

CORONAVIRUS:

EMPLOYER Q&A

Updated: March 27, 2020

We continue to receive questions from clients on how to handle coronavirus from an HR perspective. Because it is likely that most of our clients may have similar questions, we are collecting these into the following Q&A format guide.

We will plan for this to be an ongoing and cumulative guide as more questions are identified. As you have additional questions, we invite you to please submit those to Info@BFGonline.com. We will work to keep this updated frequently and posted on our website for your easy reference:

<https://www.businessfinancialgroup.com/coronavirus-employer-qa>

Revision Notes: This version contains some new information on DOL guidance, tracking FFCRA, additional questions on FFCRA (how pay rate is determined), and some information on the Texas Workforce Commission.

Nonexempt versus Exempt Employees

As a preface for these questions, it's important to note the difference between exempt (salaried) and non-exempt (hourly) employees. Because the purpose of this Q&A document is to address general handling of coronavirus situations, we will only address some basic guidelines regarding compensation.

Essentially, according to the Fair Labor Standards Act (FLSA), nonexempt employees are entitled to overtime and exempt employees are not. With few exceptions, an exempt employee must be paid at least \$35,568 per year (\$684 per week), be paid on a salary basis, and also perform exempt job duties as defined in the Act.

Compensation requirements:

- Nonexempt employees: Must be paid only for hours worked. Paid time off, if offered, is administered per company policy. No compensation is required for hours where work is not performed.
- Exempt employees: The FLSA requires exempt employees to be paid a guaranteed weekly salary that cannot be reduced based on the quality or quantity of the employee's work during that week. If improper deductions are taken, the exempt status of that employee may be jeopardized.

In the event of sickness and the employer does not provide a bona fide leave plan, that is paid sick leave or paid time off (PTO), an exempt employee who performs any work during a company-specified work week must be paid their salary for the full week. If the company does provide a PTO plan and it is exhausted, the employer may deduct in full day increments for full days off.

While there are other nuances in the FLSA, the above should serve as general guidelines.

I. Time Off

1. Can a supervisor tell an employee to leave work if they are sick?

Yes. Doing so helps to reinforce the message that employees should stay home when they are sick. Employees who show symptoms of a potentially contagious illness can be asked to leave work and stay home until they are symptom free.

Because it is allergy season, remember that a simple cough may not be a sign of coronavirus or flu; however, having fever or shortness of breath in addition to cough may point to those more serious ailments. Employers should not ask too much so as to identify a specific condition an employee may be suffering from: Per the Society for Human Resource Management (SHRM), “The Americans with Disabilities Act prohibits disability-related inquiries unless they are job-related and consistent with business necessity. But such an inquiry may be job-related and consistent with business necessity if an ill employee poses a direct threat to the health of others.”

Employers should be consistent in enforcing any policy of asking employees to go home fairly and equally across their employee base so as not to be seen as having a bias against particular employees. Have the conversation with the employee in private, and it may be best to have both the frontline manager and a representative from HR or upper management present.

2. If an employee becomes sick with the virus and has to be quarantined, how will PTO be used?

a. If the employer has a PTO plan in place, will employees be required to use that up even if it is a mandated quarantine?

Depending on the company’s PTO policy, hourly employees may choose to use PTO or take the time off without pay. Because exempt employees have a guaranteed pay, the norm is to require the use of PTO during weeks when any work has been performed as well as weeks where no work was performed.

b. Do we have to pay employees if they run out of PTO? Do we have to pay nonexempt employees? If not, can we pay them something to help them out? If an employee has no PTO, do we need to extend PTO to cover the missed hours?

No, you do not have to pay employees if they run out of PTO though you could opt to do so. For example, you could enact a specific leave policy for employees with coronavirus if you’d like. However, if you opt to offer a special leave policy, you will want to set up that it will not be in force when this specific situation is no longer an emphasis.

Nonexempt employees who do not have paid sick leave are not required to be paid for their time off of work unless there is a collective bargaining agreement in place. That said, if a nonexempt employee is quarantined during the course of business travel, they should still be paid for any time travelling home.

Be sure that employees who work remotely are paid for all time worked.

