Update on New California Laws for 2018

December 5-13, 2017

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A Very Busy Legislative Year

- ***2,495 bills were introduced in January!***
- Hundreds had to do with labor/employment issues.
- Legislative process dwindled these down.
- Governor Brown signed a number of bills aimed at countering President Trump's agenda.

AB 168 – No Salary History Inquiries

- Part of growing nationwide trend (Delaware, Oregon, Massachusetts, SF, NYC, Philadelphia).
- Proponents argue that salary history inquiries perpetuate wage inequality when employers base a new hire's compensation on prior rate of pay.

AB 168 – What *Can't* Employers Do?

- You may not seek salary history information, orally or in writing, personally or through an agent, about an applicant for employment (this includes inquiring through recruiter or during reference checks).
- "Salary history information" includes compensation and benefits.
- You cannot rely on salary history as a factor in determining whether to offer job or what salary to offer.

AB 168 – What *Must* Employers Do?

- Upon reasonable request, you must provide the pay scale information to an applicant applying for employment.

AB 168 – Does Not Prohibit Voluntary Disclosure

- Does not prohibit an applicant from ***"voluntarily and without prompting"*** disclosing salary history information to a prospective employer.
- If the applicant does so, you may consider or rely on that information in determining the salary for that applicant.

AB 450 - Immigration

- Largely a response to actions of Trump Administration.
- Puts employers right in the middle of the immigration debate.

AB 450 – No More "Voluntary Consent"

- Employer must demand a **judicial warrant** before granting ICE access to any non-public area of the worksite.
- Employer must demand a **subpoena or judicial warrant** before granting ICE access to review or obtain employee records.
- Does not apply to "Notice of Inspection" for I-9 and other forms.
- Bottom line – you no longer may **"voluntarily consent"** to ICE access.

AB 450 – Notice of Worksite Inspection

- Employer shall post a **notice** at the worksite within 72 hours of receiving a Notice of Inspection (NOI) with the following info:
  1) The name of the agency conducting the inspection.
  2) The date the employer received the notice.
  3) The "nature of the inspection" to the extent known.
- Written notice must also be provided to the employees' union (if any) within 72 hours.
- Labor Commissioner will develop a template by July 1, 2018.
- Must provide an employee with a **copy** of the NOI "upon reasonable request."

AB 450 – Notice of Results

- Employer must provide each affected employee (and union, if any) with a **copy** of the notice that provides the results of inspection (typically a "Notice of Suspect Documents") within 72 hours of receipt.
- Must also provide written notice (within 72 hours) to affected employees (and union, if any) of the obligations of the employer and the employee with respect to the following:
  1) Description of any deficiencies or other items identified.
  2) The time period for correcting any deficiencies.
  3) The time and date of any meeting with employer to correct deficiencies.
  4) Notice that the employee has the right to representation during any meetings with the employer.

AB 450 – No Re-Verification of Current Employees

- You may not **re-verify** the employment eligibility of a **current** employee at a time or in a manner not required by federal law, or that would violate any E-Verify MOU the employer has with the Department of Homeland Security.

AB 450 - Immigration

- Any violation of any of the above is punishable by civil penalty of between **$2,000 and $10,000**.
- Law was amended to provide for exclusive enforcement by Labor Commissioner or Attorney General by civil action…
- No PAGA!

Related Issue – SB 54 "Sanctuary State" Law

Trump Administration Response:

- *"ICE will have no choice but to conduct at-large arrests in local neighborhoods and at **worksites**."* (ICE Director Tom Homan 10/6/2017).
- *"We're taking worksite enforcement very hard this year. We've already increased the number of inspections and worksite operations, you're going to see that **significantly increase** this next fiscal year."* (ICE Director Tom Homan 10/18/2017).
- ICE Director has given instruction for workplace enforcement to increase "***four or five times.***" (ICE Director Tom Homan 10/18/2017).

What will all of this mean for California employers?

SB 179 – Gender Recognition Act "Nonbinary" Gender

- Creates third gender category for government documents.
- Authorizes legal action to have new birth certificate issued with any of the "three genders" reflected.
- No proof of "change" required other than affidavit confirming the person "identifies" with the new gender.

