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Your Workplace Is Our Work®

Inside this issue:

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

The Effective Supervisor

Huntsville	October 2, 2008
Birmingham	October 8, 2008
Muscle Shoals	October 16, 2008
Mobile	October 22, 2008
Auburn/Opelika	October 30, 2008

Affirmative Action Updates

Birmingham	December 9, 2008
Huntsville	December 11, 2008

Wage And Hour Review

Birmingham	December 10, 2008

Jobs, Retirement, Money and Unions

The incredible turmoil in our country's insurance and financial markets during the past several weeks is raising the anxiety of employees in sectors throughout our economy. The increased vulnerability employees feel also increases their susceptibility to union organizing, regardless of whether the Employee Free Choice Act becomes a law in 2009, and further increases the potential for employment litigation.

Let's look at what has happened to the satisfied employee who is not a day trader and has not been trying to "flip" real estate. This is an employee who has seen his or her retirement account diminish, the value of the home also diminish potentially 20%, if not more, after years of appreciation, uncertainty regarding continued employment, and a decline in the availability of potential employment options. In fact, according to the Economic Policy Institute in a report released on September 17, 2008, "there are now 5.4 million more job seekers than job openings in the United States, and that number is expected to increase as the downturn deepens. Millions of dedicated, productive American workers are experiencing the hardship and insecurity of unemployment with little hope of finding a job."

The most vulnerable employee is the long term employee who cannot afford to retire or is not retirement eligible, has seen the decline in his or her assets due to the markets, is satisfied with treatment at work and wants to remain with the employer, does not want to "start over" and seeks reassurance or assistance. This is where potential unionization comes into play. Regardless of whether the Employee Free Choice Act passes as a result of the November 4 elections, the transformation of the Labor movement overlaid with the distress employees face today may make unions an appealing alternative for employees.

Unions increasingly have been perceived on the "right side" of the issues concerning our nation's workforce, including health care, trade, "going green," fiscal responsibility and excessive executive compensation. Many unions have transformed their message to the non-union workforce and how that message is delivered. Employers are less likely to be aware of organizing efforts; workplace efforts are being replaced by YouTube, blogging, and other uses of technology within the privacy of the employee's home. Unions are also moving from the historic good union-bad employer organizing model, to one that is a business case presentation to the satisfied employee. In essence, unions project that "we are the only alternative you have to address those issues that are causing you great distress and risk."

What can and should employers do in preparation for an invigorated labor movement?

- Look creatively at how employers can address those issues that concern employees. For example, is it possible to arrange with financial institutions special loan assistance and rates for those employees in need? Does the employer want to consider such a program of its own?

- Provide employees regular factual updates regarding the state of the employer's business and projected workforce need during the next six to twelve months. Generalized conclusions that everything will "be okay" are insufficient and can engender mistrust.

- Review employer orientation communications regarding unions and card signing. Move from talking in general terms about there being no need to bring an outside party to specific terms about the importance to the company and to the employees of remaining union free.

- Review with managers and supervisors what they can and should do in communications with employees about unions, but also about those issues that concern employees—a supervisor acknowledging that "yeah, it's rough out there…" is unresponsive to an employee expressing concerns.

- Evaluate the company's commitment—from executive leadership through front-line supervision—to recognize what it will take to remain union free given this rejuvenated labor movement, labor's effective use of technology and a distressed workforce.

Employer Responsible for Subcontractor's Harassment

On September 9, in the case of *O'Connor Constructors, Inc. v. Mass. Comm'n Against Discrimination*, a court upheld an award of over $50,000.00 for a subcontractor's employee due to the racial harassment of an O'Connor employee.

The case arose when O'Connor was the prime contractor at a University of Massachusetts construction site. Jarvis Aldridge worked for one of the subcontractors on that project. According to the evidence, O'Connor's site manager repeatedly used racial slurs in speaking to Aldridge. These racial slurs were spoken in front of Aldridge's supervisor. Aldridge complained to his employer and also sent a letter to O'Connor. O'Connor investigated and, although Aldridge's allegations were corroborated, no discipline occurred nor did O'Connor ever report back to Aldridge regarding the results of its investigation. Aldridge quit and filed the charge.

In upholding the award of damages against O'Connor for its manager's treatment of a subcontractor's employee, the court stated that the harassment was severe and hostile and the company was aware of the behavior and failed to act. Accordingly, the court held that the company was responsible for the harassment and therefore upheld the award of damages.

