MARCH 2024

Quarterly Update for the Asia-Pacific Region

Our regular guide to what's happening in employment law across the region

Global HR Lawyers
Ius Laboris

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Introduction

In this APAC regional quarterly update, we aim to offer an analysis of the legal changes in employment law shaping the business and regulatory environment across a range of countries in the Asia-Pacific region.

The sheer variety of change just this quarter is breathtaking. For example, we have seen changes to the rules surrounding fixed term contracts in Australia, adjustments to Hong Kong's statutory holidays, changes in data privacy law in India, updates to work hour limits in Japan, rules on the use of generative AI in court proceedings in New Zealand and a court clarification of what is meant by excessive weekly working hours in South Korea – just to name a few.

We hope our regular updates will provide a nuanced picture over time and a compass for businesses seeking to navigate the legal environment across the region. We also hope you enjoy reading it.

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1. Restrictions on fixed-term contracts

1.1. NOTABLE CHANGES TO LEGISLATION

There are limitations on the use of fixed-term contracts (FTCs) following reform to Australia's national workplace legislation. The new restrictions apply to contracts entered into on or after 6 December 2023. The restrictions limit the period of time which an employer can employ an employee under a FTC (subject to some limited exceptions). In summary, the limitations are:

- Time limitations: FTC cannot be longer than two years.
- Renewal limitations: new FTCs cannot be renewed past the end date if the sum of the identifiable period exceeds two years, or if the contract provides for the option to renew or extend more than once.
- Consecutive contract limitations: new FTCs cannot be used to avoid the time or renewal limitations. Employers cannot use back-to-back new FTCs where the employee is being engaged for the same or substantially the same work.

The limitations apply to new FTC contracts. However, FTCs entered into before 6 December 2023 do have to be considered when applying the consecutive contracts limitation for a new FTC entered into on or after 6 December 2023.

A failure to comply with these obligations may result in the automatic conversion of employees from fixed-term contracts to indefinite-term contracts in certain circumstances, and the imposition of civil penalties.

1.2. OTHER RELEVANT CHANGES

Employers must give new employees a copy of the Fair Work Ombudsman's 'Fixed Term Contract Information Statement' when they start work.

2. Respect@Work and positive duty to eliminate sexual harassment in the workplace

2.1. NOTABLE CHANGES TO LEGISLATION

The so-called 'Respect@ Work Act' came into effect on 12 December 2022, with important amendments to sex discrimination and human rights legislation. The amendments include the new positive duty upon employers to take reasonable and proportionate measures to prevent sex discrimination, sexual harassment, victimisation and 'hostile workplace environments'.

The Australian Human Rights Commission's wide-ranging powers to investigate and enforce compliance with the positive duty commenced on 12 December 2023. The AHRC is now empowered to conduct inquiries, issue compliance notices, compel the production of documents, enter enforceable undertakings and apply to the federal courts for orders where an organisation is not complying with its positive duty.

These changes are significant, as employers must proactively prevent employees from engaging in discriminatory/ harassing conduct, representing a shift away from a complaint-based system.

Over the course of 2024, we can expect there to be increased regulatory scrutiny from the AHRC (as well as safety regulators) of the steps employers are taking to proactively (rather than just reactively) control known risks to the health and safety of employees, including psycho-social risks caused by sexual harassment, and to otherwise meet the 'positive duty'.

2.2. OTHER RELEVANT CHANGES

The AHRC released Guidelines on 10 August 2023. While not legally binding, the Guidelines are authoritative and will be used by the AHRC to assess compliance. They may also be used by Courts in the event of any court-based review. The Guidelines set out standards and guiding principles that employers should follow to discharge the positive duty.

3. Compliance and enforcement: 'wage theft' and increased civil penalties

3.1. NOTABLE CHANGES TO LEGISLATION

The Australian Government introduced legislation to criminalise wage theft and significantly increase civil penalties for non-compliance with certain provisions of the Fair Work Act. An employer commits wage theft if they intentionally fail to pay an amount required under the Fair Work Act, a fair work instrument, a transitional instrument or superannuation legislation, in full when due.