SB 179 – Gender Recognition Act "Nonbinary" Gender

- Part of ongoing agenda to eliminate gender based differentiations in general
  - Another example is SB 219 which prohibits use of gender pronouns not consistent with resident preferences in long-term care facilities
- Long-term implications for employers are unclear, but the FEHC regulations that went into effect in July are a preview of things to come

SB 63 – Parental Leave

Honey I Shrunk The CFRA!

Parental Leave for Employers of 20-49 Employees

SB 63 – Parental Leave - Overview

- Applies to employers with **20 or more** employees (does not apply if CFRA/FMLA applies (50 or more)).
- Provides for **12 weeks** of job-protected parental leave (including birth, adoption, foster care placement).
- Must maintain group health insurance coverage (similar to FMLA/CFRA).
- Contains other provisions similar to CFRA (retaliation, etc.)

SB 63 – Who's Covered?

Employees:

- Works at a worksite where there are 20 or more employees within 75 miles (may include multiple worksites).
- Has at least 12 months of service with the employer (need not be consecutive).
- Has worked at least 1,250 hours within the previous 12-month period.

SB 63 – What's Covered?

- **12 weeks** of leave to bond with a new child within one year of the child's birth, adoption or foster care placement.
- Parental leave ***only***. Not all of the other CFRA/FMLA types of leave.
- Unpaid leave. But employee may use accrued vacation, paid sick time, other accrued time off.
- Where both parents work for same company, employer is not required to grant more than 12 weeks of leave total. Employer may, but is not required to, grant leave to both parents simultaneously.

SB 306 - Retaliation

- Authorizes "**injunctive relief**" in retaliation cases.
- This is a court order forcing the employer to **reinstate** the employee while the case is pending.
- You ***can*** discipline employee for conduct unrelated to the retaliation claim.
- Allows the Labor Commissioner to cite for retaliation claims without an employee complaint.

SB 306 - Retaliation

- The employee can seek injunction on his or her own.
- Employee can petition for reinstatement in pending lawsuits that include a Labor Code section 1102.5 claim.
  - Whistleblower claims – internal and external.
  - Retaliation for refusing to participate in illegal activity.
- **Burden** – "reasonable cause" to believe unlawful retaliation has occurred (much lower standard than normally required for injunctions).

SB 306 - Retaliation

The Next Big Bargaining Chip:

Pay up, or look at this face every day when you come to work!

SB 396 – Sexual Harassment Training (AB 1825)

The "Transgender Work Opportunity Act"

- Requires sexual harassment training to include harassment based on *gender identity, gender expression, and sexual orientation*.
- Does not increase overall "two hours" requirement.
- Also requires posting of a poster on "transgender rights."

AB 1701 – General Contractor Joint Liability

- Applies to **private** construction projects.
- General contractor is liable for any wage or fringe benefit debt owed by a subcontractor at any tier.
- Suit may be brought by Labor Commissioner, trust fund or joint labor-management committee.
- Applies to contracts entered on or after January 1, 2018.

Increase in State Minimum Wage

- For employers of **26 or more** employees minimum wage will increase to **$11.00** per hour effective January 1, 2018.
- For employers of **25 or fewer** employees minimum wage will increase to **$10.50** per hour effective January 1, 2018.

Increase in Minimum Wage Increases Other Minimums Too…

- For employers of **26 or more** employees, minimum salary for "white collar" overtime exemption will increase to **$45,760** per year effective January 1, 2018.
- For employers of **25 or fewer** employees minimum salary for "white collar" overtime exemption will increase to **$43,680** per year effective January 1, 2018.

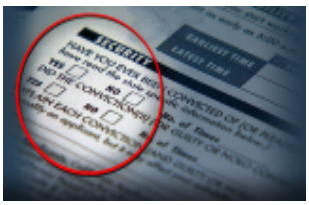
Increase in Minimum Wage Increases Other Minimums Too…

- For employers of **26 or more** employees, the minimum wage for employees who are required to provide their own hand tools will increase to **$22.00** per hour effective January 1, 2018.
- For employers of **25 or fewer** employees minimum wage for employees who are required to provide their own hand tools will increase to **$21.00** per hour effective January 1, 2018.

