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Employment Law Bulletin

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Claire F. Martin Joins LMVT Team

It is with great pleasure that we announce Claire Martin's association with the firm. Claire graduated *magna cum laude* from Samford University's Cumberland School of Law. While in law school, Claire had the distinction of serving as Editor in Chief of the *Cumberland Law Review* and also was a member of the Moot Court Executive Board. In law school, Claire studied a wide range of legal areas, but developed a great interest in employment law.

Following her graduation from law school, Claire worked for several years at a mid-sized law firm in Birmingham, Alabama, where her practice focused on employment defense and general litigation matters. Claire has experience defending employers of all types and sizes and in various industries, including restaurants, hotels, food distributors, manufacturing facilities, security companies, employment agencies, medical facilities, affordable housing agencies, and non-profit employers. Claire's employment practice focuses on employment discrimination cases before administrative and governmental agencies and state and federal court arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938 and the Family and Medical Leave Act of 1993. Claire has also defended employer clients in related Fair Housing and Public Accommodation matters involving the Fair Housing Act and Title II and III of the Americans with Disabilities Act. In her Fair Housing Practice, Claire has defended private landlords against tenant and the federal government's claims of discrimination and harassment and successfully overseen the implementation and compliance of a multi-year Consent Decree between her client and the federal government. Claire has also assisted clients in resolving property accessibility issues in compliance with Title II and III of the Americans with Disabilities Act in order to avoid litigation.

Claire completed her undergraduate degree at Auburn University, where she majored in Political Science. In her spare time, Claire enjoys being with her husband and 18 month old son and cross stitching.

Claire joins our continuing commitment to provide our clients and other relationship partners' creative and dynamic support with the highest level of professionalism.

Employer Investigations: NLRB Limitations on Confidentiality Reversed

The case of *Banner Health System v. NLRB* (D.C. Cir., Mar. 24, 2017), addressed the NLRB's notorious limitation on employer rights to request confidentiality during internal investigations. This case covers private sector, non-union and unionized workforces.

Banner had two elements to its confidentiality rules. First, it required employees during the onboarding process to sign a confidentiality statement which defined "confidential" to include employee information, such as pay, work record and disciplinary matters. Thus, confidentiality meant that an employee may not discuss his or her pay, discipline or work-related issues with other employees. The onboarding acknowledgement stated that a violation of this confidentiality rule could result in "termination and possibly legal action."

The company also established confidentiality rules when conducting internal investigations. These were not written policies but rather during the course of an investigation, employees were told not to discuss the investigation with other employees so the investigation would be "as pure as possible."

The NLRB ruled that both confidentiality rules violated employee rights under Section 7 of the National Labor Relations Act. In addition to trying to unionize or opposing unionization, Section 7 gives employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." The NLRB ruled that both confidentiality policies violated these Section 7 rights, as both explicitly prohibited employees from discussing workplace concerns with other employees.

The Court of Appeals ruled that the onboarding confidentiality agreement was overly broad. The Court said that confidentiality agreements in general are permitted, but the confidentiality agreement in this case restricted employees from exercising their Section 7 rights, such as discussing pay with other employees. Therefore, this aspect of the NLRB's decision was upheld.

The Court declined to enforce the NLRB's second aspect regarding confidentiality, concerning an internal investigation. The Court noted the reasonableness of the need for confidentiality when conducting an internal investigation, particularly involving issues such as harassment. Banner did not have a blanket confidentiality rule when conducting internal investigations, but rather requested confidentiality where it believed confidentiality was necessary to conduct a thorough and proper investigation.

The overreach of the Obama NLRB in this case has now been pared back to the overall state of the law prior to this decision. Confidentiality Agreements in general are permitted, provided that they are not so overly broad as to limit employees from discussing wages or working conditions with others. Requiring confidentiality based upon the nature of an investigation is also permitted, such as investigating harassment, safety, theft or drugs. We are glad to see the D.C. Circuit has brought common sense to this important area of employer rights.