3. In the event employees will have to work from home, how can we ensure that they are being productive?

If you typically allow work from home, you may already have policies that address this topic. If not, employers can generally monitor the use of work email if there is a valid business purpose to do so. You might schedule conference calls to provide updates and/or ask the employee to send supervisors a periodic email with progress reports or other reporting that summarizes the work they completed along with the targeted deadlines for the period.

4. What should we do if an employee is unable to work from home because...?

a. the employee is too sick to perform the required duties from home

If the employee is too sick to work, allow the employee time to rest and recover. If they have PTO, allow them to use it.

b. the employee does not have the appropriate equipment needed (hardware, software, internet service, etc.)

If the employee is not equipped to work from home and you have closed your office, then the employee is not able to work until you reopen your office. You are only required to pay nonexempt, hourly employees for the time when they are performing work. If they have PTO, allow them to use it.

c. a position, such as a receptionist, requires the employee to be physically present in the workplace

Certain positions require that the employee be present in the office and cannot be performed remotely. You are only required to pay nonexempt, hourly employees for the time when they are performing work.

5. Are we required to pay an employee who refuses to come work because of concerns about contracting coronavirus?

While employees may be fearful of contracting coronavirus, employers do not need to provide another accommodation unless there is a real potential that the employee could contract the disease in performing their job. An employee may refuse to work, but per SHRM, "If the employer can establish that there is no basis for any exposure to the disease, the employee does not have to be paid during the time period the employee refuses to work."

6. If there is not enough work for all of my employees, can I send them home?

Yes. There are several options to consider.

For industries that can't tell employees to work from home, such as manufacturing, retail, and hospitality, you could reduce the hours worked and possibly use staggered shifts.

You could also choose to either lay some or all employees off, temporarily or permanently or to furlough them.

An employee furlough is a mandatory suspension from work typically without pay. It can be as brief or as long as the employer wants.

An employer will furlough employees as a cost-saving measure when it doesn't want to lay off staff but lacks the resources to continue paying them.

You can also furlough on a partial week basis. For instance, you could furlough one day per week so that the employee is only working and getting paid for four days per week. An advantage to this for exempt employees is that you are not technically changing the rate of pay.

During the furlough, the employee retains his or her job which means that he or she also retains benefits. After the furlough ends, the employee returns to work.

Be clear, think through all the possibilities, and be as transparent as possible with your employees. If you want them to return to work, it's important that they believe that this short-term solution will ensure a long-term, mutually beneficial relationship. They will need to believe that you are making a good decision and taking the best care of them possible, while ensuring business continuation for the organization.

7. If I do send employees home or close the office, must we keep paying employees who are not working?

Under the Fair Labor Standards Act (FLSA), for the most part the answer is "no." FLSA minimum-wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires. (See Non Exempt and Exempt descriptions above).

However, an employer may choose to continue paying employees on some basis at or less than their full rate of pay.

Additionally, you can create an expanded Paid Time Off (PTO) option that could be designed specifically for this situation. This would be in addition to the new FFCRA, described below, and your current PTO plan. For this option, an additional week, 2 weeks or more could be added on top of the normal PTO that is in your handbook.

Important Note Regarding FFCRA: *As with other emergency Acts, the IRS will need time to determine what information will be needed in order for businesses to receive tax credits later for the expenses business owners are being asked to front on behalf of the government now. Unfortunately, payroll programmers cannot implement software enhancements to process and track the costs of these benefits before the IRS publishes the final regulations.*

We are encouraging clients to create separate GL accounts to track and segregate expenses related to these costs, so that when the IRS code is released, you can easily compile the information you need for your tax return. This will be critical in order for you to efficiently be able to report to be able to receive your reimbursement.

For hourly, nonexempt employees, you could also pay them their hourly pay rate for a set number of hours per week not to work. Keep in mind that they are entitled to be paid for any hours they do work if it exceeds the number of hours you agree to pay on a temporary basis.

For exempt, salaried employees, federal regulations require employers to pay their full weekly salary in any workweek in which they perform some work. If they are being temporarily furloughed so that no work will be performed, the same or a reduced pay could be offered.

8. We had an employee call into work because his wife is sick with flu-like symptoms. Should we be concerned? And what can we require of him before returning to work?

