

# **Worker misclassification and independent contractors**

**The Canadian, US and UK perspective**

**20 October 2021**

# Welcome

## Today's speakers:



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# What will we cover?

1. Local focus



2. Legal Test



3. Risks and alternatives



4. Practical tips

# Test for employment status - Canada



## *Employment Standards Act, 2000 (Ontario)*

**s. 5.1** (1) An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act. (2017)

## *Canada Labour Code*

**s. 167.1** An employer is prohibited from treating an employee as if they were not their employee in order to avoid their obligations under this Part or to deprive the employee of their rights under this Part.

**s. 167.2** If, in any proceeding in respect of a complaint made under this Part, the employer alleges that the complainant is not their employee, the burden of proof is on the employer. (2018)

# Test for employment status - Canada



## 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983 (S.C.C.)

*“The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks. It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.”*

# Test for employment status - Canada



- The Canadian courts will often look to the written agreement between the parties as a starting point, because it may give some guidance as to the intentions of the parties in framing their relationship. However a written agreement is not determinative.
- If an individual with an independent contractor agreement is treated like an employee in most respects, the court is likely to find that (s)he is an employee.
- Likewise, if an individual with an employment agreement is treated like an independent contractor in most respects, the court is likely to find that (s)he is an independent contractor.
- While the incorporation of a personal services company for the contractor is not determinative, as may be the case in other countries, it can help to steer Canadian courts and Canada Revenue Agency (CRA) towards the finding of an independent contractor arrangement.

Catherine's Golden Rule: "If it walks like a duck and quacks like a duck, it's probably a duck".

# Canada - Dependent status



In Canada, there is a mid-ground status between employees and independent contractors, called dependent contractors:



- According to the Ontario Court of Appeal ([\*McKee v Reid's Heritage Homes Ltd\*, 2009 ONCA 916](#)) there is a 2 part test to determine whether a worker is a dependent contractor. The first step is to determine if the worker is an employee (using the *Sagaz* analysis). The second step, if the worker is not an employee, is to determine whether there was near or complete exclusivity, and whether there was a level of economic dependency. If so, then a dependent contractor finding may be made.
- Dependent contractors, are generally found to be entitled to similar termination entitlements as employees. In other words, instead of being held to a short termination of contract provision under the agreement, they will be entitled to significant employee-like termination entitlements equal to approximately one month of total compensation per year of services.

# Canada - Dependent status



## *Keenan v Canac Kitchens Ltd, 2016 ONCA 79*

- The plaintiffs, a married couple, worked exclusively for Canac Kitchens from 1976 and 1983 respectively until 2007, at which point they also worked for a competitor to Canac for two years until 2009. In 2009 the plaintiffs' relationship with terminated and they brought an action for wrongful dismissal.
- The Ontario Court of Appeal held that exclusivity cannot be established using a “snapshot” approach. Instead, a determination of exclusivity should consider the full history of the relationship and whether that full history shows economic dependency due to complete or near complete exclusivity.
- Given that the Plaintiffs had devoted close to 30 years of their lives to Canac Kitchens, mostly exclusively, and given that they were in their 60's at the time that their contracts were terminated, they were each awarded with a termination package equal to 26 months of total compensation.

## *Thurston v Ontario (Children's Lawyer), 2019 ONCA 640*

- The threshold of the economic dependence part of the test needs to be derived from near or total exclusivity.

# Tests for employment status – US



## Internal Revenue Service Test

A variety of factors are considered, generally grouped into three categories:

### Behavioral Control

- Does the business have the right to direct and control how and when the worker performs the work?
- Does the business provide instructions on how the work should be done? Training on how to perform the work?

### Financial Control

- Does the worker have a substantial financial investment?
- Does the business reimburse the worker for expenses associated with the work?
- Does the worker have the ability to have a profit or loss? Or is the worker simply paid by the hour or day?

### Relationship of the Parties

- Is there a written agreement showing an intent to create an independent contractor relationship?
- Is the worker provided with employee benefits?

