Benefits and Employment Briefing

QUARTERLY NEWSLETTER

Summer 2017

Top 5 Things Brokers and Their Clients Need to Know about HIPAA

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1. Brokers, Employers, and Plan Sponsors have Different Roles under HIPAA

In order to shore up HIPAA compliance, brokers and their clients must first understand exactly which requirements apply to them. Under HIPAA, two types of entities have compliance obligations – Covered Entities and Business Associates. Covered Entities include healthcare providers, healthcare clearinghouses, and health plans. In other words, a business that is not involved in the healthcare industry is not subject to HIPAA on its own. It is only when the employer becomes a plan sponsor that it takes on HIPAA obligations. It is that same relationship with a health plan that creates an obligation for brokers. Once a broker becomes involved with a health plan, and begins to see Protected Health Information (PHI) from that plan, it becomes a Business Associate.

Covered Entities such as health plans and Business Associates like brokers have different compliance obligations. Before the passage of the Health Information Technology for Economic and Clinical Health Act (HITECH Act), Business Associates took on HIPAA obligations indirectly through Business Associate Agreements. In the agreements, Business Associates promised to follow the privacy and security provisions of HIPAA on the same basis as the Covered Entity they were supporting. If the Business Associate violated HIPAA, it was liable to the Covered Entity, but not directly to the government. That all changed, however, when the HITECH Act created direct liability for Business Associates.

Although their roles are different, compliance obligations are now similar between Covered Entities and Business Associates. Just like Covered Entities, it's generally required that brokers who see PHI follow the privacy and security rules, maintain their own written HIPAA policies, conduct an annual risk assessment, provide a Notice of Privacy Practices upon request, and put Business Associate Agreements in place with all Covered Entities with which they exchange PHI.

2. HIPAA Compliance Is More Important Than Ever

Final regulations under the HITECH Act became effective in 2013. The Act requires the U.S. Department of Health and Human Services (HHS), the entity responsible for HIPAA enforcement, to complete a defined number of HIPAA audits per year. HHS began Phase 2 of its HIPAA Audit Program in 2016 to "review the policies and procedures adopted and employed by covered entities and their business associates to meet selected standards and implementation specifications of the Privacy, Security, and Breach Notification Rules." Penalties for HIPAA violations are steep; several prominent cases have resulted in fines exceeding $1 million. HIPAA also imposes criminal penalties for some willful acts of non-compliance.

In addition to the audit risk, the ubiquity of data breaches makes compliance even more important.

3. The Value of a "Hands-Off" Approach Cannot Be Underestimated

Don't forget that compliance obligations can vary for plan sponsors depending on whether a health plan is fully-insured or self-insured.

Fully-insured plans can maintain a "hands-off" approach to PHI by ensuring the plan sponsor never sees it. Instead, the broker can prepare aggregated, de-identified information known as Summary Health Information. In that case, the law allows the plan to comply with HIPAA by simply using the insurance carrier's HIPAA policies and procedures, and there is no need to maintain separate HIPAA policies. But the broker and plan sponsor must be vigilant to avoid receiving individually-identifiable information, including information produced by claims assistance. This type of service for employees can interfere with a plan's "hands-off" approach. In addition, sponsoring a flexible spending account may also negate the "hands-off" exception for plan sponsors.

While fully-insured plans may be able to avoid full-blown HIPAA compliance by following a "hands-off" approach to PHI, this is not the case for self-insured plans. The law assumes that plan sponsors of self-insured plans will see PHI, and for this reason, self-insured plans must maintain their own compliance programs, separate and apart from any third-party administrator or stop-loss carrier.

4. It's a Good Time to Go Back to the Basics

Brokers who are Business Associates and plan sponsors of self-insured plans or plans that do not take a "hands off" approach to PHI will find themselves with onerous compliance requirements. It's a good time to take stock of those obligations and make sure each entity is meeting its obligations, including:

- Maintaining HIPAA privacy and security policies
- Distributing or maintaining a Notice of Privacy Practices
- Honoring individual rights created by HIPAA
- Contracting with third-party vendors to protect health information
- Amending the plan to allow it to share information with the plan sponsor
- Certifying that the plan sponsor will protect such information
- Training personnel
- Appointing Privacy and Security Officials
- Securing IT systems
- Conducting an annual risk assessment

5. Breach Analysis Has Changed

In addition to creating direct liability for Business Associates, the HITECH Act also changes the way brokers and their clients should think about HIPAA violations.