Conflict Among the Courts: Sexual Orientation Covered or Not Covered by Title VII?

Just a few weeks ago in our March 2017 ELB, we discussed *Evans v. Georgia Regional Hospital*, a case where the Eleventh Circuit refuted renewed arguments—supported by the EEOC this time—that Title VII's prohibition of discrimination based on sex includes discrimination based on sexual orientation. A panel of the Eleventh Circuit concluded that it did not by a 2 – 1 vote. On March 31, Jameka Evans requested that the full Court of Appeals sit *en banc* to hear her case.

On Tuesday, April 4, in the case of *Hively v. Ivy Tech Community College*, the full Seventh Circuit Court of Appeals ruled in an 8 – 3 vote that Title VII prohibits discrimination based upon sexual orientation. The lower court initially dismissed the case and a panel of the Seventh Circuit by a 2 – 1 vote upheld the decision that

Title VII did not prohibit discrimination based upon sexual orientation. Interestingly, during oral argument before the full Seventh Circuit, Judge Posner asked the attorney for the Community College, "So who will be hurt if gays and lesbians have a little more job protection?" Note that of the eleven judges who heard the case on the Seventh Circuit, eight were appointed by Republican Presidents.

Greg Nevins is the lead attorney for Hively and Evans. Greg is with Lambda Legal, which pursues LGBTQ issues nationally, and spoke at our firm's Employee Relations Summit in November 2016. In commenting about the *Hively* decision, Mr. Nevins stated "this decision is a game changer for lesbian and gay employees facing discrimination in the workplace and sends a clear message to employers: It is against the law to discriminate on the basis of sexual orientation."

The legal issue is whether "sex" under Title VII includes sexual orientation. No doubt when Title VII was enacted in 1964, the Senate's contemplation of "sex" as a protected class did not include sexual orientation. In fact, it did not include pregnancy, either, which led to the passage of the Pregnancy Discrimination Act in 1978. This issue will likely end up before the United States Supreme Court to consider whether the original intent of "sex" should govern, and thus not cover sexual orientation, or if a reasonable interpretation of "sex" includes sexual orientation. As Mr. Nevins stated at our conference, if an employee is discriminated against based upon a heterosexual relationship that is considered sex discrimination. Therefore, if an employee is discriminated against based upon a relationship with someone of the same sex why would that not be considered sex discrimination? As we have mentioned previously, the best practice overall is to treat sexual orientation as a protected class in employer policies and in employer training regarding fair employment practices, workplace harassment, and retaliation.

Job Transfer as ADA Accommodation

Frequently, an employee with a disability cannot be accommodated for the job which he or she holds, but may be qualified for another position which is vacant. Does the ADA require the employer to transfer that employee over other more qualified candidates? No, at least according to the court in the case of *EEOC v. Methodist Hospitals of Dallas* (M.D. Tex., Mar. 9, 2017).

The EEOC sued on behalf of a patient care technician who was limited in lifting and transporting patients after suffering a job related injury (Remember: Job-related injuries may be disabilities and may also be serious health conditions under the FMLA). The technician met minimal requirements for two vacant positions, but rather than shift the employee to either position, the employer required that she compete for it with other employees. That is, she was not given priority. The EEOC took the position that if she met the minimal qualifications for the job, the employer could not insist on choosing the most qualified.

The EEOC's position in this case is consistent with its ADA guidance, which is that reassignment as the form of accommodation does not require the reassigned employee to be the best qualified for the job. At least two circuit courts rejected the EEOC's position, holding that preferential treatment for the disabled employee is contrary to the ADA. Rather, accommodation is equality of opportunity, not equality of result. That is, if the disabled employee has the opportunity to compete for the position, that is evidence of the employer's efforts to reasonably accommodate.

