

Pregnant Workers Fairness Act



YOUR WORKPLACE IS OUR WORK.®

Presented by

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About Your Presenter

Education

Vanderbilt University Law School, J.D.
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Bar Admissions

Alabama, Mississippi, and related federal admissions

Selected Awards

Rising Stars, *Super Lawyers*; Top Women Attorneys, *B-Metro Magazine*; Top Attorneys, *Birmingham Magazine*; Up and Coming, *Chambers*.

Recent Presentations

Staying Afloat: Navigating Transitions in Employment Law, Alabama SHRM, Fall 2023 (with Lauren Smith)

Pay, Pregnancy, DEI and Policy, Alabama Council on Behavioral Health, Fall 2023 Conference

The PWFA and PUMP: What's New for Pregnant Workers, Alabama State Bar, Labor and Employment Section, Fall 2023 (with Charles Guerrier)



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Agenda

- What the PWFA really says
- Surprises in the PWFA final regulations
- Modifications or clarifications between draft and final regulations
- Practice pointers
- Your questions



What the PWFA really says:

42 U.S.C. §2000gg *et seq.*



The Pregnant Workers Fairness Act

- Reasonable accommodation required for known limitations caused by “pregnancy, childbirth, or related medical conditions,” except where it would impose undue hardship.
- “Qualified” employees include those who are temporarily unable to perform 1 or more essential functions of the job, if the essential function(s) can be performed again in near future and the inability can be reasonably accommodated.



The Pregnant Workers Fairness Act

- Interactive process.
- Leave—paid or not—cannot be required if another accommodation could be provided.
- Opportunities can't be denied because of anticipated need for accommodation.
- No retaliation.



The Pregnant Workers Fairness Act

- Good faith defense against damages if employer engaged in good faith efforts (including interactive process) to identify an accommodation that provided an “equally effective opportunity” but does not impose undue hardship.
- Coverage and Charge Filing process = Title VII.
- Effective 6/27/2023.

42 U.S.C. §§2000gg *et seq.*



Surprises in the PWFA Regulations



PWFA Final Regulations

Surprises in the PWFA Final Regulations

- Scope of conditions due accommodation/ protection.
- “Qualified” employees may be unable to perform essential job functions for extended, consecutive periods of time.
- Indefinite leave related to current pregnancy will not be a facially unreasonable accommodation request.
- Limitations on employer requests for information.
- Accommodation for harm/pain reduction.



Surprise #1:

Scope of Conditions Potentially Due Accommodation



What Conditions Must Be Accommodated?

- The PWFA requires reasonable accommodations for “pregnancy, childbirth, or related medical conditions.”
- Conditions need not meet any severity threshold.
- Regulations define “pregnancy” and “childbirth” to include current pregnancy, past pregnancy, and future or intended pregnancy.
 - This could include infertility, fertility treatments, and use of contraception.
 - By expansively defining “pregnancy” and “childbirth,” the EEOC gets to a list of related medical conditions that looks like this:



“Related Medical Conditions”

- Termination of pregnancy, inc. by abortion;
- Nerve injuries;
- Wound infections related to delivery;
- Anemia;
- Endometriosis;
- Sciatica;
- Carpal tunnel syndrome;
- Chronic migraines;
- Postpartum depression, anxiety, or psychosis;
- Frequent urination or incontinence;
- Loss of balance;
- Vision changes;
- Varicose veins;
- Changes in hormonal levels;
- Menstruation;
- Lactation;
- Low milk supply, engorgement, plugged ducts, mastitis.



Pregnancy, Childbirth & RMCs



**EEOC Commissioner,
Andrea Lucas**

Statement re: Vote on Final Rule to Implement the Pregnant Workers Fairness Act

“[I]n essence, the final rule redefines the common and unambiguous term ‘pregnancy’ as the ‘capacity for pregnancy.’...Thus the final rule opens the door to requiring accommodations potentially extending to a myriad of conditions ranging from infertility to menstruation to hormone issues to menopause.”



Related Medical Conditions

What about side effects of mitigating measures?