When a misuse of PHI occurs, HIPAA requires Covered Entities and Business Associates to conduct a thorough, good-faith analysis to determine whether the misuse rises to the level of a breach. A "breach" is the unauthorized acquisition, access, use, or disclosure of unsecured PHI which compromises the security or privacy of such information.

Depending on the severity of the breach, covered entities could face reporting and notification requirements that include notifying HHS, affected individuals, and even the media. For this reason, whether a misuse rises to the level of a breach requires careful examination.

In brief, a breach contains the following elements: 1) an unauthorized acquisition, access, use, or disclosure; 2) of unsecured PHI; 3) resulting in an impermissible disclosure under the privacy rule; 4) that compromises the security or privacy of such PHI; and 5) to which an exception does not apply.

Under the final regulations for the HITECH Act issued by HHS, which became effective on September 23, 2013, the concept of what "compromises" the security or privacy of PHI has changed. Previously, a breach occurred only if there was a significant risk of financial, reputational, or other harm to the individual. But the 2013 final regulations remove this "harm standard" and instead require a four-part risk assessment intended to focus on the risk that PHI has been compromised in a more objective way.

The 2013 regulations provide that a covered entity must presume that an acquisition, access, use, or disclosure of PHI in violation of the privacy rule is a breach. This presumption holds unless the covered entity demonstrates that there is a "low probability" that the PHI has been compromised based on a risk assessment which considers at least the following factors: 1) the nature and extent of the PHI involved, including the types of identifiers and the likelihood of re-identification, 2) the unauthorized person who used the PHI or to whom the disclosure was made, 3) whether the PHI was actually acquired or viewed, and 4) the extent to which the risk to the PHI has been mitigated.

Brokers should work with their clients to make sure a health plan's Privacy and Security Officials have been notified of any misuse or disclosure of PHI, and consider reaching out to legal counsel for further guidance.

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Sexual Harassment in the Headlines: Why Does It Matter for the Average Employer?

Recent headlines involving high profile figures and terminations naturally increase employee awareness regarding sexual harassment in the workplace – and a corresponding increase among employees regarding workplace rights. As a result, employers should prepare for employees to ask questions about harassment/discrimination policies and possibly to report potential (or real) policy violations. Failure to properly identify and handle reports of suspected harassment or discrimination can result in monetary judgments, attorney's fees, reduced employee morale and negative media exposure costly to your business. In this article, we offer seven steps to better protect your business.

Know the Applicable Laws

Under federal law, Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination and harassment in the workplace. The most common harassment claims are (1) "hostile work environment" generally arising when repeated unwelcome conduct creates a workplace so hostile or offensive that the employee resigns; and (2) "quid pro quo" generally occurring when a supervisor seeks to exchange sexual favors from a subordinate for favorable treatment. Many states have similar state laws and some states have laws that are much more expansive than federal law.

Implement a No-Harassment Policy and Update Regularly

Best practices start with effective up-to-date policies. When was the last time you reviewed your no-harassment policy? Does it include a definition of harassment, examples of harassment, reporting procedures for employees experiencing or witnessing harassment, and language protecting "reporters" from retaliation? (Hint: Your policy needs such language to be comprehensive.) Have you thought about your policy from a practical perspective? Many policies direct employees to lodge complaints with their "immediate supervisor" but an employee's immediate supervisor is often the very person about whom the employee wants to complain. Further, before listing a supervisor (or anyone) as the point of contact, confirm that all of your designated contacts have been properly trained to notify more senior leaders as well as to respond appropriately to the situations that might be reported. Failure to train all designated points of contact often results in untrained supervisors or contacts minimizing allegations as mere joking, ignoring employee sensitivities, or otherwise condoning unlawful behavior. To keep problems from being overlooked, consider referring employees to a trained HR individual or upper management. Why? Consider a recent $50,000 settlement out of North Carolina where an employer allegedly failed to promptly stop harassment when an employee complained of inappropriate touching and sexual comments. The employee alleged the harassment was witnessed by management and had been reported several times.