Increase in Minimum Wage Increases Other Minimums Too…

- For employers of **26 or more** employees the minimum earnings per hour to qualify for the inside salesperson exemption from overtime in a given workweek will increase to **$16.51** per effective January 1, 2018.
- For employers of **25 or fewer** employees the minimum earnings per hour to qualify for the inside salesperson exemption from overtime in a given workweek will increase to **$15.76** per effective January 1, 2018.

AB 1008 – "Ban the Box"



- Prior state law applied only to public employers (cannot inquire about criminal history until employer determines applicant meets minimum qualifications).
- This new law applies to public and ***private*** employers.
- Based on City of Los Angeles ordinance but requirements are different.

AB 1008 – "Ban the Box"

- Applies to employers with ***5 or more*** employees.
- ***GENERAL RULE - Cannot consider criminal history until a conditional offer of employment has been made.***

AB 1008 – Job Applications

- Employers are prohibited from including on any application any question that seeks the disclosure of the applicant's conviction history *before the employer makes a conditional offer of employment*.
- Review job applications now.
- Any questions or "boxes" that ask about criminal conviction history should be eliminated.
- You can still advise applicants that you may consider conviction history after a conditional offer is extended.

AB 1008 – Criminal History Inquiry

- When conditional offer is made, require the applicant to disclose in writing any criminal convictions, and to certify that all information provided on the form is true and correct.
- The form should include a written warning that in the event of falsification or omission of material fact, the applicant will not be hired or, if hired, will be subject to immediate termination.
- Applicant should be advised that the offer is contingent upon the outcomes of the criminal history inquiry, a background check (if conducted) and pre-employment drug test (if administered).
- ***This preserves the "honesty test" previously provided by the box on the application.***

AB 1008 – Interview Process

- You may not inquire about criminal conviction history during interview process.
- Train any staff who are involved in the hiring process.

AB 1008 – Individualized Assessment

- Before you can deny the applicant the position based on prior criminal convictions you must conduct an ***individualized assessment***.
- This assessment must analyze whether the conviction has a direct and adverse relationship with the specific duties of the position.
- The **individualized assessment** must consider:
  1) Nature and gravity of offense.
  2) Time that has passed since offense.
  3) The nature of the job held or sought.

AB 1008 – Notice Requirement # 1

- If you tentatively decide to disqualify an applicant, must you notify them in writing.
- The notice may (but is not required to) explain your reasoning, but it must identify the conviction(s) considered.
- Notice must contain:
  1) Notice of the disqualifying conviction or convictions that are the basis for the tentative decision to rescind the offer.
  2) Copy of the conviction history report, if any.
  3) An explanation of the applicant's right to respond and the deadline to respond. You must inform the applicant they can submit evidence challenging the accuracy of the information, evidence of rehabilitation or mitigating circumstances, or both.

AB 1008 – Applicant's Response

- Applicant then has **five business days** to respond to challenge accuracy of the criminal history information or submit evidence of mitigation or rehabilitation **before the employer can make a final decision**.
- If the applicant challenges accuracy of information, he/she must be given an **additional five business days**.
- You must consider the applicant's response.

AB 1008 – Notice Requirement # 2

- If you make a final decision to deny employment, **you must notify the applicant in writing.**

- Notice must contain:
  1) The final denial or disqualification. You may, but you are not required to, justify or explain your reasoning.
  2) You must disclose any existing procedure for appealing the decision.
  3) You must state that the applicant may file a complaint with the ***Department of Fair Employment and Housing (DFEH).***

AB 1008 - Exceptions

The new law does not apply to the following:

- A position with a state or local agency required by law to conduct a conviction history background check.
- A position with a criminal history agency (Penal Code 13101).
- A position as a Farm Labor Contractor.
- A position where the employer is required by state, federal or local law to conduct criminal background checks or restrict employment based on criminal history (includes the Securities and Exchange Act).

AB 1008 – Local Ordinances

Does AB 1008 supersede local ordinances (LA, SF)?

- Unfortunately no.
- The new law specifically provides that it does not affect other rights and remedies that an applicant may have under any other law, "including any local ordinance."
- Employers in local jurisdictions with ordinances will have to comply with both AB 1008 and the local ordinance.

