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Labor and Employment Law Update

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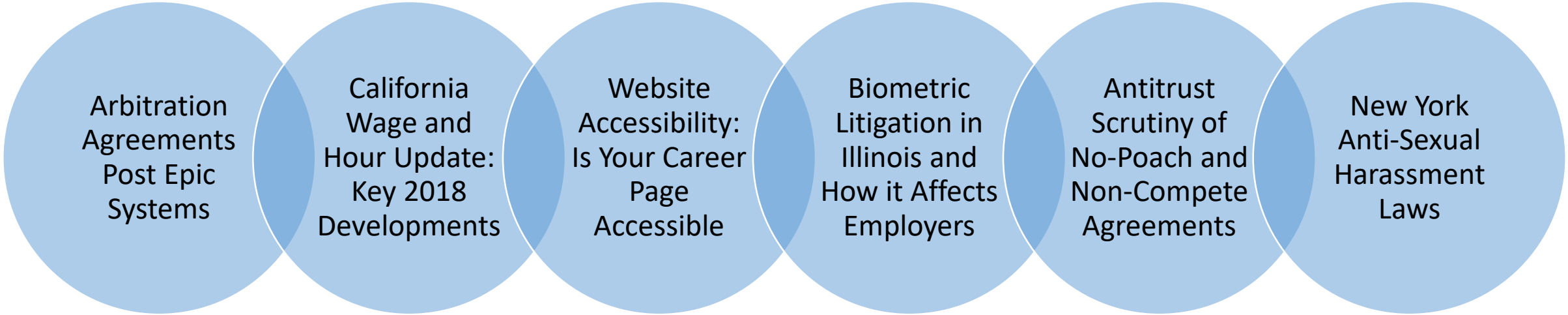
Topics


Arbitration Agreements Post Epic Systems
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Antitrust Scrutiny of No-Poach and Non-Compete Agreements
New York Anti-Sexual Harassment Laws

Epic Systems Corp. v. Lewis

SCOTUS upheld the legality of class action waivers (without opt-outs) in employee arbitration agreements.

Held that arbitration agreements providing for individualized proceedings were valid, and neither the Federal Arbitration Act nor the National Labor Relations Act suggested otherwise.

The Court explained the FAA "specifically direct[s] [courts] to respect and enforce the parties' chosen arbitration procedures."

Reverses Seventh and Ninth Circuit decisions that had held the NLRA prohibits class action waivers in arbitration agreements required as a condition of employment.

Class Action Waivers

Making the Most of SCOTUS' *Epic* Decision

- Revisit your arbitration agreement and confirm its enforceability.
- Class action waivers may be used to defeat class actions by independent contractors claiming misclassification.
- Is the agreement's enforcement governed by the FAA? Or by local or state law?
- Is there a clause that severs unenforceable provisions?
- Does it include a class and collective action waiver?
- What about a representative waiver? (for PAGA in CA)
- Does the agreement comply with the California's Armendariz requirements?

California's Legislative Response

On August 23, 2018, the California legislature passed AB 3080.

Would not outlaw arbitration agreements entirely, but requires employees to enter those agreements voluntarily, rather than as a mandatory condition of employment.

Also prohibits retaliation against employees who choose not to waive their right to pursue claims under either the FEHA or the California Labor Code in any particular forum, including courts.

Would have applied to arbitration agreements entered into as of January 1, 2019 forward, but not retroactively.

Governor vetoed.

Reflects continued resistance in CA to arbitration agreements.

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California Wage and Hour Update

The ABC's of *Dynamex*, meal breaks, California's take on the *de minimis* rule, rounding, flat sum bonuses, standing under PAGA, and class action waivers

Independent Contractor Classification

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Independent Contractor Classification

Dynamex Operations West, Inc. v. Superior Court,
4 Cal. 5th 903 (2018)

- In *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018) the California Supreme Court overruled California's long standing multi-factor common law test for determining worker classification for claims involving the IWC Wage Orders

Independent Contractor Classification

Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018)

- The California Supreme Court adopted the "ABC test." Under this test, a worker will be deemed an employee, **unless** the hiring entity proves the following three factors:
  - The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
  - The worker performs work that is outside the usual course of the hiring entity's business; ***and***
  - The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