Penalties for non-compliance with wage theft laws reflect the criminal nature of the offence: for corporations, fines of up to three times the underpayment amount or AUD 7.825 million (whichever is greater) and for individuals, ten years' imprisonment and/or three times the underpayment amount or AUD 1.565 million.

In relation to civil penalties for non-compliance with certain provisions of the Fair Work Act by employers (other than small businesses), generally the applicable maximum pecuniary penalties will increase from 60 to 300 penalty units (AUD 18,780 to 93,900) or for serious contraventions, from 600 to 3,000 penalty units (AUD 187,800 to 939,000). The reforms will also give courts the power to order that a person comply with a compliance notice given to them by the regulator, Fair Work Ombudsman or a Fair Work Inspector.

Although the new wage theft laws and increases to civil penalties will not commence until 2025, employers should use 2024 to mitigate any outstanding risks, including controls and processes in place ensure compliance and that no intentional underpayments occur. The issue of historical compliance will remain a significant issue in corporate transactions, with payroll due diligence and W&I insurance taking on increasing importance in this context.

4. Right to disconnect

4.1. NOTABLE CHANGES TO LEGISLATION

The Australian Government has introduced legislation to include a new 'right to disconnect' applying to employers other than small businesses. The amending legislation introduces changes that will allow employees to refuse to monitor, read or respond to contact or attempted contact from an employer (or work-related contact from a third party) outside of their working hours, unless the refusal is unreasonable.

The reasonableness of the refusal will be assessed by factors including:

» the reason for the contact;

» how the contact is made and the level of disruption caused by the contact;

» the extent to which the employee is compensated for their after-hours availability, the nature of the employee's role and their level of responsibility; and

» the employee's personal circumstances (including family and carer responsibilities).

The regime gives the Fair Work Commission power to deal with disputes about the right to disconnect (including by making orders to stop refusing contact or to stop the employer taking certain action). The FWC is also to make written guidelines about the framework. The new law contains criminal penalties for employers who breach 'right to disconnect orders'.

Importantly, the right to disconnect is a 'workplace right' for the purposes of the general protections regime. Consequently, any disciplinary matters involving an employee's refusal of after-hours contact will need to be sensitively handled.

The changes may cause challenges for companies working across multiple time zones. Employers should also consider the extent to which employees are expected to be contactable and available outside of their contracted hours and, if it is a requirement, whether they are compensated appropriately for their availability. Employers should also consider whether template contracts should be updated to reflect the changes.

The changes will commence six months from 26 February 2024.

5. Casual employment

5.1. NOTABLE CHANGES TO LEGISLATION

The Australian Government has passed significant reforms in relation to casual employment. The changes replace the current definition of 'casual employment' in Australia's primary labour legislation, shifting away from the contractual terms of engagement as determinative of the employment relationship.

Under the new definition an employee is casually employed only if both of the following are satisfied:

» there has been no 'firm advance commitment' to continuing and indefinite work; and

» the employee is entitled to a casual loading (or specific rate of pay for casual employees) under an applicable fair work instrument or the contract of employment.

The new law sets out a list of indicia to be considered when assessing whether there is a firm advance commitment to continuing and indefinite work, much like a multi-factor test which requires an objective assessment of the totality of the relationship.

If an employee commences employment as a casual employee, they remain a casual employee until the occurrence of a 'specified event'. These events encompass circumstances in which a casual employee's employment status is changed or converted to permanent employment, including under the existing casual conversion legal framework or the proposed new 'employee choice' conversion framework. Under the new framework, the employer has an obligation to proactively offer conversion after 12 months' service and the employee has a right to request conversion every six months thereafter.

