



**Labor and Employment Seminar**  
**May 20, 2015**

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**Labor and Employment Legal Update**  
By: Brad Hiles, Kayt Kopen, Terry Potter

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**New Regulations for Federal Contractors**

- Final Rule effective April 8, 2015
- Prohibits federal contractors and subcontractors from discriminating on the basis of sexual orientation and gender identity
- Applies to contracts “entered into or modified” after April 8, 2015

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### New Regulations for Federal Contractors

- Requires adding sexual orientation and gender identity to EEO policies
- Requires ensuring restroom access policies do not discriminate
- Does not require contractors to conduct data analysis
- Does not require contractors to collect any information about applicants' or employees' sexual orientation or gender identity

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### EEOC: Defining Sex Discrimination

- The EEOC continues to argue gender identity discrimination is sex discrimination under Title VII
  - Found gender identity discrimination for first time in May 2012
    - *Macy v. Holder*
  - Settled first transgender suit in April 2015
    - *EEOC v. Lakeland Eye Clinic*
      - ✓ Two payments of \$75,000 to aggrieved individual
      - ✓ Must implement gender and transgender discrimination policy
      - ✓ Must train managers and employees

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### U.S. Supreme Court: UPS Case

- *Young v. UPS, Inc.*,
  - Pregnant employee with a lifting restriction was denied a light-duty accommodation that was provided to other employees.
  - She sued under the Pregnancy Discrimination Act, alleging that the failure to provide her light duty was pregnancy discrimination.
  - The Supreme Court announced a new set of rules for evaluating claims of pregnancy discrimination based on a failure to accommodate.



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**NLRB: Fast Track Rule for Elections**

- Final Rule effective April 14, 2015
  - Known as “ambush rule” and “quickie election rule”
  - Tilts election procedures in unions' favor
  - Elections may be held in as few as 13 days from date of petition
  - Leaves employers with less time to:
    - Respond to petition
    - Provide employees with information prior to voting

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**NLRB: GC Memo on Employee Handbooks**

- Released on March 18, 2015
  - NLRB aggressively policing employee handbooks in non-unionized workplaces
  - GC says: “most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act,” but that “even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act” are not allowed.”

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**NLRB: GC Memo on Employee Handbooks**

If ...

(1) mere maintenance of work rule has “chilling effect” **OR**

(2) employees likely to reasonably construe work rule as having “chilling effect”

on right to engage in “concerted activity” for purpose of “collective bargaining or other mutual aid or protection,” then work rule is unlawful.

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**NLRB: GC Memo on Employee Handbooks**

- Provides examples of what NLRB believes are lawful vs. unlawful policies:
  - Unlawful: "Taking unauthorized pictures or video on company property is prohibited."
  - Lawful: "No cameras are to be allowed in the store or parking lot without prior approval from the corporate office."
- Beware: copying NLRB "approved" policies may still violate NLRA because all policies are read in context

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**OSHA: New Reporting Requirements**

**4 events that must be reported:**  
 Fatality (an old requirement)  
 In-patient hospitalization  
 Amputation  
 Loss of an eye

**3 ways to report:**  
 Call OSHA Area Office nearest to the workplace  
 Call 24-hour OSHA hotline (1-800-321-OSHA)  
 Use event reporting application at [www.osha.gov](http://www.osha.gov)



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**Will OSHA Investigate in Person?**

40% Probability for the "new reporting" issues.

100% Probability in the case of a fatality.

*Exception:* Heart Attacks, depending on the circumstances.



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### New Standard for Construction Companies Effective August 3, 2015



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### New Whistleblower Reinstatement Strategy

- *Perez v. Lear Corporation* (S.D. Alabama, May 7, 2015)
- OSHA obtains a Restraining Order before determining if a violation (retaliation) was present.
- Restrained from firing or threatening workers at the Selma plant from raising safety concerns with OSHA or publicizing on-the-job health concerns.
- Not "preliminary reinstatement" (an MSHA remedy)

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### Limiting Liability – Injury Reporting

- Immediately investigate the root cause(s) of incidents involving death, hospitalization, amputation or eye loss.
- Hire an expert to do it if your staff is too distraught or internal resources are limited.
- Learn why/how it happened before OSHA does.
- Correct hazards immediately.

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## Limiting Liability – Confined Spaces

- At or before the Pre-Job Conference, identify all confined spaces.
- Purchase air monitors, fall protection and rescue equipment now.
- Train rescue teams now.
- Prepare your health & safety managers and job superintendents for inspections addressing confined spaces.

