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GERMAN LABOR AND EMPLOYMENT NEWS

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WHAT ARE THE CONSEQUENCES OF RELEASING AN EMPLOYEE FROM HIS WORK DUTIES?

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One issue that consistently crops up when terminating an employee is whether the employer can—or should—release an employee from his work duties during the termination notice period (or, as they say in England, put the employee on "garden leave"). Often employees in Germany have a three-month, six-month, or even longer termination notice period before a termination is effective. The essence of a release is that the employee continues to earn his salary and benefits during this termination notice period but is not to appear for work during this time; *i.e.,* he has been "released." The employer may want to release the employee for any number of reasons—anything from assuming that a terminated employee is less than motivated to fear of sabotage.

EMPLOYER MAY SET OFF VACATION DAYS DURING THE RELEASE PERIOD

In a case decided by the Federal Labor Court, certain employees had received identically worded notices of termination. In these notices, the employer added a statement that the employer was releasing the employees from their work duties during the termination notice period and that they were to use their remaining vacation days during the release period. The employer also noted that it reserved the right to set off from the employees' salaries any compensation they might earn from other sources during the termination notice period. The terminated employees

If an employer irrevocably releases an employee and sets off the employee's other earnings from the salary earned during the release period, the Federal Labor Court interprets this to mean that the employer has also waived the contractual noncompete clause that would otherwise bind the employee. Why is this the case?

decided to work for a competitor during the termination notice period and, despite having received the employer's notice, demanded that the employer pay their full salaries during the termination notice period.

As can be imagined, an employer will generally seek to set off an employee's unused vacation days or other planned days off during the release period so that the employer is not required to pay additional compensation for the employee's vacation days or days off. In the instant case, the Federal Labor Court confirmed that the employer could unilaterally set off the employees' unused vacation days from the release period so as to avoid having to pay such additional compensation.

■ CONSEQUENCES OF RELEASE AND SET-OFF

By releasing the employee from his work duties unilaterally, the employer is irrevocably rejecting the employee's services that would otherwise be due. As a consequence, the employer is what is referred to under German law as "in default of accepting the performance of services." If the employer is in such default, one particular legal consequence is that the employer may set off other compensation earned during the release period.

If an employer irrevocably releases an employee and sets off the employee's other earnings from the salary earned during the release period, the Federal Labor Court interprets this to mean that the employer has also waived the contractual noncompete clause that would otherwise bind the employee. Why is this the case?

Since the employer must reasonably assume that the former employee can best earn a salary by using his skills and know-how within the same field as the employer, that employer has implicitly approved of the employee working for a competitor by stating that the employer will set off any other compensation earned by the employee during the release period. The employer cannot have it both ways, *i.e.*, argue that the employee may not work for a competitor, but in the alternative, if the employee does work for a competitor, set off any earnings therefrom. In essence, the employee can only reasonably conclude that the employer has waived the noncompete clause and approved of the employee working for a competitor.

■ MAKE SURE A NONCOMPETE CLAUSE IS ENFORCEABLE

If an employer wishes to ensure that a noncompete clause is enforceable, the employer should *not* insert a clause in the notification of termination that any compensation earned by the employee from other sources during the termination notice period is subject to set-off. By way of warning, the employer should not merely ignore the possibility of a set-off when releasing an employee, as a court will then invariably hold that the noncompete clause is invalid. Only if the employer expressly excludes the possibility of a set-off will the employee be required to observe the noncompete clause (and, of course, simultaneously continue to receive his full salary during the release period).

ANTI-CORRUPTION LAWS IN THE UNITED STATES AND GERMANY: MAKE SURE YOUR EMPLOYEES KNOW THE RULES

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Though not as bad as Haiti—a country that is consistently ranked as one of the most corrupt nations in the world—Germany has recently garnered its share of attention with respect to corruption.

The most recent case of corruption grabbing the headlines in Germany involves Siemens; it is alleged that various Siemens employees were bribing foreign government officials. This has been a public relations disaster for Siemens. Not only has it led to criminal prosecution, but because Siemens is listed on a U.S. stock exchange—the NYSE—this allegation of corruption has also drawn the interest of the SEC.