This is a significant expansion of the existing avenues available to casual employees to seek conversion to full-time or part-time employment, and on its face could lead to ongoing requests for conversion and disputes about the outcomes of such requests.

Employers should revisit their current casual employment arrangements to ensure that its employees engaged as casuals are not, in practice, given a firm advance commitment to continuing work from the outset. This is to reduce the risk that, despite express terms of the contract and the absence of a specified event, they would be legally regarded as a permanent employee.

The changes will commence six months from 26 February 2024.

5.2. CASE LAW DEVELOPMENTS

The changes to casual employment reverse a 2021 High Court decision in which the Court found that the contractual terms of engagement are determinative of the employment relationship.

5.3. OTHER RELEVANT CHANGES

The 'Casual Employment Information Statement' will be updated, and there will be an obligation to provide it to all casual employees (continuing and new casual employees) as soon as practicable.

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1. Statutory Holidays increased in Hong Kong

1.1. NOTABLE CHANGES TO LEGISLATION

Starting from 2024, the first weekday after Christmas Day will be added as a statutory holiday, which increases the total number of statutory holidays to 14 days as of 2024.

This change is part of a broader legislative amendment aimed at gradually aligning the number of statutory holidays with the number of general holidays. That amendment outlines a plan to progressively increase the total number of statutory holidays from 12 days to 17 days. Following the inclusion of the first weekday after Christmas Day in 2024, three additional statutory holidays will be introduced on the following dates:

- Easter Monday starting from 2026;
- Good Friday starting from 2028;
- The day following Good Friday starting from 2030.

Employers should be reminded to review their relevant policies to ensure compliance with this update if not already done.

2. Fundamental change to be made to the '418' rule for determining continuous employment

2.1. RELEVANT CHANGES

Hong Kong's Labour Department has proposed to relax the '418' rule for determining continuous employment under employment law. Currently, that rule specifies that an individual working for the same employer for four or more consecutive weeks, with each week working at least 18 hours, is considered to be under a 'continuous contract' of employment within the meaning of the law. An employee under continuous employment is eligible for various benefits under the law, such as sick days, annual leave, and other statutory entitlements.

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Instead of assessing whether the employee has the number of qualifying hours on a week-by-week basis, the Labour Department's proposal is to tally total work hours over a four-week period, such that continuous employment will be triggered if an employee works at least 68 hours over a four-week period. The intention of the proposed change is to extend statutory benefits to a wider pool of employees, particularly those in part-time or casual employment.

The proposed change may increase costs to employers but should provide better protection to employees. A bill to introduce this change will be tabled before the Legislative Council in due course.

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1. Data protection law coming into force

1.1. NOTABLE CHANGES TO LEGISLATION

The introduction of the Digital Personal Data Protection Act, which was passed by the parliament and approved by the President in August 2023, is expected to come into effect in the first quarter of 2024. It imposes strict restrictions on employers in obtaining consent for processing personal data (which is defined exhaustively). However, from the employment law perspective, collection of personal data for employment purposes is considered legitimate under the Act. Additionally, it permits cross-border transfers of personal data but under stringent regulations. The establishment of a data protection board emphasises the government's commitment to overseeing transactions subject to this Act.

2. Update to Employee Provident Fund Act

2.1. NOTABLE CHANGES TO LEGISLATION

The Employee Provident Fund Act has also seen updates, with employers now given until 31 May 2024 to update employee data for pension on higher wages. Additionally, the regulator has launched an online facility for submitting applications for validation of options for pension on higher wages, demonstrating a shift towards digitalisation and streamlining of processes in this area.

3. New disability rules

3.1. NOTABLE CHANGES TO LEGISLATION

Another significant development is the Ministry of Social Justice and Empowerment's notification of the Rights of Persons with Disabilities (Amendment) Rules. While these rules do not directly impact employers, their emphasis on expanding accessibility rights for disabled persons signals the government's commitment to enforcing these provisions. Employers should recognise the importance of accommodating disabled individuals in the workplace and consider implementing the provisions of the rules.

