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Briefly

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Mary Moffatt Helms

"If you are thinking this article is not applicable to your business because 'we don't have a union' - think again."

NLRB HOLDS EMPLOYER POLICIES AGAINST EMPLOYEE VIDEOS/RECORDINGS UNLAWFUL

Like many employers, your employee handbook may contain some version of the following rule:

Without prior management approval or consent, recording conversations, phone calls and company meetings with any audio or video recording device is prohibited.

If it does, you should consider revising such rules in light of the latest pronouncement from the National Labor Relations Board (NLRB, or "the Board"). *If you are thinking this article is not applicable to your business because "we don't have a union" - think again.* The National Labor Relations Act (NLRA) applies to most employers and protects most employees (with limited exceptions) with or without a union.

The NLRB is the administrative agency that enforces and interprets the NLRA and protects the rights of employees engaged in "concerted activity," which occurs when two or more employees take action for their mutual aid or protection regarding the terms and conditions of their employment. In addition, one employee may be engaged in protected activity when engaging in protected activities with the authority of other employees, such as bringing group complaints to the employer or otherwise seeking group action with respect to terms and conditions of employment. Such activities might include, for example, a group of employees inquiring about wage increases, or seeking to improve workplace conditions, such as expressing safety concerns.

Section 7 of the NLRA grants employees the right to organize for purposes of collective bargaining, to engage in concerted activities for mutual aid and protection regarding their wages, hours and working conditions and to refrain from such activities. These rights are generally referred to as "Section 7 rights." In recent years, the Board has increasingly scrutinized many commonly-accepted employer policies and activities to find that a variety of employer policies either violated Section 7, or had an undue "chilling effect" on employees' exercise of those rights, issuing a number of employee-friendly decisions concerning a variety of workplace rules and practices.

Last year was no different with the Board closing out 2015 with its decision in *Whole Foods Market, Inc.*, 363 NLRB No. 87, (December 24, 2015) in which the Board held that the employer's rule against unauthorized recording of conversations or taking of photographs without prior management approval violated Section 8(a)(1) of the National Labor Relations Act. The *Whole Foods* decision is yet another example of the Board's aggressive stance regarding employee's Section 7 rights after a line of recent decisions from the Board regarding other common employer personnel policies, such as *Purple Communications*, 361 NLRB No. 126 (September 24, 2014) (employer may not ban employees' use of Company email systems during nonworking time absent special business justifications) and *Flex Frac Logistics*, 358 NLRB No 54 (2012), upheld, 2014 WL 1178698 (5th Cir. 2014) (confidentiality clause violated Section 8 rights even though it did not specifically mention "wages" because it was broad enough that employees could reasonably construe it to restrict Section 7 rights).

When determining whether a workplace rule violates Section 8(a)(1) of the NLRA, the Board and Courts are first to consider whether the rule explicitly restricts activities protected under Section 7, but even absent such specificity, the rule may still violate the NLRA if:

(1) employees would reasonably construe the language to prohibit Section 7 activity;

(2) the rule was promulgated in response to union activity; or

(3) the rule has been applied to restrict the exercise of Section 7 rights.

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004).

The two workplace rules at issue in the *Whole Foods* decision were contained in the Company's General Information Guide (GIG), which was distributed to employees.

The first rule at issue provided as follows:

> In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, Whole Foods Market has adopted the following policy concerning the audio and/or video recording of company meetings: it is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to the cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from (management) or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge. Please note that while many Whole Foods Market locations may have security or surveillance cameras

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THE DOL'S NEW SALARY THRESHOLD FOR EXEMPTION – PAY RAISE, DEMOTION OR LESS HOURS?

Carol R. Merchant

"There will also be an increased emphasis on tracking hours worked, and the potential for an increased number of claims for companies who failed to implement adequate timekeeping practices for all of the newly non-exempt employees."

On May 18, 2016, the U.S. Department of Labor (DOL) published a Final Rule which almost doubles the current salary threshold for the executive, administrative, and professional (EAP) exemptions to overtime. The rule, which takes effect December 1, 2016, is designed to plug a perceived gap that some feel causes many lower-level managers to be unfairly deprived of overtime when they work more than 40 hours. The new rule will raise the salary threshold indicating eligibility from $455/week to $913/week ($47,476 per year), in 2016. This salary threshold will be updated automatically every three years, based on wage growth over time, to keep pace with inflation. But will the rule actually result in a raise for 4.2 million people, as DOL predicts? Or will it result in perceived demotions, restrictions on hours, and cuts in take-home pay? We shall see.