"Age Culture" Supports Age Claim

A 17-year, high-performing employee referred to as "grandma" may take her age based demotion claim to a jury, a court ruled on August 28 in the case of *McDonald v. Best Buy, Inc*. Apparently, the beginning of the end for McDonald was when the company changed its focus from its products to its customers, and generally concluded that the older, long-term employees had difficulties adjusting to the new business model.

McDonald was promoted to the manager of customer service at one of Best Buy's stores in Illinois. Sixteen months later, in July 2004, she was warned for failure to adjust to the new business model and encouraged to reduce her work hours to spend more time with her

grandchildren. One month later, a new store manager, who started to refer to McDonald as "grandma," placed her on a performance improvement plan, although according to the evidence, he had no personal knowledge of her performance. Shortly thereafter, while McDonald was on vacation, her subordinates were unable to handle certain responsibilities. Upon McDonald's return, she was demoted two grades for failure to be effective as a manager. She quit and filed this claim.

The court found evidence that supported McDonald's claim, prevented summary judgment, including: the grandma references, replacing her with a 28 year-old, and the company's generalized statements that its long-term employees had difficulty adjusting to the new business model (which resulted in terminating several of them).

Age cases are among the most difficult cases employers face, because of all protected classes, age is the protected class that all jurors have in common. Furthermore, it is more unusual for a long-term age protected employee to engage in a "dramatic incident" or a violation of policy resulting in termination; the more mature employees tend to be more responsible. In these times of increasing unemployment and economic uncertainty, employers should be sure that when terminating or laying off a long term, age protected employee, the employer has the facts to substantiate its business decision was a prudent, non-discriminatory one.

EEO Tips: An Overview Of The ADA Amendments Act Of 2008

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 the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

The stated purposes of the ADA Amendments Act of 2008 as found in Section 2(b) of the Act can be summarized as follows:

1. to carry out the ADA's objectives of providing …clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection…under the ADA; (emphasis added)

2. to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines Inc.* and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

3. to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc*. with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline* which set forth a broad view of the third prong of the definition of "handicap" under the Rehabilitation Act of 1973;

4. to reject the standard enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that the terms "substantially limited" and "major" in the definitions of disability under the ADA need to be interpreted strictly to create a demanding standard for qualifying as disabled, and that to be substantially limited in performing a major life activity under the ADA an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives;

5. to convey Congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

6. to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this act, including the amendments made by this Act.

In order to put into perspective the purposes of the Amendments Act of 2008 summarized above, it might be helpful to review the main issues in the cases referred to.

In the *Sutton* case the main issue was whether severely myopic, twin sisters who had applied for global pilot positions with the airline, but were rejected, were "qualified individuals with a disability" under the ADA. Notwithstanding their myopia, the sisters could fully meet the visual requirements of the job through the use of corrective lenses. The Supreme Court concluded that they were not "substantially limited" because "corrective, mitigating measures should be considered in determining whether an individual is disabled." Additionally, the Supreme Court found that they had not been "regarded as being disabled" (the third prong in the definition of "disabled") because they had alleged that they had been regarded as being disabled only for the position of Global Pilot, not a class of jobs or a broad range of jobs.

In the *School Board of Nassau County* case a teacher was fired because of her susceptibility to tuberculosis. The Supreme Court in this case interpreted the Rehabilitation Act of 1973 broadly in holding that the teacher was a "handicapped individual" under the Act and that the School Board could not discriminate against her solely because of her handicap.

In the *Toyota Motor Manufacturing* case, the main issue was whether an employee who had carpal tunnel syndrome and was unable to move her hands and arms in a manner to perform some of the functions of her job, but could do other things, was a "qualified individual with a disability." The Supreme Court held that she was not "substantially limited" because in order to be substantially limited an individual must have an impairment that prevents or severely restricts the individual from doing tasks that are of central importance to most people's daily lives.

To address the purposes listed above, the ADA Amendments Act contains an expanded section on "**Definitions of Disability"** which amends generally Section 3 of the ADA, 42 U.S.C. 12102. In substance the various subparagraphs of Section 3 can be summarized as follows:

1. This subparagraph defines the term "disability" substantially the same as before;

2. This subparagraph defines the term "**Major Life Activities**" both: (A)"In General" terms and (B) as to "**Major Bodily Functions**" in some detail. For example Major Life Activities include but are not limited to eating, sleeping, walking, reading, concentrating, thinking and working. Major Bodily Functions include immune system, normal cell growth, bowel, bladder and reproductive functions. Some of these had been included in the EEOC's Interpretative Guidance but were not specifically mentioned in the ADA, itself.