It is important for employers to handle filling vacancies with internal candidates in the same manner as it would if one of those candidates were not seeking an accommodation. Thus, if the vacancy is filled according to the most senior qualified employee, that is the process that should be followed. If it is filled according to the best qualified employee, that is what should be done. Also, remember that the ADA does not require that the accommodated employee maintain his or her pay rate, if the new job pays less, you may pay that rate to the accommodated employee.

The AHCA Is Still Just A Bill, But Is Showing Signs Of Survival

After the delay of the vote on the American Health Care Act ("AHCA"), the Trump Administration indicated its intent to move its focus to tax reform. However, according to the Wall Street Journal, President Trump has stated that revamping healthcare is still top priority. In fact, sources say that Trump continues to negotiate with the Freedom Caucus as well as Democrats, and that they may be close to bringing the American Health Care Act back to life. GOP lawmakers recently submitted a proposed amendment to the AHCA which would create an invisible risk-sharing program as part of the AHCA's Patient and State Stability Fund (PSSF) program. Such a program would set aside appropriated funds to be used in covering remaining care costs where an insurer's premiums are unable to do so. These programs are designed to lower premium costs without sacrificing the quality of payer coverage. The proposed amendment would allocate $15 billion within the PSSF and then HHS would implement the invisible risk sharing program by providing payments to health insurers for claims for eligible individuals, with the purpose of lowering premiums. If enacted, the risk sharing program would be effective on January 1, 2018 and end on December 31, 2026. States would be required to comply by the year 2020. Additional changes to the AHCA also include providing governors with the power to opt out of certain regulations on the health insurance industry that are part of the Affordable Care Act.

In Other Benefit News…

An appellate ruling by the Seventh Circuit Court of Appeals reminds employers of the risks associated with failure to offer the same benefits to lesbian, gay and bisexual employees and their spouses or domestic partners as they do to non-LGB employees and their spouses/partners. In *Hively v. Ivy Tech Community College,* discussed earlier in this ELB, the Court held that sexual orientation discrimination was inherently encompassed in sex discrimination. Although spousal benefits was not directly addressed in this ruling, the ruling sends a clear message that disparate treatment with regard to employee benefits—including those offered to one's spouse or partner—could form the basis of a discrimination claim.

On Friday, April 7, 2017, President Trump signed legislation sponsored by Texas Republicans Sen. Ted Cruz and Rep. Kevin Brady that will allow states to expand the pool of applicants for unemployment benefits who can be drug tested. The bill nullifies a Department of Labor rule that went into effect in September 2016 that limited drug tests to applicants who had a job that regularly performed drug screenings as part of federal or state law, such as occupations in which employees operated vehicles transporting passengers. Other applicants for unemployment benefits could not be subjected to drug testing as a condition to receiving unemployment benefits. The new law provides more flexibility to states with regard to drug testing applicants for unemployment compensation benefits.

EEO Tips: EEOC and Joint Employers

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.

There has been talk in employment circles recently about the joint employment standard used by the National Labor Relations Board because of its ruling in the *Browning-Ferris Industries of California (BFI)* matter that is making its way through the courts. (Discussed in the December 2016 ELB). This new ruling appears to be a resurrection of the standard NLRB used until the mid-1980s. The Equal Employment Opportunity Commission filed an *amicus* brief in the *BFI* case pointing out that NLRB's new rule is the same as its own joint employer rule. The two agencies have had a connection on this topic since the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, and the Americans with Disabilities Act

all have been interpreted to impose joint employer liability.