It is recommended that you allow the employee to stay home to care for her. If, by chance, his spouse does have something contagious, and he catches it, whether it be the flu or something else after he requested the time off, you would not want the exposure from other employees catching it because you made him come to work until he showed signs, such as a fever.

Find out how long the employee expects to be out. You will be fine asking general questions, such as has her doctor indicated if what she has is contagious or not, how long she is expected to need help with her care, and so on. You can also ask the employee to give you an update for each day he will be out if he doesn't give you a definite return date. It is also fine to require him to call before the end of the day each day to give you an update for the next day. This is a reasonable request because you need time to schedule others to cover his duties. You could ask all of this through email, but it may be quicker and more effective to have a phone call and then follow up with an email to summarize everything discussed and agreed upon.

If the employee is staying home to care for a family member, be mindful of FMLA requirements; however, FMLA focuses primarily on job protections and does not require paid time off outside of the company policy.

9. If we cut hours for the employees we have left, can we reject them trying to use vacation time to bring their hours up to the old rates?

Yes, you do not have to pay vacation for hours they are not scheduled to work. PTO is for paid time off from scheduled work.

10. If employees seek unemployment benefits, does that change their status from inactive employees (furloughed) to terminated?

Employees who are laid off or furloughed are eligible for unemployment benefits if their weekly pay is reduced by more than 80% through no fault of their own. Therefore, they can still be employed and working or not working and be eligible for unemployment benefits. If they are still working, but only a few hours, the TWC will prorate their unemployment benefits according to their current wages. They will have to produce their pay checks on a periodic basis to continue receiving benefits.

11. How does the TWC's Shared Work program work?

Employers must apply and be accepted to participate in the Shared Work program. Once selected, employers must submit included employees' information to the TWC. Eligible employees are assigned to work for other employers participating in the program by the TWC and can be disqualified from the program if they refuse an assignment. Participating employers and employees must report wages to the TWC. The TWC allows employees to work part-time outside of the program and they are not required to report those wages. As you know, employers are required to report wages to the TWC along with the employee's name and SSN. Therefore, the

expectation would be that the TWC is monitoring this and will contact the employee to refund any benefits they should not have received and refund employer accounts accordingly.

II. Travel

1. If an employee goes out of the country, can we mandate that the employee be tested and/or quarantined before returning to work?

An employer may require that an employee self-quarantine if they have travelled to a country that may put them at high risk for contracting coronavirus (State Department Level 4 countries and CDC Level 2 and Level 3 countries). Employees who have traveled to countries with lower alert levels probably do not need to be quarantined unless they had a layover in a higher alert country, have been in close contact with someone who has coronavirus, or exhibit symptoms of coronavirus. Additionally, your industry may have specific protocols over and above general HR guidelines, such as the medical field.

III. Communication

1. What can we do to help ensure business continuity?

Talk with your employees about what you are doing to ensure safety in the workplace. As part of that communication, remind employees to stay home when they are sick, wash their hands, use a tissue when they cough or sneeze, avoid people who are sick, and regularly clean their work station. Let your employees know if you are providing hand sanitizers and disinfectant cleaners and where to find them. And encourage them to come to you to discuss any concerns they may have so you can address them.

If you are having trouble with absenteeism, you could also consider providing incentives to healthy employees who show up to work.

2. Can we move employees from salary to hourly and reduce hours?

Yes, that is perfectly legal. We recommend doing it in writing and having your employees sign it, similar to a pay change form.

3. I need to layoff a tenured employee. What is the best way to do that in the current situation?

We all know the best way to communicate bad news is often in a face-to-face conversation. If you are close to a tenured employee, you may be able to call them individually to let them know you have some very difficult news and give them the option to come into the office or let you tell them over the phone.

You should give them as much information as you can about the effect on the business, other employees, yourself, your deep concern for the health of them and their families, and you are doing everything you can to help everyone and keep the company financially stable in order to survive this, so everyone will have a place to come back to when it is over.

You can also let the employee know you are sending information to the TWC to expedite their unemployment payments and that they are welcome to go online or to a TWC office to file for unemployment themselves, and you will verify it is due to COVID-

19. We are hearing the employer site is very hard to get through at this time, given all of the other companies that are in this same position.