4. New gratuity insurance rules in Karnataka

4.1. NOTABLE CHANGES TO LEGISLATION

Karnataka has become the second state in India to issue rules on compulsory gratuity insurance. Under the new rules, employers are required to obtain a valid insurance policy for the employer's liability for payment of gratuity to eligible employees. The insurance policy can be obtained from the Life Insurance Corporation (LIC) or any other insurance company within sixty days (10 March 2024) for existing companies and within thirty days (10 February 2024) for new employers. Employers must also register their establishment with the Controlling Authority and make timely premium payments to the insurance company. Additionally, the Controlling Authority is authorized to recover the gratuity payable to an employee directly from the LIC or other insurance provider. Employers who have established an approved gratuity fund or have over 500 employees may opt to continue with such arrangement but must ensure that the fund covers the entire liability of all employees. The Rules also outline the key aspects of the Gratuity Trust, such as adhering to Indian accounting standards and sending a discharge letter at the time of an employee's exit. However, the Rules have created some ambiguity regarding funding of the Gratuity Trust and employers must ensure adherence to the conditions prescribed.

5. Additional POSH requirements in Haryana

5.1. NOTABLE CHANGES TO LEGISLATION

The Government of the state of Haryana has taken a proactive stance in issuing a comprehensive checklist for the federal sexual harassment law (the 'POSH Act'). This notification, released on 20 December 2023, requires organizations to submit their annual report on compliance under the Act by 30 April 2024. The report must cover a range of aspects, including policies, notices, awareness, assistance, and internal committee compliance. Non-compliance with the POSH Act and these rules will result in penalties.

6. Bill for paid menstruation leave in Maharashtra

6.1. NOTABLE CHANGES TO LEGISLATION

The Maharashtra Assembly has introduced a bill that would grant female employees additional paid leave during menstruation, signalling a progressive approach towards supporting women in the workforce. Employers in Maharashtra should prepare to amend their leave policies if this proposed law comes into effect.

Japan

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1. Expiration of exemptions to maximum work hours

1.1. NOTABLE CHANGES TO LEGISLATION

Japanese labour legislation was amended in April 2019 to specify the maximum limits of overtime work hours (in general 45 hours/month and 360 hours/year, but 720 hours/year as exceptions), but it provisionally exempted construction workers, automobile drivers, and physicians from those limits for five years. On and after 1 April 2024, the exemption will expire and certain maximum limits of overtime work hours will newly apply to the exempted workers. In general, construction workers will be subject to the standard maximum limitation. However, special maximum limitations, which are higher than the standard, will apply to automobile drivers and physicians.

2. Additions to key employment terms

2.1. NOTABLE CHANGES TO LEGISLATION

Labour legislation and the accompanying enforcement ordinance requires employers to notify a new employee of certain key employment terms (the 'KETs') in writing at the time of hiring. After an amended ordinance comes into force in April 2024, the following terms will be added to the KETs:

- For both indefinite-term and fixed-term employees: The scope of possible changes in the employee's workplaces and work duties, in addition to workplaces and work duties at the beginning of employment;
- For all fixed-term employees: The maximum number of possible contract renewals or the maximum total period of the employment contracts including possible renewals; and
- For fixed-term employees whose total period of employment reaches five or more years: Notification that the employee has the right to apply for conversion from fixed-term

employment to indefinite-term employment and the terms of the employee's employment after the conversion.

Accordingly, employers will need to add these items to their employment contract templates to be executed on or after 1 April 2024.

