"Your Workplace Is Our Work"®

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LEHR MIDDLEBROOKS & VREELAND, P.C.
LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

The number of discrimination charges filed with the United States Equal Employment Opportunity Commission has declined by almost 20% during the past eleven years, even though it may not feel like this to employers. During 1994, there were a total of 91,189 charges, compared to 75, 428 charges during 2005. As a percentage of all charges filed, there has been very little difference in the type of discrimination claimed. In 1994, 34.8% of all charges alleged race discrimination, compared to 35.5% in 2005. Regarding sex discrimination, 28.4% of all charges in 1994 alleged sex discrimination, compared to 30.6% for 2005. Age discrimination charges remain steady as a total percentage, 21.5% in 1994 compared to 22% in 2005, as with disability discrimination claims, 20.7% in 1994 compared to 19.7% in 2005.

The most telling and alarming statistic is the increase in the total percentage of charges that claim retaliation. In 1994, 17.4% of all charges filed alleged retaliation, compared to 29.5% for 2005. This includes claims of retaliation under the statutes where discrimination charges are filed (Title VII, ADA, ADEA and Equal Pay Act). Garden-variety retaliation claims typically involve an employee who engages in protected activity (complaining about discrimination or harassment) and then within a reasonable time thereafter, suffers some type of job harm. However, retaliation is a broader concept, as illustrated in the August 30, 2006 Third Circuit case of *Moore v. Philadelphia*. In this case, white police officers spoke out about discriminatory behavior toward their black colleagues. The alleged retaliation included sending the white officers on dangerous beats without back-up support, a change in schedules and not providing additional training and support. According to the Court of Appeals, the officers stated enough of a retaliation claim such that it should go to the jury.

Remember that retaliatory actions may not necessarily be known by the employer, yet they may be attributed to the employer. **The supervisor or manager who retaliates in a manner other than termination may have created liability for the employer, without the employer's ultimate decision makers knowing it.** Suggestions to prevent retaliation claims include:

- Add retaliation to policies concerning workplace discrimination, harassment and reporting misconduct.
- Consider a "stand-alone" policy statement regarding retaliation.
- Educate managers and supervisors how "getting even" will get them behind.

In a termination circumstance, ask whether within the prior twelve months the employee engaged in protected activity and if so, would the termination decision occur regardless of the protected activity?

MORBID OBESITY IS A PROBLEM, BUT IS IT A DISABILITY?

We thought we would do our readers a favor and avoid discussing morbid obesity as a "weighty" subject where the number of court cases addressing this issue is "slim". The case of *EEOC v. Watkins Motor Lines* (6th Cir. Sept. 12, 2006) is one of the few cases to address morbid obesity in the context of the Americans with Disabilities Act.

There is no dispute that the employee (Grindle) was morbidly obese. He weighed between 340-450 pounds throughout his employment as a dock worker and a driver, loading and unloading freight. He injured himself when he climbed a ladder and broke it. Ultimately, he was terminated because he did not return to work within 180 days after his absence due to medical conditions. The EEOC alleged that the employer failed to reasonably accommodate him by terminating him at the end of that period.

One factor the court considered in rejecting the EEOC's argument that Grindle was disabled was the EEOC's regulations interpreting the ADA. According to the court, the EEOC stated in its regulations that an "impairment" does not exist for ADA purposes unless it is connected to a physiological disorder. Therefore, "since we find that Grindle has not shown that he suffers from an ADA impairment, we do not address whether Watkins perceived Grindle as substantially limited in any major life activities." There is no evidence that Grindle's morbid obesity was due to a physiological disorder; he simply weighed twice what he should for someone of his age, height and gender.

With an alarming number of American adults and children overweight, we expect to see more issues arise regarding medical circumstances surrounding weight (our weight conscience culture also results in a more limited number of medical issues on the other end of the spectrum—those who are cadaverously thin). Expect employees to request medical absences for weight related treatments. Although morbid obesity is not per se a disability, the standard for whether it is a serious health condition under the FMLA is a lower one and, therefore, most requests for absences due to weight related medical care are protected under that statute. Where an employee presents physiological support for his or her physical condition due to weight, then the ADA likely applies and reasonable accommodation should occur.