Example #4/Definition of “Qualified”: One of the essential functions of Elena’s position as a park ranger involves patrolling the park. Park rangers also answer questions for guests, sell merchandise, and explain artifacts and maps. Due to her postpartum depression, Elena is experiencing an inability to sleep, severe anxiety, and fatigue. Her anti-depressant medication also is causing dizziness and blurred vision, which make it difficult to drive. Elena seeks the temporary suspension of the essential function of patrolling the park for 12 weeks.

1. Known limitation and request for accommodation: Elena’s inability to sleep, anxiety, fatigue, dizziness, and blurred vision are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; she needs an adjustment or change at work due to the limitation; and she has communicated this information to the employer.



Surprise #2:

Qualified E'ees Include Those
Temporarily Unable to Perform
Essential Functions



What Do You Mean by “Temporary”?

PWFA Statute

“...an employee or applicant shall be considered qualified if –

- (A) any inability to perform an essential function is for a temporary period;
- (B) the essential function could be performed in the near future; and
- (C) the inability to perform the essential function can be reasonably accommodated[.]”

42 U.S.C. § 2000gg(6)

PWFA Final Reg

“an employee or applicant shall be considered qualified if ...

- (i) Any inability to perform an essential function is for a temporary period, where “temporary” means lasting for a limited time, not permanent, and may extend beyond “in the near future”;
- (ii) The essential function(s) could be performed in the near future, where “in the near future” means the ability to perform the essential function(s) will generally resume within forty weeks, if pregnancy-related.”

29 C.F.R. § 1636.3(f).



What About “In the Near Future”?

- If inability to perform essential function is current-pregnancy-related, means 40 weeks, generally.
- If inability to perform essential function is not related to a current pregnancy, no presumptive term applies.
- New request/limitation = new clock.



What About “In the Near Future”?

Further...Time on Leave Doesn't Count

- If leave is granted as an accommodation, “the relevant inquiry is whether the employee is reasonably expected to perform the essential functions, with or without reasonable accommodation, at the end of the leave...or if the employee is qualified as set out in paragraph (f)(2) *after returning from leave.*” §1636.3(f)(1).
- “Leave as a reasonable accommodation does not count as time when an essential function(s) is suspended and, thus, is not relevant for the second part of the definition of ‘qualified.’” Appendix A. ¶49.



Indefinite Leave Requests Not Facially Unreasonable



What About Indefinite Leave?

Though the EEOC acknowledges indefinite leave would be an unreasonable accommodation under the PWFA, just as under the ADA, “Pregnancy is a temporary condition with an ascertainable end date; the request to temporarily suspend an essential function(s) due to a current pregnancy will never be indefinite and will not be more than generally 40 weeks.” (Appendix A, para. 43) (emphasis added).



What About Indefinite Leave?

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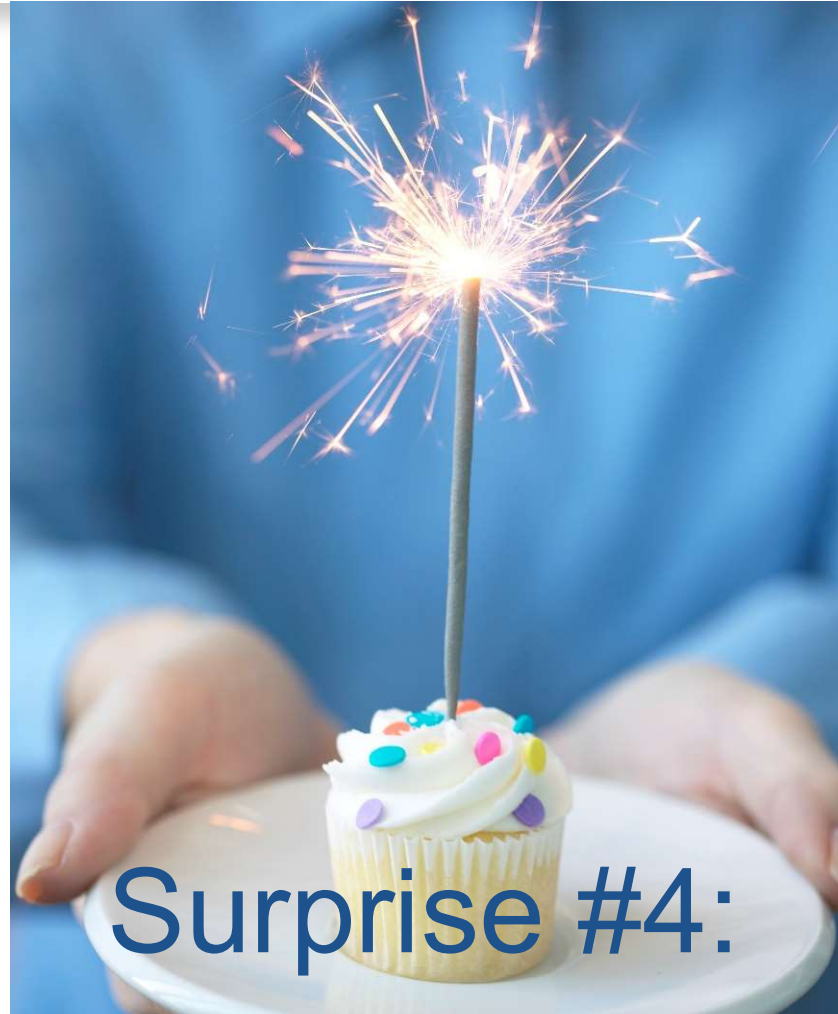