When the rule takes effect, employers will have the following options for bringing employees who are currently salaried and exempt, but earning less than $913/week, into compliance:

- Raise the exempt, salaried worker's pay to at least $913/week, and prepare to increase that pay as DOL increases the threshold; or
- Make the employee hourly, monitor hours worked, and either:
  - ✓Restrict the employee to working no more than 40 hours/week; or
  - ✓Pay time-and-a-half for all hours worked over 40.

There is another option, approved by Federal law but not allowed in a few States, of treating the employee as salaried nonexempt and paying them a guaranteed salary each week for all hours worked, plus a supplement of ½ times their regular rate for each hour worked over 40. The caveat for this pay method is that the full salary must be paid in all weeks in which the employee performs any work, even if the employee has used all vacation or sick leave time. Public-sector employers also have the option to pay overtime in the form of compensatory time off, within certain limits, in lieu of cash wages. Employers have the option of making the changes budget-neutral by lowering the hourly rate or salary and then paying overtime so that the weekly pay remains the same.

It remains to be seen as to whether these changes will result in employees getting a raise. It is likely that some exempt employees making close to the new salary level will see a pay increase, but many employers will simply shift salaried workers currently paid less than the new minimum to hourly status - with hourly rates that approximate their former salaries - and control costs by restricting overtime.

Many employees may perceive this as a demotion. There is more to salaried status than simply pay. For example, many employers make only salaried employees eligible for certain benefits like health insurance and retirement.

It also may make it more difficult for employees to reach the first rung on the management level. The old exemption threshold ($455/week) works out to about $9/hour over 50 hours, not an unusual rate for a starting-level assistant manager at a discount retail chain, for example. When the starting pay for a salaried managerial position moves up to $913/week, that means an effective rate of $18.26 per hour over 50 hours. The employer will wind up making more than twice the investment in the employee. Many small (and even large) employers may be reluctant to give inexperienced first-timers an opportunity to move up from hourly work to an annual salary in excess of $47,000.

Inevitably, job titles and descriptions will have to be retooled along with pay so that the distribution of work is in line with the dictates of the overtime regulation. There will also be an increased emphasis on tracking hours worked, and the potential for an increased number of claims for companies who failed to implement adequate timekeeping practices for all of the newly non-exempt employees.

Every employer with salaried, exempt employees earning below the new $913 weekly threshold needs to consider their options for compliance with the new rules before the December 1, 2016, effective date.

KNOW YOUR ATTORNEY - HOWARD B. JACKSON

HOWARD B. JACKSON is a Member of the Knoxville, Tennessee office of the firm, which he joined in 2001. His practice includes substantial experience with labor law, employment litigation - including both discrimination cases of all kinds and employee restrictive agreements - frequent training and counseling of employers on a wide variety of employment law issues, and commercial litigation. Howard graduated from Georgia Tech in 1983, with a B.S. in Industrial Management, from Duke University in 1987, with a Masters of Divinity, and from Georgia State University in 1994, with a Juris Doctor. He graduated summa cum laude from Georgia State University, where he was Lead Articles Editor of the Law Review and First Honor Graduate. Howard has an AV Preeminent® Rating - which is the highest possible rating given by Martindale-Hubbell, the leading independent attorney rating entity. He is a member of the bar in Georgia and Tennessee. Howard is active in the Blount Chamber Partnership and several local Human Resources organizations. He enjoys running and serves as Director of the Wimberly Lawson Townsend 10K, a road race benefiting Second Harvest Food Bank.

Edward H. Trent...

"The NLRB's persistent requirement for linguistic precision stands in sharp contrast to the treatment of … other types of employment documents, and [the standard] fails to recognize the many ambiguities inherent in the Labor Act itself."

NLRB AGAIN CHALLENGES NEUTRAL WORKPLACE RULES PROHIBITING CONDUCT THAT "IMPEDES HARMONIOUS INTERACTION AND RELATIONSHIPS"

Employers are continually reading headlines about the National Labor Relations Board (NLRB) rulings declaring common employer work rules to be overbroad and unlawful, because some employees might misinterpret such rules as applying to protected concerted or union activities.

In a recent ruling, the NLRB once again finds work rules prohibiting employees from engaging in "improper conduct" or "inappropriate behavior" as being overbroad and unlawful. *William Beaumont Hospital*, 363 NLRB No. 162, 206 LRRM 1053 (April 13, 2016). This ruling is somewhat different and interesting, however, because the dissenting NLRB member called for a new standard of evaluating the legality of employer work rules. The Board also considered the rules in the context of determining the legality of employee terminations related to overbroad work rules.