3. Amendments to Discretionary Work System

3.1. NOTABLE CHANGES TO LEGISLATION

In light of difficulties in applying rigid working hour regulations to certain professional or discretionary businesses, labour legislation allows employers to apply the Discretionary Work System (the 'DWS') to employees whose duties fall within certain types of eligible business. Under the DWS, the length of the working hours of these employees, no matter how long the actual working hours may be, is deemed to be a certain predetermined length. An amendment to the enforcement ordinance for the legislation, which comes into force in April 2024, includes several amendments to the DWS. The key amendments are as follows:

Increase in Eligible Businesses

Business in banks or securities companies related to research or analysis of M&As for their clients, as well as planning and advising on such M&As (so-called M&A advisory business) are now eligible.

Consent from employees to be required for all types of eligible businesses

Eligible businesses are divided into Professional-type Businesses and Planning-type Businesses. Before the amendment, consent from each employee was not required to implement the DWS for Professional-type Businesses, but after the amendment, it will be required. In addition, certain terms are newly required to be set forth in (a) the labour-management agreement for Professional-type Businesses or (b) a resolution of the labour-management committee for Planning-type Businesses. Accordingly, to continue implementing the DWS after the amendment, employers will need to:

- obtain each employee's consent; and
- execute an amended agreement or resolution and file it with the labour authority before 1 April 2024.

New Zealand

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1. Minimum wage increase

1.1. NOTABLE CHANGES TO LEGISLATION

New Zealand employers should be aware of the increases to the minimum wage rate coming into effect on 1 April 2024 and ensure they comply with the new rates. The adult minimum wage will increase from NZD 22.70 to NZD 23.15 per hour and the starting-out and training minimum wage will increase from NZD 18.16 to NZD 18.52 per hour.

2. Fair Pay Agreements repeal

2.1. NOTABLE CHANGES TO LEGISLATION

Following the recent general election, the new National coalition government has enacted legislation to repeal the Fair Pay Agreements Act, which came into effect from 20 December 2023. Under the previous Labour government, the Fair Pay Agreements Act had introduced a new industry-level bargaining model whereby employers and unions within a sector could bargain for Fair Pay Agreements setting minimum terms and conditions for all employees in an industry or occupation. No Fair Pay Agreements were finalised under the now-repealed legislation.

3. Trial periods available to all employers

3.1. NOTABLE CHANGES TO LEGISLATION

On 23 December 2023 legislation came into force which removed previous restrictions on trial periods being available only to employers employing 19 or fewer employees.

4. Judiciary's Guidance on Generative AI in Court Proceedings

4.1. RELEVANT CHANGES

The New Zealand judiciary has published guidelines on the use of Generative AI in court proceedings. While primarily relevant for the judiciary and legal profession, the judiciary's guidance emphasises the caution that should be used when relying on Generative AI from an evidentiary and privacy perspective.

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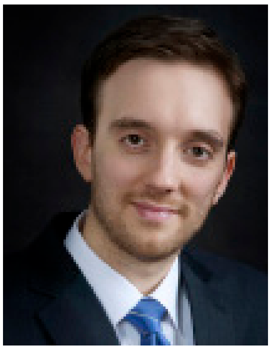

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1. Enhanced childcare-leave subsidies expanded

1.1. NOTABLE CHANGES TO LEGISLATION

Korean legislation grants parents of children aged eight or younger, or those in the second grade or below, the right to take up to one year of unpaid childcare leave. While this leave does not offer regular pay, the government provides subsidies to numerous employees on such leave. The subsidies are calculated based on the employee's wage level, with established minimum and maximum limits. Subsidies may be reduced or forfeited if the total of monthly subsidies plus any additional income surpasses the employee's 'ordinary wage'.

There were already rules providing for enhanced subsidies for each month that both parents take childcare leave (together or at different times) starting in the first year of the child's life, up to a maximum of three months. However, under a recent change in the relevant regulations, effective since 1 January 2024:

- the duration during which enhanced subsidies are available has been extended to up to six months, rather than just three;
- the period within which leave qualifying for enhanced subsidies can be initiated has been expanded to the first eighteen months following the child's birth, instead of just twelve; and
- the upper limit for enhanced subsidies has been raised.