TIME TO BUY VOTES - AFL-CIO TO SPEND $40 MILLION ON NOVEMBER ELECTIONS

Last year, seven unions split from the AFL-CIO to form the Change-to-Win Coalition, because they believed the AFL-CIO wasted too much time and money on national elections. True to its form, the AFL-CIO is at it again, committing $40 million to candidates it supports for the November 2006 elections. This effort, according to its president John Sweeney, is the largest in the history of the labor movement.

The AFL-CIO plans to spend the money to mobilize voters in twenty-one key battleground states. It plans to reach 50% of all union voters by telephone, noting that 70% of all union voters who were reached by telephone in 2004 voted for John Kerry. The issue raised by the AFL-CIO is the economy, not homeland security or national defense. According to AFL-CIO polls, 55% of those voters surveyed are dissatisfied with the economy and do not believe that it will get better. Furthermore, labor claims that real wages have grown by only 9% since 1979.

The AFL-CIO political effort is intended to promote focus on the issues that concern the voter daily, which relate to whether that individual will still have job tomorrow and the rising cost of health insurance. Should organized labor become successful in turning Congress from a slight Republican majority to a Democratic majority, it will then set its sights for 2008 on the White House, hoping that a Congress and White House controlled by Democrats will lead to labor legislation to eliminate secret ballot elections for employees to decide whether they wish to be represented by unions.

SAY GOODBYE TO NON-COMPETITION AGREEMENTS---IN CALIFORNIA

The enforceability of a non-competition agreement depends on the following key factors:

- Its duration (if it is too long, often more than a year, it may not be enforced);
- geographical scope (if it is beyond the area where either the employee worked or where the company does business it may not be enforced); and
- the scope of work prohibited (if it shuts the employee out of an industry, it may not be enforced).

Perhaps the most critical factor regarding enforceability of a non-compete agreement is the state in which the enforceability claim is brought. Unlike many of the employment laws employers work with daily, the law regarding enforceability of non-compete agreements depends upon each state and can vary within a state, depending upon which judges hear the cases. The recent case of *Edwards II v. Arthur Andersen LLP* (Cal. Ct. App August 30, 2006) essentially eliminated the viability of non-competition agreements in California.

Edwards signed an agreement when he joined Arthur Andersen (remember that company?) which provided that he would not work for or solicit clients of Arthur Andersen when he left the company. As the demise of Arthur Andersen occurred, it offered to release employees from their non-competition agreements, provided they would release Andersen of all actual or potential claims against Andersen. Edwards accepted an offer from HSBC, a consulting firm that purchased some of Andersen's assets. However, because Edwards refused to sign the documents to be released from the non-compete agreement, HSBC terminated his employment and Edwards sued Andersen for interference with a prospective economic advantage.

In holding that Anderson's non-compete agreement was unenforceable, the court stated that California generally prohibits non-compete agreements, except where the agreement is necessary to protect trade secrets, the agreement applies to an individual who sold goodwill to another (sold a part of the business to a competitor) or in anticipation of dissolving a partnership.

An employer with a non-competition agreement in California needs to have that agreement reviewed by counsel. Non-competition agreements in general may be enforced throughout most of the states. Be sure that the non-competition agreement for your organization is properly drafted for enforceability in the state that concerns you.

EEO TIPS: DOES YOUR SEVERANCE AGREEMENT "RELEASE" REALLY RELEASE?

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of LEHR MIDDLEBROOKS & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U. S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

If asked whether it would be lawful for an employer to deny severance pay to an employee who filed a charge with the EEOC after signing a Severance Agreement which states that severance pay and/or other benefits are conditioned upon the employee's foregoing the right to pursue any claims with the EEOC, many employers would say "Yes," it is lawful and enforceable as a matter of contract law. However, that clearly was not what the courts recently ruled in two cases under Title VII and another two cases under the ADEA.