The majority in *William Beaumont Hospital* held certain policies or policy statements to be "overbroad" when, in its view, the policies may cause an employee to "reasonably believe" that the policy prohibits conduct protected under Section 7 of the National Labor Relations Act, which protects employees' "concerted activity" for the "mutual aid and protection" of the employees on matters of "wages, hours, and working conditions."

After finding that policies prohibiting

- "willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees,"
- "profane and abusive language directed at employees,"
- "behavior that is rude, condescending or otherwise socially unacceptable," and
- "intentional misrepresentation of information"

were all lawful, the Board set its gaze on other provisions of the employers' Code of Conduct.

Specifically, the Board required the hospital to modify and not enforce its policies prohibiting conduct that

- "impedes harmonious interactions and relationships,"
- "verbal comments or physical gestures directed at others that exceed the bounds of fair criticism,
- "negative or disparaging comments about the . . . professional capabilities of an employee or physician made to employees, physicians, patients, or visitors," and
- "behavior that . . . is counter to promoting teamwork."

Dissenting NLRB member Miscimarra - the only Republican remaining on the currently 4-member NLRB - wrote an extensive dissent to the majority, finding these rules to be unlawfully overbroad. Miscimarra would find that the rules noted above are supported by substantial justification unrelated to the Labor Act, and have a minimal impact, if any, on the exercise of rights afforded by the Act. He would rewrite the NLRB's current doctrine - which renders unlawful all employment policies, work rules and handbook provisions whenever an employee "would reasonably construe the language to prohibit Section 7 activity." He further noted that in many cases the NLRB current doctrine invalidates facially neutral work rules solely because they are "ambiguous" in some respect.

Miscimarra argued that the current "[Board] standard stems from several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks."

He further argued that the standard

> "… invalidates facially neutral work rules solely because they are ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and [the standard] fails to recognize that many ambiguities are inherent in the NLRA itself."

So rather than review a case to determine if a policy directly prohibits protected activity or is used to punish protected activity, the NLRB looks to see if anyone might possibly believe that some kind of protected activity would be covered by the policy, and if so, the policy is declared overbroad and illegal.

Miscimarra believes that the NLRB has a duty instead to strike a proper balance between asserted business justifications and the invasion of employee rights. Thus, he believes that when evaluating a facially neutral policy, rule or handbook provision, the NLRB should evaluate the potential adverse impact of the rule on NLRA-protected activity, and the legitimate justifications an employer may have for maintaining the rule. Under this test, a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity.

In this ruling the NLRB majority did uphold long-standing Board precedent that even if employees have been fired for violating unlawfully broad work rules, in many circumstances the terminations themselves might nevertheless be deemed lawful. That is, discipline imposed pursuant to an unlawfully overbroad work rule violates the Act in those situations in which an employee violates the rule by: (1) engaging in protected conduct; or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act.

Of course, the burden falls to the employer to prove that the termination was for conduct not protected by the Act. An employer will avoid liability if it can establish that the employee's conduct

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operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and team members and to discourage theft and robbery.

The second rule at issue in the decision provided:

It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

In addition to these two rules, the GIG contained a list of "major infractions" that could result in discharge, which included the following:

"recording conversations, phone calls or company meetings with any audio or video recording device without prior approval or consent."

In its analysis, the Board considered "photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media," to be protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.

In fact, the Board held that such protected conduct "may include … recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions." In summary, the Board considered photography or recording, even when covert, to be "an essential element in vindicating the underlying Section 7 right."

While the Board recognized several potential legitimate restrictions on employees' ability to record in the workplace, such as certain state laws which prohibit nonconsensual recording, and/or industry-specific privacy laws such as the Health Insurance Portability and Accountability Act (HIPAA), the Board found the Whole Foods rules were not limited to stores geographically based on relevant state law, but were applied companywide and found that no overriding privacy interests applied.

Whole Foods argued the rules were in place "to promote open communication and dialogue" in the workplace and to "preserve privacy interests, including personal and medical information about team members, comments about their performance, details about discipline, criticism of store leadership and confidential business strategy and trade secrets." Whole Foods further argued that the rules contained an "embedded rationale - the encouragement of open communication - that would lead a reasonable employee to understand their lawful purpose." The Board found however, that Whole Food's attempted business justifications, while "not without merit," were based on relatively narrow circumstances, and thus failed to justify the unqualified restrictions placed on Section 7 activity by the rules at issue.