2. Supreme Court holds that a reinstated employee can be placed on temporary leave while employer arranges a suitable role

2.1. CASE LAW DEVELOPMENTS

In Korea, an employee who prevails in an unjust dismissal claim is entitled to reinstatement with back pay, typically in the same or a similar

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position, with potential criminal consequences for employers failing to comply. However, a Supreme Court ruling has now clarified that employers, where necessary due to changed circumstances and provided they are acting in good faith, may temporarily place reinstated employees on leave while arranging a suitable position for them.

This decision requires a sufficient justification and good faith, so there may still be disputes regarding the temporary leave's reasonableness. Nonetheless, it offers employers a viable interim solution to facilitate the proper reintegration of employees who win unjust dismissal cases. Employers are advised to engage sincerely with the employee during the reinstatement process to demonstrate good faith.

3. Supreme Court clarifies calculation of excessive weekly working hours

3.1. CASE LAW DEVELOPMENTS

Under Korean law, the standard workweek is capped at 40 hours, with a daily limit of eight hours. Hours beyond these limits are classified as 'overtime' and are subject to higher pay rates. While it is common to state that overtime is restricted to 12 hours per week, the law specifies that work hours can be 'extended by up to 12 hours per week', leading to confusion about whether this 12-hour limit applies solely to hours beyond the 40-hour weekly limit or also includes daily overtime.

The Supreme Court clarified that the 12-hour weekly overtime cap pertains only to hours worked beyond the 40-hour weekly threshold for full-time employees. For instance, an employee working 12 hours daily over four days would:

- incur four hours of 'overtime' each day at the premium rate due to exceeding the eight-hour daily limit; but
- not violate the excessive working-hours restriction despite accumulating 16 hours of overtime for the week, as the total hours worked amount to 48, which is within the overall permissible 52-hour limit (40 + 12).

4. Supreme Court explains obligation to accommodate employees' childcare obligations

4.1. CASE LAW DEVELOPMENTS

Korean equal opportunity

legislation mandates that employers support employees with children under eight or in the second grade or lower by 'endeavour[ing] to take' measures such as flexible work hours, limiting overtime, and other necessary childcare support actions. Despite the wording as an obligation only to try to take such measures, the Supreme Court has now confirmed its enforceability.

The plaintiff, an employee with two young children, was employed by a service provider and worked for a certain client company; then when the client changed service providers, she became an employee of the new provider. But she was dismissed by the new employer for refusing to work early mornings and holidays, a request that had been accommodated by her previous employer due to her childcare needs. The Supreme Court declared the dismissal unjust, emphasizing that the employer had failed to reasonably consider her childcare obligations. This is the first Supreme Court decision to treat these obligations under the equal opportunity law as concrete employee rights. However, the case involved an employee who transferred from one employer to another, occupying essentially the same role with only the employer's identity changing. So it leaves open questions about its applicability in cases where an employee simply accepts a new job at a new employer and requests special accommodations. Nonetheless, the decision signals to employers the importance of seriously considering requests for childcare accommodations.

5. Severe Accidents Penalties Act now applies to small employers

5.1. RELEVANT CHANGES

The Severe Accidents Penalties Act ('SAPA') is aimed at preventing serious accidents by imposing criminal liability on senior executives (particularly CEOs) for serious accidents if they have not fulfilled certain health-and-safety management and oversight duties. At the time of this writing, employers with 5 to 49 employees and smaller construction projects ('Small Employers') are now required to fulfil the obligations set forth under SAPA as their grace period has ended starting on 27 January 2024.

Although President Yoon's administration and various members of both the ruling and opposition parties expressed a desire to lengthen this grace period to give Small Employers additional time to prepare for compliance, the National Assembly failed to reach a bipartisan agreement. Therefore, Small Employers are now required to take steps to align their health-and-safety management systems with SAPA.