In the two cases under Title VII, *EEOC v. Lockheed Martin Corp.* and *EEOC v. Ventura Foods* the EEOC filed lawsuits on behalf of former employees who had been denied severance benefits which were specifically conditioned upon the employees' giving up any right to assert their statutory rights to file discrimination claims. The main contention of the EEOC's complaint in each action was not that waiver of rights provisions were illegal, but that such provisions in the severance agreements violated the non-retaliation provisions of Title VII. Incidentally, similar non-retaliation provisions are in the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA).

In *Lockheed Martin,* the Charging Party, Denise Isaac, had been laid off following a merger between Lockheed and the Comsat Corporation. The severance agreement that she was asked to sign included a general release which specifically conditioned her receipt of severance benefits upon her waiving all rights to file a charge with the EEOC. During the administrative process, the EEOC attempted to settle the charge by requesting that Lockheed amend the general release to permit the Charging Party to pursue her Title VII rights while receiving the severance benefits which had been offered to those in her job classification or group. Lockheed refused this offer and asserted that the severance benefits would be withheld unless the Charging Party withdrew her charge.

The EEOC filed suit and the court, after considering the general release and other correspondence to Ms. Isaac by the company, held that Ms. Isaac, as an employee, should not have to choose between the forfeiture of her statutory right to pursue a claim of discrimination and/or the forfeiture of severance benefits. The court called it a "Hobson's Choice." Lockheed argued that the general release in effect only prevented Ms. Isaac from receiving personal gain from both the severance benefits as well as any monetary gain that might be obtained by pursuing her Charge with the EEOC. Although the court admitted that the agreement might be lawful, the correspondence to her stated that she had to withdraw the charge to receive any severance benefits. According to the EEOC, any such interference with the employee's right to pursue a discrimination claim under Title VII constitutes an act of retaliation. The court agreed.

In the case of *EEOC v. Ventura Foods,* the EEOC brought a similar action based on the charge of an employee who had been laid off and likewise faced a similar choice of giving up the right to file a charge or losing severance pay or other severance benefits. However, in this case the EEOC was also able to obtain relief for similarly situated employees in the employer's other plants, nationwide. The EEOC settled the case favorably for the employees with a Consent Decree which provided in pertinent part that Ventura Foods would:

1. revise its Severance Agreement to remove those provisions which condition the receipt of severance pay upon the employees foregoing the right to file a charge of discrimination;
2. contact and make another offer of severance benefits to those employees who had refused to sign the Severance Agreement because of the offending provisions, and
3. contact and notify those employees who did sign the Severance Agreement to receive severance benefits that they had a right to file a charge, notwithstanding the offending provisions, and that they would not lose any benefits if they choose to do so.

EEO TIP: These cases represent a clear signal that the EEOC nationwide will be looking carefully at severance agreements which expressly condition established severance pay or other severance benefits upon the employee's relinquishment of his or her right to file a charge of discrimination. EEOC will, no doubt, take the position that such provisions violate the anti-retaliation sections of Title VII or one of the other statutes enforced by the EEOC.

In the two cases under the Age Discrimination In Employment Act (ADEA), namely: *Syverson v. International Business Machine Corp.* and *Thomforde v. International Business Machine Corp.*, the courts found that the releases signed by the employees in question were faulty. In fact, the releases were identical because they were general releases used by IBM for severance purposes. The releases in both cases stated in effect that by signing the release to get the severance benefits offered the employee "*agrees that (he or she) will never institute a claim of any kind against the company.*" The release, however, allowed one narrow exception, namely that: "*the covenant not to sue*" did not "*apply to actions based solely on the ADEA.*" Both of the courts found this provision to be confusing in light of the earlier provision which denied a right to sue for any reason. Accordingly, the releases were found to be unenforceable.

Please feel free to contact this office at the phone number above if you have questions concerning the efficacy of any severance agreements you contemplate.

OSHA: DEFENSE AGAINST OSHA CITATIONS

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at (205) 226-7129.