3. This subparagraph defines the term "**Regarded As Having An Impairment**" in connection with the three-prong definition of "Disability."

4. This subparagraph contains a new section entitled **"Rules of Construction Regarding The Definition of Disability"** which further clarifies how the term "disability" shall be construed. For example, subparagraph (A) indicates that the Act should be broadly construed; subparagraph (C) states that "*An impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability;"* subparagraph (E) RC states that *"The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures"…*and goes on to indicate such measures as medication, medical supplies, prosthetics, mobility devices, the use of assistive technology and learned behavioral or adaptive neurological modifications. Subparagraph (E)(ii) states, however, that "*The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."* (Emphasis added)

The provision in subparagraph 3(4)(E) above is somewhat curious in view of the fact that eyeglasses or corrective lenses were at issue in the *Sutton v. United Air Lines* case and that one of avowed purposes of the ADA Amendments Act of 2008 was to reject *Sutton*. However, the Act in Section 5 (b) does lessen the impact of sub-paragraph 3(4)(E)(ii) in providing that "*a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard test, or selection criteria…is shown to be job-related…and consistent with business necessity.*

Finally, it should be mentioned that the EEOC is expected to revise its Regulations to conform its explanation of the term "substantially limits" to the provisions of the ADA Amendments Act. In the past the EEOC regulations stated that the term "substantially limits" means that the individual is "significantly restricted" in the ability to perform a broad range of jobs or a class of jobs. The Amendments Act makes it clear that "*An impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability;"*

The foregoing in substance provides an overview of the major provisions of the ADA Amendments Act of 2008. The full extent of its impact on employers probably will not be known for sometime. However, given the explicit intent by Congress that the term "disability" should be broadly construed, the coverage of individuals who may qualify as being "disabled" almost certainly will increase. Nonetheless, Senate Bill 3406 was supported on a bi-partisan basis in both the House and the Senate and received positive support from a number of national disability organizations, veterans organizations, the U. S. Chamber of Commerce, the National Association of Manufacturers, and the Society for Human Resource Management.

Please feel free to call this office at (205) 323-9267 if you have questions or need legal assistance in resolving your ADA problems.

OSHA Tips: PPE And Training Violations To Be More Costly?

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.

OSHA recently proposed a rule that could significantly increase penalties for violating standards that require personal protective equipment (PPE) use and training. The proposal is said to clarify that when an OSHA standard requires an employer to provide PPE or training to employees, the employer must do so for each employee subject to the requirement. **Each employee not protected may be considered a separate violation for penalty purposes.** The proposed rule, entitled "Clarification of Remedy For Violation of Requirements To Provide Personal Protective Equipment and Train Employees," affects OSHA's general industry, construction and maritime standards. In commenting on the proposal, the Assistant Secretary of Labor for OSHA Edwin G. Foulke, Jr., said "we want employers to understand the importance of complying with OSHA's PPE rule for each and every one of their employees."

The agency's longstanding position has been that a separate violation occurs for each employee who is not given required PPE or training and that a separate citation item and proposed penalty may be issued for each. However, as noted in the discussion of this proposed rule, the requirements for PPE and training are addressed with different wording in the various applicable standards. For instance, some standards indicate the employer must "institute a training program and ensure participation in the program," while others might state that training must be provided to "each employee."

OSHA normally calculates a penalty by grouping all findings of noncompliance with a particular section of a standard into one cited violation. However, under what is known as their "egregious citation policy," OSHA may treat each separate instance of noncompliance as a discrete violation with an individual penalty. OSHA first employed this method of assessing a penalty in 1986. In that case, separate penalties were calculated for alleged egregious violations of respiratory protection and recordkeeping requirements.

Subsequently, on October 21, 1990, the agency issued Compliance Directive 2.80 (later designated CPL 02-00-080), Violation-by-Violation Policy. This directive was to govern the manner in which the field staff would identify cases meriting use of the policy and the way in which it would be implemented. OSHA offers the opinion that large proposed penalties that accompany violation-by-violation citations are not primarily punitive nor exclusively directed at individual workplaces. Rather they serve the public policy purpose of increasing the impact of OSHA's limited enforcement resources. This policy of allowing multiple penalties is limited to "egregious" cases where the violation is alleged to be willful. It must also

meet at least one other criterion, such as, the violation resulted in worker fatalities or there exists an extensive history of prior violations.