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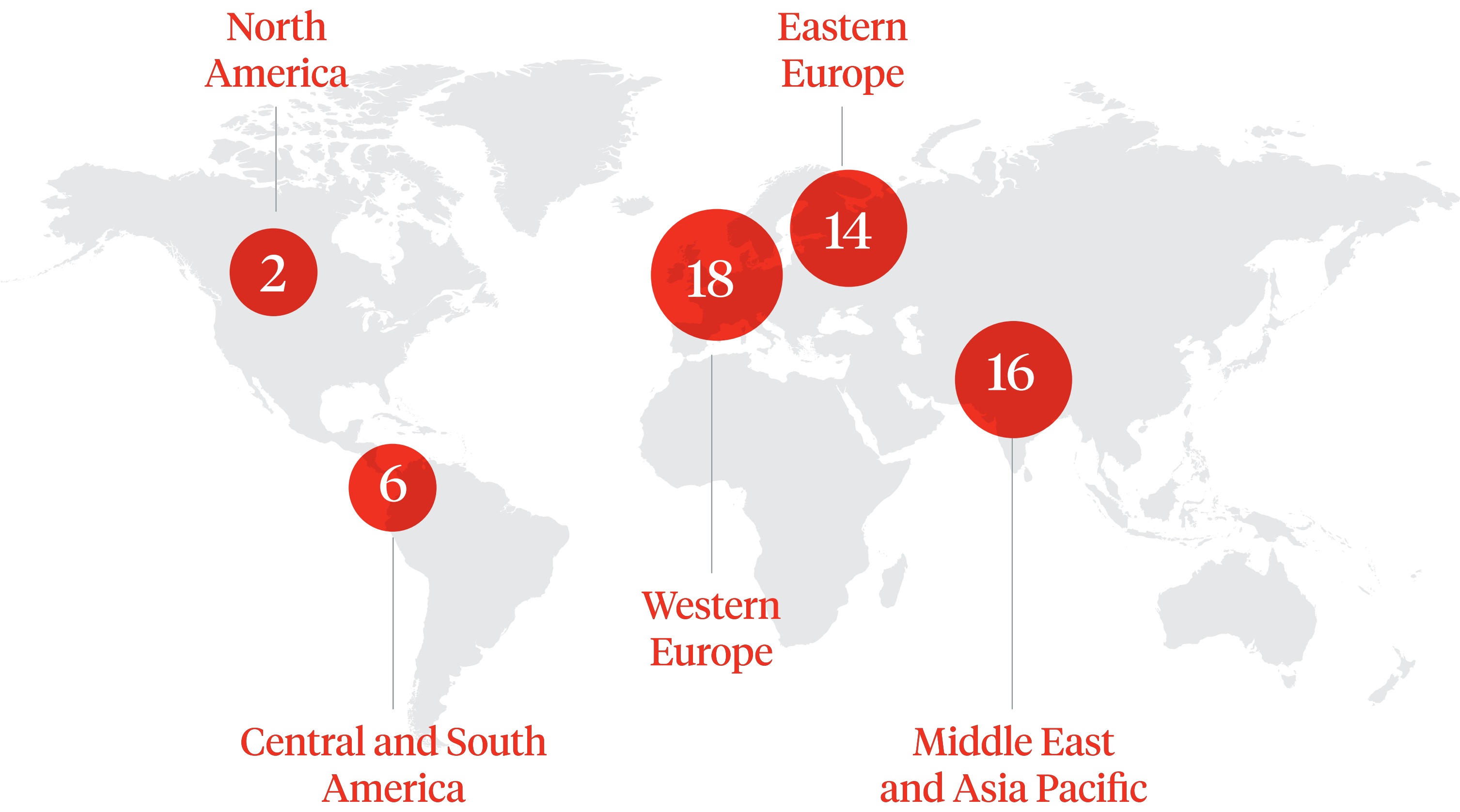

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