Independent Contractor Classification

Takeaways

- *Dynamex* dramatically impacts the use of independent contractors in CA
- Most litigation likely to be on Part B
- Consider reclassifying workers as employees if they perform work in the usual course of your business or do not perform work for any other companies

**Arbitration agreements with class action waivers can limit exposure*

De Minimis Time

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De Minimis Time

Troester v. Starbucks Corp., No. S234969
2018 WL 3582702 (Cal. July 26, 2018)

- Does the *de minimis* rule apply in California?
- Question certified to the California Supreme Court from the Ninth Circuit in *Troester v. Starbucks Corp.*, 680 F. App'x 511, 515 (9th Cir. 2016)
- Facts of *Troester*:
  - Starbucks' employees were regularly and routinely expected to perform 4-10 minutes of unrecorded and uncompensated time at the end of their shifts transmitting data to corporate headquarters, activating the alarm and locking the doors, exiting the store, and walking customers to their cars

De Minimis Time

Troester v. Starbucks Corp., No. S234969
2018 WL 3582702 (Cal. July 26, 2018)

- California Supreme Court holds that federal *de minimis* rule is not part of California law
- California Supreme Court declines to decide if California independently recognizes a form of the *de minimis* rule, because even if it did, the rule would not excuse 4-10 minutes of regularly occurring unpaid work time each day
- Concurring justices would allow de minimis exception under different facts where unpaid time is less regular and less substantial

De Minimis Time

Practical Pointers

- Restructure work so that non-exempt employees do not work before or after clocking out
- Customize and adapt available time tracking tools
- Move location of time clocks / add time clocks
- Estimate the time it takes employees to perform regularly occurring off the clock work that cannot feasibly be performed on the clock and compensate employees for that time

Rounding

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Rounding

California Law

- *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012) upheld rounding to nearest 10th hour under California law, so long as the direction of rounding is neutral and does not systematically result in underpayment of wages
- Ninth Circuit approved neutral rounding to nearest quarter-hour under California law in *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069 (9th Cir. 2016)

Rounding

AHMC Healthcare, Inc. v. Superior Court, 24 Cal. App. 5th 1014 (June 25, 2018)

- Class action plaintiffs in *AHMC Healthcare, Inc. v. Superior Court* argued that rounding is permissible only when **a majority** of a proposed class of employees received more than they would have without rounding (as was the case in *See's Candy)*
- CA Court of Appeal rejected plaintiffs' argument and held that neutral rounding is permitted, even if a majority of a class of employees happened to come up a little short over a given period of time

Rounding

AHMC Healthcare, Inc. v. Superior Court, 24 Cal. App. 5th 1014 (June 25, 2018)

- CA Court of Appeal strongly suggests that neutral rounding is permissible even when a class receives less than they would without rounding over a given period of time, as long as the policy is truly neutral and does not systemically result in under payment

Overtime on Flat Sum Bonuses

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Overtime on Flat Sum Bonuses

The “Regular Rate”

- The regular rate is an hourly rate that takes into account various forms of compensation during a workweek that is used to calculate the rate of pay for overtime hours worked
- For an hourly employee who receives no additional forms of compensation, the regular rate of pay is the employee’s base hourly rate

Overtime on Flat Sum Bonuses

Overtime Premium

- California employers must pay 1.5 times the regular rate for all overtime hours worked
- California employers must pay 2.0 times the regular rate for all double overtime hours worked
- Overtime hours are all hours worked in a workweek over 40, all hours worked in a single day in excess of 8 hours up to and including 12 hours, the first 8 hours worked on the seventh consecutive day of work in a workweek
- Double overtime hours are all hours worked in excess of 12 hours in any workday and all hours worked in excess of 8 hours on the seventh consecutive day of work in a workweek

Overtime on Flat Sum Bonuses

Bonuses

- Purely discretionary bonuses may be excluded from the regular rate
- Non-discretionary bonuses must be included in the regular rate
- A discretionary bonus is an unexpected, unannounced payment that is made at the sole discretion of the employer
- A non-discretionary bonus is a promised or predictable payment made on the basis of some defined metric
- Most bonuses are non-discretionary and must be included in the regular rate

Overtime on Flat Sum Bonuses

Alvarado v. Dart Container Corp. of California, 4 Cal. 5th 542 (2018)

