Latest Employment, Benefits and Immigration Developments

EMPLOYMENT LAW

ADEA Does Not Permit "Reverse" Discrimination Claims by Younger Workers

On February 24, 2004, in *General Dynamics Land Systems, Inc. v. Cline*, the U.S. Supreme Court ruled that the Age Discrimination Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, which prohibits age discrimination against individuals aged 40 years and above, does not prevent employers from favoring older workers over younger workers when both fall within the protected age group. In so holding, the court reversed a Sixth Circuit Court of Appeals decision and found the Equal Employment Opportunity Commission's (EEOC) contrary interpretation of the ADEA to be erroneous.

The Facts

The case arose after General Dynamics Corp. changed its retirement benefits plan to eliminate healthcare benefits for all subsequently retired employees who were not then at least 50 years old. A group of General Dynamic's workers, who were then all in their 40s and without benefits under the new plan, filed suit against General Dynamics, claiming that the plan violated the ADEA by discriminating against them with respect to "compensation, terms, conditions, or privileges of employment, because of [their] age."

Findings of the District and Circuit Courts

Although the workers fell within the protected age group covered under the ADEA, the trial court originally dismissed their claim, finding that the ADEA does not prevent discrimination against the younger worker in favor of the older.

The Sixth Circuit Court of Appeals had reversed the trial court, reasoning that the ADEA prohibits discrimination on the basis of age against both the younger and the older portions of the protected class. The Sixth Circuit found that § 623(a)(1) of the ADEA, which prohibits discrimination against "any individual. . . because of such individual's age," was "so clear on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so." Also, in support of its view, the Sixth Circuit relied, in part, on EEOC regulation 29 C.F.R. 1625.2(a), which clearly illustrates that an employer may not use age as a basis to discriminate against the young in favor of the old.

The Supreme Court's Decision

In a 6-3 decision, the Supreme Court reversed the Sixth Circuit, holding that the ADEA does not protect younger workers from discrimination in favor of their older counterparts. The court reasoned that the legislative history behind the Act revealed that the "ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young," and not the reverse. The court explained that "in a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the older. . . the enemy of 40 is 30, not 50."

In reaching this conclusion, the court reasoned that the term "age" has different meanings at different places in the statute. With respect to § 623(a)(1), the court found that the term as used in the phrase "discrimination . . . because of such an individual's age" should be interpreted in light of social history, which the court believed "emphatically

reveals an understanding of age discrimination as aimed against the old." Thus, the court determined that the term age referred to "old age." Nevertheless, the court found that the term as used in § 623(f), which establishes an affirmative defense to charges of age discrimination when "age is a bona fide occupational qualification," refers to "comparative youth."

Next, the court addressed the dissenting argument that the court's narrow interpretation of the ADEA incorrectly implied that antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964, should be limited to protect only against the particular or most common form of the discrimination that Congress had in mind when it passed the statute. The court responded, stating that the ADEA's prohibition of age discrimination should be read more narrowly than the analogous statutes addressing discrimination on the basis of race and sex, and that the narrower reading "makes perfect sense" in light of "Congress's demonstrated concern with distinctions that hurt older people."

Finally, with respect to the EEOC regulation 29 C.F.R. 1625.2(a), the court determined that there was no need to address the degree of deference to be assigned to the regulation because the EEOC's interpretation of the ADEA was "clearly wrong."

What Does This Decision Mean To Employers?

Apparently, it means that discrimination on the basis of age means only discrimination on the basis of old age. Thus, employers are now free to make discriminatory preferences in favor of the old over the young.

While legal scholars and politicians will debate this decision and its effect on how far courts can go in interpreting the language and intent of federal statutes, it is clearly good news for employers. "Reverse" discrimination claims have become relatively common under Title VII. Employers attempting to promote diversity often face reverse race discrimination claims by white employees or reverse sex discrimination claims by male employees. In the *General Dynamics* case, the Supreme Court has drawn a clear line by saying that such reverse age claims are not actionable under the ADEA.

