



Common Misunderstandings about the ADA, HIPAA, OSHA and Employee Medical Information.



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Scenario 1

An employee is struck by a forklift and taken by ambulance to the nearest hospital, which is 25 miles away. A supervisor follows the ambulance to the hospital. Family members arrive and the supervisor is unable to obtain information from the hospital because they advised him that HIPAA and other confidentiality restrictions prohibit them from updating employee on his condition.

The supervisor suspects that bones were broken but also knows that the employee was conscious and talking easily to people when the ambulance took him to the hospital. The family members are distraught and have directed a certain amount of anger at the company and do not want to talk to the supervisor.

Scenario 1 (con't)

The accident occurred at 3 PM and around 8:30 that night, the supervisor assumes that the employee will be kept overnight, but does not know if the employee is being kept overnight because of treatment or for observation.

The next morning, Saturday, the HR director tries to get a Worker's Compensation case management nurse to contact the hospital and get more information, but no one is assigned until the following Tuesday. On Monday, OSHA arrives on site and asked why the overnight hospitalization was not reported to OSHA within 24 hours as required. OSHA learned of the accident from the emergency responders, who notified OSHA.

Scenario 1 (con't)

Two days later, OSHA requested copies of the OSHA 300 injury log and of the OSHA form 301/First Report of Injury, and demands to know why there is little detail on the 300 Log and in the Form 301.

OSHA subsequently issued citations against the employer for (1) failure to notify OSHA of an overnight hospitalization for treatment within 24 hours, (2) failure to describe the body part and injuries suffered in the form 300, and (3) failure to identify whether the accident involved days away from work, etc.

Scenario 1 - questions

- What are the deadlines for providing Injury and Accident-related information to OSHA and completing OSHA Forms 300, 300A and related documents?
- What legal requirements limit the employee from getting information about an employee patient's status in the early stages?
- How can an employer obtain the necessary information?

OSHA Workplace Injury Recordkeeping Obligations

- Is the employer required to maintain the OSHA 300 Log?
 - Exemptions are found at [OSHA.gov](https://www.osha-slc.gov/Recordkeeping), Recordkeeping page.
- IF yes, the injury must be properly entered on the 300 Log within 7 days.
 - You can revise the entry if it is later found to be non-work related.
- The employer must complete the OSHA Form 301, which is generally the same as the state “First Report of Injury.” within 7 days.



OSHA's Form 300 (Rev. 04/2004)
Log of Work-Related Injuries and Illnesses

Note: You can type input into this form and save it. Because the forms in this recordkeeping package are "fillable/writable" PDF documents, you can type into the input form fields and then save your inputs using the free Adobe PDF Reader. In addition, the forms are programmed to auto-calculate as appropriate.

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

Year 20
U.S. Department of Labor
Occupational Safety and Health Administration
Form approved OMB no. 1218-0176

Please Record:
- Information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid.
- Significant work-related injuries and illnesses that are diagnosed by a physician or licensed health care professional.
- Work-related injuries and illnesses that meet any of the specific recording criteria listed in 29 CFR Part 1904.8 through 1904.12.

Reminders:
- Complete an injury and illness Incident Report (OSHA Form 301) or equivalent form for each injury or illness recorded on this form. If you're not sure whether a case is recordable, call your local OSHA office for help.
- Feel free to use two lines for a single case if you need to.
- Complete the 5 steps for each case.

Establishment name
City
State

Step 1. Identify the person (A) Case no., (B) Employee's name, (C) Job title, (D) Date of injury or onset of illness, (E) Where the event occurred, (F) Describe injury or illness. Step 3. Classify the case (G) Days away from work, (H) Job transfer or restriction, (I) Other medical treatment, (J) On job transfer or restriction, (K) Days away from work, (L) On job transfer or restriction. Step 4. Enter the number of days the injured or ill worker was... Step 5. Select one column: (M) Injury, (N) Skin disorder, (O) Respiratory condition, (P) Poisoning, (Q) Hearing loss, (R) All other illnesses.