# Tests for employment status – US



## US Department of Labor Test

A variety of factors are considered, with the goal of discerning the **economic reality** of the relationship. Among the factors USDOL considers are these:

- 1) the extent to which the worker's services are an **integral part** of the employer's business;
- 2) the **permanency** of the relationship;
- 3) the amount of the worker's **investment** in facilities and equipment;
- 4) the nature and degree of **control** by the principal;
- 5) the worker's opportunities for **profit and loss**; and
- 6) the **level of skill** required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise.

# Tests for employment status – US



## ABC Test (Massachusetts, California and others)

This test presumes that a worker is an employee, unless the company shows that **all** three criteria are met:

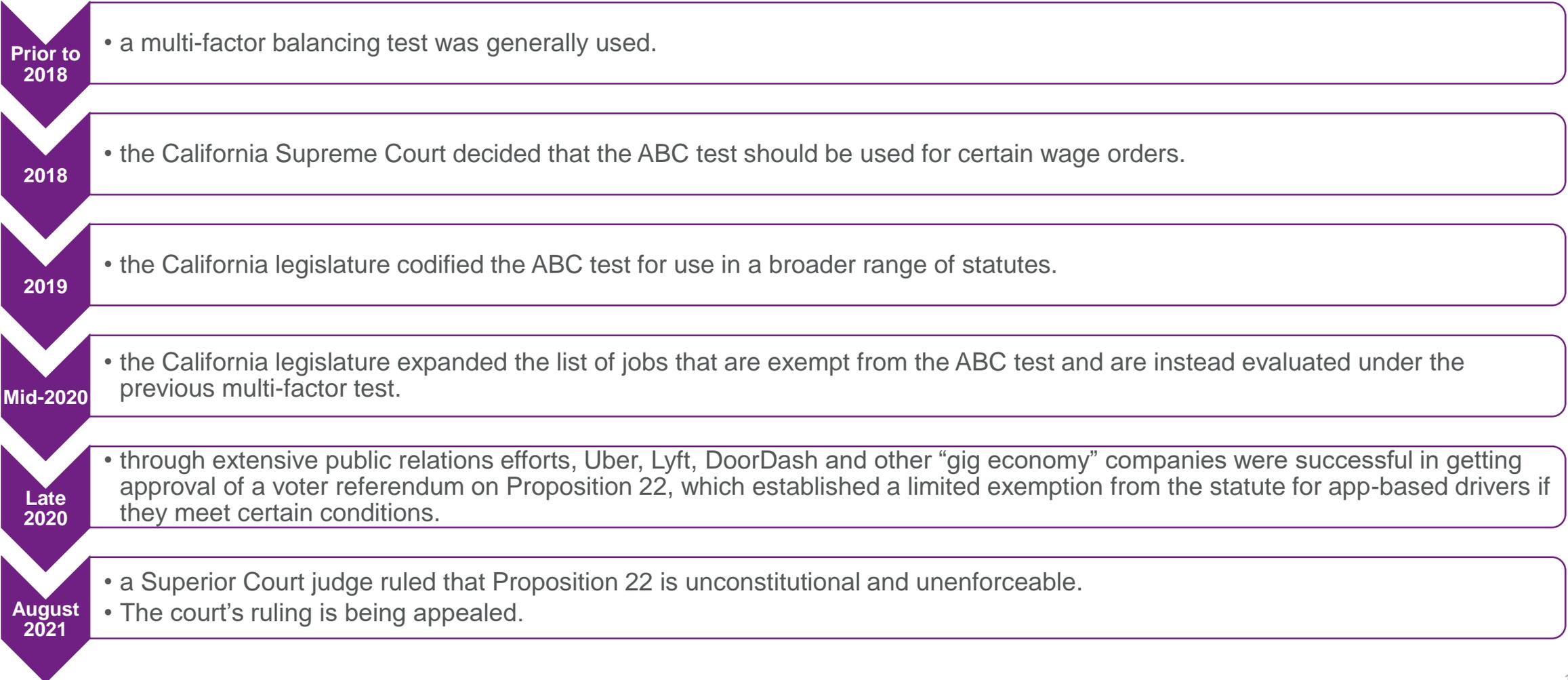
- A. The worker is **free from the control and direction** of the company in performing work, both practically and in the contractual agreement between the parties; ***and***
- B. The worker performs work that is **outside the usual course** of the company's business; ***and***
- C. The worker is customarily engaged in an **independently established trade, occupation, or business** of the same nature as the work performed for the company.