IV. For Businesses Working with Coronavirus Patients

1. We work in the healthcare industry and may come into contact with coronavirus patients. Should we make any adjustments?

Consider your processes and how they can be enhanced to reduce the likelihood of spreading disease. For example, a doctor or nurse who sees one patient with coronavirus could have the potential to infect their other patients. Take steps to identify which patients/clients may have coronavirus and to minimize the transmission risk with these patients. We have more in-depth guidance on this topic. If needed, please contact our HR team.

V. Government Action & Legislation to Be Aware of

1. What is the Families First Coronavirus Response Act?

On March 18, the Families First Coronavirus Response Act (FFCRA) was signed into law. FFCRA will be **effective on April 1, 2020, until December 31, 2020.**

FFCRA has two major provisions that affect employers:

- **Emergency Paid Sick Leave**

- Applies to

- Private employers with fewer than 500 employees
- Public employers with 1 or more employees
- Exemptions may be granted to employers with less than 50 employees only if making the payments would jeopardize the viability of the business

- Benefit

- Employers must provide 2 weeks (80 hours) of paid sick leave for full-time employees.
- Part-time employees must be provided paid sick leave based on the average number of hours they work in a two-week period.
- This paid sick leave must be provided regardless of the length of employment.
- An employer is in compliance if the employer already has a paid leave policy that meets or exceeds the benefits specified in the FFCRA.

- Reasons for Leave

1. Employee is subject to a Federal, state or local quarantine related to COVID-19.
2. Employee has been advised by a health care provider to self-quarantine.
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. Employee is caring for an individual who is subject to quarantine pursuant to 1 and 2.
5. Employee must care for a child or children (under 18 years of age) whose school or care provider is unavailable due to COVID-19.

- 6. Employee is experiencing a similar condition as specified by HHS, DOL or Treasury.
 - Wage Requirements
 - For Reasons #1-3 above: Employees should be paid at their regular rate. Pay is capped at \$511/day and \$5,110 total.
 - For Reasons #4-6 above: Employees should be paid at 2/3 of their regular rate. Pay is capped at \$200/day and \$2,000 total.
 - Tax Credit
 - Private sector employers with fewer than 500 employees may obtain a credit for wage replacement: The paid sick leave credit offsets 100% of employer costs for providing mandated paid sick leave. The credit also offsets, uncapped, the employer contribution for health insurance premiums for the employee for the period of leave.
 - Self-employed individuals are provided refundable income tax credits in an amount of what they would have received if they had been an employee receiving paid leave benefits under the mandates. For a given day that a self-employed worker could not work, they can claim a "rough justice" tax credit in the amount of their average daily self-employment income for the year.
- **Emergency Family and Medical Leave**
 - Applies to
 - Private employers with fewer than 500 employees
 - Exemptions may be granted to employers with less than 50 employees if making the payments would jeopardize the viability of the business
 - Benefit
 - Employers must provide 10 weeks of paid family and medical leave for employees who have been employed for at least 30 days.
 - Reasons for Leave
 - Employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.
 - Wage Requirements
 - Not less than 2/3 of regular rate of pay based on the typical number of hours scheduled to work. Pay is capped at \$200/day and \$10,000 total.
 - Tax Credit
 - Private sector employers with fewer than 500 employees may obtain a credit for wage replacement: The paid sick leave credit offsets 100% of employer costs for providing mandated paid sick leave. The credit also offsets, uncapped, the employer contribution for health insurance premiums for the employee for the period of leave.
 - Self-employed individuals are provided refundable income tax credits in an amount of what they would have received if they had been an employee receiving paid leave benefits under the mandates. For a given day that a self-employed worker could not

work, they can claim a "rough justice" tax credit in the amount of their average daily self-employment income for the year.

Important Note: As stated above, as with other emergency Acts, the IRS will need time to determine what information will be needed in order for businesses to receive tax credits later for the expenses business owners are being asked to front on behalf of the government now. Unfortunately, payroll programmers cannot implement software enhancements to process and track the costs of these benefits before the IRS publishes the final regulations.

