

Understanding Employer Risks and Limitations on Running Routine Background Checks

A KNOWLEDGEConferences

Audio Conference

Presented by

by

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OVERVIEW

Background Checks:

- Credit Checks: Compliance with the Fair Credit Reporting Act;
- Criminal Background Checks: Compliance with the EEOC.

HIRING QUALIFIED EMPLOYEES CREDIT & BACKGROUND CHECKS

Why a Background Check?

- Common sense—verify information on an application;
- Reduce liability to third parties for actions committed by an employee;
 - Under a negligence theory, an employer is required to exercise reasonable care in hiring, retaining, and training an employee;
 - Background checks help show that the employer exercised reasonable care in hiring the employee.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS

- The “Fair Credit and Reporting Act” (FCRA) allows background checks, also known as “Consumer Reports,” for employment purposes;
- The FCRA requires that certain criteria be met both BEFORE the employer requests the report and AFTER the employer receives the report.

HIRING QUALIFIED EMPLOYEES CREDIT & BACKGROUND CHECKS

What Is the Purposes of the FCRA?:

- To promote confidentiality, privacy, accuracy, and relevancy regarding information about consumers (individuals) in a variety of contexts including employment;
- They establish specific rules and requirements when employers obtain pre-employment background reports on job applicants and current employees.

HIRING QUALIFIED EMPLOYEES CREDIT CHECKS

The FCRA Allows “Consumer Reporting Agencies” to Provide “Consumer Reports” to Employers:

What is the definition of a Consumer Reporting Agency?

- “The term ‘consumer reporting agency’ means any person which, for *monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports;*”
- The FCRA does not apply to reports generated internally by the employer without the assistance of consumer reporting agencies.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

The FCRA Allows “Consumer Reporting Agencies” to Provide “Consumer Reports” to Employers:

What is the definition of a “consumer report”?

- “The term ‘consumer report’ means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes.”

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

Before an Employer Can Request a Consumer Report, the Employer Must:

- Provide a disclosure letter to the applicant;
 - Must be a stand alone document;
 - Should provide a “check-off” box giving job applicant an opportunity to request a copy of any report obtained;
- Obtain written authorization from the applicant;
- Certify (preferably in writing) to the consumer reporting agency that you did the above two items; and
- Certify (preferably in writing) to the consumer reporting agency that you will not use the report in violation of federal or state law.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

An Employer's Obligations AFTER Receiving the Report but Before Taking Adverse Action:

- First, what is adverse action?
 - Adverse action in relation to employment means a denial of employment, or any other decision for employment purposes that adversely affects any current or prospective employee. This includes corrective or disciplinary action taken against a current employee, such as in the context of a sexual harassment investigation.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

An Employer's Obligations AFTER Receiving the Report but Before Taking Adverse Action, E.G., Not Extending an Offer of Employment:

- Provide a copy of the consumer report to the applicant;
 - No cover letter is required, but it is highly recommended that employers use a cover letter to provide some explanation and a written record;
- Provide the applicant with a written summary of the applicant's rights under FCRA.
- Note: the consumer report need only provide part or some of the rationale for the adverse action.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

An Employer's Obligations AFTER Receiving the Report but Before Taking Adverse Action, *E.G.*, Not Extending an Offer of Employment (cont'd):

- Give the job applicant a reasonable period of time before actually taking adverse action;
- The FCRA does not define what a reasonable period of time is, but generally at least five business days will be deemed to satisfy this requirement.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

At the Time the Employer Takes an Adverse Action the Employer Must:

- Provide oral, written, or electronic notice of the adverse action;
- Disclose the numerical credit score and certain credit score information;
- Disclose the name, address, and telephone number of the consumer reporting agency that furnished the report to the person;
- Provide a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
- Provide a statement advising the employee that he or she can obtain a free copy of the report from the reporting agency directly, and that he or she may dispute the accuracy or completeness of the information contained therein.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

The Costs & Penalties of Non-Compliance:

1. Negligent Failure to Comply

- Actual Damages, Attorney's Fees and Costs;
- Federal and State Agencies are also authorized to sue for damages, injunctive relief, and \$1000.00 per violation in lieu of actual damages;

2. Willful Failure to Comply

- In addition to actual damages, attorney's fees, and costs, an aggrieved individual may also recover punitive damages and \$1000.00 in lieu of actual damages;

3. Knowing Violation Involving a Pattern & Practice of Non-Compliance

- FTC may bring an action seeking a civil penalty of up to \$2,500.00 per violation;

4. Obtaining Information from the CRA Under False Pretenses

- Fine and/or imprisonment for up to two (2) years.

