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# USA Regional Employment

New Hampshire  
Sheehan Phinney Bass & Green PA

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# 2019

## Law and Practice

*Contributed by Sheehan Phinney Bass & Green PA*

### CONTENTS

<b>1. Current Socio-Economic, Political and Legal Climate; Context Matters</b>	<b>p.3</b>
1.1 “Gig” Economy and Other Technological Advances	p.3
1.2 “Me Too” and Other Movements	p.4
1.3 Decline in Union Membership	p.4
1.4 National Labor Relations Board	p.4
<b>2. Nature and Import of the Relationship</b>	<b>p.4</b>
2.1 Defining and Understanding the Relationship	p.4
2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity	p.5
2.3 Immigration and Related Foreign Workers	p.5
2.4 Collective Bargaining Relationship or Union Organizational Campaign	p.5
<b>3. Interviewing Process</b>	<b>p.5</b>
3.1 Legal and Practical Constraints	p.5
<b>4. Terms of the Relationship</b>	<b>p.6</b>
4.1 Restrictive Covenants	p.6
4.2 Privacy Issues	p.6
4.3 Discrimination, Harassment and Retaliation Issues	p.6
4.4 Workplace Safety	p.6
4.5 Compensation & Benefits	p.7
<b>5. Termination of the Relationship</b>	<b>p.7</b>
5.1 Addressing Issues of Possible Termination of the Relationship	p.7
<b>6. Employment Disputes: Claims; Dispute Resolution Forums; Relief</b>	<b>p.8</b>
6.1 Contractual Claims	p.8
6.2 Discrimination, Harassment and Retaliation Claims	p.8
6.3 Wage and Hour Claims	p.8
6.4 Whistleblower/Retaliation Claims	p.8
6.5 Dispute Resolution Forums	p.9
6.6 Class or Collective Actions	p.9
6.7 Possible Relief	p.9
<b>7. Extraterritorial Application of Law</b>	<b>p.9</b>

**Sheehan Phinney Bass & Green PA** is a full service business law firm. The firm represents a wide variety of organizations – ranging from local and regional businesses, to higher education institutions and to not-for-profit and public sector entities, as well as national and international businesses – throughout the New England region. The firm has 60 attorneys with offices in New Hampshire (Manchester, Hanover and Concord) and Massachusetts (Boston). In terms of labor, employment and employee benefits, the firm specializes in workplace issues including: labor negotiations/dispute resolution; employee benefits; employment law compliance; contracts and policies; employee privacy; workers' compensation; workplace/management training; and defending against workplace discrimination claims. Education and counselling are the cornerstones of the firm's

labor and employment practice. Sheehan Phinney's experienced team of attorneys counsel clients on how to deal with sensitive workplace problems before they become claims; if claims do occur, the firm aggressively defends clients in state and federal courts, as well as before administrative tribunals. Given the ever-changing number of workplace laws and regulations, Sheehan Phinney's lawyers stay on top of all new developments so they can assist employers in understanding and effectively managing an increasingly complex range of workplace legal issues. In addition to the Labor, Employment and Employee Benefits Practice group, the firm has attorneys who work in the healthcare, intellectual property, environmental, corporate and litigation sectors, all of whom provide additional expert support as needed.

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## **1. Current Socio-Economic, Political and Legal Climate; Context Matters**

### **1.1 "Gig" Economy and Other Technological Advances**

The rise of the "gig" economy has drawn more attention to the proper classification of workers, which presents challenges for companies that make use of independent contractors, even if independent contractors form only a minority of the company's workers. The primary problem is that most government agencies tend to assume that a worker is an employee as opposed to an independent contractor, and thus should receive the protections and benefits to which employees are entitled. While different agencies use different tests, in general, the employer's right to control the worker's

activities is the common and often controlling factor in classification decisions. The employer bears the burden of showing that the worker is properly classified. The real difficulty is that no one factor is determinative; agencies will make each assessment on a case-by-case basis, and their judgments are not always consistent. And, because of the various tests used, a worker may be properly classified as an employee under one test and as an independent contractor under another, which makes deciding whether to classify a worker as an employee or independent contractor at the start of the relationship that much more complicated. For this reason, it is important to thoughtfully consider every aspect of the job and understand the elements of each applicable classification test. While "gig" economy workplaces and jobs may not fit traditional workplaces or job descriptions, they

must still comply with the applicable laws and regulations. If it is determined that an employee was misclassified as an independent contractor, the employer may be liable for the payment of back wages, taxes, workers' compensation insurance premiums, fringe benefits, reimbursement for past business expenses, and interest and penalties imposed under federal and/or state law.

Other technological advances are similarly altering the legal landscape for employers. As more organizations store data on remote servers and in the cloud, the data becomes more susceptible to hard-to-detect security breaches, as physical intrusion into an organization's offices is no longer necessary. This presents clear and significant risks. While New Hampshire's laws on the protection of personally identifiable information (PII) are more limited than other states' laws, there is still the risk that the disclosure of PII could expose the employer to common law legal claims, especially if it turns out that the organization did not have adequate cybersecurity protections in place.