The Board noted that its decision does not mean that "employers are forbidden from maintaining narrowly drawn restrictions on recording" but the Board went on to find that the rules at issue were unlawful because they would reasonably be read to prohibit all recording.

Where an employer has a business justification with respect to a no-recording rule, the business justification should be set forth in the policy as specifically as possible. For example, medical providers and business associates subject to HIPAA may benefit from specifically referencing such rules to applicable industry-specific privacy concerns and regulations. Many employers include a "savings clause" or "disclaimer" provisions such as "this rule is not intended to prohibit employees from engaging in protected concerted activity under the National Labor Relations Act or other applicable laws." However, the Board has observed such disclaimer language may not be sufficient because most employees are not knowledgeable of their rights guaranteed under the NLRA and thus such disclaimers are unlikely to satisfy Board scrutiny.

The Board's decision reversed the prior ruling of an Administrative Law Judge, and in turn, Whole Foods has appealed the NLRB's decision to the U.S. Court of Appeals for the Second Circuit. At the time this article goes to press, the case is still pending in the Court of Appeals. However, given the Board's aggressive stance with respect to the no-recording rule and other commonly-accepted employment policies, employers should consult with legal counsel to ensure employment policies are drafted to prohibit conduct outside the scope of Section 7 rights and are specific enough with respect to the conduct prohibited so as not to interfere with or "chill" an employee's exercise of his or her Section 7 rights, or any other legal rights.

The Firm wishes to congratulate Mary Moffatt Helms for publication of this article in the May Edition of HR Professionals Magazine.

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actually interfered with the employee's own work or that of other employees, or otherwise actually interfered with the employer's operations - and that the interference, rather than the violation of the rule, was the reason for the discipline. Thus, it is not unlawful for an employer to discipline an employee pursuant to an overbroad rule in situations where the employee's conduct is not similar to conduct protected by the Act, but under this standard, it surely does appear that the NLRB will not uphold the employment "at will" doctrine when dealing with the application of an overbroad work rule.

Editor's Note - The majority ruling is some comfort to employers to know that in many circumstances an employee may be lawfully disciplined or terminated pursuant to an unlawfully overbroad rule. However, many commentators believe the NLRB continues to err in finding common employer policies or rules to be unlawfully overbroad simply because an employee might inappropriately interpret the rules as applicable to protected union or concerted activity. Accordingly, clear rules and solid documentation on the reasons for termination when it comes to violation of work rules remains a must.

AGENDA

(Note: These are Pre-Conference Topics, Titles and Times.
They may Change – Please Check Final Conference Program on Day of Conference.)

Thursday, November 3, 2016 (9:00 a.m. - 5:00 p.m.)

8:00 a.m. – 9:00 a.m. - Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session
The Year in Review
Legislative Updates on Workers' Comp Reform
Insider's Look at Wage and Hour Developments
EEOC Initiatives, including Retaliation under the Proposed New Guidance

11:00 a.m. - 12:00 p.m. - Breakout Sessions
Workplace Accommodations and the ADA
FLSA - Recent Developments on Overtime, Joint Employment and Independent Contractors
Developments with Mental, Emotional, and Psychological Issues Related to Employment (Including the Opioid/Heroin Addiction Crisis)
LGBT, Religious Freedom, and Government Oversight
FMLA, Unexpected Issues on Your Doorstep Every Day
Top Ten Strategies for Defending TN Workers' Comp Claims
What Public Employers Need to Know

12:00 p.m. - 1:15 p.m. - Lunch *(As Guests of Wimberly Lawson)*

1:30 p.m. - 2:30 p.m. - General Session
Keynote Speaker, *Inky Johnson*

2:45 p.m. - 3:45 p.m. - Breakout Sessions
FMLA / ADA / Workers' Comp
Cyber Liability – Liability for Cyber Crimes and Data Breaches
Common Mistakes From Hiring to Discharge
Life Cycle of an Employment Case
Social Media & Technology, with Millennials and Other Generations
Can You See It? Behavioral Stages of Chemical Addiction

4:00 p.m. - 5:00 p.m. - General Session
Trends & Issues on NLRB & Union Organization
OSHA Update
Immigration

5:00 p.m. - 6:45 p.m. - Reception *(please join us for scrumptious hors d'oeuvres)*

Friday, November 4, 2016 (8:30 a.m. – 12:15 p.m.)