5. NOTE: The FCRA prohibits the job applicant from maintaining an action in the nature of defamation, invasion of privacy or negligence based on a violation of the FCRA, except as to false information furnished with malice or willful intent to injure the job applicant.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

“Reasonable Procedures” Defense:

- Under the “reasonable procedures” defense, an employer may not be liable for violations of the FCRA if the employer can show “that at the time of the alleged violation [the employer] maintained reasonable procedures to assure compliance with the provisions of this section.” 15 U.S.C.A. § 1681m(c);
- Reasonable procedures is not defined. But at least one court has ruled that the reasonable procedures defense is not available when the employer repeatedly violated the FCRA. See *Mathews v. Gov't Employees Ins. Co.*, 23 F. Supp. 2d 1160, 1163-64 (S.D. Cal. 1998).

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

When Does the FCRA Not Apply?:

- A business investigates another business before entering into an economic relationship, such as in the situation of a merger or acquisition;
- An employer conducts an internal investigation (i.e. using its own employees) without the use of a CRA;
- When a report is obtained for employment purposes due to suspicion held by employer of wrongdoing or misconduct by subject of the investigation.*

*subject to a limited disclosure requirement.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

What About Drug Tests When a Drug Lab Provides the Results Directly to the Employer?:

- While the results of a drug test would normally constitute a Consumer Report under the FCRA, the FCRA excludes any report containing information solely as to the transactions or experiences between the consumer and the person making the report;
- However, where an intermediary, such as a drug counselor, reports the results of the test done by a lab to the employer, the issue of whether the communication is Consumer Report, covered by the FCRA, requires a detailed review of the facts.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

What About the Internet?:

- An employer search of the Internet does not subject it to the FCRA. However, an employer can face allegations of unlawful discrimination if the online research reveals information that cannot be used to deny employment (race, color, religion, etc.).



HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

State Limitations:

- Some states further restrict the use of consumer reports, particularly as it pertains to credit reports.
- For instance, California Labor Code section 1024.5 precludes the use of a credit report unless the position involves one of the following:
 - A managerial position;
 - A position in the state Department of Justice;
 - A sworn peace officer or other law enforcement;
 - A position for which the information contained in the report is required by law to be disclosed or obtained;
 - A position which the person can enter into financial transactions on behalf of the company;
 - A position that involves access to confidential or proprietary information;
 - A position that involves regular access to cash totaling ten thousand (\$10,000.00) or more of the employer, a customer, or client during the workday.

HIRING QUALIFIED EMPLOYEES

CREDIT CHECKS (cont'd)

Fixing a Flaw in the FCRA—Workplace Misconduct Investigations:

- *Vail Federal Trade Commission Staff Opinion Letter date 9/15/99 (the “Vail Letter”)* In 1999, attorney Judy Vail sent a letter to the FTC asking whether the FCRA applies to investigations of sexual harassment claims against current employees. The FTC unequivocally stated that investigation of current employees by a third party that regularly conducts such investigations was covered by the same FCRA rules for pre-employment background screening. Therefore, an employer that utilized a third-party investigator to investigate claims of harassment had to obtain written authorization from the alleged harasser prior to conducting the investigation, which was impractical and unrealistic.

HIRING QUALIFIED EMPLOYEES CREDIT CHECKS (cont'd)

Fixing a Flaw in the FCRA – Workplace Misconduct Investigations- The Fair and Accurate Transactions Action of 2003 (“FACT”):

- FACT amended the FCRA so that an employer need not obtain written authorization in order to conduct investigation of current employees using a third-party investigator, where the investigation involves one of the following:
 - Suspected misconduct relating to employment;
 - Compliance with federal, state, or local laws, and regulations;
 - The rules of a self-regulatory organization;
 - Any pre-existing written policies of the employer.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

A Criminal Background Check Provided by an Outside Company May Be Considered a Consumer Report Under the FCRA:

- A consumer reports includes any communication of any information by a consumer reporting agency bearing on a consumer's general reputation. 15 U.S.C.A. § 1681a(d)(1);
- A consumer reporting agency includes individuals or businesses that regularly engage in whole or in part in the practice of assembling or evaluating consumer credit information *or other information*. 15 U.S.C.A. § 1681a(f);
- The FTC took the position that a company that provides criminal background information to employers is a “consumer reporting agency” that provides “consumer reports.” See FTC Opinion Letter, June 9, 1998.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

- The FCRA regulations governing credit checks will likely apply to criminal background checks if the employer hires an outside company to conduct the background check;
- The FCRA pertains to reports from third parties, *i.e.*, “consumer reporting” agencies;
- The FCRA does not apply to reports generated internally by the employer without the assistance of third parties.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Even if the FCRA Does Not Apply, Various Local State Laws May Restrict a Criminal Background Check:

- **State Laws vary on criminal background checks.**
 - For example, some states allow the use of arrest records while other states forbid the use of arrest records that did not result in a conviction.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Why This Is a Hot Button Issue?:

- In a recent survey, by the Society of Human Resource Managers, 92 % of responding employers stated that they subjected all or some of their job candidates to criminal background checks;
- Employers report that their use of criminal history information is related to ongoing efforts to combat theft and fraud, as well as heightened concerns about workplace violence, and potential liability for negligent hiring.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

EEOC Guidance—Arrests:

- The fact of an arrest does not establish that criminal conduct has occurred. An exclusion based on an arrest, in itself, is not job related and consistent with business necessity;
- However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

EEOC Guidance—Convictions:

- A conviction record will usually serve as sufficient evidence that a person engaged in a particular conduct. However, the EEOC requires relying on a conviction to preclude employment to be job related and consistent with business necessity.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

How Do Employers Satisfy the Job-Related and Consistent with Business Necessity Standard? Ensure the Following Are Met (*Green Factors*):

- No blanket policies;
- Must consider the nature and gravity of the offense or conduct, including;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

The Nature and Gravity of the Offense or Conduct

- Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position.
- The nature of the offense or conduct may be assessed with reference to the harm caused by the crime.
- The legal elements of a crime conviction are also instructive. For example, a conviction for felony theft may involve deception, threat, or intimidation.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

The Time That Has Passed Since the Offense, Conduct, and/or Completion of the Sentence:

- If a specific duration provision is provided in an employer's policies, whether it will be deemed to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and available information to make this assessment includes, for example, studies demonstrating how the risk of recidivism declines over a specified time.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

The Nature of the Job Held or Sought:

- It is important to identify the particular job(s) subject to exclusion for a criminal conviction. While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job's duties (e.g. data entry vs. box lifting), identification of the job's essential functions, the circumstances under which the job is performed (e.g. the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job duties are performed.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Title VII Concerns Raised by Criminal Background Checks:

- Disparate Treatment
 - A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability);
 - An employer may violate Title VII disparate treatment provisions when evidence shows that the employer rejected an African-American or Hispanic based on his or her criminal record but hired a white applicant with a similar criminal record.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Title VII Concerns Raised by Criminal Background Checks:

- Disparate Treatment—Evidence:
 - Biased Statements;
 - Inconsistencies in the Hiring Process;
 - Similarly Situated Comparators;
 - Employment Testing;
 - Statistical Evidence.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Title VII Concerns Raised by Criminal Background Checks:

- Disparate Impact
 - An employer's neutral policy (*e.g.*, excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity;
 - The EEOC recently concluded: "National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions."

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Title VII Concerns Raised by Criminal Background Checks:

- Showing Criminal History Background Check as a Business Necessity;
 - If an applicant can show that a criminal background check had a disparate impact, the burden shifts to the employer to show that the background check was related to the position in question and a business necessity.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Criminal History Background Check as a Business Necessity:

- According to the EEOC, an employer can meet the business necessity test one of two ways;
 - (1) The employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); or
 - Note: Uniform Guidelines available here: <http://www.eeoc.gov/laws/regulations/index.cfm>

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Criminal History Background Check as a Business Necessity:

- (2) The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job, and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Example of Exclusion Not Job Related and Consistent with Business Necessity:

- The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including “have you ever been convicted of a crime?” If the applicant answers “yes,” the online application process automatically terminates, and the applicant sees a screen that simply says “Thank you for your interest. We cannot continue to process your application at this time.”