Communicate Company Policy

Next, clearly communicate your policies against harassment/discrimination/retaliation by including them in your employee handbook, posting them on your intranet, and regularly disseminating them. You should maintain records of these communications to your employees.

Train

Train your supervisors and managers on how to handle complaints. Training should include examples of unacceptable comments and behavior. Managers need to understand that harassment may take various forms, including sending or forwarding inappropriate emails or sharing of electronic communications and photos (consider recent headlines involving active-duty officers under investigation for sharing nude photos of female troops). Managers also must be trained to recognize a complaint because complainants do not always use the words “harassment” or “hostile work environment,” but should be taken seriously regardless. In fact, many complainants emphasis that they really are not even complaining! Even so, a manager or notice must investigate and resolve the problem or else report the problem to someone with the authority to achieve a resolution.

Investigate

When the company becomes aware of an issue, it should swiftly investigate in a thorough and impartial manner. Before starting an investigation, an employer needs a well thought out investigatory plan that is appropriately tailored to the nature of the complaint, the persons to be interviewed, the nature of the business, etc. When conducting interviews, questions should be asked in a way that is not accusatory, overly familiar, or impartially supportive. Investigations should include review of all pertinent information (including text messages and electronic communications) and should be well documented. Often, an employer may choose to ask the complaining employee or “victim” (who may or may not be the same individual) to provide a written statement of their allegations. Investigators should know that, while they can tell employees that information will be maintained as confidentially as possible, they cannot guarantee complete confidentiality due to the need to fully investigate.

Take Remedial Measures

Once your investigation is complete, take swift and effective corrective action where appropriate. The law does not discriminate in its application and neither should you. Regardless of whether your investigation finds improper conduct by a member of upper level management or the new intern at the front desk, corrective action should be taken, up to and including termination. Alternative remedial measures may include a strong warning, transfer of the wrong-doer, provision of a new supervisor, counseling/training, or re-issuing company policy, among many other options. The most important goal of any corrective action taken – the misconduct must stop.

Call Your Employment Attorney

Call your attorney – not your real estate attorney or your tax attorney but your employment attorney. Your employment attorney can provide valuable advice throughout the complaint, investigation and remedial action process. Your attorney can evaluate your policies, provide training, create an investigation outline, and more. To the extent your company operates in multiple states or a state with specific requirements beyond Title VII, your attorney can advise you on whether state law requires that certain information be included in your no-harassment policy and whether training is mandated.

Conclusion

One does not need to go farther than the daily newspaper or evening news show to see that sexual harassment allegations can arise in any organization and involve wrong-doers at all levels within an organization. Learning how to handle these situations internally can lessen your risk that employee concerns and complaints become expensive lawsuits and negative media coverage.

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It's Just Marijuana: Employers Nationwide Struggle with Increased Acceptance

We've entered a new era of acceptance when it comes to the legally permitted use of marijuana. As of today, 28 states have legalized medical use of the drug, and eight states permit its recreational use. With over half of the states permitting some form of marijuana use, employers may be understandably confused about how this shifting stance will impact their businesses and current workplace drug testing programs. Some common questions we've fielded of late include:

1. What does the patchwork of state laws mean for our national employment policies?
2. What if our strict drug testing policies make it difficult to hire and retain workers?
3. What if we are covered by federal drug-free workplace rules, federal safety or similar regulations, or run a business with numerous safety-sensitive positions?
4. Can we maintain a zero-tolerance policy in a state that permits medical marijuana use?
5. What if an employee with a medical marijuana card says that we need to make a reasonable accommodation to comply with the Americans with Disabilities Act (ADA)?

These are just a small sampling of the questions that have crossed employers' minds (and our desks) recently. This article will attempt to answer these questions through the lens of two states at different stages of the marijuana legalization cycle, and provide a discussion of employer experiences in those states.

Legal Background

Despite the flurry of state-level legalization, federal law still classifies marijuana as an illegal substance. The U.S. Drug Enforcement Agency lists marijuana as a Schedule I narcotic, making it illegal under the federal Controlled Substances Act (CSA). Under President Obama, however, the U.S. Department of Justice (USDOJ) adopted a policy to forgo enforcement of the federal law as it applies to marijuana in compliance with their states' respective laws.