Public reporting burden for this collection of information is estimated to average 34 minutes per response, including time to review the instructions, search existing data sources, gather the data needed, and complete and review the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. If you have any comments about this estimate or any other aspect of this data collection, contact the US Department of Labor, OSHA Office of Statistical Analysis, Room N-3644, 250 Constitution Avenue, NW, Washington, DC 20210. Do not send the completed forms to this office.

Page total:

Be sure to transfer these totals to the Summary page (Form 3004) before you post it.

Add a Form Page

Page 1 of 1

Injury 1, Skin disorder 2, Respiratory condition 3, Poisoning 4, Hearing loss 5, All other illnesses 6



OSHA's Form 300A (Rev. 04/2004)

Summary of Work-Related Injuries and Illnesses

Note: You can type input into this form and save it. Because the forms in this recordkeeping package are "fillable/writable" PDF documents, you can type into the input form fields and then save your inputs using the free Adobe PDF Reader.

Year 20
U.S. Department of Labor
Occupational Safety and Health Administration
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All establishments covered by Part 1904 must complete this Summary page, even if no work-related injuries or illnesses occurred during the year. Remember to review the Log to verify that the entries are complete and accurate before completing this summary. Using the Log, count the individual entries you made for each category. Then write the totals below, making sure you've added the entries from every page of the Log. If you had no cases, write "0." Employees, former employees, and their representatives have the right to review the OSHA Form 300 in its entirety. They also have limited access to the OSHA Form 301 or its equivalent. See 29 CFR Part 1904.35, in OSHA's recordkeeping rule, for further details on the access provisions for these forms.

Table with 4 columns: Total number of deaths, Total number of cases with days away from work, Total number of cases with job transfer or restriction, Total number of other recordable cases. All values are 0.

Table with 2 columns: Total number of days away from work, Total number of days of job transfer or restriction. Both values are 0.

Table with 6 columns: Total number of (1) Injuries, (2) Skin disorders, (3) Respiratory conditions, (4) Poisonings, (5) Hearing loss, (6) All other illnesses. All values are 0.

Put this Summary page from February 1 to April 30 of the year following the year covered by the form. Public reporting burden for this collection of information is estimated to average 34 minutes per response, including time to review the instructions, search and gather the data needed, and complete and review the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. If you have any comments about these estimates or any other aspects of this data collection, contact: US Department of Labor, OSHA Office of Statistical Analysis, Room N-3664, 200 Constitution Avenue, NW, Washington, DC 20210. Do not send the completed form to this office.

Establishment Information form including fields for: Year establishment name, Street, City, State, Zip, Industry description, North American Industrial Classification (NAICS), Employment information (Annual average number of employees, Total hours worked by all employees last year), and a Save Input button.



OSHA's Form 301 (Rev. 04/2004)
**Injury and Illness
 Incident Report**

Note: You can type input into this form and save it. Because the forms in this recordkeeping package are "filable/writable" PDF documents, you can type into the input form fields and then save your inputs using the free Adobe PDF Reader. In addition, the forms are programmed to auto-calculate as appropriate.

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.



U.S. Department of Labor
 Occupational Safety and Health Administration

Form approved OMB no. 1218-0176

This *Injury and Illness Incident Report* is one of the first forms you must fill out when a recordable work-related injury or illness has occurred. Together with the *Log of Work-Related Injuries and Illnesses* and the accompanying *Summary*, these forms help the employer and OSHA develop a picture of the extent and severity of work-related incidents.

Within 7 calendar days after you receive information that a recordable work-related injury or illness has occurred, you must fill out this form or an equivalent. Some state workers' compensation, insurance, or other reports may be acceptable substitutes. To be considered an equivalent form, any substitute must contain all the information asked for on this form.

According to Public Law 91-596 and 29 CFR 1904, OSHA's recordkeeping rule, you must keep this form on file for 5 years following the year to which it pertains.

If you need additional copies of this form, you may photocopy the printout or insert additional form pages in the PDF, and then use as many as you need.