Contrary to popular belief, OSHA inspections don't always result in citations and penalties. Inspections without cited violations may be expected to fall within the 25% to 50% range in federal OSHA offices. (These would include partial inspections that might have been limited to a single issue or small area of a worksite as well as follow-up inspections made to document corrective actions.) But chances are still pretty good that following an OSHA visit, even the more conscientious employers may be left with citations demanding response.

Employers should know what is required of OSHA to establish a violation and the possible defenses open to them to counter charges of a violation. The Occupational Safety and Health Review Commission says OSHA's allegation must show: (1) the cited standard or rule applies (2) terms of the same were not met , and (3) the employer had actual or constructive knowledge of the cited conditions. If OSHA establishes each of these items, the charged violation is likely to stand and the employer's best bet may be to negotiate the most acceptable terms. That is unless the employer can successfully defend against the cited item.

Chapter III of OSHA's Field Inspection Reference Manual (FIRM), section 8, addresses "affirmative defenses." For their purposes they define this as "any matter which, if established by the employer, will excuse the employer from a violation which otherwise has been proven by the CSHO (Compliance Safety and Health Officer)."

The first such defense discussed and probably the most frequently claimed and successfully employed is "unpreventable employee misconduct or isolated event." The FIRM indicates that this claim may be in order when the violative condition was <u>unknown</u> to the employer and involved a violation of an <u>adequate work rule</u> which was <u>effectively communicated</u> and <u>uniformly enforced</u>. The Review Commission has adopted a four-part test for assessing the claim of unpreventable employee misconduct. They include those just stated along with a showing that the employer has taken steps to discover violations. Obviously this defense gets more difficult to establish as the length of time the violation goes uncorrected increases and where visibility of the violation to employer representatives is significant. **It should be noted that OSHA considers knowledge of a violation by a foreman or supervisor as constituting knowledge by the employer.**

With respect to an unpreventable employee misconduct defense, the employer's work rule may not have to be in writing. In a 2006 case the Review Commission reversed a judge's decision that had found the "unpreventable" claim lacking because the employer had "no written safety program, no written disciplinary program, and no record of prior disciplinary actions." The Commission held that the small employer involved had a verbal rule and otherwise met the requirements for this defense.

A second claim against a citation is that compliance with the requirements of a standard would be impossible or would prevent performing required work. It would also be necessary to show that there is no alternative means of protecting the employee. Not infrequently the claim is made that certain equipment can't be operated, or a particular job can't be performed, with the guard in place. In such cases OSHA compliance officers are told to document answers to relevant questions. These could include whether use of a guard is impossible or just more difficult and whether use of a guard is feasible and used in all other operations with the machine.

The third affirmative defense noted in OSHA's manual is that of "greater hazard." Here the claim is raised that compliance with a standard would result in greater hazards to an employee than noncompliance. In making this claim the employer would be expected to be able to demonstrate that there was no alternative means to protect the employee and why an application for a variance was not appropriate. (Employers may formally apply for and be granted a variance from an OSHA standard. They must demonstrate that their method achieves a degree of safety equal to or greater than the promulgated standard.)

OSHA notes that there are other affirmative defenses than the three identified but find them to be less frequently raised.

CURRENT WAGE AND HOUR HIGHLIGHTS

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

Although the Wage and Hour Division has been operating without an Administrator, the agency is still conducting investigations and collecting large amounts of back wages. On August 1 the Senate Committee on Health, Education, Labor and Pensions held a hearing on the nomination of Paul DeCamp to be Wage and Hour Administrator. President Bush nominated Mr. DeCamp for this position several months ago. He previously worked as a labor and employment lawyer representing employers. As the hearing was in the last week before Congress began its summer recess, no vote occurred by the committee or the full Senate. On August 31, 2006 President Bush gave Mr. DeCamp a recess appointment. Therefore he will not have to go through a Senate confirmation vote.