Uniformly Applied No-Rehire Rule Does Not Violate the ADA

In *Raytheon v. Hernandez*, the U.S. Supreme Court was recently presented with the issue of whether a "no rehire rule," purportedly uniformly implemented by appellant Raytheon Co. and applied to bar re-employment by its former employee, Joel Hernandez, a recovering alcoholic and drug user, violated the Americans with Disabilities Act (ADA). The Supreme Court reversed the Ninth Circuit Court of Appeals holding that the practice violated the ADA. While in its decision the court made very clear its opinion that actions in conformance with such a policy are not likely to be a violation of the ADA, technically the court never reached the issue, since it concluded that the Ninth Circuit had improperly applied a disparate impact (as opposed to a disparate treatment) analysis in its decision, despite that it had not been pleaded or raised by Hernandez.

The Relevant Statutory Analysis

The ADA prohibits employers of 15 or more employees from discriminating against "a qualified individual with a disability" in regard to job application procedures or any term, condition or privilege of employment. An individual can qualify as "disabled" within the meaning of the statute in three different ways: (1) the individual actually may have a "physical or mental impairment that substantially limits one or more of the major life activities of such individual;" (2) the individual may have "a record of such an impairment;" or (3) the individual may be falsely "regarded as having such an impairment."

Further, the ADA defines "discrimination" to include the failure to make "reasonable accommodations" in certain circumstances. Specifically, an employer discriminates if it (1) does not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business; or (2) denies employment opportunities to a job applicant or employee who is an otherwise

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qualified individual with a disability, if such denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

Finally, and relevant to the *Raytheon* case, the ADA provides a carve out for illegal drug users: individuals currently using illegal drugs are explicitly excluded from the ADA's protection. The Act also provides that employers may (1) prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees; (2) require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; and (3) hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

The Facts

In July 1991, Hernandez came to work with cocaine in his system and alcohol on his breath. The company gave Hernandez a choice: resign or be terminated. Hernandez chose to resign. Notably, a few years earlier, Hernandez was about to be terminated for excessive absenteeism, but he informed Raytheon that his absences were caused by alcoholism. On that occasion, the company gave him the opportunity to seek rehabilitation in lieu of termination.

More than two years after his employment terminated, Hernandez applied to be rehired by Raytheon. Hernandez stated on his application that he had previously been employed by the company. He also attached two reference letters, one from his pastor, stating that he was a "faithful and active member" of the church, and the other from an Alcoholics Anonymous counselor, stating that Hernandez attends Alcoholics Anonymous meetings regularly and is in recovery.

Joanne Bockmiller, an employee in the company's Labor Relations Department, reviewed Hernandez's application. She pulled his personnel file, reviewed his employee separation summary which indicated that Hernandez had been discharged for violating workplace conduct rules and subsequently rejected Hernandez's application. During discovery, Bockmiller insisted that the company had a policy against rehiring employees who were terminated for workplace misconduct. Bockmiller specifically testified that she did not know that Hernandez was a former drug addict when she made the employment decision and did not see anything that would constitute a "record of" addiction.

Hernandez subsequently filed a charge with the EEOC. His charge of discrimination alleged that Raytheon did not give him a reason for his nonselection and that Hernandez believed he had been discriminated against in violation of the ADA. In the company's response to the EEOC, it specifically mentioned Hernandez's "demonstrated drug use" and "complete lack of evidence indicating successful drug rehabilitation." This response, together with evidence that the letters submitted with his employment application may have alerted Bockmiller to the reason for Hernandez' prior termination, led the EEOC to conclude that the company may have "rejected [his] application based on his record of past alcohol and drug use." The EEOC thus found that there was reasonable cause to believe that Hernandez was denied rehire because of his disability. The EEOC issued a right-to-sue letter, and Hernandez subsequently filed this action alleging a violation of the ADA.