ANTI-CORRUPTION LAWS IN THE UNITED STATES AND GERMANY

The United States was one of the first countries to criminalize the bribery of foreign government officials, enacting the Foreign Corrupt Practices Act ("FCPA") in 1977. (In the United States, as in most other countries, it was already a criminal offense to bribe *domestic* public officials.) At that time, many companies in the rest of the world accepted the bribery of foreign government officials as a necessary evil, or sometimes just as a standard way of doing business; in fact, many countries—including Germany—permitted companies to write such bribes off as business expenses. This caused many U.S. companies to see themselves at a competitive disadvantage against those who lived by the poetic German motto of *"Wer nicht schmiert, verliert"* ("Those who don't bribe, lose").

Twenty years after the United States enacted the FCPA, the Organization for Economic Cooperation and Development ("OECD") signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Since then, all 30 OECD member states, plus six nonmember states, enacted implementing legislation making the Convention part of their national law. Germany's implementing statute was the Act on Combating Bribery of Foreign Public Officials in International Business Transactions.

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WHAT DO THESE STATUTES PROHIBIT?

The basic tenet of both the FCPA and Germany's Act on Combating Bribery in International Business Transactions is that it is illegal to bribe foreign officials to "obtain or retain business." Though beyond the scope of this article, Germany's Penal Code also prohibits bribery in the private sector, both domestically and in the international arena. U.S. courts have held that payments that *indirectly* cause a company to obtain or retain business (*e.g.*, payments to foreign officials to reduce customs or sales taxes) also may constitute violations of the FCPA. Under the FCPA, corporations may be held vicariously liable for the actions of their sales representatives, consultants, or other third parties. Parent corporations may also be held liable for the actions of their foreign subsidiaries if the parent authorizes or directs the subsidiary to make criminal payments. Though simple negligence will not suffice, parent corporations may not turn a blind eye to the actions of their foreign subsidiaries.

The FCPA goes one step further than Germany's anti-corruption statute by also requiring listed companies to prepare and maintain books and records that properly reflect the company's transactions. As should be expected, this applies also to foreign subsidiaries of listed companies; if the listed company owns 50 percent or less of the shares of the foreign subsidiary, it must "in good faith . . . to the extent reasonable" cause the affiliate to maintain its books and records in accordance with the accounting and record-keeping provisions.

It is not necessarily correct, however, to state that the FCPA is stricter than Germany's law prohibiting the bribery of foreign government officials. In fact, some of Germany's provisions are more encompassing than the FCPA's. For example, Germany's law not only prohibits the bribery of government officials but also may govern the acceptance of such bribes by foreign officials within the European Union. The FCPA does not apply to the acceptance of bribes. Also, the FCPA permits "facilitating payments" (*e.g.*, payments to government officials to speed up routine governmental actions). German law does not make an exception for such payments.

RECENT CASES

The Siemens corruption affair is of such vast interest because it involves simultaneous investigations by the U.S. Department of Justice and the SEC for possible violations of the FCPA and by German criminal prosecutors for violations of German law. It is alleged that Siemens employees bribed public officials in various countries to be awarded contracts, such as for infrastructure projects in Greece in connection with the 2004 Olympics.

Late last year, Statoil ASA, a NYSE-listed Norwegian oil company, entered into a plea agreement after stipulating that it had paid US$5.2 million to an offshore intermediary company that had ties to the Iranian Minister of Oil. The purpose of these payments was to help Statoil obtain oil and gas contracts in Iran. Statoil was fined US$21 million in the aggregate by Norwegian authorities, the U.S. Department of Justice, and the SEC.

In 2004, GE Electronics announced that it intended to acquire InVision Technologies, a U.S. manufacturer of airport bomb-detection equipment. During the due-diligence phase, GE concluded that InVision might have been violating the FCPA by making certain payments to its Asian sales representatives and distributors. It was subsequently concluded that the payments were used to obtain sales orders from governmental authorities in Asia. The SEC fined InVision more than US$600,000 because it had failed to have proper internal controls in place to ensure that its agents and distributors were acting in accordance with anti-corruption laws.