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Example of Exclusion Not Job Related and Consistent with Business Necessity:

- The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work, to delivery, to management positions. If a Title VII charge were filed based on these facts, and there was a disparate impact on Title VII protected basis, the EEOC would find reasonable cause to believe that the blanket exclusion was not job related and consistent with business necessity because the risks associated with all convictions are not pertinent to all of the Company's jobs.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Best Practices: An Individualized Assessment:

- Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Individualized Assessment Factors:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Age at the time of conviction; or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g. education/training;
- Employment or character references and any other information regarding fitness for the particular position;
- Whether the individual is bonded.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Example: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity:

- The County Community Center rents meeting rooms to civic organization and small businesses, party rooms to families and social groups, and athletic facilities to local recreational sports leagues. The County has a targeted rule prohibiting anyone with a conviction for theft crimes (e.g. burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction or release from incarceration. The rules were adopted by the County's Human Resources Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also offers an opportunity for individuals identified for exclusion to provide information showing the exclusion should not be applied to them.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Example: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity:

- Isaac, who is Hispanic, applies to the Community Center for a full-time position as an administrative assistant, which involves accepting credit card payments for room rentals, in addition to having unsupervised access to the personal belongings of people using the facilities. After conducting a background check, the County learns that Isaac pled guilty eighteen months earlier, at age 20, to credit card fraud, and that he did not serve time in prison. Isaac confirms these facts, provides a reference from the restaurant where he now works on Saturday night, and asks the County for a “second chance” to show that he is trustworthy. The County tells Isaac that it is still rejecting his employment application because his criminal conduct occurred eighteen months ago and is directly pertinent to the job in question.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Example: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity:

- Issac challenges this rejection under Title VII, alleging that the policy has a disparate impact on Hispanics and is not job related and consistent with business necessity. After confirming disparate impact, the EEOC finds that the policy screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct. Thus, even though the policy has a disparate impact on Hispanics, the EEOC does not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Example: Targeted Screen Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity:

- “Shred 4 You” employs over 100 people to pick up discarded files and sensitive materials from offices, transport the materials to a secure facility, and shred and recycle them. The owner of “Shred 4 You” sells the company to a competitor, known as “We Shred.” Employees of “Shred 4 You” must reapply for employment with “We Shred” and undergo a background check. “We Shred” has a targeted criminal conduct exclusion policy that prohibits the employment of anyone who has been convicted of any crime related to theft or fraud in the past five years, and the policy does not provide for any individualized consideration. The company explains that its clients entrust it with handling sensitive and confidential information and materials; therefore, it cannot risk employing people who pose an above-average risk of stealing information.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Example: Targeted Screen Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity:

- Jamie, who is African American, worked successfully for “Shred 4 You” for five years before the company changed ownership. Jamie applies for his old job, and “We Shred” reviews Jamie’s performance appraisals, which include high marks for his reliability, trustworthiness, and honesty. However, when “We Shred” does a background check, it finds that Jamie pled guilty to misdemeanor insurance fraud five years ago, because he exaggerated the costs of several home repairs after a winter storm. Jamie asks management to consider his reliable and honest performance in the same job at “Shred 4 U,” but “We Shred” refuses to do so. The employer’s conclusion that Jamie’s guilty plea demonstrates that he poses an elevated risk of dishonesty is not factually based given Jamie’s history of trustworthiness in the same job. After confirming disparate impact based on race, the EEOC finds reasonable cause to believe that Title VII was violated because the targeted exclusion was not job related and consistent with business necessity.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Interview Tips:

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity;
- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

HIRING QUALIFIED EMPLOYEES CRIMINAL BACKGROUND CHECKS (cont'd)

Less Discriminatory Alternatives:

- If an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less a discriminatory “alternative employment practice” that serves the employer’s legitimate goals as effectively as the challenged practice, but that the employer refused to adopt.

HIRING QUALIFIED EMPLOYEES

CRIMINAL BACKGROUND CHECKS (cont'd)

Positions Subject to Federal Prohibitions or Restrictions on Individuals with Records of Certain Criminal Conduct

- In some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. Compliance with federal laws and/or regulations is a defense to a charge of discrimination. However, the EEOC will continue to coordinate with other federal departments and agencies with the goal of maximizing federal regulatory consistency with respect to the use of criminal history information in employment decisions.

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