The ABC test is more stringent and difficult to meet than the other tests. Generally, the second factor is the hardest to meet.

# Tests for employment status – US



## The quickly changing (and confusing) landscape in California



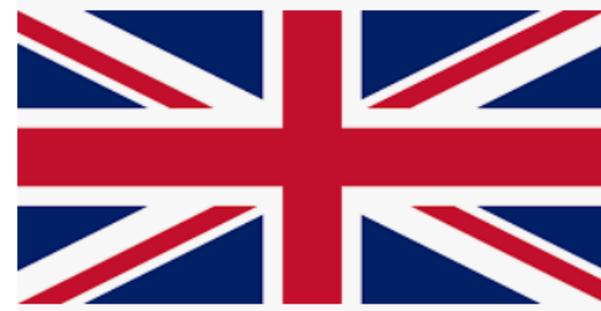
# Tests for employment status – US



## Other Tests

- There are countless other variations in tests among states.
- For example, the Maine test requires that all of six factors be met, plus an additional three factors out of a list of seven others.
- In Wisconsin, the workers compensation law contains nine criteria, all of which must be met in order to be properly classified as an independent contractor.
- In Alaska, the workers compensation law requires that the worker must meet seven specific criteria, plus at least two others from a list of three.
- Moreover, the tests can be different for different purposes even within the same state (e.g., in many states the test for employee status for unemployment benefits/taxes or workers compensation is stricter than for minimum wage and overtime pay purposes).

# Tests for employment status - UK



## Employment vs Self-employed

ERA : S230(1) and (2) and WTR : Reg 2

In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

Key factors – mutuality of obligation, degree of control and personal service.

# UK - Worker status

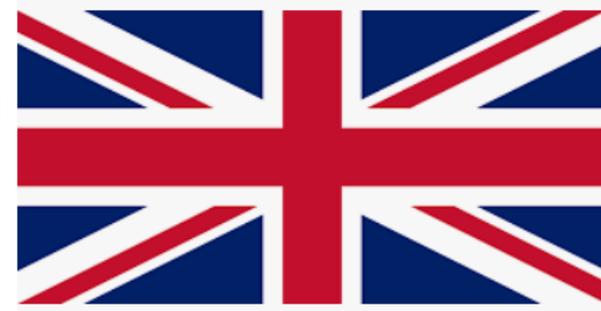


## ERA : S230(3)

In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under):

- a) a contract of employment, or
- b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
- c) and any reference to a worker’s contract shall be construed accordingly.

# UK - Worker status – Uber decision



- Uber Supreme Court decision:
  - Uber drivers previously treated as independent contractors.
  - Claims for minimum wage and holiday pay – asserted ‘worker’ status under UK legislation.
  - Uber drivers were not independent contractors but workers.
  - Supreme Court looked beyond the contract – degree of control of drivers and other factors pointing to worker status.
  - Drivers entitled to certain employment rights – minimum wage and holiday pay.

Uber- May 2021 recognised the GMB (trade union) – holiday pay and pension

- *Next battle ground – what counts as working time?*

# UK - IR35 regime - UK



## Medium and large companies:

- Contractor performs services through PSC
- Client determines employment tax status of contractor
- If 'deemed employee', PSC is paid after operation of PAYE
- PSC no longer responsible for determining employment tax status of contractor

## Tax status change only:

- If IR35 applies, it operates for income tax and NIC purposes only
- It does NOT confer wider employment status on the individual
- The individual does not accrue employment rights with the end client
- Big increase in cost for end client – employer NICs – 13.8% (15.05% next year)

# Save the date: Global Employment and Labor Webinar Series

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## Global Employment & Labor webinar series

Worker misclassification and independent contractors – a look at Germany, Italy and Poland

WEDNESDAY 10 NOVEMBER 2021  
4.00PM BST, 5.00PM CEST, 11.00AM ET



Davide Boffi  
Partner, Milan



Sascha Grosjean  
Partner, Düsseldorf



Aleksandra  
Minkowicz-Flanek  
Partner, Warsaw

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- **LSBC:** This session is registered for 60 Substantive minutes with the Law Society of British Columbia.
- **LSO:** This program is eligible for up to 60 Substantive minutes with the Law Society of Ontario.
- **Barreau du Québec:** Selon nous, cette formation rencontrerait les critères de FCO du Barreau du Québec. Veuillez s.v.p. envoyer un courriel à Annie Girard pour recevoir une confirmation de présence.
- **Barreau du Québec:** In our view, this session would meet the CLE requirements of the Barreau du Québec. Please email Annie Girard to receive a confirmation of attendance.

