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WHITE PAPER

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California Employment Regulators Issue Four Important Actions

California regulators have recently established or recommended several actions that warrant the attention of the state's employers. The actions define an employer's obligations concerning the prevention of workplace harassment and discrimination, proposed limitations on the use of criminal history in employment decisions, a regulatory "guidance" concerning the rights of transgender employees, and proposed regulations regarding the rights of transgender employees. This White Paper analyzes the actions and explains how employers can remain in compliance.

TABLE OF CONTENTS

California's regulatory agencies have issued four important actions in the past two months: (i) a set of final regulations establishing employers' obligations concerning harassment and discrimination prevention; (ii) a proposed set of regulations limiting employers' use of criminal history in hiring, promotion and other employment decisions; (iii) a regulatory "guidance" concerning the rights of transgender employees; and (iv) a set of proposed regulations on the rights of transgender employees.

The regulations concerning the use of criminal history and transgender employees are not yet final, and we expect that the California Fair Employment and Housing Council ("FEHC") will finalize those regulations this year or in early 2017.

NEW FAIR EMPLOYMENT REGULATIONS FOR CALIFORNIA EMPLOYERS BECAME EFFECTIVE APRIL 1, 2016

The Fair Employment and Housing Council, the California agency responsible for implementing regulations under the Fair Employment and Housing Act ("FEHA"), issued new regulations that became effective April 1, 2016. These regulations affect all employers in California who are subject to the FEHA. Here is a brief overview of the key provisions of the new regulations, which are also summarized in more detail below:

- Employers must develop and disseminate a comprehensive, detailed policy prohibiting discrimination, harassment, and retaliation. This is an entirely new regulatory requirement not previously found anywhere in the text of the FEHA.
- Individuals employed by temporary service agencies are deemed to be employees of both the agency and contracting employer for purposes of FEHA liability.
- The existing regulations regarding mandatory anti-harassment training and education are expanded to include new minimum recordkeeping and other requirements.
- The regulations impose new restrictions on employer policies requiring a driver's license to obtain or hold a job.
- The regulations add new definitions of "gender expression" and "gender identity," each of which is a protected classification under the FEHA.
- The regulations repeal or eliminate one of the two previously authorized notices concerning leave under the California Family Rights Act ("CFRA") and its relationship to pregnancy disability leave ("PDL"). "Notice B" is no longer approved by the FEHC.
- The regulations require that all postings required by the FEHA be posted in every language that is spoken by at least 10 percent of the employer's workforce.

Employers Must Now Develop a Written Policy Concerning Harassment, Discrimination, and Retaliation

Perhaps the most significant change in the regulations is the new requirement that each "covered employer" "develop a harassment, discrimination, and retaliation prevention policy" that is in writing and distributed to employees. The requirements are detailed and mandate that the policy do all of the following:

- Identify all "protected categories" covered by the FEHA.
- State that the FEHA prohibits coworkers and third parties, as well as supervisors and managers, from engaging in prohibited discrimination or harassment.
- Provide a complaint process that itself must include a number of specific features: (i) discussion of confidentiality; (ii) assurance of both a timely response and of "impartial and timely investigation[s] by qualified personnel, and appropriate options for remedial actions and resolutions"; (iii) a statement that allegations of misconduct will be fairly and thoroughly investigated, that all parties will receive "appropriate due process," and that the investigation will reach "reasonable conclusions" based on the evidence collected; confidentiality must be promised by the employer "to the extent possible," but the policy must state that investigations cannot be completely confidential; (iv) instruct that supervisors report any complaints of harassment or discrimination to a designated company representative; and (v) no requirement that an employee complain directly to his or her immediate supervisor.
- Promise that there will be no retaliation as a result of lodging a complaint or participating in a workplace investigation, and indicate that, if misconduct if found, appropriate remedial measures will be taken.

In addition, the policy must be disseminated by specific methods, including providing a copy to all employees with an acknowledgment form for signature, email distribution, posting of the policies on the company's intranet, and discussing policies upon hire or during new hire orientation. Employers are required, in some cases, to translate the policy into other

languages spoken by their employees. If more than 10 percent of the workforce at any facility or establishment speak a language other than English, the employer must translate the policy into every language that is spoken by at least 10 percent of the workforce.