- California Supreme Court holds for a "flat" non-discretionary bonus that does not vary with productivity, the overtime payable on the bonus must be computed as follows:
  - Divide the bonus by the number of **non-overtime hours** worked in the workweek in which it was earned
  - Multiply the result by 1.5 times all overtime hours worked and 2.0 times all double overtime hours worked in the workweek

Overtime on Flat Sum Bonuses

Alvarado v. Dart Container Corp. of California, 4 Cal. 5th 542 (2018)

- If any overtime is worked, the number of non-overtime hours worked in a workweek will normally be 40, but not always. If non-overtime hours worked are less the 40, the number of non-overtime hours actually worked is the denominator

Overtime on Flat Sum Bonuses

Example:

- Phoebe is a waitress/occasional guitarist at Central Perk Café
- Her base hourly rate is $18.00
- This week, she worked 8-hour shifts Monday-Friday; and 8-hour shift on Saturday
  - 40 regular hours
  - 8 overtime hours
- She received a $20 “flat” bonus for working Saturday

Overtime on Flat Sum Bonuses

Example Continued

Straight Compensation

- 48 hours × $18.00 = **$864.00**
- $20.00 “flat” bonus = **$20.00**

Overtime Premium

- 8 overtime hours × $9.00 (0.5 x $18.00) = **$72.00**
- 8 overtime hours x $0.75 ([$20 ÷ 40] x 1.5) = **$6.00**

Overtime on Flat Sum Bonuses

Different From Federal Method

- Under federal law, overtime in same example would be computed as:

Straight Compensation

- 48 hours × $18.00 = **$864.00**
- $20.00 “flat” bonus = **$20.00**

Overtime Premium

- 8 overtime hours × $9.00 (0.5 x $18.00) = **$72.00**
- 8 overtime hours x $0.21 ([$20 ÷ 48] x 0.5) = **$1.68**

Overtime on Flat Sum Bonuses

Alvarado Applies Only To "Flat" Bonuses

- The California Supreme Court's formula in *Alvarado* is required only for "flat" bonuses, such as a flat sum for attendance on a certain day
- Under the DLSE manual and prior case law (*Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804 (2008)), the federal formula may be used for productivity based bonuses
- *Alvarado* formula must be used for compensation structures that "encourage" imposition of overtime by making each overtime hour comparatively cheaper for the employer (i.e. hours increase, but pay does not)

Overtime on Flat Sum Bonuses

Practical Pointers

- The regular rate calculation set forth in *Alvarado* for flat-sum bonuses applies **retroactively**
- Employers who provide non-discretionary flat-sum bonuses to employees must review their overtime pay practices and determine if they are compliant with the new formula set forth in *Alvarado* as soon as possible

Standing Under PAGA

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Standing Under PAGA

Huff v. Securitas Security Services USA, Inc.
23 Cal. App. 5th 745 (2018)

- Can a plaintiff who brings a representative action under PAGA seek penalties not only for the Labor Code violation(s) that affected them, but also for different violations affecting different employees?
- **Apparently yes**, according to *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745 (2018)

Standing Under PAGA

A Crazy Statute Gets Crazier

- Because a plaintiff in a PAGA action brings suit "as the proxy or agent of the state's labor law enforcement agencies, not other employees," the court in *Huff* reasoned that "not being injured by a particular statutory violation presents no bar to a plaintiff pursuing penalties for that violation"
- As long as a PAGA plaintiff suffers a single Labor Code violation, the plaintiff can recover PAGA penalties for **any** Labor Code violation, even if the alleged violation never affected the plaintiff

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Website Accessibility

Website Accessibility

Title III of the ADA requires businesses open to the public to maintain websites that are accessible to visually impaired consumers

Companies saw an increasing amount of Title III claims brought against them in 2017 and 2018 because potential plaintiffs can attempt to access hundreds of websites from the comfort of their own home

Employers are now starting to see similar claims brought against them by prospective job applicants under Title I of the ADA (applicable to private sector employers) and the FEHA

Website Accessibility

Why Title I and FEHA claims?