indefinite
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, para. 43)



If you blink...

...you might miss that the PWFA is an unpaid leave bonanza, for employees who want to use it as such.



Surprise #4:

Limitations on Employer Information Gathering



Limits on E'er Info Gathering

Employer must accept request made by a “representative.”

- Representative could be a friend, family member, union rep, health care provider, etc.
- However, employer may engage directly with employee thereafter, except where representative is legal representative or if employee is incapacitated.



Limits on E'er Info Gathering

E'er must act on request to...

- “a supervisor, a manager, someone who has supervisory authority for the employee or who regularly directs the employee’s tasks (or the equivalent for an applicant), human resources personnel, or another appropriate official, or by following the steps in the covered entity’s policy to request an accommodation.”

§1636.3(d)



Actual Image of Plaintiff's Bar at CLE





Limits on E'er Info Gathering

Reasonable Requests

Requests for documentation describing or confirming:

- Physical or mental condition;
- That condition related to pregnancy, childbirth, or RMC;
- That change at work needed.

§1636.3(I).

Unreasonable Requests

Requests for documentation where:

- Limitation and needed adjustment are obvious and employee self-confirms need is pregnancy, childbirth or RMC-related.
- Employer already has adequate info on the three bullets to left.
- Employee seeks a presumptively-reasonable accommodation.
- Employee seeks pumping or nursing related worksite accommodation, self-confirms need.
- Accomm. available as a matter of policy w/o documentation.



Limits on E'er Info Gathering

- Per regs, employers also may not:
 - Select the healthcare provider or type of healthcare provider;
 - May have to accept documentation from doulas, midwives, as well as doctors or nurses.
 - Require use of a form, even for employee self-confirmation (which may be verbal only).
 - Require use of a particular request protocol.
 - Require an employee use magic words.

§1636.3(l)(2)-(4)



Limits on Employer Info Gathering

Example #6: A pregnant employee tells her supervisor, “I’m having trouble getting to work at my scheduled starting time because of morning sickness.”

Example #8: An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy.

Example #10: An employee tells a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer’s online form for requesting an accommodation.