Findings of the District and Circuit Courts

Hernandez proceeded through discovery on the theory that the company rejected his application because of his "record of" drug addiction or because he was "regarded as" being a drug addict. In response to the Raytheon's motion for summary judgment, Hernandez for the first time argued alternatively that if the company really did apply a neutral no-rehire policy in his case, it still violated the ADA because such a policy has a disparate impact.

The District Court granted Raytheon's motion for summary judgment with respect to Hernandez's disparate treatment claim and refused to consider his untimely raised disparate impact claim. However, the Ninth Circuit Court of Appeals, although purporting to apply the traditional burden-shifting approach first adopted in *McDonnell Douglas Corp. v. Green*, and agreeing that the company's no-rehire rule was lawful on its face, held the policy to be unlawful

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"as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." Thus, the Ninth Circuit concluded that the company's application of the neutral no-rehire policy was not a legitimate, nondiscriminatory reason for rejecting Hernandez's application, because a neutral no-rehire policy, when applied to an employee terminated for illegal drug use, has a disparate impact on recovering drug addicts.

The Supreme Court's Decision

The U.S. Supreme Court held that the Ninth Circuit had erred in its analysis by conflating the analytical framework for disparate impact and disparate treatment claims. The court stated that "[h]ad the Court of Appeals correctly applied the disparate treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA."

The Court explained that disparate treatment is the most easily understood type of discrimination: the employer simply treats some people less favorably than others because of their race, color, religion, sex, or other protected characteristic. By contrast, disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Under a disparate impact theory of discrimination, a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate that is required in a disparate treatment case.

The court held that Raytheon's neutral no-rehire policy is a "quintessential, legitimate, non-discriminatory reason" for refusing to hire an employee terminated for violating workplace misconduct rules and, therefore, plainly satisfied its obligation under *McDonnell Douglas*. Therefore, the court explained that the only relevant question before the appeals court was whether there was sufficient evidence from which a jury could conclude that Raytheon's stated basis for rejecting Hernandez was false or pretextual, actually making its employment decision based on Hernandez's status as disabled despite its explanation. The Supreme Court concluded that the appeals court's automatic rejection of Raytheon's legitimate, nondiscriminatory reason because it "serves to bar the re-employment of a drug addict despite his successful rehabilitation" was inapplicable to a disparate treatment claim, and therefore remanded the case for further findings consistent with its opinion.

What Impact Does This Decision Have on Employees?

Employers should take away two important lessons from this decision. First, the court made clear its view that even if workplace misconduct is related to a disability, such misconduct is a legitimate basis both to terminate the individual's employment and refuse to rehire him. In other words, disabled employees may be held to the same standards of workplace conduct as other employees.

Second, in applying a no-rehire rule based upon prior workplace misconduct, employers should establish a uniform decision-making procedure which is consistently applied. The procedure should provide that the decision maker look no further than the fact that the applicant was discharged for workplace misconduct, without consideration or even review of the particular misconduct resulting in the discharge. Utilization of such a procedure will be strong evidence that the applicant's record, perception or actual disability played no part in the employment decision, which was solely based upon a "quintessential, legitimate, non-discriminatory reason."

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BENEFITS LAW

Employer Group Health Plans Must Implement HIPAA Privacy Regulations

Most assisted living residences probably know something about HIPAA, the Health Insurance Portability and Accountability Act of 1996, which requires new privacy and security procedures related to individuals' health information. Of particular concern are the new HIPAA privacy standards that impose numerous regulatory mandates on the use and disclosure of health information.

What may have escaped the attention of some employers is that these privacy and security standards apply directly to most employers' group health plans, as well as to many providers of health services. If a company has a group health plan for its employees, the plan likely will be subject to HIPAA even if the company's business is not related to health care.