- These suits claim applicants are precluded from certain jobs because they cannot access job boards or recruiting applications that are incompatible with mainstream reading software
- Unlike Title III, which only requires the business to fix the issue, Title I and FEHA claims permit **monetary** and other forms of damages
- But, like Title III claims, potential Title I and FEHA plaintiffs can still sit in front of their computer and attempt to access a multitude of websites in a short period of time

Website Accessibility

Takeaways:

- Review recruiting websites and platforms (career sites, job portals, applications, screening tools, etc.) to ensure individuals with disabilities have equal access to them
- Ensure that any online job boards are programmed to be compatible with most commercially available screen reading software
- Consider providing non-web-based, alternative channels for applications
- Consider retaining an ADA website accessibility vendor to conduct an audit of your website

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Biometric Litigation in Illinois

Biometric Litigation in Illinois

Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14 *et seq*.

- Passed in 2008 to regulate private entities' collection, retention, disclosure and destruction of biometric identifiers and information.
- Based on public concern that biometrics, unlike credit card numbers or social security numbers, are "biologically unique to the individual" and "once compromised, the individual has no recourse."

Biometric Litigation in Illinois

What kind of biometric data is covered by BIPA?

- "**Biometric identifiers**"
  - A retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.
- "**Biometric information**"
  - Any information based on an individual's biometric identifier used to identify an individual.

Biometric Litigation in Illinois

BIPA's notice-and-consent requirements:

- Inform the individual in writing that a biometric identifier is being collected and/or stored, and the purpose and length of time the identifier will be collected, stored, and used;
- Receive a signed, written release from the individual;
- Develop a publicly available written policy with a retention schedule and guidelines for permanent destruction.

Biometric Litigation in Illinois

Disclosure of biometric identifiers or information is only permitted if:

- The individual consents to the disclosure;
- The disclosure completes a financial transaction requested or authorized by the individual;
- The disclosure is required by local, state, or federal law; or
- The disclosure is required pursuant to a warrant or subpoena.

Biometric Litigation in Illinois

BIPA creates a private right of action for "[a]ny person aggrieved by a violation of" the Act.

BIPA litigation has focused on statutory standing – what makes someone "aggrieved"?

- Defendants: actual injury, such as unauthorized disclosure or collection
- Plaintiffs: a mere technical violation of BIPA's notice-and-consent requirements

Biometric Litigation in Illinois

Illinois appellate courts disagree about what makes someone "aggrieved".

Rosenbach v. Six Flags Entertainment Corporation, 2017 IL App (2d) 170317 (December 21, 2017)

- A mere technical violation is <u>not</u> enough to make a person "aggrieved."
- Actual harm is required

Sekura v. Krishna Schaumburg Tan, Inc., 2018 IL App (1st) 180175 (September 28, 2018)

- A mere technical violation <u>is</u> enough to make a person "aggrieved" and have standing to sue.

Biometric Litigation in Illinois

What should employers do to comply with BIPA?

- **Clearly inform employees in writing**:
  - You will be collecting, storing, and using biometric identifiers and information;
  - The length and purpose of collection, storage, and use;
  - If you will be disclosing their biometric identifiers and information to third parties (such as a third-party timekeeping company).

Biometric Litigation in Illinois

What should employers do to comply with BIPA?

- Obtain employees' written consent to collection, storage, use, and disclosure;
- Develop a publicly available written policy setting forth a retention schedule and guidelines for permanent destruction; and
- Treat employees' biometric identifiers and information as confidential and sensitive information.

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Antitrust and Implications For No-Poaching Agreements

Antitrust and Implications For No-Poaching Agreements

In October 2016, the DOJ and FTC released formal guidance for HR Professionals regarding no-poaching and wage-fixing agreements.

- No-poaching agreements are agreements between competitors not to solicit or hire each other's employees.
  - These agreements can be formal or informal, written or oral, and even one-sided.
- Wage-fixing agreements are agreements with another company to "fix" employee wages or salaries at a specific level.

Per the guidance, "[n]aked wage-fixing or no-poaching agreements…are per se illegal under the antitrust laws."

Antitrust and Implications For No-Poaching Agreements

The 2016 formal guidance followed a trend of high profile DOJ and class action suits filed from 2010-2012 against eight large technology companies challenging agreements between the companies not to recruit or hire each other's employees.