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## Limiting Liability – Whistleblower TROs

- Don't panic. This is not a change in the direction of whistleblower law (just enforcement).
- Always ensure there are valid, non-retaliatory reasons for discharging a whistleblower.
- Limit internal discussion/correspondence about "suspect whistleblowers" upon receipt of anonymous complaints.

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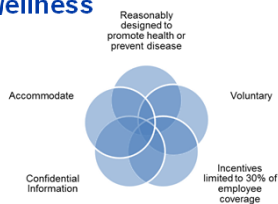
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## EEOC: Employer Wellness Programs

- Proposed new rules regarding wellness programs under the Americans with Disabilities Act (ADA)



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### MO Supreme Court & Arbitration

- *Baker v. Bristol Care, Inc., et al.*
  - MO Supreme Court held that continued at-will employment is not valid consideration for agreement to arbitrate
    - Agreement entered into by parties at time employee was given promotion and raise
    - Agreement included mutual arbitration provision
    - Agreement allowed employer to modify agreement with 30 days' notice to employee

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### Technology & E-Discovery — Is Your Legal Hold Process Meeting Your Ethical Obligations?

By: Tessa Jacob

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### Ethical Duties & Discovery Obligations

- Duty of Candor Toward the Tribunal (ABA Model Rule 3.3)
- Duty of Fairness (ABA Model Rule 3.4)
- Duty of Competence (ABA Model Rule 1.1)

Fed. R. Civ. P. 26 (f) & (g)

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### ABA Model Rule 1.1, Comment 8 Maintaining Competence

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”



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### 14 States Have Adopted Comment 8

- Arizona, effective Jan. 1, 2015
- Arkansas, effective Jun. 28, 2014
- Connecticut, effective Jan. 1, 2014
- Delaware, effective Mar. 1, 2013
- Idaho, effective Mar. 1, 2014
- Kansas, effective Mar. 1, 2014
- Massachusetts, effective Jul. 1, 2015
- Minnesota, effective Apr. 1, 2015
- New Mexico, effective Dec. 31, 2013
- North Carolina, approved Jul. 25, 2014
- Ohio, effective Apr. 1, 2015
- Pennsylvania, effective Nov. 21, 2013
- West Virginia, effective Jan. 1, 2015
- Wyoming, effective Oct. 6, 2014



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### CA Proposed Formal Opinion Interim No. 11-0004 Either be competent in e-discovery, associate with others who are, or decline representation.



“Not every litigated case involves e-discovery. Yet, in today’s technology world, almost every litigation matter potentially does. The chances are significant that a party or a witness has used email or other electronic communications, stores information digitally, and/ or has other forms of ESI related to the dispute.”

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## Attorney Handling E-Discovery Should be Able to .....

- Initially assess e-discovery needs and issues, if any
- Implement/cause to implement appropriate preservation procedures for electronically stored information (ESI)
- Analyze and understand client's ESI systems and storage
- Identify custodians of relevant ESI
- Perform data searches
- Collect responsive ESI in a manner that preserves its integrity
- Advise client on available options for collection and preservation of ESI
- Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan
- Produce responsive ESI in a recognized and appropriate manner

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Analyze & Understand Company's/Client's IT Infrastructure

## IT Infrastructure



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## IT Considerations

- EMAIL
  - System/version
  - Where can email be stored?
    - PSTs/OSTs/NSFs
  - Auto purges – by date
  - Size restrictions
  - Server location (UTC off-set)
- EMAIL ARCHIVE
  - Does it contain all email for relevant time frame?
  - Journaling
  - Configuration Questions
    - Migration of sever email
    - Migration of PSTs

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## IT Considerations - continued

- User Files
  - Metadata concerns
- Computers
  - Image
- IT Policies for departing employees
- Backup Cycle
- Hardware upgrades or rotations
- Software upgrades
- Databases

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Legal Hold Processes for ESI

## Implement Appropriate Preservation Procedures



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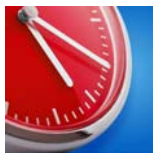
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## Step 1 - Legal Hold Notice

- Timing
- Recipients
  - Relevant Custodians
  - Managers/Supervisors/Assistants
  - Employees who fill former employees' position
  - Source Custodians
  - IT Dept
  - Third Parties



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### Legal Hold Notice - Custodians

- Duty to Preserve
- All potentially relevant documents
- Define "documents"
  - Hard Copy
  - ESI
  - Drafts
  - Non-identical copies
- Relevant Time Frame
- Relevant Topics/Subjects
- Relevant Sources
- Instructions on how to comply
- Acknowledgement form

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### Legal Hold Notice – IT Dept.