Until recently, NLRB's standard has been that, to be recognized as joint employers, entities had to exercise direct and immediate control over day-to-day activities such as supervising, scheduling, disciplining, hiring and firing. Not only did they have to possess such control, they had to exercise it. Some other government agencies also use this standard. However, the EEOC has long held that control does not necessarily need to be exercised. In the *BFI* case, EEOC's brief stated that its standard examines an "entity's *right* to control the terms and conditions of employment, as well as its indirect control …" (emphasis added)

EEOC policy lists many factors to be considered when determining whether a joint employer relationship exists. It makes clear that its standard is flexible and the weight afforded different factors varies by the circumstances. The first and most emphasized factor in EEOC training is who "has the right to control when, where, and how the worker performs the job." Some other aspects of the employment relationship which can be considered are who actually controls the above factors, what type of work is being performed, who furnishes tools/equipment used, who provides benefits, the duration of the job, and whether a continuing relationship exists with either entity. Its Enforcement Guidance also allows "other aspects of the relationship" to be considered and does not require that all or even a majority of the listed criteria be met. Again, EEOC's standard is very flexible.

Liability is not the only issue affected by joint employer rules. A business too small even to be covered by most laws enforced by EEOC will be subject to those laws if it forms a joint employer relationship (as determined by EEOC) and the combined workforces meet the threshold number. The EEOC Compliance Manual says, "To determine whether a respondent is covered, count the number of individuals employed by the respondent alone *and* the employees jointly employed by the respondent and other entities. If an individual is jointly employed by two or more employers, then s/he is counted for coverage purposes for *each* employer with which s/he has an employment relationship."

Please remember that all administrative agencies do not use the same standards to determine coverage for the same or a similar situation. If your company uses employees of another company or supplies workers to another company, in some circumstances it could be liable for the violations committed by that other company. Before forming the relationship, it is wise to ensure that the other company's employment policies are up to the same standards as your own. Even with contractual safeguards in place, EEOC may determine you are responsible for their actions.

OSHA Tips: Workplace Fatalities

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, 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.

During fiscal year 2016, covering October 1, 2015, through September 30, 2016, 1,080 workers were killed on the job. It is noted that this number of work fatalities was reduced 346 percent from 2014 when 4,821 workers were killed while working.

It should be noted that the numbers of fatalities may change from one year to the next but the list of causes for these deaths remain very similar from year to year. This was true for 2016 fatalities As usual, fall protection violations led the list. This standard 29 C.F.R. §1926.501, requires use of an accepted method of fall protection. The total violations were 6,929.

Number 2 on the list in 2016 were the requirements of the hazard communication standard. This includes proper labeling and handling of such materials. The OSHA standard is 29 C.F.R. §1910.1200. The number of violations for this standard was 5,677.

The third most cited violation in 2016 was for scaffolds in the construction industry. The standard referenced is 29 C.F.R. §1926.451. There were 4,431 violations for this violation.

OSHA's respiratory protection standard, 29 C.F.R. §1910.134 was the fourth most cited standard violation in 2016, cited 3,585 times.

The lockout-tag out standard was the fifth most cited standard having 2,765 violations for the year. Total penalties for these came to $2,016,458. This standard 29 C.F.R. §1910.147 requires implementation of procedures to control the unexpected release of energy during maintenance or servicing of equipment.

Wage and Hour Tips: Employment of Minors

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, 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. Mr. Erwin can be reached at 205.323.9272.

Each year as we approach the end of another school year I try to remind employers of the potential pitfalls that can occur when employing persons under the age of 18. While summer employment can be very beneficial to both the minor and the employer one must make sure that the minor's employment is permitted under both the State and Federal Child Labor laws. According to some information I found on the Wage and Hour web site, they are not spending nearly as much of their resources in conducting directed child labor investigations as they have previously. However, they still found more than 1,750 minors employed contrary to the child labor requirements of the Fair Labor Standards Act last year. Consequently, employers still need to be very aware of those requirements before hiring a person under the age of 18.

In 2016, Congress amended the child labor penalty provisions of the FLSA increasing the maximum penalties and implementing an annual escalator provision. Effective February 17, 2017, any violation that leads to **serious injury or death** may result in a penalty of up to $55,808 while the penalty for other prohibited employment of minors may be as great at $12,278. Additionally, the amount can be doubled for violations found to have been repeated or willful.