Companies that Contract Workers Through Temporary Staffing Agencies May Be the Employer for FEHA Purposes

The regulations state that an employee of a "temporary service agency" will also be considered an employee of the temporary service agency *and* the employer who contracts with the agency. The regulations do *not* require that the staffing agency employee be working directly with employees of the contracting employer, that the staffing agency employee be supervised or directed by employees of the contracting employer, or even that the temporary service agency employee be working on the contracting employer's premises.

New Minimum Recordkeeping Requirements Imposed by Regulations on Anti-Harassment Training

The new regulations go further in requiring additional minimum standards for anti-harassment training. Anti-harassment training has been the subject of recent legislation, and many employers have already expanded their training offerings; these changes and other, additional minimum requirements are adopted in the new regulations:

- The employer must, for two years after the date of any webinar training, maintain a copy of all written materials used by the trainer and all written questions submitted during the webinar, together with written responses or guidance the trainer provided during the webinar. Sign-in sheets, certificates of attendance or completion, and all written or recorded training materials must be maintained for the same two-year period for all training.
- Regardless of the format of the training, hypothetical situations must be discussed. Teaching methods should include pre- or post-training quizzes or tests, small-group discussion questions, discussion questions that accompany hypothetical fact scenarios, or "any other learning activity geared towards ensuring interactive participation as well as the ability to apply what is learned to the supervisor's work environment."
- The training must include descriptions of conduct that constitutes unlawful harassment, discrimination, and/or retaliation, and it must also mention the supervisor's obligation to report harassing, discriminatory, or retaliatory conduct of which a supervisor may become aware.
- The training sessions must mention the employer's obligation to take appropriate remedial action to correct any harassing behavior, including conducting effective investigations.
- The training must include a discussion of "abusive conduct" and its negative effects. The regulations contain a detailed definition or description of "abusive conduct," including "conduct undertaken with malice that a reasonable person would find hostile or offensive and that is not related to an employer's legitimate business interests (including performance standards)." However, the training should emphasize that a single act will not constitute abusive conduct unless the act is especially severe or egregious. "Abusive conduct" is not a violation of the FEHA at present, unless it also constitutes unlawful harassment or discrimination.
- The training must mention that individual employees may be personally liable for harassment.

Regulations Limit Employers' Policies Requiring Driver's Licenses for Employment

The regulations state that an employer may require an employee or applicant to hold a present California driver's license only if the license is (i) required by state or federal law or (ii) required by an employer's policy, is otherwise permitted by law, and the employer consistently applies the policy to all applicants or employees. The regulation states that even a uniformly applied policy may be unlawful if it is "inconsistent with legitimate business reasons (i.e., possession of a driver's license is not needed in order to perform an essential function of the job)."

Revised Definitions of "Gender Identity," "Gender Expression," and "Sex Stereotypes" Broaden Discrimination Regulations

"Gender identity" and "gender expression" are defined, protected classifications. "Sex stereotypes" are defined as a type of sex discrimination. Further, transgender individuals are expressly protected under the FEHA. The regulations contain definitions of all of these terms. The definition of "sex stereotype" is extremely broad, making it illegal to discriminate against a person based on assumptions about "a person's appearance or behavior, or about an individual's ability

or inability to perform certain kinds of work based on a myth, social expectation, or generalization about an individual's sex."

Changes to Notices for CFRA Affect its Relationship to Pregnancy Disability Leave

The regulations repeal or eliminate "Notice B," one of two previously approved notices that employers were to post and provide to pregnant employees. Instead of the former practice of two notices (one for employers covered by the CFRA and the second for employers not covered by the CFRA), there is now a single notice. The new notice includes text that describes the additional rights of an employee covered by the CFRA. The new notice must be posted where other employee notices are posted and may be posted electronically if it is also posted in hard copy. The new notice, like the anti-harassment policy, must be translated into every language that is spoken by at least 10 percent of the workforce in any of the employer's facilities. The existing regulations require that the employer provide a copy of the notice as soon as practicable after an employee advises the employer of her pregnancy, or if the employee inquires about a pregnancy-related reasonable accommodation, transfer, or pregnancy disability leave (even if the employee is not pregnant at the time).