INTERNAL CORPORATE CONTROLS

Employers need to ensure that employees are aware that management will not tolerate the violation of anti-corruption laws. What can employers do—or better yet, what *must* employers do—to ensure that this message is clear to employees, whether domestic or foreign?

- Training—Employers must ensure that employees who are in contact with customers, suppliers, individuals of the company's sales staff, and government authorities are aware of the anti-corruption laws and the consequences of violating these laws.

- Red Flags—Ensure that employees are aware of the "red flags"—*e.g.*, unusually high commission payments to sales representatives or distributors, lack of transparency in invoices or expense records, doing business with a party that has been "recommended" by a public official or whose primary "service" is to have relationships with government officials.

- Ethics Code of Conduct—Employers should prepare an ethics code of conduct that clearly sets forth the company's policies and procedures when doing business in foreign countries.

- Compliance Officer—Any company regularly doing business in foreign countries should appoint a compliance officer.

- Employees Must Be on Notice—If employees detect or think there is a violation, make sure that (i) the employees are aware that it is in their interests and the company's to report the incident, and (ii) the employees are aware of the proper reporting channels.

- Ignorance Is No Defense—Ensure that employees are aware that they are required to ask the proper questions and to conduct the proper due diligence before doing business in foreign countries. If the answer from their foreign counterpart is "You don't want to know," then this means potential trouble.

WARNING: STRICT PROCEDURE FOR EMPLOYERS TO CHANGE AN EMPLOYEE'S CONDITIONS OF EMPLOYMENT

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An employer asks an employee to work under different conditions of employment, *e.g.*, to assume additional duties, take a pay cut, relocate, etc. To introduce such different conditions of employment is often not as easy as it may seem, as the employer is required to observe a certain procedure when implementing such a request. The employee, in order to protect his rights, must also adhere to certain requirements when confronted with such a situation.

NOT A DIRECT PATH TO TERMINATION

German employment law requires an employer to first check whether an employee can be employed elsewhere within the company—even under different conditions of employment—before terminating an employee for operational reasons (*i.e.*, reasons unrelated to the employee's conduct or for cause). If such a position is available, the employer must offer such employment under different conditions to the employee. Failure to do so will invalidate the termination.

If an employer offers employment under different conditions (as should be guessed, this invariably means under conditions less favorable to the employee), the employee has three options available: (i) accept the offer to work under the proposed different conditions, (ii) reject the offer, or (iii) accept such employment under the proviso that a labor court reviews whether the employment under different conditions is "socially justifiable."

If the employee elects option (i), the result should be clear. If the employee opts for (ii), *i.e.*, rejects the employment under different conditions, then the employer will be able to issue a notice of termination to terminate the employment relationship. The upside to the employee is that at least the employee had the right to decide not to work under the revised conditions of employment before being terminated.

Option (iii) may not be as clear. If an employee elects to accept the revised employment with the reservation that he will accept the different conditions of employment only if a labor court determines that such employment is socially justifiable, the employee will be required to work under the revised conditions of employment until the court reaches a decision.

A CUMBERSOME PROCESS IF SEVERAL EMPLOYEES ARE INVOLVED

If only one employee is concerned, the procedure is relatively straightforward. Unfortunately, the same cannot be said if several employees are involved, because the employer will not be able to offer the different conditions of employment to more than one employee simultaneously (assuming only one position is available) because the employer will not know for some time how the employee will respond. Fortunately, a recent decision by the Federal Labor Court will facilitate matters a bit for employers. According to this new decision, an employee has only three weeks to decide on one of the above options.

THREE-WEEK DEADLINE

In the case before the court, the employer had issued a notice of employment under different conditions and asked the employee to reply "promptly" as to whether he would accept the new conditions of employment. (In this case, the employer sought to reduce the employee's allowance for commuting to and from work.) The employee took three months to finally decide to accept the travel-allowance reduction. The employer argued that this was too late,

German law sets forth that if an employee decides to accept employment under different conditions with the reservation that it is subject to a court's review, the employee must notify the employer of his decision within three weeks of receiving the employer's notification.

meaning the employee had been deemed to have rejected the offer, and as a result, the employment relationship would end upon the expiration of the termination notice period. The employee sued, arguing that the employment relationship had not been terminated; the revised conditions of employment were acceptable.