The Act defines "serious injury" as any of the following:

1. permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

2. permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty; including the loss of all or part of an arm, leg, foot, hand or other body part; or

3. permanent paralysis or substantial impairment causing loss of movement or mobility of an arm, leg, foot, hand or other body part.

Previously, the maximum penalty for a child labor violation, regardless of the resulting harm, was $11,000 per violation. Congress also increased the penalties up to $1,925 for any repeated and willful violations of the law's minimum wage and overtime requirements. According to their web site, they have established certain minimum penalties for specific types of violations. For example, employers are required to have a record of the date of birth of any employee under the age of 19 on file and if the employer has not maintained such a record there is a penalty of $390 per investigation.

Prohibited Jobs

There are seventeen non-farm occupations, determined by the Secretary of Labor to be hazardous, that are out of bounds for teens below the age of 18. Those that are most likely to be a factor are:

- Driving a motor vehicle or being an outside helper on a motor vehicle.

- Operating power-driven wood-working machines.

- Operating meat packing or meat processing machines (includes power-driven meat slicing machines).

- Operating power-driven paper-products machines (includes trash compactors and paper bailers).
- Engaging in roofing operations.
- Engaging in excavation operations.

In recent years Congress has amended the FLSA to allow minors to perform certain duties that they previously could not do. However, due to the strict limitations that are imposed in these changes and the expensive consequences of failing to comply with the rules, employers should obtain and review a copy of the regulations related to these items before allowing an employee under 18 to perform these duties. Below are some of the more recent changes.

1. The prohibition related to the operation of motor vehicles has been relaxed to allow 17-year-olds to operate a vehicle on public roads in very limited circumstances. However, the limitations are so strict that I do not recommend you allow anyone under 18 to operate a motor vehicle **(including the minor's personal vehicle)** for business related purposes.

2. The regulations related to the loading of scrap paper bailers and paper box compactors have been relaxed to allow 16 & 17 year olds to load **(but not operate or unload)** these machines.

3. Employees age 14 and 15 may not operate power lawn mowers, weed eaters, or edgers.

4. Fifteen-year-olds may work as lifeguards at swimming pools and water parks but they may not work at lakes, rivers or ocean beaches.

Hourly Limitations For Minors

There are no limitations on the work hours, under federal law, for youths 16 and 17 years old. However, the state of Alabama prohibits minors under 18 from working past 10:00 p.m. on a night before a school day. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, and non-hazardous jobs (basically limited to retail establishments and office work) up to:

- 3 hours on a school day
- 18 hours in a school week
- 8 hours on a non-school day
- 40 hours in a non-school week
- Work must only be performed between the hours of 7 a.m. and 7 p.m., except from June 1 through Labor Day, when the minor may work until 9 p.m.

To make it easier on employers, several years ago the Alabama Legislature amended the state law to conform very closely to the federal statute. Further, the state of Alabama statute requires the employer to have a work permit on file for each employee under the age of 18. Although the federal law does not require a work permit, it does require the employer to have proof of the date of birth of all employees under the age of 19. A state issued work permit will meet the requirements of the federal law. Currently, work permits are issued by the Alabama Department of Labor. Instructions regarding how to obtain an Alabama work permit are available on the Alabama Department of Labor web site (www.labor.Alabama.gov).

The Wage and Hour Division of the U. S. Department of Labor administers the federal child labor laws while the Alabama Department of Labor administers the state statute. Employers should be aware that all reports of injury to minors, filed under Workers Compensation laws, are forwarded to both agencies. Consequently, if you have a minor who suffers an on the job injury you will most likely be contacted by either one or both agencies. If Wage and Hour finds the minor to have been employed contrary to the child labor law, they will assess a substantial penalty in virtually all cases. Thus, it is very important that the employer make sure that any minor employed is working in compliance with the child labor laws.