However, key players in the Trump administration have indicated they will take a hardline approach. In a March 2017 press conference, White House Press Secretary Sean Spicer hinted that federal authorities might home in on states where recreational use is legal. Further, U.S. Attorney General Jeff Sessions, who is responsible for heading any efforts by the federal government to crack down on marijuana use, is staunchly opposed to the use of marijuana.

Case Studies: Colorado And California

In 2000, Colorado voters passed Amendment 20, allowing the medical use of marijuana. Twelve years later, Coloradans voted to legalize the use of recreational marijuana through Amendment 64 to the state constitution. Since then, the marijuana industry in the state has exploded. According to the State Department of Revenue there was a total of 2,976 licensed marijuana businesses (retail and medical) in Colorado as of May 1, 2017, including 479 retail stores. These numbers paint a picture of robust demand and the use of cannabis in the state. Presumably, much of that demand comes from Colorado residents who are also employed within its borders. Of course, other demand comes from many visitors to Colorado who will be returning to workplaces in other states.

Although some states, Arizona and Minnesota for example, protect the employment of medical marijuana card holders whose use violates zero-tolerance policies, Colorado does not. In 2015, the state Supreme Court held that employees do not have protection from disciplinary action, including loss of employment, if they violate their employers' workplace drug policies through the use of medical marijuana.

Many employers were relieved by this decision, comforted to know they could continue to enforce zero-tolerance drug policies. For some, the relief was short-lived; businesses began to realize that enforcing zero-tolerance policies could result in serious difficulties recruiting and retaining a workforce. Over the past few years, Colorado employers have struggled with this issue, choosing to address it in various ways. None, however, are completely satisfactory in achieving employers' goals.

Meanwhile, although California was the first state to decriminalize marijuana for medicinal use with the Compassionate Use Act of 1996, it wasn't until more than 20 years later that Californians legalized its recreational use. On November 8, 2016, California voters passed Proposition 64, which allows adults aged 21 and over to possess small amounts of marijuana and up to six plants. Although Prop 64 received substantial support (56 percent of the vote), the numbers indicate that a noteworthy portion of voters (44 percent) still oppose legalized recreational use of the drug.

Although Prop 64's passage immediately allowed Californians to possess and cultivate their own plants, selling marijuana for recreational use will not be legal until at least January 1, 2018. By then the state will have developed regulations and issued licenses for retail stores. State finance officials predict that approximately 4.8 million Californians (a little over 10 percent of the state's population) will purchase marijuana at the outset of the regulatory rollout, and that the number will increase significantly over the following several years.

Similar to Colorado, the California Supreme Court held in 2008 that employers are not required to accommodate an employee's use of medical marijuana. Further, Prop 64 specifically states that employers may continue to enforce zero-tolerance policies prohibiting the use of marijuana, regardless of the reason for use.

California employers need to be able to improvise and adapt to the changing legal landscape with an eye on both federal and state law. Given that a sizeable portion of California's voting population disfavored legalized recreational use, it is uncertain what will happen when January 1, 2018, rolls around. The new law might entice more Californians to use the drug, enable current users to consume more of the drug, and relax the attitudes of users such that they bring it into the workplace either in plant or edible form. To prepare for this change, employers need policies in their arsenals that will allow them to make adjustments as the impact (or lack thereof) becomes clearer.

Strategies for Navigating the Changing Legal Landscape

As we head into this new era, you should examine your personnel policies to see how they address marijuana use. Review them with a critical eye and ask yourself whether these policies, which were probably written in a bygone era, are still right for your business and workforce today. Most critically, ask whether you still need or want a zero-tolerance policy.

The answer to that question may depend on your line of business, whether the position or type of work is safety-sensitive, and your typical employee demographic. Further, the federal Drug Free Workplace Act (DFWA) obligates federal contractors and grantees to maintain a workplace that is free of "illegal drugs" as defined by the CSA. Employers who fall within the constraints of the DFWA have additional obligations to consider beyond those listed above.