AB 1008 – Ban the Box

Employer Dilemma

- Do I deny employment based on criminal history and risk FEHA lawsuit?

Or

- Do I hire applicant and risk liability for negligent hiring and retention?

Relation Between AB 1008 and New FEHC Criminal History Regulations

- Some overlap.
- Similar terms and procedural requirements.
- But some contradictions as well.
- AB 1008 imposes a ***process***.
- FEHC says may have to "revisit" the regulations in light of passage of AB 1008, but no timeline.

Final Questions

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December 2017
Case Law Update

December 5-13, 2017

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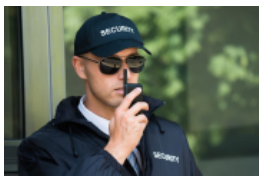
Augustus v. ABM Security Services, Inc.

- Facts:
  - Security guards
  - Employer required them to keep pagers and radios on during rest breaks
  - They were seldom, if ever, actually paged

Augustus v. ABM Security Services, Inc.

- Issue:
  - Can employers require their employees to remain "on call" during rest periods?



Augustus v. ABM Security Services, Inc.

- Result:
  - Plaintiffs were awarded **$90 million** in damages, interest, and penalties (employees are entitled to one hour of pay for every day in which a 10 minute rest period is missed)
  - California Supreme Court upheld the award

Augustus v. ABM Security Services, Inc.

- Rationale:
  - State law requires employers to provide *off-duty* rest periods for employees
  - Requiring guards to remain on call during rest periods meant they were not *off-duty* as they remained under the employer's control

Augustus v. ABM Security Services, Inc.

- Takeaways:
  - You must relieve employees of all duties during rest breaks; they cannot be required to answer calls or assist customers
  - Consider requiring employees to leave their work areas during breaks
  - Because they are still "on the clock," they are still subject to company policies while on break

Bareno v. San Diego Community College District

- Facts
  - Leticia Bareno was an administrative assistant at a community college
  - Bareno had a disciplinary history regarding absences
  - She requested CFRA leave and did not return when leave was up
  - Employer took the position that she "voluntarily resigned" and refused to reconsider despite receipt of certification of her need for additional leave

Bareno v. San Diego Community College District

- Result:
  - Trial court granted summary judgment for employer
  - Court of appeal reversed
  - Under CFRA, employee has up to 15 days to provide certification of need for additional leave

Bareno v. San Diego Community College District

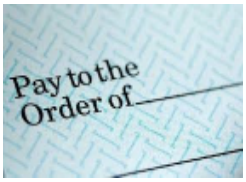
- Takeaways:
  - Do not fire for "job abandonment" employees who fails to return from an FMLA/CFRA leave when due
  - Instead, contact the employee and tell them they must either return to work or submit medical certification of their need for additional leave within 15 days
  - If they fail to do either they can be terminated

McLean v. State

- Facts:
  - Janis McLean, a former deputy attorney general working for the Department of Justice, retired
  - She did not receive her final pay on her last day so she filed a class action for "waiting time penalties" under the Labor Code

McLean v. State

- Issue:
  - Do Labor Code sections 202 and 203 (regarding waiting time penalties) apply when employees retire?



McLean v. State

- Result:
  - Prompt wage payment requirements applying to employees who "quit" also apply to employees who retire
- Waiting Time Penalties Refresher:
  - Wages due 72 hours after employee "quits"
  - Wages due immediately if employee gave 72 hours notice
  - Wages due immediately if employee is discharged
  - Penalty = up to 30 days' pay

Featherstone v. Southern California Permanente Medical Group

- Facts:
  - Ruth Featherstone resigned. She told her supervisor that she resigned because "God had told her to do something else"
  - She confirmed resignation in writing
  - A few days later, she requested to rescind her resignation
  - Employer refused
  - Featherstone sued, alleging that her employer discriminated against her while she had a temporary disability

Featherstone v. Southern California Permanente Medical Group

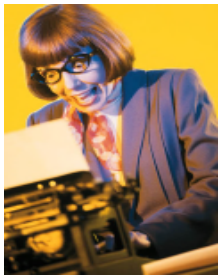
- Issues:
  - Was the employer's refusal to allow Featherstone to rescind her resignation an adverse employment action?
  - Was the employer on notice of any temporary mental disability triggering a duty to accommodate?
  - Did the employer have a duty under FEHA to engage in the interactive process?