Employees Located Outside of California May Be Counted Toward the Minimum Five-Employee Threshold for Employer Coverage Under FEHA

Employees located outside of California are included in the determination of whether the employer "regularly employs" five or more individuals working each day in 20 consecutive calendar weeks in the current or proceeding year (the "trigger" for coverage under the FEHA). However, employees located outside of California "are not themselves covered by protections of the [FEHA] if the wrongful conduct did not occur in California and it was not ratified by decision makers or participants in California." In other words, conduct occurring in a different state *could* be unlawful under the Act if it was ratified by a California-based decision-maker.

Regulations Include Strict Liability for Harassment by Agents or Supervisors

The regulations include new provisions concerning the definition of "sexual harassment" and liability for established harassment. The regulations generally restate the current case law standard that "an employer is strictly liable for the harassing conduct of its agents or supervisors, regardless of whether the employer or covered entity knew or should have known of the harassment." This principle, however, would be limited by the "avoidable consequences" doctrine, although that doctrine is not mentioned in this section of the new regulations. The new regulations also contain detailed descriptions of the standard for "hostile work" harassment and the liability of employers for harassing conduct committed by non-employees toward the employer's own employees.

Revised Definitions of "Assistive" and "Support" Animals Expand Possible Reasonable Accommodations for Employees with Disabilities

The new regulations continue to broaden the categories of "assistive" and "support" animals that may be a reasonable accommodation for employees with disabilities. The regulations no longer require that "assistive" animals be trained; they only need to be necessary as a reasonable accommodation for a disability. "Support" animals, which are a type of assistive animal discussed in the regulations, previously provided for any type of support animal that provides emotional "or other support" for disabilities such as traumatic brain injuries or mental disabilities like depression. The new regulations clarify that the "support" animal may be a reasonable accommodation if it provides "emotional, cognitive, or other similar support" for such conditions. These continued changes highlight that it is important for employers to carefully evaluate any requests for assistive or support animals in the workplace in light of current regulations.

Regulations Adopt "Substantial Motivating Factor" Standard of Proof for Disparate Treatment Claims

The new regulations include a description of the standard or method of proof in a discrimination case. Much of this discussion is derived from the California Supreme Court's holding in *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013), which held that, in order for a plaintiff to prove disparate treatment discrimination, she must produce evidence showing that discrimination was a "substantial factor" motivating an adverse employment decision. The regulations adopt this standard: they state that discrimination is established if a preponderance of the evidence demonstrates that an unlawful factor was a "substantial motivating factor" in the challenged employment action unless the employer establishes a permissible defense. A "substantial motivating factor" is a "factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial." This

standard applies to claims of discrimination and retaliation but does *not* apply to claims of harassment, denial of reasonable accommodation, failure to engage in the interactive process with a disabled employee, and/or failure to provide leaves under the CFRA or the pregnancy discrimination leave law.

FEHC ISSUES PROPOSED REGULATIONS ON USE OF CRIMINAL HISTORY IN EMPLOYMENT DECISIONS

On February 19, 2016, FEHC announced that it is considering regulations regarding employers' use of criminal history in hiring and other employment decisions. These proposed regulations are similar in many respects to the U.S. Equal Employment Opportunity Commission ("EEOC") Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (Number 915.002, April 25, 2012) issued by the EEOC in 2012.

We expect these regulations will ultimately be adopted, although perhaps they will be amended in the interim. Therefore, we recommend that employers review their policies and practices regarding the use of criminal history in hiring and promotion decisions. Given the interest from both the EEOC and the FEHC (as well as regulatory agencies in other states), employers should use criminal history as a factor only if the conviction or other history being considered bears some reasonable relationship to the job in question. Employers should not, as a general rule, disqualify applicants based on insignificant convictions, convictions remote in time, or convictions that bear little or no relationship to the duties of the job in question. A summary of the regulations follows.