German law sets forth that if an employee decides to accept employment under different conditions with the reservation that it is subject to a court's review, the employee must notify the employer of his decision within three weeks of receiving the employer's notification. In its February 1, 2007, decision, the Federal Labor Court applied this statutory requirement by analogy also to those instances in which an employee wishes to accept the revised employment without any reservations.

The Federal Labor Court did not stop there: It stated that an employer must always give an employee at least three weeks to make a decision when given a request to work under different conditions. Failure to grant the employee at least three weeks will not cause the employer's notification to be invalid; however, the court will take it upon itself to grant the employee three weeks to decide.

Practically speaking, the three-week period will also apply indirectly to an employee's decision to reject the offer of employment under different conditions if the employee seeks to challenge the termination in court, as German statutory law sets forth that an employee has only three weeks to challenge a termination.

DO YOU KNOW WHICH EMPLOYEES YOU ACQUIRED AS PART OF YOUR ASSET DEAL?

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One issue that often requires significant advance planning when completing an acquisition in Germany, or for that matter, within the European Union, is the issue of "transfer of undertakings," *i.e.*, the concept that employees are automatically transferred to the buyer upon the completion of an asset deal. A recent Federal Labor Court decision provided further guidance on this ever-evolving legal concept when it reviewed the extent to which the administrative department of an engineering company constituted a separate "undertaking" (division or department) and whether the employees of that department were automatically transferred to the buyer upon the acquisition of certain of the target company's operations.

WAS THE ADMINISTRATION DEPARTMENT A SEPARATE UNDERTAKING?

The plaintiff was an administrative executive of a company that belonged to a group of 12 companies. His department, comprising 16 employees, was responsible for administrative matters such as purchasing, accounting, payroll, and general administrative matters. This department served the entire group of companies rather than only the target company's operations. The employees of this department were not assigned specific tasks, but instead, each was responsible for various assignments. The plaintiff essentially headed this department.

The defendant company acquired various engineering units by way of an asset deal from one of the companies. The plaintiff's employer subsequently filed for bankruptcy, prompting the plaintiff to argue that his employment relationship had actually automatically transferred to the (solvent) buyer of the various engineering units.

The Federal Labor Court disagreed with the plaintiff's assertion because, although the administrative department—part of the corporate legal entity that the buyer had acquired—constituted a separate undertaking, it was not an essential part of the undertaking that the defendant had acquired.

Whether a particular undertaking (and the employees of that undertaking) may unintentionally be included as part of an acquisition depends on which assets the buyer is acquiring and to what extent employees are "tied" to those assets.

WHAT EXACTLY IS AN "UNDERTAKING"?

Since it depends greatly on the facts at hand, it is tough to come up with a precise definition for "undertaking." Suffice it to say, an undertaking is a separate commercial unit or business unit—it may be either an entire company or only part of a company. Whether a particular undertaking (and the employees of that undertaking) may unintentionally be included as part of an acquisition depends on which assets the buyer is acquiring and to what extent employees are "tied" to those assets. This requires an analysis of the target's organizational structure, as well as to what extent the buyer will continue to operate the target's business in terms of having the same customers, suppliers, and key personnel and to what extent, if any, there was an interruption in business activities between the sale of the assets and the buyer's use of such assets to operate the business.

If the buyer continues to operate the undertaking, the employees of that undertaking automatically transfer to the buyer, whether intentionally or unintentionally.

If the buyer is acquiring only part of a company, the parties should determine in advance to what extent, if any, that part of the company operated as a separate undertaking prior to the acquisition. Only if an undertaking was a separate undertaking prior to the acquisition can the buyer "continue" to operate the undertaking; *i.e.*, only then can there be a transfer of an undertaking. If the buyer continues to operate the undertaking, the employees of that undertaking automatically transfer to the buyer, whether intentionally or unintentionally.