8:00 a.m. - 8:25 a.m. - Continental Breakfast

8:30 a.m. - 9:30 a.m. - General Session
Is Management Training Necessary?
Cyber Security, Including Cyber Bullying & Ransomware
Intellectual Property for Employers
Where Does Your Lawyer Fit In?

9:45 a.m. - 10:45 a.m. - Breakout Sessions
Ask Your Friendly EEOC/THRC Representatives About Their Enforcement Priorities
Is Your Employee Handbook Stale? BYOD, Wearables, and Other Technologies
The Need for Employment Contracts - Confidentiality, Non-Competition, Jury Waivers and Other Risks
NLRB & Union Issues
Resolving Employee Complaints - First Line of Defense
Workplace Fairness & Avoiding Discrimination Claims
Crossing the Line: When Workplace Behavior Goes from Unlikable to a Liability

11:15 a.m. - 12:15 p.m. - General Session
Heightened Scrutiny for Religious Accommodations
Legal & Practical Issues for Pre-Employment Testing
Beyond FMLA Leave - The Wide, Wide World of Mandatory Paid Leave
Potential Impact of the 2016 Elections

12:15 p.m. - Conclusion

Approval of this program for 8.5 General recertification credit hours toward aPHR™, PHR®, PHRca®, SPHR®, GPHR®, PHRi™ and SPHRi™ recertification through HR Certification Institute® (HRCI®) will be requested. For more information about certification or recertification, please visit the HR Certification Institute website at www.hrci.org.

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The use of this seal confirms that this activity has met HR Certification Institute's® (HRCI®) criteria for recertification credit pre-approval.

Wimberly Lawson Wright Daves & Jones, PLLC, is recognized by SHRM to offer Professional Development Credits (PDCs) for the SHRM-CP℠ or SHRM-SCP℠. Approval of this program for 8.5 PDCs valid for the SHRM-CP or SHRM-SCP will be requested. For more information about certification or recertification, please visit www.shrmcertification.org.

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Applications will be made with TN, GA, VA and KY for 8.5 Attorney CLE credit hours.

Wimberly Lawson

Attorneys & Counselors at Law

Thirty-Seventh Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee
November 3-4, 2016

COST:

Early Bird (registration AND payment received by Sept. 26, 2016)
- $369 per person
- $359 for each additional person from same company
- $329 each for eight or more from same company

Registration and payment received AFTER September 26, 2016)
- $399 per person
- $389 for each additional person from same company
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REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch, and evening reception on Thursday, November 3, 2016

REFUND POLICY:

A 50% cancellation fee will be incurred for cancellations after October 7, 2016. Cancellations made after October 21, 2016 will forfeit the registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted through Thursday, November 3, 2016.

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Deadline to reserve hotel accommodations is October 3, 2016 or until the block is full.

KEYNOTE SPEAKER

Inky Johnson

September 9, 2006. It started as a normal college football game in Neyland Stadium. If anything, the event was an afterthought, dropped into the schedule at the last minute.

For Inky Johnson, though, the game changed everything. A routine tackle turned into a life-threatening injury, and nothing has been normal for Inky ever since. Not with a paralyzed right arm. Not with daily pain. Not with constant physical challenges.

His dream had always been to play professional sports. You might think his injury would have destroyed his motivation and crushed his spirit. But that's only because you don't know Inky.

Who is Inquoris "Inky" Johnson? He could be described as the survivor of an underprivileged past. He could be described as a refugee of poverty and violence. He could be described as a success story stained by tragedy. But if you look deeper, you'll discover something else.

You'll see a man who looks in the face of defeat and says, "Am I really failing, or is God prevailing?" You'll see a man gripped by the promise that God has purposes and plans far beyond our own. And you'll be inspired by his relentless determination, which he loves to impart to others through his dramatic story.

Inky has a master's degree in sports psychology from the University of Tennessee. He devotes much of his time to mentoring athletes and underprivileged youth. He and his amazing wife Allison live in Atlanta, Georgia with their beautiful children, Jada and Inky Jr.

FIVE WAYS TO REGISTER

1. *Mail to:* Laura Reeves
   Wimberly Lawson Wright
   Daves & Jones, PLLC
   P.O. Box 2231
   Knoxville, TN 37901
2. *Fax to:* Laura Reeves at 865-546-1001
3. *Email to:* LReeves@wimberlylawson.com
4. *Via website:* **www.wimberlylawson.com**
5. *Phone:* **865-546-1000**

Special Needs? If you should have any special needs, such as wheelchair access or special dietary requirements, please contact Laura Reeves at 865-546-1000 no later than 10 days before the event.

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Company _____

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