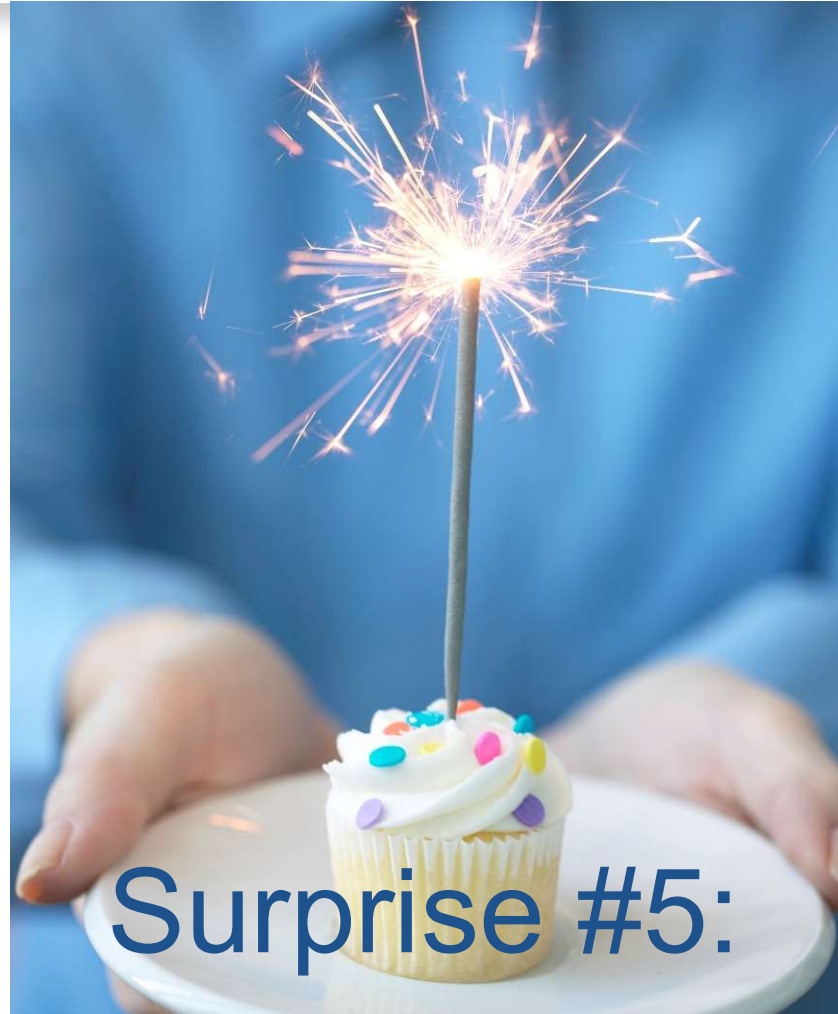
Limits on E'er Info Gathering

Example #6: A pregnant employee's supervisor is having trouble getting her to complete my scheduled starting time of 9:00 a.m. every morning.

Example #8: An employee tells a human resources specialist that they are continuing to work because they are concerned that they will harm their pregnancy.

Example #7: An employee needs more frequent bathroom breaks than needed because the employee is pregnant. The employer's online form for requesting accommodation is not complete.

**Did you get recognize each of these as a request for accommodation?
Would every supervisor, manager, and HR specialist in your company recognize and refer these correctly?**