We are encouraging clients to create separate GL accounts to track and segregate expenses related to these costs, so that when the IRS code is released, you can easily compile the information you need for your tax return. This will be critical in order for you to efficiently be able to report to be able to receive your reimbursement.

2. What does Governor Abbott's latest executive order mean to all of us in Texas?

Gov. Greg Abbott announced on Thursday a statewide public health disaster for the first time in more than 100 years due to coronavirus. This is the first time a public health disaster has been issued in Texas since 1901.

The disaster declaration gives the state and local officials the tools and resources they need to combat coronavirus.

Abbott also issued an executive order that requires all Texas schools, bars, gyms and restaurant dining rooms to temporarily close. This order is not a shelter in place, Abbott said. "We as a country must swiftly elevate our response to COVID-19," the governor said. "It is essential that all Americans comply with the CDC standards."

The executive order will begin on Friday, March 20, and end on April 3. Abbott said these dates are subject to change.

Here's what falls under Abbott's executive order:

1. Every person in Texas must avoid social gatherings that have more than 10 people.
2. People should avoid eating and drinking at bars, restaurants and food courts or visiting gyms. There will be no dining at bars or restaurant dining rooms since they will be closed. Restaurants can still offer take-out options.
3. People shall not visit nursing homes, retiring centers or long-term care facilities unless they're providing critical care assistance.
4. All Texas schools must close temporarily. This does not mean that education stops. Superintendents will continue to work with the Texas Education Agency to continue online or additional educational options.

3. What does the latest emergency declaration by the City of San Antonio include?

Effective on March 24 at 11:59 PM is the Stay Home, Work Safe Order in both San Antonio and Bexar County. It will last until April 9, unless it is rescinded or extended.

Mayor Nirenberg and Judge Wolff ordered all businesses to close and stop operations other than allowing employees to work from home, maintaining security and

maintenance of the business' property and facilitating information technology services that allow employees to work from home. This excludes businesses that are considered essential. A complete list of exemptions is available in the order:

<https://www.sanantonio.gov/Portals/0/Files/health/COVID19/Website%20Docs/Emergency%20Declaration%20No.%205.pdf?ver=2020-03-23-175107-393>

4. Does the WARN Act apply to businesses closed by the San Antonio Emergency Declaration?

Under the WARN Act, employers with 100 or more employees are required to provide 60 days' advance notice of a temporary shutdown if the shutdown will either affect 50 or more employees at a single site of employment and result in a layoff of the affected employees of at least 6 months or at least a 50 percent reduction in hours of work of the affected individual employees during each month of any 6-month period of the shutdown.

This notice is not required if the closure/shutdown is a result of a "natural disaster" or "unforeseeable business circumstances." WARN does not address whether a pandemic fits within these definitions, although an "unanticipated and dramatic economic downturn" might be considered "not reasonably foreseeable."

However, assuming that the COVID-19 situation qualifies above, it is still recommended that employers provide as much advance notice as possible. Following the mandated closure, if the business does not resume full operations due to loss of business revenue, WARN notification would be required for those who meet the criteria above.

5. I believe my business is considered "essential": do I need to document that somehow?

We recommend that you provide your employees who will be working from your office with a letter explaining the category that your business falls in to be considered essential (as identified in the mandate), the duties performed by the overall company to deem it essential, and the skills, training, duties that employees perform in order to be determined as vital to the organization in carrying out the company's obligations deemed essential by the ordinance. This letter should be customized for each employee and provide the employee's name and address if the employee does not have a work-issued ID badge.

6. Has the DOL provided any guidance on FFCRA?

The DOL has put out some guidance and resources on their website:

<https://www.dol.gov/agencies/whd/pandemic>

This information includes the following:

- Employer Fact Sheet: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>
- Employee Fact Sheet: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>
- FFCRA Q&A: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Please note, the DOL is requiring that employers keep a posted notice about sick leave. The different versions of the poster are available at the main link above.

7. How should we track if an employee needs to go out on an FFCRA leave?

We are recommending clients set up separate GL accounts to track the wages, taxes, and benefit costs associated with FFCRA leaves.

If BFG is your payroll provider, please let us know as soon as someone goes out on one of these leaves, so we can set up the pay types and link them to whatever new GL accounts you create.

Our payroll system is now ready to track the leave mandated by the FFCRA.