These are often referred to as the "*High Tech*" cases and involved eBay, Intuit, Lucasfilm, Pixar, Adobe, Apple, Google, and Intel.

Antitrust and Implications For No-Poaching Agreements

Come 2016, the DOJ and FTC solidified their position on these types of agreements and let the world know these types of agreements may and will result in criminal liability.

Why do the DOJ and FTC care?

- Unfairly restricts employee mobility
- Free and open markets are the foundation of a vibrant economy
- Controls employee wages
- Unfair competition

However, “legitimate joint ventures” are not considered per se illegal under antitrust laws.

Antitrust and Implications For No-Poaching Agreements

Where are we now?

- In early April 2018, the DOJ filed suit against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. regarding the parties' no-poach agreements from 2009 until at least 2015.
  - The parties reached a settlement with the DOJ shortly thereafter.
- Former employees filed three class action lawsuits shortly after the DOJ filed suit, which were consolidated in the Western District of Pennsylvania and are still pending.

Antitrust and Implications For No-Poaching Agreements

The DOJ has indicated it intends to continue to aggressively pursue these actions in the future.

Antitrust and Implications For No-Poaching Agreements

Where are we now?

- Former employees are also filing suit against former employers, alleging inclusion of no-poach clauses in franchise agreements violates the Sherman Act.
- **Examples**:
  - *Deslands v. McDonald's* – N.D. Illinois
  - *Markson v. CRST Expedited, Inc. et al.* – C.D. California

Antitrust and Implications For No-Poaching Agreements

Where are we now?

- **Franchise developments**
  - WA Attorney General is focused on the use of no-poach agreements in franchise agreements and has reportedly reached agreements with over 30 national fast food chains to remove no-poach clauses from franchise contracts.
  - Other states are following Washington's lead, including: New York, California, Illinois, Massachusetts, Maryland, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, and the District of Columbia.

Antitrust and Implications For No-Poaching Agreements

Takeaways:

- Educate and train HR employees.
- Do not enter into written or oral agreements about compensation or other terms of employment, or restrictions on employee recruitment or hiring, with competitors.
- Review your non-compete and non-solicitation agreements to ensure they are reasonable and tailored.

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New York Sexual Harassment Laws

New York Sexual Harassment Laws

The Stop Sexual Harassment in NYC Act

- Must provide written notice of employee rights – displayed poster and information sheet at time of hire.
- Starting April 1, 2019, private employers (15+ people) must conduct annual anti-sexual harassment trainings. Interns & contractors included.
- Must keep records of such trainings for at least 3 years.

New York Sexual Harassment Laws

New York State's sexual harassment policy requirements:

- A statement prohibiting sexual harassment
- An explanation and examples of prohibited sexual harassment
- Information on federal and state statutes prohibiting sexual harassment
- A statement that local anti-sexual harassment laws may apply
- Remedies and rights of redress under the applicable statutes
- Company procedures for reporting and timely investigation of complaints
- A complaint form
- A prohibition on retaliation
- A statement that sanctions will be enforced against those who engage in sexual harassment and managers and supervisors who knowingly allow sexual harassment.

New York Sexual Harassment Laws

New York State's sexual harassment law also requires employers to provide annual sexual harassment trainings to all employees, which must include the following:

- An interactive component;
- An explanation and examples of prohibited sexual harassment;
- Information on federal and state statutes prohibiting sexual harassment;
- Remedies and rights of redress under the applicable statutes; and
- An explanation of added responsibilities for supervisory employees.

Employers must provide compliant trainings by October 9, 2019.

New York Sexual Harassment Laws

New York State's sexual harassment law also:

- Includes interns, contractors, volunteers and vendors.
- Prohibits mandatory arbitration clauses and non-disclosure agreements that cover sexual harassment claims.

NDAs covering sexual harassment claims are OK if employee is given 21 days to consider and 7 days to revoke.

Questions? Thank you for joining us!

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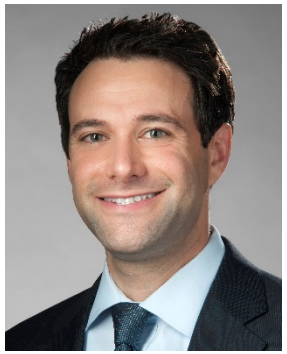

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