An employer's group health plan is subject to HIPAA if it is (1) a medical, dental, prescription, or vision plan; or (2) a cafeteria or flexible spending plan. HIPAA's reach is not limited to large insurers, like CIGNA, Oxford and the Blues, that offer plans to employers and others. The fact that an insurer from which an employer purchases health benefits coverage is a HIPAA-covered entity in its own right does not mean that an employer's group health plan itself does not have to comply with HIPAA. HIPAA views a group health plan as a separate entity, even if it is not a discrete corporate entity. Only if an employer's health plan is self-administered *and* covers less than 50 participants is it exempt from HIPAA compliance. This means that as plan sponsors, most employers will be required to implement procedures to comply with requirements for protection of the health information of their employees.

Group health plans covered under HIPAA are subject to government investigations and sanctions for HIPAA violations, including up to $250,000 in fines and 10 years in prison. "Small" health plans with annual revenues (premiums collected) of $5 million or less must comply with the HIPAA Privacy Standards by *April 14, 2004*. Larger plans must already be in compliance, as of April 14, 2003.

What Practical Steps Must Group Health Plans Take to Comply with the Privacy Standards?

A group health plan may have to undertake the following in order to be fully compliant:

1. Designate a privacy official to oversee the privacy compliance program and to accept complaints from consumers;
2. Develop privacy policies and procedures to ensure compliance with the privacy standards. Privacy policies and procedures should be reasonable in light of the size of the entity and type of activities undertaken by it;
3. Establish a privacy training program for existing and new workforce members;
4. Implement reasonable administrative, technical and physical safeguards to protect personally identifiable health information from intentional or unintentional use or disclosure in violation of the privacy standards. Examples could include the shredding of documents prior to disposal, keeping doors to file cabinets locked, limiting the personnel who have keys to the cabinets, turning computers off at night, and taking steps to ensure passwords are kept confidential;
5. Apply appropriate sanctions against workforce members who fail to comply with the plan's privacy policies and procedures. The sanctions should be communicated so that employees are aware of what actions are prohibited and punishable;
6. Establish a privacy complaint procedure which includes documentation of all complaints received and their disposition;
7. Identify business associates, as defined by HIPAA, with whom the plan shares health information and develop written contracts with business associates that are HIPAA-compliant;

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8. Issue a privacy notice;
9. Amend the group health plan.

The extent to which a group health plan must comply with these requirements depends on whether the plan receives protected health information. In reality, it is likely that most plans will be required to comply with all HIPAA privacy standards.

What Health Information is Protected?

Protected health information (PHI) is broadly defined to include virtually all health information data that identifies or could reasonably be used to identify the subject of the information, regardless of the medium. Electronic, paper and even oral communications are included.

The Minimum Necessary Requirement

Group health plans covered under HIPAA are required to make reasonable efforts to limit the use and disclosure of PHI to the minimum amount of information necessary to accomplish the intended purpose of the use, disclosure or request. To comply with the minimum necessary standard, a health plan must identify persons or classes of persons in its workforce who need access to PHI in order to carry out their duties, and define the level of access that will be granted based on the person's function and their need to know.

Authorizations

The general rule under the privacy standards is that a health plan must obtain appropriate permission from the individual who is the subject of the information before using or disclosing PHI for purposes other than treatment, payment or healthcare operations and certain other limited purposes. The HIPAA privacy standards specify the content, form and retention requirements for authorizations.

What Must Be Included in a Privacy Notice?

Unless certain exceptions apply, a health plan must provide a privacy notice to each covered insured written in plain language. The notice must include, among other things, a description of the types of uses and disclosures that the plan is permitted to make, a statement that other uses and disclosures will be made only with the individual's permission, and a statement regarding individuals' right to complain, without fear of retaliation, if they believe their privacy rights have been violated.

What is a Business Associate?

A business associate is a person (not otherwise a member of the group health plan's workforce) who on behalf of a plan performs or assists in the performance of a function or activity involving PHI, including claims processing or administration; data analysis, processing or administration; utilization review; quality assurance; billing; and benefit management; or who provides legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation or financial services for the covered plan. Plans may disclose PHI to business associates pursuant to a business associate contract. The contract must establish the permitted and required uses and disclosures of the PHI, and authorize the termination of the contract if the business associate violates any of its material terms.