Completed by _____
 Title _____
 Phone _____ Date _____
 Month Day Year

Information about the employee

- 1) Full name _____
- 2) Street _____
 City _____ State _____ ZIP _____
- 3) Date of birth _____
 Month Day Year
- 4) Date hired _____
 Month Day Year
- 5) Male Female

Information about the physician or other health care professional

- 6) Name of physician or other health care professional _____
- 7) If treatment was given away from the worksite, where was it given?
 Facility _____
 Street _____
 City _____ State _____ ZIP _____

- 8) Was employee treated in an emergency room?
 Yes
 No
- 9) Was employee hospitalized overnight as an in-patient?
 Yes
 No

Information about the case

- 10) Case number from the Log _____ (Transfer the case number from the Log after you record the case.)
- 11) Date of injury or illness _____
 Month Day Year
- 12) Time employee began work _____ AM PM
- 13) Time of event _____ AM PM Check if time cannot be determined

* Re fields 14 to 17: Please do not include any personally identifiable information (PII) pertaining to worker(s) involved in the incident (e.g., no names, phone numbers, or Social Security numbers).

14) What was the employee doing just before the incident occurred? Describe the activity, as well as the tools, equipment, or material the employee was using. Be specific. Example: "climbing a ladder while carrying roofing materials"; "spraying chlorine from hand sprayer"; "daily computer key-entry."

15) What happened? Tell us how the injury occurred. Examples: "When ladder slipped on wet floor, worker fell 20 feet"; "Worker was sprayed with chlorine when gasket broke during replacement"; "Worker developed soreness in wrist over time."

16) What was the injury or illness? Tell us the part of the body that was affected and how it was affected. Examples: "strained back"; "chemical burn, hand"; "carpal tunnel syndrome."

17) What object or substance directly harmed the employee? Examples: "concrete floor"; "chlorine"; "radial arm saw." If this question does not apply to the incident, leave it blank.

18) If the employee died, when did death occur? Date of death _____
 Month Day Year

Save Input Add a Form Page Reset

Public reporting burden for this collection of information is estimated to average 22 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this data collection, including suggestions for reducing this burden, to Washington, DC 20503. Do not send this completed form to this office.

OSHA Injury Reporting Obligations.

Employers **must now report** the following to OSHA:

- All work-related fatalities and three or more hospitalizations within 8 hours (same as current requirement)
- **All work-related in-patient hospitalizations of one or more employees within 24 hours**
- All work-related amputations within 24 hours
- All work-related losses of an eye within 24 hours

OSHA Injury Reporting Obligations.

IN PATIENT HOSPITALIZATIONS:

In-patient hospitalization is defined as a formal admission to the in-patient service of a hospital or clinic for care or treatment.

1904.39(b)(10) *Do I have to report an in-patient hospitalization that involves only observation or diagnostic testing?*

- No, you do not have to report an in-patient hospitalization that involves only observation or diagnostic testing. You must only report to OSHA each inpatient hospitalization that involves care or treatment.

But, Get it in writing

Making Sense Out of HIPAA Limitations.

Who Does HIPAA Apply To?

1) “Covered Entities”:

- health care providers
- health care clearinghouses, and
- group health plans

2) Business Associates:

- performs function on behalf of a covered entity or provides it with specific services, and
- has access to individually identifiable health information
- E.g., TPA, attorney, broker, actuary, accountant, service provider

What benefit plans must comply with HIPAA?

“Group Health Plans”

- 1) an employee welfare benefit plan (defined in ERISA),
 - Including insured and self-insured plans
- 2) that provides medical care, and
- 3) either
 - has 50 or more participants; or
 - is administered by an entity other than the employer that established and maintains the plan.