Clarification of Existing Restrictions on Considering Criminal History

The proposed regulations outline the existing law governing the use of criminal history in employment decisions. Examples are arrest or detention records that did not result in a conviction (Labor Code Section 432.7); convictions that had been judicially dismissed or ordered sealed, expunged, or statutorily eradicated pursuant to law (*id.*); referrals to or participation in a pre-trial or post-trial diversion program (*id.*); and non-felony convictions for possession of marijuana that are more than two years old (Labor Code Section 432.8). The proposed regulations also clarify that certain existing limitations apply to government employers, and that municipalities are free to enact more restrictive legislation that goes beyond the FEHA's protections.

Addition of "Adverse Impact" Concept

The FEHC proposes new language setting forth both the burden of proof for an adverse impact discrimination claim and the standard for the employer's business necessity defense. The proposed regulations state that employers:

> are prohibited under the [FEHA] from utilizing other forms of criminal history in employment decisions if doing so would have an adverse impact on individuals on a basis enumerated in the [FEHA] and the employer cannot demonstrate that the criminal history is job related and consistent with business necessity … or if the employee or applicant has demonstrated a less discriminatory alternative means of achieving the specific business necessity as effectively.

The proposed regulations expressly state that, "depending on factors such as the type of convictions considered, the job position, the geographic bounds of the applicant pool," an employer's consideration of criminal convictions may have an adverse impact on the basis of characteristics that are protected under the FEHA, including, but not limited to, gender, race, and national origin. The regulations refer to the EEOC's April 2012 Guidance and state that the term "adverse impact" has the same meaning as "disparate impact" as used by the EEOC (the EEOC Guidance states that disparate impact liability is established if a criminal screening practice "disproportionately screens out" a protected group and the employer cannot demonstrate that the practice is job related and consistent with business necessity).

The regulations also specify that a plaintiff has the burden of proof to establish an adverse impact: the "adversely affected applicant or employee" must demonstrate that "the policy of considering criminal convictions has an adverse impact on a basis enumerated in the [FEHA]." The proposed regulations do not state that the use of criminal history in hiring decisions, as a general rule, imposes an "adverse impact" on individuals or any particular protected class or category. Nevertheless, the regulations may invite claims that in effect shift the burden to an employer to demonstrate "business necessity" if an adverse impact is shown.

The Employer's "Business Necessity" Defense

The proposed regulations detail the employer's "business necessity" defense to a claim of adverse impact discrimination. Specifically, to establish that defense, the employer must show that the policy is justifiable "because it is job related and consistent with business necessity." To make this showing, the employer must establish that the challenged policy bears a "demonstrable relationship to successful performance of the job and in the workplace and measure[s] the person's fitness for the specific job, not merely to evaluate the person in the abstract." The employer must also demonstrate that the practice or policy is "appropriately tailored" to the particular job or jobs at issue, taking into account at least the following factors: (a) the nature and gravity of the offense or conduct; (b) the time that has elapsed since the offense or conduct and/or the completion of any sentence; and (c) the nature of the job held or sought. These factors are borrowed, verbatim, from the EEOC's Guidance.

"Bright-Line" Use of Convictions is Questioned

The proposed regulations establish a "rebuttable presumption" that "any bright-line conviction disqualification policies" that do not incorporate an "individual assessment" of the convictions and jobs in question, and that include convictions or related information seven years or more old are presumptively *not* job related and consistent with business necessity. In other words, an employer that has such a policy has presumptively violated the FEHA, if an adverse impact on a protected group is shown.

An employer that maintains an "across-the-board conviction disqualification" policy may find it difficult to establish the defense of business necessity, as formulated in the proposed regulations. This is because the proposed regulations state that, as to such policies, the employer may establish the business necessity defense only by proving either (i) the across-the-board policy can properly distinguish between applicants or employees that do and do not pose an unacceptable level of risk and that the convictions being used to disqualify or adversely affect individuals have a "direct and specific bearing on the person's ability to perform the duties and responsibilities necessarily related to the employment position" in question; or (ii) "that an employer conduct an individualized assessment of the circumstances or qualifications of the applicants or employees excluded by the conviction screen." The second of these two alternatives essentially negates the "bright-line, across-the-board" disqualification standard, as it requires the employer to conduct an "individualized assessment" as to each affected applicant or employee.