If you are not subject to federal drug-free workplace standards or other state or regulatory requirements to maintain a zero-tolerance policy, and are without safety-sensitive positions, you might have a little more freedom when designing workplace drug policies. In some ways, that freedom makes for more complicated decision and policy-making.

For example, employers who are not required by federal law to enforce zero-tolerance policies may wonder whether they must then provide an ADA reasonable accommodation to an employee who has a medical marijuana card. The answer depends on the state in which the employer is located. In enacting their medical marijuana laws, some states (Oregon, for example) created additional provisions that expressly state employers have no duty to accommodate employees who use medical marijuana. But New York, Arizona, Minnesota, and Illinois have enacted specific provisions that require just the opposite.

The case law regarding reasonable accommodation for medical marijuana in states where the law is silent on the issue (California, for example) have overwhelmingly determined that, because it is an illegal drug under the CSA, employers have no obligation to accommodate employees who use medical marijuana. The ADA excludes from its protections employees or applicants "who [are] currently engaging in the illegal use of drugs" as defined by the CSA.

Few employers want to announce they are throwing away their drug policies, which might as well serve as a signal to employees that they are free to do whatever they want. Many employers, however, have expressed ambivalence in assuming any sort of role – such as workplace drug testing – that effectively monitors employees' off-duty conduct. Your employee who uses marijuana at Saturday night's party will likely test positive on Monday's drug test, even though that employee is no longer under the influence of marijuana.

Although there is no perfect answer, and each "solution" has its own legal risk, employers have found some relief for their hiring and retention problems with the following options:

- Maintain zero-tolerance drug testing, but only at the time of hire.
- Announce any such testing in advance as part of the job-posting process, allowing potential applicants time for marijuana to clear from their systems.
- Retain the right to test employees who appear impaired while at work.
- Remove marijuana testing from the drug-panel test.
- Raise the threshold at which an employee's THC level is deemed acceptable under workplace testing policies.
- Do away with pre-employment and random drug testing, and retain only reasonable suspicion testing.

Because each of these options may still present legal risks, it is always a good idea to discuss any proposed changes to workplace drug policies with your employment attorney before implementation.

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Church-Affiliated Employers Have Big Win in the Supreme Court

The Supreme Court of the United States recently overturned three Circuit Court rulings *(Advocate Health Care Network v. Stapleton; St. Peter's Healthcare System v. Kaplan; and Dignity Health v. Rollins)* and held unanimously that employee benefit plans established and maintained by church-affiliated organizations such as hospitals or schools qualify for the "church plan" exemption under the Employee Retirement Income Security Act (ERISA) regardless of whether the plan was established by a church. This decision is a huge win for church-affiliated health care providers and other organizations who have consistently relied upon the church plan exemption in the design and administration of their benefit programs. Although the underlying cases primarily dealt with pension plan funding, the decision also impacts the welfare plan compliance of those organizations.

These three cases, which wound their way to the Supreme Court, are just a few of the recent cases challenging the exemption from ERISA of pension plans sponsored by church-affiliated organization. In the three cases before the U.S. Supreme Court, the plaintiffs were concerned that, unlike retirement plans of similarly situated employees working for secular employers, the exemption from ERISA leaves their retirement benefits at risk because ERISA's fiduciary, vesting, and funding requirements do not apply. Because of the impact to the nonprofit community relying on the exemption and excessive costs that would be borne if thousands of plans were retroactively deemed subject to and out of compliance with ERISA, the U.S. Supreme Court agreed to consolidate and review all three cases.

As background, Congress carved out an exemption for church plans from ERISA's comprehensive regulatory scheme to avoid excessive entanglement between government and religion. The initial exemption for church plans was then expanded in 1980 to more broadly include church-affiliated organizations within the scope of the exemption, as well as "churches." Based on a narrow reading of the amended exemption, three appellate courts held that, in order for the exemption to apply, the employee benefit plan must have first been established by the church to which the organization is affiliated. This interpretation, if upheld, would be in direct contrast to the long-standing position taken by the Internal Revenue Service (IRS), the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor (DOL), which over the last 30 years have issued numerous rulings to church-affiliated organizations, including the defendants in this case, that their employee benefit plans qualify as "church plans" for purposes of the ERISA exemption.