Recently the House of Representatives passed a bill to increase the minimum wage, however, because it was tied to a permanent change in the estate tax structure the Senate refused to go along with the proposal. There are indications that the issue will surface again this year but the bill's sponsors indicate they do not have the 60 votes necessary to get the bill past the Senate. However, several states have passed or are considering increases in their minimum wage. **The latest state to increase their minimum wage is California, which increased their wage to $7.50 on January 1, 2007 and $8.00 on January 1, 2008. Ten other states have increased their minimum wage in 2006 making of 20 states currently (or by January 1, 2007) that have a minimum greater that the federal minimum wage. In November voters in other states (for example, Ohio will consider raising theirs to $6.85 per hour) will face propositions to increase their minimum wage this year.**

There continues to be significant activity regarding the exempt or nonexempt status of stockbrokers. Recently a U. S. District Court allowed a case against A. G. Edwards to go forward denying the firm's motion for a summary judgment. Most of these employees earned a considerable amount of money but they were paid on a commission basis and thus did not receive a guaranteed salary as required in order to be considered exempt employees. The brokers also contend their duties do not qualify them for the administrative exemption. Wage and Hour's Kansas City office announced that Quick Cash, a payday loan company, has agreed to pay more than $500,000 to some 900 employees. The violations resulted from the failure to pay overtime to nonexempt salaried managers and the failure to include bonuses when computing overtime pay.

Recently U. S. District Judge U. W. Clemon of Birmingham decertified a "collective action" brought by almost 2500 Dollar General store managers after a week of trial. Two days later Judge Clemon dismissed the case based on a confidential settlement reached by the 12 named plaintiffs. The issues involved whether the managers met the duty requirements for exemption, had the authority to hire or fire employees and supervised at least two full time employees.

There was a recent decision by the U. S. Second Court of Appeals that can have a major impact on the Home Health Care Industry. The court found, in *Cole v. Long Island Health Care at Home* that the companionship exemption in the act does not apply when the companion is employed by a third party rather than person they are serving. The court found that regulations, written in 1974, did not correlate with the plain language of the statute and therefore were not enforceable.

Not everything that is involved in litigation is related to the Fair Labor Standards Act, as there is also considerable activity under the Family and Medical Leave Act. Thus employers should review their FMLA policies to ensure they are in compliance. Employers who acquire employees through a "staffing company" may rely on the staffing company to provide the proper notification to an employee who requests FMLA leave. U. S. District Judge Gregory Presnell, Middle District of Florida, recently ruled that the staffing company was the primary employer and therefore bore the responsibility for addressing the employee's request. This decision agrees with the statement the FMLA regulations that in the event of joint employment "only the primary employer is responsible for giving required notices to its employees, providing FMLA leave and maintenance of health benefits."

The U. S. Eleventh Circuit Court of Appeals recently affirmed a $614,000 judgment against an employer (Fulton County, Georgia) who failed to give the employee written notice of the employer's medical certification requirement, the consequences of failing to comply and a 15-day period in which to provide the certification. The judgment included almost $250,000 in back pay, $58,000 in pension contributions and $309,000 in liquidated damages. **The court specifically found that a supervisor's oral request was not sufficient to meet the requirements of the regulations.**

A Tennessee auto parts manufacturer violated the FMLA when it terminated an employee who had requested an extension of her approved leave. The employee had surgery and was approved for one week of FMLA leave. When the employee realized that she had been scheduled for a follow-up appointment on the day following the expiration of her leave, she contacted the company nurse and requested a leave extension. When her supervisor called the employee to ask why she had not returned to work the employee informed the supervisor that the company nurse had extended the leave. The same day the employee asked her doctor to fax a new certification to the employer, which was done that day. The new certification stated the employee was unable to perform any work for another week. When the employee contacted the human resources department to see if they had received the new medical certification she was fired by her supervisor.

As you can see failure by employers to follow the regulations of either the Fair Labor Standards Act or the Family and Medical Leave Act can cause substantial problems. Thus, I encourage that you schedule a systematic review of your polices to ensure that you are complying with both statutes. If I can be of assistance do not hesitate to give me a call.