THE BUYER DID NOT ACQUIRE THE OTHER EMPLOYEES

The Federal Labor Court, in the above-referenced case, concluded that the administrative department did indeed constitute a separate undertaking, but that it was not part of the transaction at issue because it was not a distinct part of the operational engineering units that the buyer had acquired. Though the administrative department had its distinct responsibilities, *i.e.*, the administration of the entire group of companies, it was not deemed to be tied only to those engineering units that the buyer had acquired. As a result, the employees of the administrative department did not automatically transfer to the buyer.

The above case points out the importance of reviewing in advance the extent to which a buyer could unintentionally acquire employees who are not directly part of the transaction at issue. Such a review can—and should—be completed prior to beginning serious negotiations to ensure that each party is on the same wavelength.

TO WHAT EXTENT MAY AN EMPLOYER RESERVE THE RIGHT TO REVOKE BENEFITS AND CERTAIN COMPENSATION SET FORTH IN A STANDARDIZED EMPLOYMENT AGREEMENT?

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Though it was a matter of dispute for some time, Germany's Federal Labor Court has determined that employees who enter into a standardized employment agreement are entitled to the same general level of protection as consumers who are subject to general terms and conditions.

ARE EMPLOYEES "CONSUMERS"?

The use of standardized agreements (such as general terms and conditions in the commercial world)—though widespread in Germany, just as in nearly every other corner of the world—is subject to heightened scrutiny in Germany, as any clause that is egregious, ambiguous, unexpected, atypical, etc., will be interpreted against the party that introduced the standardized agreement (in an employee/employer relationship, it is invariably the employer that introduces the standardized agreement). The German legislature felt it was necessary to protect the "weaker" party; *e.g.*, in a seller/consumer relationship, the consumer is typically the "weaker" party, while in an employee/employer relationship, the employee is generally the "weaker" party.

MAY THE EMPLOYER REVOKE CERTAIN BENEFITS?

Recent case law has added some practical insight into whether, and to what extent, employers may reserve the right to revoke benefits of employees who entered into the employer's standardized employment agreement. In a watershed case, the Federal Labor Court reviewed the extent to which an employer may include in its standardized employment agreement a clause giving it the right to revise the terms for reimbursing employees for their commuting costs. Based on this case, the following is now clear:

- Employers may include such reservation clauses as long as the revocation is reasonable, meaning any such clause must be well founded. The revocation may not be arbitrary. An example of a legitimate reason for a revocation is if the employer's financial situation is in such a state that the employer needs to revoke particular benefits in order to remain financially stable.

- An employer may not shift the economic risk of operating a business to its employees, meaning the employer may not revoke the core aspects of the employment relationship. Practically speaking, an employer may not revoke any part of an employee's salary as set forth in a collective bargaining agreement, nor may an employer make more than 25 percent of an employee's aggregate salary subject to reduction.

- One proviso to the above: If a payment from an employer is not direct compensation for an employee's services, but instead is a reimbursement for expenses that are normally borne by the employee, then the revocable part of the remuneration may be increased to up to 30 percent—rather than only 25 percent—of the employee's aggregate salary. A typical example is the reimbursement for commuting costs.

FEDERAL LABOR COURT'S STANCE TOWARDS THE REVOCATION OF BENEFITS

The Federal Labor Court has generally frowned upon clauses permitting an employer to revoke certain benefits, as it holds the firm—and reasonable—belief that each party must adhere to the terms of an agreement as executed. Applying the logic of the Federal Labor Court, the possibility of revoking certain benefits is actually an exception to statutory law.

Section 307 of Germany's Civil Code states that "standardized terms and conditions are unenforceable if they . . . unreasonably disadvantage" the other party. For example, Section 307 continues, such an "unreasonable disadvantage" may arise if a certain provision is "unclear or ambiguous." The next section of the Civil Code states with more particularity that a reservation to amend standardized terms and conditions is unenforceable unless the party amending the standardized terms and conditions also takes the other party's interests into consideration.

Though the Federal Labor Court recognized that an employer may revoke certain benefits for business reasons—*i.e.*, to ensure that the employer remains financially viable—the Federal Labor Court also held that such an employer must include the reason for the revocation within the standardized clause. To quote the Federal Labor Court, the employee has a right to "know what is in store for him."

