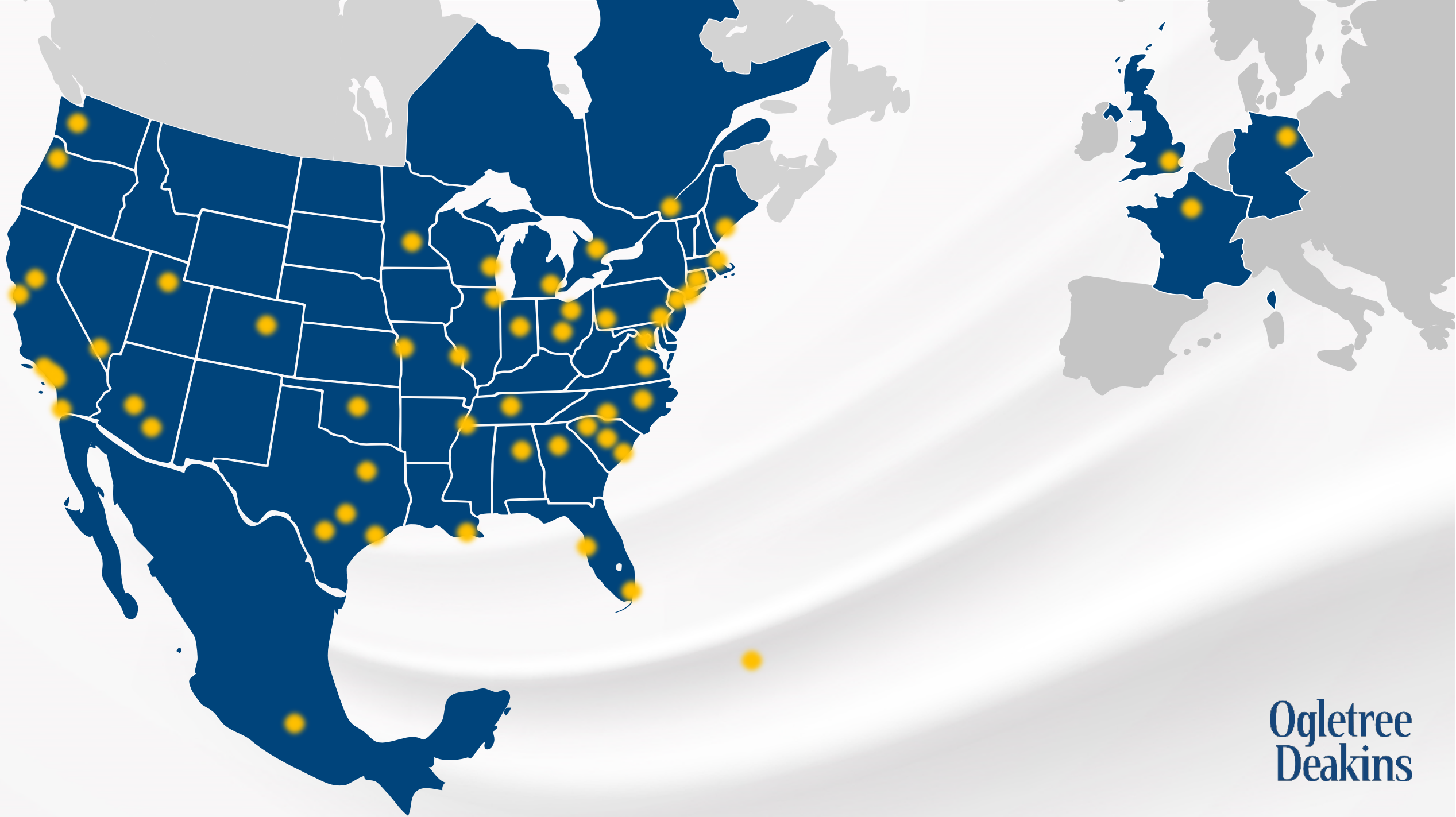
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