If I can be of assistance in your review of your employment of minors do not hesitate to give me a call.

2017 Upcoming Events

EFFECTIVE SUPERVISOR®

Decatur – May 16, 2017
Sykes Place on Bank
726 Bank Street
Decatur, AL 35601
(256) 355-2656
http://sykesplace.com

Montgomery – May 18, 2017
MAX Credit Union
400 Eastdale Circle
Montgomery, AL 3117
(334) 260-2600
https://www.mymax.com/about-max/locations-and-atms/montgomery-eastdale-branch

Huntsville – October 17, 2017
Redstone Federal Credit Union
220 Wynn Drive
Huntsville, AL 35893
(256) 837-6110
www.redfcu.org

Birmingham – October 19, 2017
Vulcan Park & Museum
1701 Valley View Drive, Electra Room
Birmingham, AL 35209
(205)933-1409
www.visitvulcan.com

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"The use of the HRCI seal is not an endorsement by the HR Certification Institute of the quality of the activity. It means that this activity has met the HR Certification Institute's criteria to be pre-approved for recertification credit."

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For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jennifer Hix at 205.323.9270 or jhix@lehrmiddlebrooks.com.

Did You Know…

. . . that a 74-year-old who was replaced by a 68-year-old was discriminated against based upon age? *Massasoit Industrial Corp. v. Massachusetts Commission Against Discrimination, et al.* (Mass. App. Ct. Mar. 23, 2017). William J. Glynn, aged 74, was terminated from his custodian position after a series of absences due to his poor health. Prior to that time period, Glynn had a stellar employment record. Glynn was replaced by a 68-year-old and alleged that he was discriminated against based upon his age because his replacement was six years younger. In upholding an award of $ 141,000 in damages and attorney's fees, the court stated that "the hearing officer found that while Massasoit employed older individuals, [the employer] drew the line at someone who is in his mid-seventies who is confronting sequential health issues." Age discrimination plaintiffs are not required to show that they were replaced by someone younger than age 40 in order to sustain a case. Rather, the question is whether the individual was replaced by somebody "substantially" younger. In this case, a 68-year-old was considered "substantially younger" than the 74-year-old he replaced.

. . . that President Trump, on April 3, told several union leaders they "will always find an open door" during a Trump Administration? This comment occurred when the

President spoke at the North America Building Trades Union Annual Legislative Conference. Participating unions included Plumbers, Pipefitters, Painters, Molders, Operating Engineers and Iron Workers. The President stated that his $1 trillion infrastructure plan will be good for the building trades unions and their members, as will actions that he's already taken regarding the Trans-Pacific Partnership, the Keystone XL and Dakota Access pipeline projects and his overall efforts to give "you the level playing field you deserve." He added that government should stop continuing "to punish America's builders."

. . . that 83% of employees do not have the amount of recommended sleep each night, which causes several workplace issues? This is based upon a survey conducted by CareerBuilder. According to the survey, 52% average between five and seven hours of sleep a night and 6% averaged fewer than five hours a night. Of the 83% who sleep less than what is recommended, 60% state that it impedes their job performance and 22% say they have called in sick because they did not get enough sleep the night before. Additionally, 27% say that the lack of sleep reduces their motivation and 25% say that it makes them less productive. According to the National Institute of Health, "deficits in decision-making and short term memory both occur after even one night of poor sleep." FYI: we have worked with Circadian 24/7 Workforce Solutions, which specializes in working with companies to address sleeping patterns affected by non-traditional schedules.

. . . that on March 27, President Trump eliminated the Fair Pay and Safe Workplaces rule issued by President Obama last October? The rule required federal contractors to disclose labor law violations during the prior three years. Based upon a contractor's labor violations history, they could be "blacklisted" from receiving government contracts. The rule was cancelled in all respects, including the provision that required contractors to provide employees with more detailed information about their pay each pay day.

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