A decision of the Occupational Safety and Health Review Commission (OSHRC) in 2003 suggested that minor variations in the wording of the various PPE and training provisions of OSHA standards might affect their authority to cite and penalize separate violations. *The Secretary of Labor v. Erik K. Ho Ho Ho Express, Inc.* involved OSHA's citing with separate penalties for each of eleven employees not provided respirators or training while exposed to asbestos fibers. Hearing the case on appeal, the OSHRC, by a 2-1 vote, disallowed the assessment of eleven separate penalties. The commission concludes that "per-employee" penalties may be applied only when the cited standard clearly requires actions directed to individual employees.

Adoption of this proposed rule clarifying PPE and training requirements might be expected to lead to continued if not increased use of violation-by-violation assessments. The rule change would not, however, create any new or additional compliance obligations for employers.

Wage and Hour Tips: Current Wage and Hour Highlights

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In an effort to update its regulations under the Fair Labor Standards Act, on July 28, 2008, the Department of Labor proposed to revise certain regulations to reflect statutory amendments that have been enacted over the last thirty plus years. Several of the proposed revisions are summarized below.

- In 1974 Congress extended an existing FLSA overtime exemption related to the sale of automobiles, trucks or farm implements to include any salesman primarily engaged in selling boats and eliminated the overtime exemption previously provided for parts men and mechanics servicing trailers or aircraft. **Several appellate courts have interpreted the overtime exemption for "any salesman, parts man, or mechanic primarily engaged in selling and servicing automobiles" to include service advisors. The proposed change makes clear that this overtime exemption may apply to service advisors.**

- Also in 1974 Congress also revised aspects of the FLSA's tip credit provisions which, as further revised by amendments enacted in 1977, impact the existing regulatory guidance on tips. **The rules are being updated to reflect current statutory law regarding tip credits**, which currently requires that a tipped employee (one who customarily and regularly receives at least $30 per month in tips) receives a cash wage of at least $2.13 per hour and additionally receives sufficient tips to bring the employee up to the minimum wage. Further the employer must notify the employees of any required tip pool contribution amount.

Although not related to the proposed changes in the regulations, employers should be aware that recently, a restaurant chain operating in Colorado and Arizona had to pay $500,000 in back wages to tipped employees due to their requirement that all tipped employees share 3% of their tips with managers and cooks. The employees were also required to contribute $.75 per day to a "dine and dash" fund that was used to cover unpaid checks if a customer left without paying. The tip regulations make it very clear that tips are the property of the employee and the employee can only be required to share them with other tipped employees such as bartenders, bus persons and other wait staff.

- Another proposed change relates to meal credits. Several courts have ruled that an employer may claim credit against wages for the "reasonable cost" of providing employees with meals and may require their acceptance as a mandatory condition of employment. The proposal updates the regulations to include the agency's enforcement position adopting these court decisions.

- In 1985 Congress added the use of comp-time in lieu of overtime payments for certain public sector employees. Several appellate court decisions have interpreted the

statutory language in section 7(o)(5) of the FLSA concerning public sector employers' obligation to grant employee requests to use compensatory time off "within a reasonable period after making the request" if the use of compensatory time does not unduly disrupt the agency's operations. The use of comp-time is only allowed for employees of public agencies such as state, county or city governments or public schools and hospitals. Private employers may not use comp-time instead of paying overtime.

- In 1996 Congress amended the Portal-to-Portal Act to define certain circumstances when pay is not required for employees who use vehicles provided by their employers for home-to-work commuting purposes. **This allows an employer to furnish an employee a vehicle to commute from his home to his first job site without making the time compensable provided it is within the normal commuting area and pursuant to an agreement between the employer and employee.**

The 1996 amendments also created a new FLSA youth opportunity wage that allows an employer to pay an employee under 20 years of age a minimum wage of $4.25 per hour during the employee's first 90 consecutive calendar days of initial employment with the employer.

- Congress, in 1998, amended the definition of "employee" to exclude individuals who volunteer solely for humanitarian purposes to work for private non-profit food banks and who receive groceries from those food banks.

- In 1999 Congress added a new definition for employees engaged in "fire protection activities." This change affected the scope of the partial overtime exemption in section 7(k) of the FLSA for firefighters and emergency medical personnel.

- The FLSA was amended in 2000 to provide that stock options meeting certain criteria were an additional type of remuneration that could be excluded from the regular rate when computing overtime pay.

- The 2007 amendments increased the general FLSA minimum wage in three steps, to: $5.85 per hour effective July 24, 2007; $6.55 per hour effective July 24, 2008; and $7.25 per hour effective July 24, 2009.