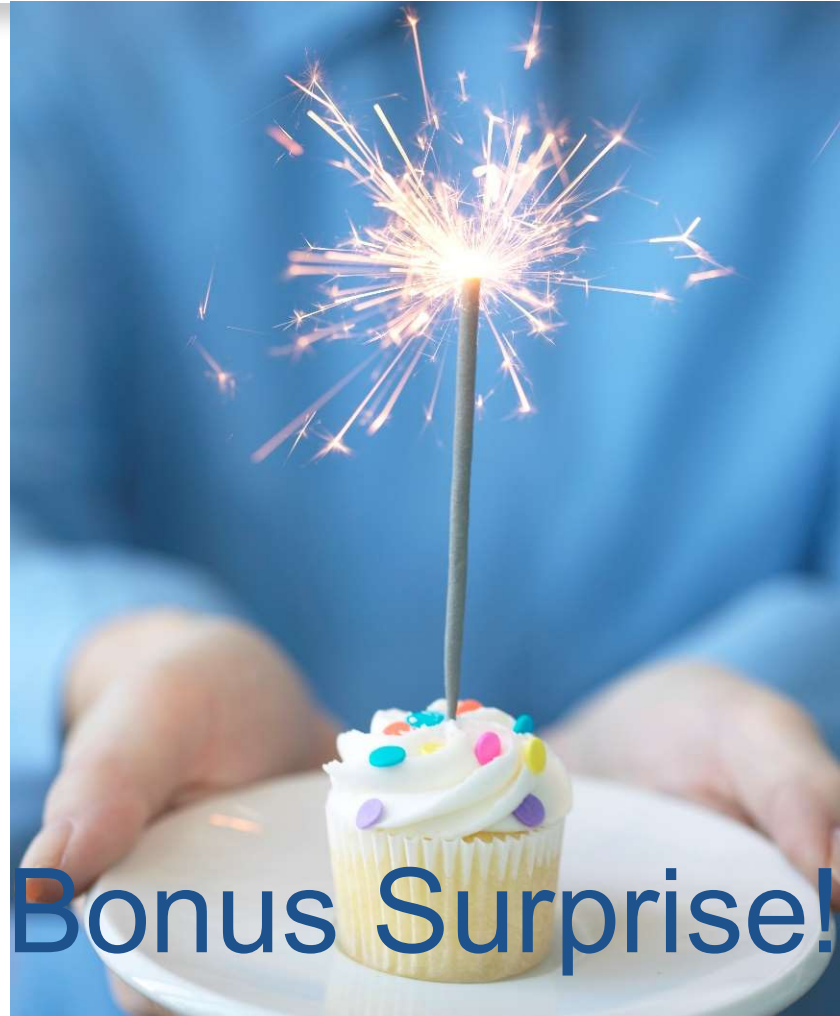
Surprise #5:

Accommodations for Harm or Pain Reduction



Alleviating Increased Pain or Risk

- In the Appendix, the EEOC describes employer obligation to provide reasonable accommodations to employees with additive limitations due to pregnancy.
- Frighteningly, most examples include speculative and employee-made medical conclusions, such as a chemical in the environment causing a cough.



Requirement to Provide Personal Devices(?)



Must E'er Supply Personal Devices?

“Nour is pregnant, and she drives a delivery van. Her employer uses vans that do not have air conditioning. It is summer and the temperature is over 100 degrees. Nour tells her supervisor she is pregnant and needs a change at work because of the risk to her health and the health of her pregnancy because of the excessive heat. Her supervisor orders equipment that will help Nour, such as a personal cooling vest or neck fan. While waiting for the equipment to be delivered, the employer does not have other possible work that Nour can do. In this situation, the employer could tell Nour that she may take leave while waiting for the equipment to arrive.”

Appendix A, Example #24



Mods and Clarifications between Draft and Final Regs



Modifications/Clarifications

Only the pregnant (or potentially or previously) pregnant employee is entitled to accommodations.

“Limitation means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, of the specific employee in question.”

§1636.3(a)(2)

“The PWFA does not create a right to reasonable accommodation based on an individual’s association with someone else who may have a PWFA-covered limitation. Nor is a qualified employee entitled to accommodation because they have a physical or mental condition related to, affected by, or arising out of someone else’s pregnancy, childbirth, or related medical conditions. For example, a spouse experiencing anxiety due to a partner’s pregnancy is not covered by the PWFA. Time for bonding or time for childcare also is not covered by the PWFA.”

Appendix A, ¶6.



Modifications/Clarifications

Employer need not provide paid leave or benefit continuation specific to pregnancy.

“Employees must be permitted to choose whether to use paid leave...or unpaid leave to the same extent that the covered entity allows employees to choose between these types of leave when they are using leave for reasons unrelated to pregnancy, childbirth, or related medical conditions. Similarly, an employer must continue an employee’s health insurance benefits during their leave period to the extent that it does so for other employees in a similar leave status, such as paid or unpaid leave. An employer is not required to provide additional paid leave under the PWFPA beyond the amount provided to similarly situated employees.”

Appendix A, ¶64.



Modifications/Clarifications

Increased emphasis on lactation-related accommodations, including promoting leave for nursing breaks from interpretive guidance appendix to the regulation.

Reasonable accommodation related to lactation includes, but is not limited to:

“(iii) Accommodations related to nursing during work hours (where the regular location of the employee’s workplace makes nursing during work hours a possibility because the child is in close proximity);”

§1636.3(i)(4)(iii).