Since the employer has already granted a certain benefit if it merely reserves the right to revoke it, it is probably in the employer's interest only to refer to a benefit (or certain compensation) as voluntary.

One could argue that the Federal Labor Court overstepped its bounds to the employer's detriment, because an employee will know precisely what may be "in store for him" as long as the employment agreement sets forth that the employer may revoke certain benefits. The only thing that the employee may not know is the basis on which the employer may revoke the benefits. However, where does it state in the law that the employer must provide a *reason* for the revocation in order to be valid?

NEW OR OLD AGREEMENTS—A SIGNIFICANT DIFFERENCE

The Federal Labor Court also complicated matters a bit more—this time to the employer's advantage—by also reviewing when exactly the parties had concluded the employment agreement. Did they conclude it prior to the German legislature's significant amendments to Germany's Civil Code on January 1, 2002, or after this date?

In the case before the Federal Labor Court, the parties had concluded the employment agreement in 1999. This led the Federal Labor Court to rule not only that the ineffective clause should be stricken, but also that there was an omission in the agreement. It was the court's responsibility to fill this omission with a provision that it believed reflected the parties' intent. The court held that if the parties had known that the clause reserving the right to revoke the benefits was invalid, they would have at least included a specific clause permitting the employer to revoke an employee's benefits if this was necessary to keep the company financially strong. Applying this logic, the court upheld the employer's right to revoke the reimbursement of commuting costs.

ARE BENEFITS VOLUNTARY OR MAY THEY BE REVOKED?

Taking all of the above into consideration, employers may question whether it makes more sense for them to include in their standardized employment agreements a clause that sets forth (i) that they are granting certain benefits only on a voluntary basis (and thus they do not need to be provided all the time), or (ii) that they may revoke certain benefits. To distinguish between these two alternatives may seem trivial to an employer. From a legal perspective, however, there is a difference. If a benefit is revocable, the employer already has a claim to that particular benefit. Conversely, if the benefit is voluntary, the employer never had a claim to the benefit.

Employers will often take a "better safe than sorry" approach by setting forth in their standardized agreements that the employer is granting certain benefits voluntarily *and* that the employer may revoke them. The pertinent part of such a clause may read as follows: "This benefit is a voluntary benefit and the employer may revoke it at any time." A court may hold, however, that such a clause is self-contradictory.

Since the employer has already granted a certain benefit if it merely reserves the right to revoke it, it is probably in the employer's interest only to refer to a benefit (or certain compensation) as voluntary. This argument is buttressed if the employer is unable—or unwilling—to give the employee a specific reason for revoking a particular benefit. Though using a voluntary-benefit clause is not a panacea, employers should seriously consider including such a clause—rather than reserving for themselves the right to revoke certain benefits—in their standardized employment agreements.

CAN AN EMPLOYEE CLAIM UNEQUAL TREATMENT UPON RECEIVING A LOWER PAY RAISE?

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Germany's Constitution sets forth that all persons must be treated equally. This principle of equal treatment also applies indirectly to private claims. Does this mean, however, that an employer is always required to grant equal pay raises to employees? The short answer is no. A German court recently tackled the issue of how an employer should handle employee raises to avoid a claim of unequal treatment.

In the case at issue, the employer had awarded the employees an average raise of 2.5 percent. One employee claimed that he had been the victim of unequal treatment, causing him to subsequently file an action, as he had received a raise of only 0.5 percent. He argued that he should be entitled to a raise of 2.5 percent, as otherwise the employer had engaged in an illegal form of unequal treatment.

The labor court rejected the plaintiff's argument, holding that the employer had not granted a general pay raise of 2.5 percent. Instead, the employer considered each employee's performance and then negotiated a wage or salary increase with the respective employee. The court opined that the principle of equal treatment applies only if a select group of employees, or an individual employee, was excluded or treated less favorably upon the announcement of a general pay increase. Contrary to what the plaintiff had argued, an employee does not automatically have a claim to a raise for the same amount as the other employees if such raises were based on objective criteria (such as performance) and had been individually negotiated.

Based on the above, employers should take care to document their decision making when awarding a raise. To minimize any misunderstandings or disputes, employers should also provide employees with information about the decision-making process when awarding a raise.

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