The Supreme Court agreed with the IRS, PBGC and DOL that a plan does not first have to be established by a church for the exemption to apply. While this is extremely good news for those employers relying on the exemption, it may not be the end of the story. Although Justice Sotomayor agreed with the outcome of the decision, she raised policy concerns in a concurring opinion that many church-affiliated organizations primarily operate as secular organizations with for-profit subsidiaries earning billions of dollars in revenue and include some of the largest health-care providers in the country. She noted that this may be an unfair advantage, as they are in direct competition with secular employers who are required to comply with the complex regulatory requirements of ERISA, including minimum funding requirements for employees' retirement benefits. Justice Sotomayor even hints that Congress should reevaluate the scope of the exemption.

Accordingly, church-affiliated employers should continue to monitor future developments and consider seeking a ruling from the IRS or DOL that their benefit programs are exempt from ERISA. In this regard, to qualify for the church plan exemption, the interpretation of the DOL, IRS and PBGC, which the Supreme Court upheld, rely on the fact the nonprofit employer has an internal benefit plan committee that maintains the plans. Accordingly, church-affiliated employers should evaluate the structure of their programs. The three cases heard by the Supreme Court are only a few of the many cases out there challenging the church plan exemption, and any employer relying on the exemption for its retirement and welfare plans will want to be sure that they meet the technical requirements of the exemption.

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New Guidance from Federal Agencies on Mental Health Parity and Addiction Equity Act

On June 16, 2017, the Department of Labor, Internal Revenue Service, and Department of Health and Human Services (collectively, the "Departments") released additional guidance under the Mental Health Parity and Addiction Equity Act (MHPAEA) to comply with changes to the law under the 21st Century Cures Act (Cures Act). The Departments issued both an FAQ (Part 38) on mental health parity implementation and a draft model form on which participants may seek information from the carrier or plan sponsor regarding nonquantitative treatment limitations that may affect their mental health or substance use disorder benefits. The form may also be used to obtain information to support an appeal after an adverse benefit determination involving such benefits. The Departments are seeking comments on the form and other MHPAEA issues under the Cures Act, which must be provided by September 13, 2017. In December 2016, the Cures Act required the agencies to improve mental health parity compliance by issuing additional guidance and soliciting feedback on various MHPAEA issues.

As background, the MHPAEA requires "parity" between the plan's mental health and substance use disorder benefits and its medical and surgical benefits. This generally means that a plan's coverage limits on mental health and substance use disorder benefits may not be more restrictive than its coverage limits on medical and surgical benefits in four key areas, including (1) annual and lifetime dollar limits; (2) financial requirements (i.e. deductibles, copayments, coinsurance, and out-of-pocket maximums); (3) quantitative treatment limitations (i.e. numerical limits on certain treatments or days of coverage); and (4) nonquantitative treatment limitations (i.e. non-numerical limits such as prescription drug formularies, step therapies, geographic location or facility type).

Highlights of the recent guidance include:

- *Eating Disorders (FAQ 38).* The FAQ reiterates that treatment for eating disorders is protected by the parity requirements of the MHPAEA and requests comments on whether additional clarification is needed for plan sponsors or carriers to comply with the rules with regard to eating disorders, including residential treatment.
- *Draft Model Participant Request Form.* The agencies also released a draft model form that participants, enrollees, and their authorized representatives could use to request both general and specific information from plans regarding mental health or substance use disorder benefits. In particular, the form focuses on nonquantitative limitations that may apply to a particular mental health or substance abuse benefit. It can be used after a claim denial by a plan or more generally, regardless of whether there has been a claim for benefits. Use of the form is optional, but plan sponsors should anticipate an increase in information requests with the availability of the form once finalized. Plan sponsors must respond within 30 days to any request for information under these rules.

Next steps for plan sponsors are to review plan provisions limiting treatment for eating disorders or other mental health or substance abuse conditions with legal counsel to ensure the parity rules are satisfied. In addition, plan sponsors should ensure that they are aware of any nonquantitative limits in their group health plan to ensure timely and accurate responses to any information requests regarding a plan's mental health and substance abuse benefits. The passage of the Cures Act is just more evidence that plan sponsors, advisors, and insurers can expect to see an even greater focus on mental health parity compliance in 2017 and future years.

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