Prior Notice to Adversely Impacted Applicants or Employees May Be Required

The proposed regulations also require employers to notify an individual before taking an "adverse action." Although employers are already required to provide certain "pre-adverse action" notifications when considering criminal history, the proposed regulations would specifically require that the employer notify the individual of "the disqualifying conviction" and provide him or her with "a reasonable opportunity to present evidence that the information is factually inaccurate. If the employee establishes that the record is factually inaccurate, under the proposed regulations an employer cannot consider it in the employment decision.

Employees Can Show a "Less Discriminatory Alternative"

If an employee shows an adverse impact from a particular policy relying upon criminal history, and the employer establishes the business necessity defense, the employee still can prevail by showing there was a "less discriminatory alternative." According to the proposed regulations, such an employee may prevail if the employee demonstrates that "there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer."

This final provision contains virtually no substantive limitation. Based on the proposed regulations, an employer would be hard pressed, when adopting a criminal history policy, to foresee every conceivable "less discriminatory alternative" that might arguably "serve the employer's goals as effectively as the challenged policy or practice." Especially with the assistance of an "expert," any potentially affected employee or applicant could conceive of a "more narrowly targeted list of convictions" that the employee could arguably "evaluate job qualification or risk as accurately" as the employer's chosen method.

"Safe Harbor" for Compliance with Other State or Federal Regulations

Fortunately, the FEHC proposed regulations also state that compliance with federal or state laws, regulations, or licensing

requirements "is a form of job relatedness, is consistent with business necessity, and constitutes a defense to an adverse impact claim under the [FEHA]." Employers should take care, if these regulations are adopted in their present form, to make sure that their use of criminal convictions or other history required by regulatory statutes actually complies with the applicable statute or regulation; employers should not rely upon information not required by licensing or other regulatory requirements unless the employer is prepared to defend potential claims of adverse impact resulting from the use of overbroad criminal screens.

NEW ADMINISTRATIVE GUIDANCE AND PROPOSED REGULATIONS CONCERNING TRANSGENDER EMPLOYEES IN THE WORKPLACE

Both the FEHC and the Department of Fair Employment and Housing ("DFEH") have issued recent pronouncements regarding the rights of transgender employees in the workplace.

On February 17, 2016, the DFEH issued "guidance" concerning transgender rights in the workplace. Notably, the DFEH does *not* have rule-making authority under California law. Its guidance is not binding on courts and will not have the force of law. However, the DFEH guidance may be considered by courts.

On April 7, 2016, the FEHC published proposed regulations regarding "transgender identity and expression." The FEHC will hold a public hearing on the proposed regulations on June 27, 2016 in Los Angeles. Written comments on the proposed regulations may be submitted on or before June 27, 2016.

The February DFEH Guidance is described below, followed by a summary of the proposed FEHC regulations, which are still are subject to change.

Obligations of Employers Regarding Bathrooms, Showers, and Locker Rooms

The DFEH Guidance is aimed at maintaining workplaces that are safe for employees and free of harassment based on gender identity or expression, particularly for employees who identify as transgender and may or may not be in transition. The DFEH states that transgender employees have the right to use the restroom or locker room that corresponds to the employee's gender identity, regardless of the employee's assigned sex at birth. According to the DFEH, therefore, employees must be permitted to use the restroom of their choice and cannot be forced to use a particular one either as a matter of policy or due to harassment.

The DFEH also states that "where possible, an employer should provide an easily accessible unisex single stall bathroom for use by an employee who desires privacy, regardless of the underlying reason." Such a restroom could be used by employees who do not want to share a restroom with a transgender coworker. However, no employee, according to the guidance, should be required to use any particular restroom as a matter of policy or due to "continuing harassment in a gender appropriate facility."

Implementing Dress Codes and Grooming Standards

The Guidance also discusses employer dress codes and grooming standards. An employer with an established dress code "must enforce it in a non-discriminatory manner." This means, for instance, that a transgender woman must be allowed to dress in the same manner as a non-transgender woman, and her compliance with the dress code cannot be judged more harshly than a non-transgender woman's.