Benefits Plans subject to HIPAA:

- individual plans providing medical care
- major medical plans
- dental and vision plans
- health flexible spending arrangements
- governmental health plans
- church plans
- wellness programs
- employee discount programs that provide discounted medical services
- retiree health plans
- on-site medical clinics (as a provider)

Benefits plans that might have to comply with HIPAA:

- supplemental benefits (cancer insurance, hospital indemnity)
- employee assistance plans
- long-term care
- cafeteria plans
- life insurance

*** coverage depends upon whether these plans provide medical care and whether they are maintained by an employer.**

Fully-insured Plans

- Most fully-insured plans will attempt to keep a “hands off” approach
- Summary Health Information
- Enrollment data
- Claims assistance
- FSAs and HRAs



Self-insured Plans

**KEEP
CALM
AND
JUST
COMPLY**

- Self-insured plans generally cannot qualify for “hands-off” status
- Includes the following self-insured arrangements:
 - FSAs and HRAs (limited exception re excepted benefits)
 - Employee Assistance Programs (EAPs)
 - Group health (major medical type) plans
 - Wellness Programs affiliated with a group health plan

Protected Health Information (PHI)

- Individually identifiable health information created or received by a Covered Entity or Business Associate which relates to past, present, or future health care or payment for health care
- Excludes employment records
- Examine *source, purpose and use* to determine whether a document is an employment record
- ePHI is PHI stored or transmitted electronically

Information that is not PHI

- Summary Health Information (SHI)
 - Info summarizing claims history, expenses or types of claims from which all identifying information has been removed
 - SHI may be used only for modifying or terminating a health plan or seeking bids for coverage
 - *Use this information if feasible!*
- Enrollment/disenrollment information
- Info you receive in your HR (not health plan) role. Determine which “hat” you are wearing when you received the info.

HIPAA's Privacy Rule

- Use/Disclosure of PHI without Authorization:
 - Treatment
 - Payment
 - Activity undertaken to fulfill plan responsibility for provision of benefits or obtain reimbursement for health care. Includes eligibility and coverage determinations, adjudication of benefit claims, coordination of benefits, determining cost-sharing, risk adjusting, billing, premium collection, claims management, medical necessity, cost review and utilization review.
 - Healthcare Operations
 - Activities directly related to treatment or payment. Includes internal quality oversight review, credentialing, legal services, audit functions, general administration, placing reinsurance, underwriting renewal or replacement of a contract of health insurance.
 - Other Disclosures
 - To the individual, Business Associates, or as required by law
 - Emergencies
- If not, individual authorization is required

Minimum Necessary Standard



- Covered Entity/Business Associate must limit disclosure of PHI to the minimum necessary
- Only employees with a need to know may have access
- Identify employees who need access to PHI and limit access to those employees and the specific PHI necessary for them to perform job function
- Requests: establish policies and procedures limiting PHI disclosure to amount and type necessary

HIPAA's Security Rule

- Ensures the confidentiality, integrity, and availability of all electronic PHI (“ePHI”) that you can create, receive, maintain, or transmit
- Protects against reasonably anticipated threats
- Protects against uses or disclosures of ePHI that can reasonably be anticipated
- Protects regardless of where ePHI is accessed
- Employers with fully-insured plans are generally exempt from the Privacy Rule requirements to adopt privacy policies and procedures and deliver privacy notices; but *every* plan must comply with the Security Rule

Medical Inquiries and Examinations

- Pre-offer inquiries
 - Should not ask about disabilities or medications
- Post-offer inquiries
 - No need for medical test to be related to job, but withdrawal of offer must be
 - Same test for all applicants for same job
 - Agility and drug tests not medical tests
- Once employment starts
 - Must be job-related

Scenario 2

Jennifer operates a forklift at the Atlanta distribution center. She has commented to the number of coworkers that she suffers from a seizure disorder; however, her medications have the seizures under control and she claims not to have had an episode in several years.

- Can the employer ask Jennifer about her condition and ask for proof that she can safely perform the essential functions of the job?
- Does OSHA maintain physical qualification standards for a forklift operator?

Scenario 3

Bob drives a pickup truck provided by the company. He works as a technician and may carry light materials and tools. Bob has a cardiac condition and the company is aware that he has missed work twice in recent years for bypass operations, and visibly looks unhealthy.

- What can the employer do about its concern that Bob might have a heart attack or pass out while on public roads?
- Can the employer require Bob to satisfy physical qualification standards in the Federal Motor Carrier Safety Administration regulations?

Follow the ADA Process.