- Suspension of anything that could over-ride relevant data
  - Email
  - Backup tapes/disks/drives
  - Departing employees
  - Hardware upgrades/rotations
  - Software upgrades
- Notify the correct people (Sentinel & others)
- Help IT with Holds

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### Step 2. Determine if Preservation Requires Collection

- Dynamic Data
  - Email
- Metadata – dates
- Computers
  - Deleted files
  - Departing employees
- Mobile Devices
- Databases



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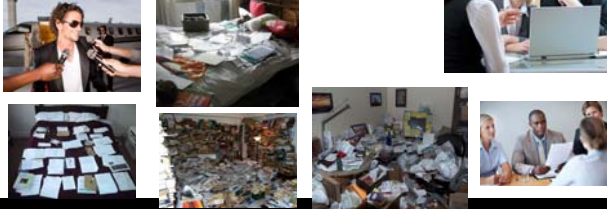
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### Step 3. Interview Relevant Custodians

- “Non- IT” controlled data



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### Step 4. Communicate, Document & Monitor

- Communicate
  - Who is responsible in-house for preservation & collection
  - Who has supervisory responsibility for verifying?
- Document
  - Hold Notices
  - Collection

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### Step 4. Continued

- Imaging decisions
  - COC
- Backup tape evaluation
- Affirmative steps to monitor

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### Step 5. Supplement Holds

- Newly identified custodians
- Scope of case changes
- Reminder Notice



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### Step 6. Release Holds

- Return data to Ordinary Course Document Retention Schedule
- Notify Custodians
- Notify IT
- Notify Outside Counsel
- Notify Third Parties

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**Rapid Fire Presentations:**  
**Husch Blackwell L&E Attorneys and their**  
**Frequently Asked Questions**

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**CAN MY COMPANY CLASSIFY**  
**WORKERS AS INDEPENDENT**  
**CONTRACTORS INSTEAD OF AS**  
**EMPLOYEES?**

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Independent Contractors	Employees
<ul style="list-style-type: none"> <li>• Drivers work whenever they want</li> <li>• Drivers provide their own cars</li> <li>• Company merely connects riders with drivers for a fee</li> <li>• Company has no obligation to provide riders to drivers</li> <li>• Drivers decide <i>how</i> provide the ride</li> </ul>	<ul style="list-style-type: none"> <li>• Company sets the rate</li> <li>• Company sets rules for conduct</li> <li>• Company sets vehicle standards</li> <li>• Drivers can be “deactivated”</li> <li>• Company selects drivers who pass certain tests</li> <li>• Drivers may not solicit future rides</li> </ul>

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▪ “[T]he jury in this case will be handed a square peg and asked to choose between two round holes.”

- U.S. District Judge Vince Chhabria

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### Independent Contractor Factors

- Are the services an **integral part of the employer's business**?
- How **permanent** is the relationship?
- How much is the **worker's investment** in the relationship?
- What is the nature and degree of **control** over the worker?
- What are the worker's opportunities for **profit and loss**?
- What **level of skill** is required to perform the work?

A WRITTEN AGREEMENT IS HELPFUL – GET AN INDEMNIFICATION IF YOU CAN

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## DO WE HAVE TO CREATE LIGHT DUTY POSITIONS TO ACCOMMODATE DISABILITIES OR PREGNANCY?



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**Accommodations under the ADA**

- ADA Requires Reasonable Accommodations Unless The Accommodation Causes An Undue Hardship
  - ADA does not require employers to create new positions
  - Consider alternative existing positions
  - Consider removing marginal functions to accommodate

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**Accommodations for Pregnancy**

- Federal Pregnancy Discrimination Act – *Young v. UPS*
  - Examine whether accommodation is provided for others
  - Any neutral rationale will be scrutinized closely
- State Pregnancy Discrimination Laws May Have Additional Requirements (Illinois)

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**ARE EMPLOYEES ENTITLED TO SUCCESSIVE PERIODS OF ADA LEAVE?**



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## Americans with Disabilities Act (ADA)

The ADA prohibits discrimination on the basis of an employee's disability.

The ADA requires an employer to provide reasonable accommodations to an employee or job applicant with a disability, unless doing so would cause undue hardship for the employer.