DID YOU KNOW…

…that there are still some cases out there alleging a discriminatory application of dress code policies? In *Rohaly v. Rainbow Playground Depot, Inc.* (WA Ct. App, August 28, 2006), the court determined that the discriminatory application of a dress code policy to women could proceed to trial. The company sells playground equipment. Its sales employee were permitted to wear t-shirts or denim shirts with a company logo and jeans. The company then implemented an unwritten dress code, which required men to purchase and wear denim shirts with the company logo and women were required to wear a navy blue blazer over a polo shirt. Both genders were required to wear khaki pants. Rohaly was disciplined for not wearing a blazer. Her sex discrimination claim is that requiring women but not men to wear a blazer was a form of sex discrimination, because otherwise men and women were permitted to wear the same type of casual clothing. Judge Ann Schindler agreed that such facts were sufficient for the case to proceed to trial.

…that according to the Bureau of National Affairs, first year wage increases for contracts negotiated thus far in 2006 amount to 3.5%, the same average as one year ago? Manufacturing increases thus far in 2006 are 3.2%, compared to 3.4% in 2005; construction increases are 4.0% in 2006, compared to 3.5% in 2005 and non-manufacturing, non-construction increases are 3.9%, compared to 3.6% for 2005.

…that Naomi Earp was appointed Chair of the EEOC on August 29, 2006? Earp had served as the Commission's Vice-Chair. She succeeds Cari Dominguez, who chaired the Commission for five years. Prior to joining the Commission in 2003, Earp was Director of EEO and Diversity for the National Institute of Health.

…that the state of Massachusetts adopted a regulation requiring employers to provide health insurance? The regulation becomes effective on October 1, 2006 and covers employers with eleven or more employees. The Massachusetts Division of Health Care Finance and Policy adopted a regulation that requires employers to either insure at least one out of four employees or pay at least one third the cost of individual premiums. Otherwise, the employer will pay an annual assessment of $295.00 per employee. Massachusetts requires that all Massachusetts residents obtain health insurance coverage by July 1, 2007, whether that is from their employer, Medicaid, state assistant plans or individual policies.

LMV UPCOMING EVENTS

Date: Oct 17, 2006
Recent Developments in Title VII, ADA, ADEA, Harassment, and at the EEOC.
Webinar
David Middlebrooks and Jerome Rose, EEOC Consultant

Date: Nov 9, 2006
Affirmative Action for the Savvy Employer: Staying Up to Date on the Changing OFCCP Landscape.
Bruno Conference Center
David Middlebrooks and Donna Brooks
This three-hour program is geared to the those professionals who have an understanding of affirmative action basics and are looking to increase their effectiveness in managing OFCCP compliance efforts. We'll talk about where the dust has settled regarding the Internet Applicant regulation and the final rules on compensation analysis, and give you strategies for handling the OFCCP's new approach to enforcement. Each attendee will receive comprehensive written materials. The fee for the program is $100 per attendee and $50 for each additional attendee from the same employer.

Date: Nov 13, 2006
The Alabama Employer's Desk Manual Conference
Bruno Conference Center
LMV's "Alabama Employer's Desk Manual" is the only resource that was written in Alabama, by our Alabama lawyers and consultants, to provide practical guidance to businesses and individuals for addressing a broad range of workplace issues. A copy of this comprehensive guide to federal and state workplace laws and regulations will be provided to each attendee. This program introduces the contents of the "Manual" to attendees so that they can turn to it routinely, and can effectively integrate it into their daily decision-making process.

Nov 15, 2006
Government Contractor Update
Holiday Inn Express
David Middlebrooks, Donna Brooks and Lyndel Erwin, former District Director of the Wage & Hour Division of the U.S. Department of Labor.
This full-day program will cover the same affirmative action matters addressed in the November 9, 2006 Birmingham seminar, but will also cover the Service Contracts Act, the Davis Beacon Act, and other employment issues such as USERRA, whistle-blowing, and ethical issues.

For more information about Lehr Middlebrooks & Vreeland, P.C. events, please visit our website at www.lehrmiddlebrooks.com.

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