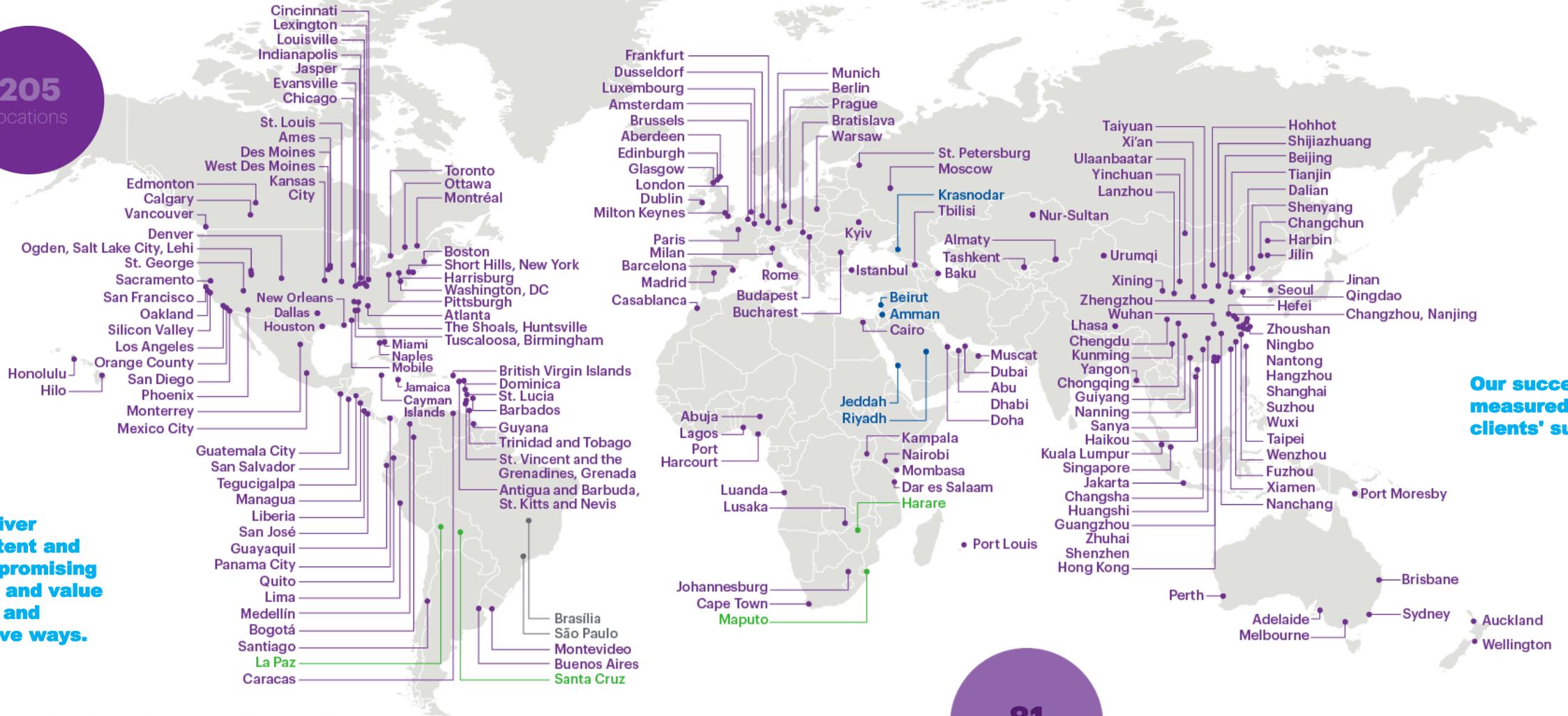
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July 2021

# Thank you



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