Modifications/Clarifications

Increased emphasis on interim accommodations, other than leave.

“Interim reasonable accommodations are not required. However, providing an interim reasonable accommodation is a best practice under the PWFA and may help limit a covered entity’s exposure to liability under 42 U.S.C. 2000gg–1(1) and § 1636.4(a)(1) (“An unnecessary delay in providing a reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee may result in a violation of the PWFA if the delay constitutes a failure to provide a reasonable accommodation.”).

Preamble, 89 Fed. Reg. 29123-124

“...the interim reasonable accommodation should be one that allows the employee to continue working.” §1636.4(a)(1)(vii).



Practice Pointers



What to do now?

- Train, train, train.
- Consider to what extent company will comply with the EEOC's most extreme over-reaches.
- Unified accommodation request policy.
 - With a specific complaint/review policy.
- Job Description reviews.
- If using TPAs for leave/accommodation administration, review.
- Evaluate/eliminate “light duty” from vocabulary, except in reference to a specific and employment counsel-reviewed or CBA-required program.
- Train, train, train.



What to do now?

Train, train, train your supervisors:

- Non-discrimination, non-retaliation.
- Recognizing requests/limitations.
- Who to refer request to and expectation of immediacy.
- What's the safe harbor move when HR isn't around?
- Caution in taking disciplinary action or adverse evaluation for reasons ultimately arising from an accommodation.



What to do now?

Train, train, train your supervisors:

- What not to say:
 - “If I did that for you, I’d have to do it for everyone.”
 - “No.”
 - “You’ll be on unpaid leave until we can sort it out.”
 - “You need to make a request like that to your own supervisor [or HR].”
 - “I can’t do anything until it’s in writing [or on a particular form].”



What to do now?

Train, train, train your supervisors:

- Maintaining privacy around employee health information.
- Not to overstep into removing a pregnant employee from a desired but dangerous or demanding position when she hasn't requested it or hasn't demonstrated an inability to perform the job.
- The one question that's safe to ask in any situation:
 - “I see you are having trouble with _____. Do you need anything from me to help?”



Your Questions



Your Questions

- Is this an FMLA expansion, or does it apply to employers <50 employees?
 - The PWFA applies to all employers of 15 or more employees, and employees and applicants are immediately covered.
- Are there any time limits for the length of the accommodations?
 - Not really.
 - Remember that temporary/in the near future refers to suspensions of essential job functions.



Your Questions

- What can an employer do to prove unreasonable requests?
 - Put managers to test on “essential functions.” (Same definition under ADA and PWFA).
 - What they are; which ones would need to be suspended.
 - Show an absence of such requests being granted in past.
 - Be able to articulate costs in proportion to overall business operation.

Also, be sure non-privileged communications don't use outcome-oriented language.



Your Questions

- If employee has severe menstrual cycles and requests to work from home one week per month, could this be a reasonable accommodation?
 - EEOC overreach makes this potentially pregnancy-related. So, it is due reasonable accommodation analysis.
 - But also consider categorizing under ADA (and don't forget FMLA rights).
 - Review essential functions.
 - Review impact on overall business operations, particularly work available for employee to do and who will absorb the employee's on-site work.



Your Questions

- What is our obligation for employees requesting remote work because baby will not take a bottle? What if this lasts two years?
 - To be rejected, any accommodation must satisfy undue hardship standard, which has gotten progressively harder to do in all remote work cases.
 - Consider making accommodation for breaks instead of remote work. EEOC made breaks for nursing (not just pumping) where mom works close to baby an in-regulation example.
 - Also, an employer could seek documentation here; the limitations on doing so for lactation are related to workplace accommodations of a place to pump or leaving the worksite to nurse. §1636.3(l)(1)(iv).



Your Questions

- Are any industries excluded from or have modified PWFA obligations w/r/t accommodations?
 - No.
- Will I get a PDF of these slides?
 - Yes, within 48 hours.



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LMVT's Effective Supervisor

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- May 23, Huntsville
- October 22, Birmingham
- October 24, Decatur
- Register at:
<https://www.lehrmiddlebrooks.com/training/live-seminars/>



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