Plan Amendment

Under HIPAA, an employee's group health plan, *i.e.*, the written document, must be amended to include certain protections of PHI. The plan also must be amended to prohibit the plan sponsor from using or disclosing PHI it receives from the group health plan for employment-related decisions and to provide for adequate separation between the plan sponsor and the plan. The amendment must be tailored to the individual plan of the sponsor.

Security Standards

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Group health plans also will have to adhere to the HIPAA security standards. For small health plans, compliance is required by April 21, 2006. The security standards apply only to electronically transmitted or stored data. While some flexibility is allowed, there are 20 standards that must be followed precisely.

Because the HIPAA privacy standards compliance date for small health plans is just a few months away and because penalties for violations are steep, covered entities should begin now to implement a HIPAA compliance program.

IMMIGRATION LAW

DHS Announces Fiscal Year 2004 H-1B Visa Cap Has Been Reached

The United States Citizenship and Immigration Services (USCIS) announced that as of February 17, 2004 it has received a sufficient number of petitions for new H-1B temporary workers to meet the Congressionally mandated fiscal year (FY) 2004 limitation, otherwise known as the H-1B cap. On February 25, 2004, the Department of Homeland Security (DHS) published a notice in the Federal Register[1] explaining how the USCIS will process H-1B cap-subject petitions for the remainder of the FY 2004.

Background

An H-1B nonimmigrant is an alien (*i.e.*, foreign national) employed by a U.S. employer in a specialty occupation or as a fashion model of distinguished merit and ability. A specialty occupation includes doctors, engineers, accountants, professors, researchers, scientists, medical personnel and computer professionals, among other professional occupations. Section 214 of the Immigration & Nationality Act provides that the total number of foreign nationals who may be issued new H-1B visas or otherwise granted H-1B status is 65,000 per FY.[2] Due to recently enacted Free Trade Agreements (FTA) with Chile and Singapore, which reserve new H-1B visa numbers specifically for citizens of Chile and Singapore, the adjusted H-1B cap for FY 2004 is 58,200.

Exemptions to the Cap

Petitions for foreign nationals not considered to be "new employment"[3] are exempt from the cap. These primarily include those who are currently in H-1B status, same employer H-1B extensions or amendments, changes of H-1B employer and concurrent H-1B employment. Further, persons who will be employed by an institution of higher education or related or affiliated non-profit entity, a non-profit research organization or a governmental research organization are exempt from the cap. However, an individual who is changing employers from a cap-exempt employer to a cap-subject employer will need to be counted.

Processing

The USCIS will continue to process petitions for new employment filed by the February 17, 2004 cut off date, as well as petitions for nationals of Chile and Singapore pursuant to the FTAs. The Federal Register Notice explains that an H-1B petition for new employment submitted after February 17, 2004, and before April 1, 2004, will be returned without being processed. A petition for new H-1B employment can be submitted on or after April 1, 2004, with the earliest possible starting date being October 1, 2004, the beginning of FY 2005.

Problem Situations

Nonimmigrant workers currently in a status other than H-1B, such as F-1 student or J-1 exchange visitor, and whose authorized period of stay will expire before a new petition can be filed (*i.e.*, April 1, 2004), are *not* eligible for an H-1B change of status unless the person is first able to file a *timely* change of status to another status, such as B-2 tourist. A timely filed application means before the date the individual's Form I-94[4] expires. If the B-2 change of status is approved, then the individual would be considered as maintaining status for purposes of another change of status to the H-1B when the new FY 2005 cap numbers become available on October 1, 2004. While this "bridging" strategy has worked in the past, it is risky since a denial of the intervening change of status to B-2 means that a person

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must immediately depart the country and wait abroad for an H-1B to be effective on or after October 1, 2004. Further, if the first change of status was *untimely* filed and denied, then the individual starts accruing unlawful presence from the date the I-94 card originally expired. This can result in bars to admission to the U.S. of three or 10 years.