Under the ADA, you must **Reasonably Accommodate a Disabled** employee or applicant unless doing so is an **Undue Hardship** or creates a **Direct Threat** to health or safety.

An employer must go through an **Individualized Interactive Process** with the employee.

Initiate the interactive process when the employee's disability is **known** or **apparent**. For example, when:

- Employee requests an accommodation
- Employee presents doctor's note with work restrictions
- Employee exhausts FMLA leave
- Employer otherwise becomes aware of need for accommodation through third party or observation

Evaluation of Direct Threat and Undue Hardship.

Direct Threat.

- Employee must not pose an imminent risk of substantial harm.
- Fear of a future harm is not sufficient.
- Evaluation of risk should be based on reasonable medical judgment and available objective evidence.

Employers are entitled to know:

- Healthcare provider's qualifications
- Nature and duration of restrictions but not necessarily entitled to know diagnosis
- Employee's limitations
- Need for reasonable accommodation
- Suggested accommodation(s)

May request medical documentation and information.

Be clear on what you are seeking so that employee and physician know the request is narrowly tailored to the restriction or concern at issue

If medical information provided still unclear, may require Independent Medical Examination (IME).

Example of EEOC Guidance.

- **17. When may an employer refuse to hire, terminate, or temporarily restrict the duties of a person with epilepsy because of safety concerns?**
- An employer only may exclude an individual with epilepsy from a job for safety reasons when the individual poses a direct threat. A "direct threat" is a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced through reasonable accommodation. This determination must be based on objective, factual evidence, including the best recent medical evidence and advances in the treatment of epilepsy.
- In making a direct threat assessment, the employer must evaluate the individual's present ability to safely perform the job. The employer also must consider:
 - the duration of the risk;
 - the nature and severity of the potential harm;
 - the likelihood that the potential harm will occur; and
 - the imminence of the potential harm.
- The harm must be serious and likely to occur, not remote or speculative. Finally, the employer must determine whether any reasonable accommodation (for example, temporarily limiting an employee's duties, temporarily reassigning an employee, or placing an employee on leave) would reduce or eliminate the risk.

ADA Confidentiality Obligation

Medical information obtained from offerees or employees must be kept confidential.

- information obtained regarding the medical condition or history of the offeree/employee is collected and maintained on separate forms and in separate medical files with restricted access and is treated as a confidential medical record, except that:
 - supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
 - first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
 - government officials investigating compliance with this chapter shall be provided relevant information on request.

EEOC Guidance.

18. May an employer require an employee who has had a seizure at work to submit periodic notes from his doctor indicating that his epilepsy is under control?

- Yes, but only if the employer has a reasonable belief that the employee will pose a direct threat if he does not regularly see his doctor. In determining whether to require periodic documentation, the employer should consider the safety risks associated with the position the employee holds, the consequences of the employee's inability or impaired ability to perform his job, how long the employee has had epilepsy, and how many seizures the employee has had on the job.

1. FMCSA Physical Qualifications for Drivers.

- The FMCSA is responsible for the medical certification of drivers of commercial motor vehicles operating in interstate commerce as defined by 49 C.F.R. 390.5. A commercial motor vehicle (CMV) is defined as any motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle generally has a gross weight of at least 10,001 pounds and is designed or used to transport more than eight passengers (including the driver) for compensation. *Id.*

Scenario 4

Sam is known to be a heavy drinker. He often comes to work smelling of alcohol, unshaven, and looks rough, but has not experienced significant performance problems. He drinks heavily at any firm event, but has not engaged in any conduct warranting discipline. Coworkers comment that they are unnerved by how completely drunk he gets when he is with them. He passes out, and has been observed leaving a party to drive when he was probably impaired.

- He is a salesperson who uses his own cars to travel to see customers.
- What can the company do to limit its risk?
- Can the company approach him about reports and observations about his non-work related drinking?

What about the ADA?

- Alcoholism will most likely be a disability.
- A rehabilitated drug addict is protected under the ADA.
- Leave of absence for rehabilitation may be considered reasonable accommodation (before violation of policy).
- A *current* user of illegal drugs is not protected under the ADA.
- An individual with alcoholism is protected under the ADA, but may be disciplined for violating Company policy or work rule.