8. In FFCRA, what is meant by “calculated based on the employee’s regular rate of pay for the number of hours the employee would otherwise be normally schedule to work”?

The lookback period is 6 months. If the employee did not work that long, then it reverts to, “the reasonable expectation of the employee at the time of hiring of the average number of hours per day the employee would normally be scheduled to work.” The Act is leaving it to the employee’s expected hours at the time of hire, not the employer’s.

9. If we have reduced hours and pay, on April 1st, would the FFCRA calculation be based on the reduction or prior to the reduction?

You would be taking a high risk by using the reduced wages and/or hours. If an employee were to file a complaint, the DOL could require the employer to turn over all current and past payroll records and possibly conduct employee interviews. If the DOL calculates it differently, an employer would at minimum owe the difference to everyone from April 1st forward.

10. How will Texas Workforce Commission be handling layoffs due to COVID-19?

The TWC has announced that work separations due to COVID-19 should not result in chargebacks to the employer. They will not show up as direct tax increase; however in future tax years, there is indirect effect due to replenishment (starting in 2021).

If you are able to reduce hours (rather than layoff employees), you can apply with TWC for their Shared Work Program, which will allow you employees to work and get benefits, ultimately resulting in higher income for them.

11. It’s our understanding that we will be required to file a federal relief form at some point to enable the government to send checks directly to our employees. Is that portal available yet and is there a state or county version of the same thing?

We have not aware a federal, state, or county portal to apply for relief at this time. It will likely be launched once the regulations are finalized and published.

VI. Handling Benefits

1. How should we handle benefits for employees who are not working?

If you are temporarily suspending normal business operations or some employees are going to be on an unpaid leave of absence or furlough for an unspecified period of time, you should follow the policies in your Employee Handbook, which should be compliant with insurance regulations. FYI, furloughed employees are still employed and eligible for benefits.

If employees remain eligible...during the reduction in hours/furlough, the employer **will most likely want to collect the employee's share of the premiums.**

Your handbook may have a requirement for employees on leave to make arrangements to pay their portion of health premiums while they are not working. Depending on the circumstances, your options range from requiring someone to pay weekly, monthly, when they return, or forgive it entirely. The coverage will remain in place as long as you do not notify your broker or the carrier that the employee has been terminated.

For example, you pay your premiums in advance of each month and if you terminate someone before the end of the month, state law mandates their coverage to remain in place through the end of the month. If you fail to inform your carrier that an employee terminated in the prior month in less than three days into the following month, the insurance carrier will not refund your premium and will keep their coverage in place until the last day of the following month.

VII. Maintaining a Clean Environment

12. What steps should we take to minimize transmission of coronavirus in the workplace?

- Cover your mouth when you cough or sneeze. Use a tissue and dispose of it in the trash, but if you don't have one, use your arm or sleeve (not your hands) to cover.
- Wash your hands. Use soap and water and scrub for about 20 seconds. If you can't wash your hands, use hand sanitizer. You'll want to do this frequently, especially after using the restroom, before eating or preparing food, after caring for someone who is sick, after coughing or sneezing, and after handling animals or touching garbage.
- Clean shared surfaces, such as doorknobs, handles, copy machines, coffee makers, and the like, often with disinfectants.
- Avoid touching your eyes, nose and mouth.
- Stay home when you are sick. Go to the doctor if needed. If you suspect you have been exposed to the coronavirus, call your doctor to request instructions before heading into their office.
- Social distancing/remote work
 - Recommend to clients who are high risk or who have high risk persons living in their home to either meet via phone or postpone meeting if possible.
 - Avoid using handouts at meetings and instead deliver all meeting materials and handouts electronically.
 - Refrain from shaking hands.
 - Avoid serving lunch or drinks in glasses in the office.
 - Regularly clean office conference rooms and commonly-touched surfaces in the office.

13. Has the CDC provided any guidance?

Here is a link to the CDC's Frequently Asked Questions page posted on their website:
<https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

For More Information

We will continue to monitor this situation and release updates. For more information or assistance, please contact our Human Resources team at **210-775-6082**, toll-free at **1-888-757-2104**, or **HRManagement@BFGonline.com**.



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