Clarifying Prohibited Employment Inquiries Regarding Gender Identity and Expression

The DFEH also clarifies that employers should avoid inquiries about an employee's or applicant's sexual orientation or gender identity and cannot condition treatment or accommodations on these attributes. The DFEH identifies two kinds of "gender transition"—"social transition" and "physical transition." "Social transition" involves "a process of socially aligning one's gender with the internal sense of self (*e.g.* changes in name and pronoun, bathroom facility usage, participation in activities like sports teams)." "Physical transition" refers to "medical treatments an individual undergoes to physically align their body with internal sense of self (*e.g.* hormone therapies or surgical procedures)." The DFEH states that "[a] transgender person does not need to complete any particular step in a gender transition to be protected by the law," and that employers should avoid asking questions about, or conditioning treatment or accommodation on, any particular transition step that an individual may have taken or not taken.

Proposed FEHC Regulations

The FEHC proposed regulations in many respects track or agree with the DFEH Guidance. However, if adopted in final

form, these regulations would have the force of law. The proposed regulations include the following:

- "Equal access to comparable, safe and adequate restrooms, locker rooms, dressing rooms, dormitories and other similar facilities … shall be provided to employees without regard to the sex of the employee."
- "Employers shall permit employees to use facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth."
- "To balance the privacy interest of all employees, employers shall provide alternatives if no individual facility is available, such as, locking toilet stalls, staggered schedules for showering, shower curtains, or other method of ensuring privacy. However, an employer or other covered entity may not require an employee to use a particular facility."
- "Transitioning employees shall not be required to undergo, or provide proof of, any particular medical treatment to use facilities designated for use by a particular gender."
- "Employers and other covered entities with single-occupancy facilities shall use gender neutral signage for those facilities, such as 'Restroom,' 'Unisex,' 'Gender Neutral,' 'All Gender Restroom,' etc."
- "It is unlawful for employers and other covered entities to inquire or require documentation or proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment, unless the employer or other covered entity meets its burden of proving a [bona fide occupational qualification" ("BFOQ")] defense … or the employee initiates communication with the employer regarding any requested adjustment to the employee's working conditions."
- "It is unlawful to discriminate against an individual who is transitioning or has transitioned."

The proposed regulations retain the following language regarding the BFOQ defense, with only minor changes to the "personal privacy considerations" that may justify a BFOQ:

- The following do *not* justify the BFOQ defense: (i) a correlation between individuals of one sex and physical agility or strength; (ii) a correlation between individuals of one sex and height; (iii) customer preference for employees of one sex; (iv) the necessity for providing separate facilities for one sex; or (v) the fact that members of one sex have traditionally been hired to perform a particular type of job.
- Further, "personal privacy considerations" may justify a BFOQ defense only where: (i) the job requires an employee to observe other individuals in a state of nudity or to conduct body searches; (ii) it would be offensive to prevailing social standards to have an individual of different sex present; and (iii) it is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of a different sex present.
- Even where an employer could establish a BFOQ defense, the employer "shall assign job duties and make adjustments so as to minimize the number of jobs for which sex is a BFOQ."

The regulations also contain restrictions on grooming and dress standards. The regulations state that it is lawful for an employer to impose a physical appearance, grooming, or dress standard if the standard "serves a legitimate business purpose, so long as any such standard does not discriminate based on an individual's sex, gender, gender identity or gender expression. It is unlawful to require individuals to dress or groom themselves in a manner inconsistent with their gender identity or gender expression."

The proposed regulations also make it unlawful to require an applicant or employee to state whether the individual is transgender. Similarly, the proposed regulations state that it is unlawful to fail to abide by an employee's stated preference where the employee requests to be identified with a "preferred gender, name, and/or pronoun." And the proposed regulations would make it unlawful for an employer to inquire or require documentation or proof of an individual's sex, gender, gender identity, or gender expression as a condition of employment, unless the employer could establish and prove a BFOQ defense, or if the employee initiates communication with the employer regarding any requested adjustment to the employee's working conditions.

The next meeting of the FEHC is June 27, 2016. The agenda for that meeting has not yet been published as of the time of this publication, but we expect these proposed regulations to be considered by the FEHC this year.

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