Featherstone v. Southern California Permanente Medical Group

- Result:
  - Trial court awarded summary judgment for employer; appellate court affirmed
  - Employer was not required to allow employee to rescind her resignation as a "reasonable accommodation" as the employment relationship had ended
  - Employer was not on notice of any mental disability

Featherstone v. Southern California Permanente Medical Group

- Takeaways:
  - You need not allow an employee to rescind a resignation
  - If employee orally resigns, get it in writing (e-mail is OK)



Mendoza v. Nordstrom, Inc.

- Facts:
  - Hourly, non-exempt employees brought class action lawsuit alleging that employer violated the Labor Code by not providing them with one day of rest in seven days
  - Both employees worked more than six consecutive days, on multiple occasions, with some but not all shifts being six or less hours in duration

Mendoza v. Nordstrom, Inc.

Relevant Law – California Labor Code

- Section 551 – Every person in any occupation of labor is entitled to one day's rest in seven
- Section 552 – No employer of labor shall *cause* his employees to work more than six days in seven
- Section 556 – Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day

Mendoza v. Nordstrom, Inc.

When is a day of rest required?

- Plaintiffs' Interpretation – On a Rolling Basis
  - One day of rest in any period of seven consecutive days
  - If you work six consecutive days, then you must have the next day off
- Employer's Interpretation – On a Weekly Basis
  - One day of rest in a given workweek
  - Would allow employer to schedule an employee to work up to ***twelve*** consecutive days by starting the work week with an off day and ending the next workweek with an off day
  - ***Court agreed with employer's interpretation***

Mendoza v. Nordstrom, Inc.

How is the exception applied?

- Recall that section 556 provides:
  - Sections 551 and 552 ***do not apply*** to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof
- Plaintiffs' Interpretation – Each and every day of work must be six hours or less
- Employer's Interpretation – At least one day of work must be six hours or less
- ***Court agreed with plaintiffs' interpretation***

Mendoza v. Nordstrom, Inc.

The rule is not absolute

- Court recognized that Labor Code section 554 allows for an accumulation of days of rest when the nature of the work reasonably requires that the employee work 7 or more consecutive days, so long as in each calendar month the employee receives the equivalent of one day's rest in seven.
- Overtime laws contemplate work on the 7th day at 1-1/2 times regular rate for first 8 hours and 2 times regular rate for more than 8 hours
- ***If the number of days of rest in a month equal or exceed the number of calendar days divided by 7, the statute will be satisfied***

Mendoza v. Nordstrom, Inc.

What does it mean for an employer to *cause* its employees to work more than six days in seven?

- Plaintiffs' Interpretation – "cause" means allow, suffer, or permit to work
- Employer's Interpretation – "cause" means requires, forces, or coerces work
- ***Court arrived at a middle ground:*** "An employer causes its employees to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not . . . forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest."

Mendoza v. Nordstrom, Inc.

- Takeaways:
  - You can comply by giving employees one day off per workweek
  - You can also comply by giving employees the equivalent of one day's rest in seven every calendar month if the nature of the work requires it
  - You may not induce or encourage employees from waiving their minimum days of rest but they may voluntarily agree to do so

Williams v. Superior Court

- Facts:
  - Plaintiff brought PAGA action against defendant retail store chain for various Labor Code violations
  - Plaintiff served employer with interrogatories seeking contact information of each nonexempt California employee in the relevant time period
  - Employer refused to provide information

Williams v. Superior Court

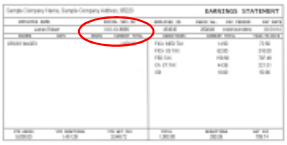
- Result:
  - Court ordered employer to produce the contact information
  - Mere contact information for employees is not subject to the same right to privacy as health or financial information
  - It is not unduly burdensome for employer to produce such information