The proposal also clarifies and updates the regulations governing the "fluctuating workweek" method of computing overtime pay for salaried nonexempt employees whose weekly work hours vary or fluctuate, and who receive a fixed salary as compensation (apart from overtime premiums) for whatever hours they are called upon to work in a workweek, whether few or many. The proposed clarifying revision would eliminate language that discourages employers from paying bonuses or premium payments in addition to salary (*e.g.*, nightshift differentials or hazard pay) by sometimes invalidating the fluctuating workweek method of overtime computation where such payments are made.

The DOL published the proposed regulations in July 2008 and allowed for public comment through September 11. It is not known when they may publish the final regulations but after reviewing the proposal it does not appear that it makes any major changes from DOL's current enforcement policies. However, if you have any questions regarding these areas or other Fair Labor Standards Act issues please do not hesitate to call.

2008 Upcoming Events

AFFIRMATIVE ACTION UPDATES

Birmingham – December 9, 2008
Bruno Conference Center

Huntsville – December 11, 2008
Holiday Inn Express

EFFECTIVE SUPERVISOR®

Huntsville-October 2, 2008
Holiday Inn Express

Birmingham-October 8, 2008
Cahaba Grand Conference Center

Muscle Shoals-October 16, 2008
Marriott Shoals

Mobile-October 22, 2008
Ashbury Hotel

Auburn/Opelika-October 30, 2008
Hilton Garden Inn

WAGE AND HOUR REVIEW

Birmingham – December 10, 2008
Vulcan Park

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Did You Know…

…that an employee fired one week after she announced that she was pregnant, where the employer gave "shifting" reasons for the termination, presented enough evidence for the court to deny summary judgment and let the case proceed to a jury? *Shepherd v. Geo. W. Park Seed Company* (D.S.C. August 26, 2008). The company stated that Park was terminated because of poor job performance, but she had never received any warnings. The court stated that "adverse employment actions on the heels of a pregnancy disclosure can create an issue of pretext when the employer asserts poor performance only after a pregnancy disclosure."

…that the "no cost" requirement for employees receiving bloodborne pathogens standard (B.P.S.) treatment under OSHA includes pay for travel and non-work time? *Secretary of Labor v. Beverly Healthcare* (3rd Cir. September 4, 2008). Two nurses received needle sticks and sought treatment off-site. The employer paid for the treatment but did not pay for the non-work time to receive the treatment and travel to and from the treatment. The Court of Appeals agreed with the Secretary of Labor that providing treatment for the bloodborne pathogen standard at "no cost" to the employees includes employee travel time for the treatment and the time spent receiving the treatment—"compensating employees for their time and effort in undergoing testing and evaluation is an effective way to ensure that employees who have potentially been exposed to a bloodborne pathogen pursue testing."

…that a union violated the rights of drivers by checking the employers' motor vehicle records to get home addresses and contact them for union organizing purposes? *Pichler v. U.N.I.T.E* (3rd Cir. September 9, 2008). This case arose during a lengthy organizing effort by U.N.I.T.E. toward Cintas drivers. Under the Driver's Privacy Protection Act, access to driving records is limited to litigation or efforts related to law enforcement. The union argued that its organizing effort was indistinguishable from pursuing other unfair labor practice charges and claims against the company for alleged labor law violations. In rejecting the union's argument, the court stated that "the litigation component to U.N.I.T.E.'s campaign should not obscure what U.N.I.T.E. was trying to accomplish---organizing labor."

…that according to a study released on September 18, 2008 by the American Constitution Society for Law and Policy, employment discrimination lawsuits declined by 40% since 2001? The report stated that the most significant declines occurred in courts within the Eleventh, Fifth, Fourth, Eighth, and Sixth Circuits. The authors concluded that those circuits are "perceived by the Bar to be the most hostile to employment discrimination plaintiffs." The study states that because those named appellate courts are perceived as unfavorable to plaintiffs in employment claims, more plaintiff's attorneys are filing claims in state court and also pursuing Fair Labor Standards Act litigation.

…that "permanent replacements" during a strike are still considered at-will employees? The case of *United Steelworkers v. NLRB* (7th Cir. September 15, 2008) involves striker replacements who signed employment applications stating that they were "at-will" employees. The union argued that such language meant that at the end of the strike, the replacement employees had to be terminated. However, in upholding the NLRB, the court found that the striker replacements and employer had a "mutual agreement" that the replacements were considered "permanent" employees in the context of the striker replacements and, therefore, did not have to be terminated when the strike ended. The court stated that employers have the right "to hire permanent employees while imposing certain conditions on their retention, so long as there is a mutual understanding that the employer's desire to re-instate a striker will not cause the replacement employee's discharge."

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