Drug & Alcohol Policies: The ADA

- The EEOC regulations explain that *“individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities.”*
- Although courts generally do not consider alcoholism a “per se” disability – an alcoholic is a person with a disability when the condition “substantially limits” him or her in at least one “major life activity.”
- The ADA also protects individuals who do not currently drink alcohol but have a record of alcoholism.

Drug and Alcohol Policies – the ADA

- Employers may require an employee who is an alcoholic or who is currently using illegal drugs to meet the same performance standards of performance and behavior as other employees;
- Employers do not have to tolerate poor job performance or unsatisfactory behavior such as absenteeism, tardiness, insubordination or on the job accidents related to an employee's alcoholism if similar performance or conduct would not be tolerated in other employees.
- The ADA specifically permits employers to prohibit the use of alcohol and the illegal use of drugs in the workplace and to discipline employees for such use.
- Employers may maintain a drug free workplace standard.

Drug & Alcohol Policies: Family and Medical Leave Act (FMLA)

- The FMLA provides twelve weeks of leave and reinstatement for employee with a “*serious medical condition.*”
- In most cases, drug addiction will be considered a “*serious medical condition.*”
- Substance Abuse Rehabilitation may count as FMLA leave.
- An employer is not prohibited from taking action against an employee for illegal drug use even if the employee who has entered a treatment program if the employer has a uniform policy that such use will result in termination.

Scenario 5

Marie works as an analyst in a white collar setting entering data, talking on the phone, and coordinating with various coworkers in adjoin cubes. Marie reported to work with several heavy bandages on her left arm and hand. Marie explained that she has MRS and does not know how she contracted it. She said that her doctor told her that she poses no infection risk as long as she keeps her open wounds covered. Employees are concerned that they may get exposed from doorknobs, keyboards, or from the break room which everyone shares.

- Should the employer approach Marie?
- What should the employer tell employees?

Scenario 6

Several coworkers advise the HR director that Mickey told them that he has TB, but it is okay to work. Mickey has not approached HR or the supervisor, and employees are concerned about exposure risk.

- How should HR approach Mickey?
- What should HR tell coworkers?
- How is TB regulated by state public health authorities question?

Infectious Disease - TB.

- Follow Public Health Guidance, including from the CDC, NIOSH, OSHA, and state Health departments. CDC/NIOS Site on Workplace TB Issues: <https://www.cdc.gov/tb/>
- States aggressively manage TB, requiring healthcare providers to notify the public health department and even pursuing criminal actions for failure to do so.
- When someone says they have TB,” that can mean many things.
- TB is not as easily transmitted in most settings as employees may fear. See NIOSH section, “What to Do if You are Exposed.” <https://www.cdc.gov/tb/topic/basics/exposed.htm>
- Manage information and employee fear.

Infectious Disease – MRSA.

From the CDC:

Methicillin-resistant *Staphylococcus aureus* (MRSA) is a cause of staph infection that is difficult to treat because of resistance to some antibiotics.

How do I prevent the spread of MRSA?

- Cover your wounds with clean, dry bandages until healed.
Follow your healthcare provider's instructions about proper care of the wound. Pus from infected wounds can contain MRSA.
 - Do not pick at or pop the sore.
 - Throw away bandages and tape with the regular trash.
- Clean your hands often.
You, your family, and others in close contact should wash hands often with soap and water or use an alcohol-based hand rub, especially:
 - after changing a bandage
 - after touching an infected wound
 - after touching dirty clothes
- Do not share personal items such as towels, washcloths, razors, and clothing, including uniforms.
- Wash laundry before use by others and clean your hands after touching dirty clothes.

Scenario 7

Employer offers a wellness program. Employees who participate in the employer's group health plan are eligible to participate in the wellness program, and can earn a reward of \$50 off their monthly premium if they complete a HRA.

- Is the wellness program covered by HIPAA?
- How can the employer use the information obtained from the HRA?
- Is the \$50/month reward permissible?

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Thank You



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