As of this writing, the DHS has not addressed what procedures will be followed for foreign nationals currently holding an F-1 or J-1 status with a period of work authorization under Optional Practical Training (OPT) but whose OPT will expire before October 1, 2004. Absent such clarification, the foreign national must cease employment when the OPT date is reached, regardless of a pending application to change status to H-1B filed after April 1, 2004. Further, without a policy statement from the USCIS, it is advisable that such an individual depart the U.S. within 60 days (F-1s) or 30 days (J-1s) after his/her OPT expires and remain abroad until the new H-1B petition is approved with an October 1, 2004 start date.

Strategies for Hiring New Nonimmigrant Temporary Workers Subject to the Cap before October 1, 2004

When considering a potential new professional hire who would otherwise qualify for an H-1B but for the FY quota limit, consider the following nonimmigrant classifications:

1. H-1B for citizens of Chile or Singapore under the Free Trade Agreements;
2. TN (Trade NAFTA) for Canadians or Mexicans under the North American Free Trade Agreement;
3. L-1 (Intra-company transferee) for workers employed in a management, executive or specialized knowledge capacity with a subsidiary, branch office or affiliate of your company abroad;
4. B-l (Business Visitor) for nonimmigrants coming to the U.S. to perform legitimate business activities on behalf their foreign employer (*e.g.*, negotiate contracts, meet with clients or colleagues, receive or deliver training.) *Note: this classification does not permit employment for a U.S. employer and visitors must be careful not to abuse this category*;
5. J-1 (Exchange Visitor) for nonimmigrants sponsored for certain types of training;
6. H-3 (Trainee) for nonimmigrants who will receive training to further their career and the company's business interests abroad.

Depending on your circumstances, one or more of these visa options may permit you to use the services of a foreign national during the next several months when new H-1Bs are unavailable. However, careful consideration of the appropriate visa category is necessary and consultation with a qualified immigration lawyer is highly advisable. In the meantime, the best strategy is advance planning for the upcoming FY H-1B quota. This means you should consider filing your new petitions as soon as possible after April 1, in order to secure a number under the FY 2005 quota before it becomes exhausted.

[1] 69 Fed. Reg. 37, pages 8675-8676; available from Federal Register Online via GPO at www.wais.access.gpo.gov

[2] Federal Government's fiscal year runs from October 1st through September 30th

[3] "New employment" is defined as H-1B petitions that are filed for foreign nationals who are not currently in the U.S. in H-1B status

[4] An I-94 is a small white card on which the immigrant inspector at the port of entry records the foreign national's date of admission, non-immigrant classification and expiration date. The I-94 governs the individual's authorized period of stay.

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Target Corporation Sued by Employees after Being Terminated Due to Social Security Mismatch Letters

The national controversy over mismatches between employees and their Social Security numbers has resulted in 44 employees suing Target Corporation in Sonoma County, California. The employees claim the department store chain improperly terminated them when questions arose over the mismatches. Target denies the lawsuit's allegations that it discriminated against the terminated employees and defended the procedures it used.

Regardless of who prevails in this matter, it drives home the controversy over the "mismatch" letters the Social Security Administration mailed to employers across the nation. The letters notify employers that an employee's name or Social Security number as reported on an annual W-2 form did not match Social Security records. Many employers took the mismatch letters as a federal warning that the employees were undocumented aliens and terminated them – even though the letter itself warns employers not to terminate workers because of the letters. But because of the discrepancy between the Social Security statement and immigration regulations, employers are in a quandary about finding a resolution. There are severe penalties under the immigration laws for hiring undocumented aliens – penalties which have become more harsh since September 11. Proper compliance procedures documenting notice to the employee of the receipt of the letter and adequate time to cure the mismatch is key to striking a balance between the two.

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