Williams v. Superior Court

- Takeaways:
  - Employer may be subject to burdensome discovery early in most PAGA cases
  - Employer's exposure will be increased in most cases as plaintiff's lawyer will have access to many potentially aggrieved employees
  - More pressure on employers to settle PAGA cases early

Lopez v. Friant & Associates, LLC

- Facts:
  - Employer failed to include the last four digits of employees' social security numbers on wage statements
  - Employee sued under PAGA
  - Employer claimed no violation because it was not "knowing and intentional" and did not cause injury



Lopez v. Friant & Associates, LLC

Relevant Law:

- Section 226(a) – Sets forth nine components that must be included on a wage statement, namely the last four digits of an employee's social security number *or* employee identification number
- Section 226(e)(1) – Permits recovery of damages or a "penalty" by an individual employee for a violation of section 226(a) that is "knowing and intentional" and resulting in "injury"

Lopez v. Friant & Associates, LLC

Issue:

- Does section 226(e)(1) apply to PAGA actions?

Lopez v. Friant & Associates, LLC

- Result:
  - No, the Court held that section 226(e)(1) is limited to claims for ***damages*** or ***statutory penalties*** for violations of section 226(a)
  - A PAGA action seeks only ***"civil penalties"*** so it is not subject to the requirements of section 226(e)(1)
    - Plaintiff does not have to show he suffered an "injury"
    - Plaintiff does not have to show employer's alleged violation was "knowing and intentional"

Lopez v. Friant & Associates, LLC

- Takeaway:
  - Be sure that your wage statements contain all of the required information!

Final Questions

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Benefits Update

December 5-13, 2017

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Benefits Update

Affordable Care Act (ACA)

- Repeal / Replace…
- Promoting Healthcare Choice and Competition Across the United States Executive Order (Otherwise known as the "AHP Executive Order")
  - Instructs agencies to expand the availability of AHPs
  - Expansion of Short-Term, Limited Duration Insurance
  - Expansion of HRAs

Benefits Update

Affordable Care Act (ACA) (a blast from the past…)

Today's agenda:

1. Repeal / Replace
2. Repeal / Replace
3. Repeal / Replace
4. Repeal / Replace
5. Repeal / Replace

Benefits Update

Affordable Care Act (ACA) (continued)

- In the meantime, IRS continues to plug forward…
- Individual returns must address healthcare coverage
- Early stages of enforce of the Employer Mandate
  - Penalty notices for 2015
  - 30-day deadline for responses
  - Importance of documentation
- Predictions…?

Benefits Update

Healthy California Act (SB 562)

- Possible state law replacement if ACA is repealed
- Passed by Senate on June 1, 2017, but did not proceed from there
- "This bill . . . would create the Healthy California program to provide comprehensive universal single-payer health care coverage and a health care cost control system for the benefit of all residents of the state."
- Early stages and very high level right now
- Contingent on financing
- Funding sources still TBD

Benefits Update

California Secure Choice Program

- Background
- Initially Contingent on DOL Guidance
- New Administration…
- Lawyers to the Rescue
- Legislative Amendment
- Current Estimated Effective Date for Employers: "Late 2019 is likely…"

Benefits Update

California Secure Choice Program (continued)

Once Program is Operational:

- Employers with 100 or more employees will need to comply within 12 months
- Employers with 50-99 employees will need to comply within 24 months
- Employers with 5-49 employees will need to comply within 36 months

Benefits Update

California FUTA Credit Reduction

- California's UI Trust Fund deficit was approximately $3.9 billion at the end of 2016
- 2017 FUTA credit reduction was 2.1%
- Likely an additional 0.3% FUTA credit reduction for 2018 (total of 2.4%)
- Projections released by EDD in May of 2017 estimate that:
  - Trust Fund deficit will drop to $1.4 billion by the end of 2017
  - In 2018, Trust Fund will end the year with a positive balance of $1.6 billion—first positive balance since 2008

Benefits Update

Increased DOL and IRS Audit Activity

- General increase, particularly out of Pasadena and San Francisco DOL offices
- Increased focus on health and welfare plans
- Increased focus on Form 5500 compliance
- Increased enforcement of deadlines

Final Questions

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