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## Categories of ADA Leave

- Definite Duration
- Indefinite Duration
- Successive Requests

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## Best Practices

- Examine the costs and complications of extending the leave.
- Ask for as much information as possible to confirm ability to return and to consider other accommodations.
- Open-ended leave requests are unlikely to be reasonable accommodations, but should not end the interactive process.
- If an employee is discharged due to inability to return to work, try to replace promptly and consider suggesting the employee re-apply when released.
- Avoid policies that set a maximum leave entitlement.
- Avoid policies or practices that require a full release to return to work.

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## CAN OUR COMPANY BE LIABLE FOR OUR EMPLOYEES' OFF-DUTY COMMENTS IN SOCIAL MEDIA?



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- Yes.
  - Defamation
  - Harassment
  - HIPAA violations
- No duty to monitor (unless company-sponsored or promoted); but once known company must take action

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## DISCIPLINING EMPLOYEES

- Considerations:
  - NLRA Protections
  - Whistleblower Activity
  - 1<sup>st</sup> Amendment
- Permitted For Unlawful or Threatening Comments, Disclosure of Confidential Information and Negative Comments about Clients/Customers.

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**EVOLVING, UNSETTLED AREA OF LAW**

- Many Different Sources of Law May Apply
  - Federal statutes and regulations
  - State statutes and regulations
  - Local regulations and ordinances
  - Industry regulations (FINRA, FTC, SEC, etc.)

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**IS MY COMPANY AT RISK OF A CLASS ACTION LAWSUIT BECAUSE OF OUR BACKGROUND CHECK POLICY OR PROCEDURE?**

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**Flood of FCRA Class Action Lawsuits**



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**Before Obtaining A Consumer Report**

- Clear and Conspicuous Written Disclosure
- Written Authorization
- Compliance Authorization

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**Before Taking an Adverse Action**

- Must provide the individual with:
  - A notice of the adverse action
  - A copy of the report
  - Document entitled: *A Summary of Your Rights Under the Fair Credit Reporting Act*

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**Other Issues to Consider**

- State laws;
- Compliance after taking adverse action
- Individual does NOT have to show actual damages to collect punitive damages and get attorneys' fees

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**HOW CAN WE CREATE AN APPLICATION THAT CONFORMS TO ALL BAN-THE-BOX LAWS?**

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■ Has a state law (may also have city and county fair chance policies).  
■ Has at least one city or county fair chance policy.

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**Beware of Nuances**

- Expunged records
- Sealed records
- Annulled records
- Arrests without convictions

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**OPTIONS:**

- Create different applications and be mindful about all applicable laws
- Use a conservative application without asking about criminal history and wait until a conditional offer is made to inquire
- Use one application that excepts various locales\*

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**MAY WE ASK  
EMPLOYEES TO TAKE  
A LIE DETECTOR  
TEST?**



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1. Require – No.
2. Request As Part of Theft Investigation – Yes.
3. Must Show:
  - a. Employee Access
  - b. Reasonable Suspicion

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4. Employer Polygraph Protection Act (EPPA 29 U.S.C. § 2006(d))

5. Must Give Written Notice to Employee At Least 48 Hours Before Test

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6. Tell Why?

- Describe
- Property
- Explain Access/Suspicion
- Provide Questions

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**MAY WE USE A TEMPLATE SEVERANCE AGREEMENT FOR ALL EMPLOYEES?**

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### Drafting Severance Agreements

- Do you have a severance policy?
- Is the employee over 40?
- Is the employee being discharged in connection with:
  - a “group termination,” or
  - as part of a “voluntary retirement program?”

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### Drafting Severance Agreements

- Are there other agreements between the employee and the company that should remain in full force and effect?
  - (e.g., non-compete, non-solicit, non-disclosure)
- Is the employee in possession of company property?
- Does the employee have a pending complaint against the company?

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## IS EMPLOYEE X EXEMPT UNDER THE FLSA?



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**Executive Exemption:**

- Authority to hire or fire **OR**
- Particular weight given to recommendations for significant personnel decisions (e.g., hiring, firing, advancement, promotion, etc.)
  - Authority is not enough; they must actually do it!
  - Be sure you can prove it happened.

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**Administrative Exemption:**

- Exercise discretion and independent judgment **with respect to** matters of significance.
  - Not satisfied by discretion with regard to insignificant matters.
  - Not satisfied by involvement with significant matters without discretion.

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**Questions?**

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