Social media also presents problems for employers. As more and more people share their personal thoughts on social media apps, it becomes more likely that they will share privileged company information, even accidentally, or that they will share opinions that do not reflect well on their employer. For these reasons, it is vital for every employer to have a robust social media policy in place, which includes the right to terminate an employee for prohibited conduct, even if such conduct takes place after hours and/or away from the employer's premises. New Hampshire has a law that prohibits employers from requiring employees to disclose their social media user name or passwords and lower their privacy settings. That said, if the employee's social media posts are public, the employer can review them, and, within the limits of law (eg, National Labor Relations Act), potentially discipline the employee for posts that are harmful to the employer's business interests.

### 1.2 "Me Too" and Other Movements

As in all states, the "Me Too" movement has had a noticeable impact on employers in New Hampshire. New Hampshire law protects certain categories of individuals from discrimination and harassment, and those categories include sex, gender identity, and sexual orientation. It can be difficult for an employer to verify claims of alleged harassment, even before the #MeToo movement, which means that it must often make decisions with limited factual information, especially when the allegations involve just harasser and victims, or when they relate to conduct in the distant past. Investigations often require companies to analyze emails, private messages, and other information that some employees may consider private. Fortunately, employees in New Hampshire (and elsewhere in the United States) are not considered to have an expectation of privacy in such emails or messages, and thus the employer may monitor messages and images

sent, received or stored on the employer's computer systems and factor that information into its decision. Additionally, New Hampshire is an at-will employment state, which lowers the employer's risk of facing a successful wrongful termination or defamation lawsuit arising out of a termination following an investigation of harassment or retaliation. Employers are advised to follow their progressive discipline or grievance procedures to avoid problems. These could clearly play a role in any "Me Too"-related claims, investigations and decisions, so it is still important for an employer to carefully consider any allegations made, and not simply jump to conclusions in either direction.

### 1.3 Decline in Union Membership

New Hampshire does not have a significant private sector union presence. Most unions in the state are in public sector (eg, state, county, municipal or school) workplaces. New Hampshire has not seen a significant decline in union membership in the limited presence it has in private sector workplaces. This is largely due to the fact that the state has not enacted a so-called "right-to-work" law, which many other states in the United States have enacted. Right-to-work laws provide that unions cannot, through agreements with employers, require employees to join the union or pay union dues. The recent US Supreme Court decision on public sector agency or fair share dues has not yet had an impact on union membership in the state, but that could change going forward.

### 1.4 National Labor Relations Board

The National Labor Relations Board (NLRB) consists of five members, all of whom are appointed to five-year terms by the President of the United States. Because of this, the ideological leanings of the NLRB tend to match those of the then-President. In other words, when there is a Democratic President, the NLRB tends to be more employee-friendly, and when there is a Republican President, the NLRB tends to be more employer-friendly. Currently, three members of the Board were appointed by the current President (President Trump), meaning that a majority of the Board is pro-employer. As a result, it is far less likely that companies will be punished for actions taken against employees (although, to be clear, it is not impossible; there are still many rules that employers must abide by in order to avoid liability and punishment). Another benefit of the current makeup of the NLRB is that it is far more willing to issue guidance intended to help employers comply with existing law, as opposed to simply punishing employers for violations.

## 2. Nature and Import of the Relationship

### 2.1 Defining and Understanding the Relationship

As previously discussed, it is vital that organizations consider whether their workers are properly classified as em-

employees or independent contractors. While many companies lean toward independent contractor relationships since there are short-term benefits to doing so (especially financially), the risk of incurring penalties for misclassification cannot be ignored. The safer position is to consider workers as employees, unless it is crystal clear that they are properly classified as independent contractors.

In terms of structuring the business entity itself, companies should be wary of implementing a franchise model (whereby independent individuals or companies obtain a license to operate under the business entity's name). While this model limited liability in the past, recent court decisions have made it clear that the business entity can still be held liable for the actions of a franchisee.

Finally, when considering doing business in New Hampshire, as compared to other states, familiarity with the state laws and tax structure is important in order to make an informed decision as to where the business should be located. New Hampshire has traditionally been considered a business-friendly state because of its tax structure (no state income or sales tax) and limited government, but there are laws and regulations that should still be considered for organizations that are new to the state (eg, wage and hour laws, business profits tax, etc).

## **2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity**

Generally, employment in New Hampshire is "at will", which means that either the employer or the employee can terminate the employment relationship at any time for any reason, with or without advance notice, unless otherwise agreed upon in a contract. Such an employment relationship benefits the employer, as it decreases the likelihood that they will be held liable for wrongful termination. However, there is risk involved with any employment relationship. For example, New Hampshire law provides that employees cannot be terminated based on their age, sex, race, color, marital status, physical or mental disability, religious creed, national origin, gender identity, or sexual orientation.

## **2.3 Immigration and Related Foreign Workers**

New Hampshire law does not impose any special immigration requirements on employers, but employers must of course comply with applicable federal law. That said, it should be noted that, under state law, the New Hampshire Department of Labor has the authority to review I-9 documents and supporting information as part of workplace audits, and employers can be fined for employing unauthorized workers.

## **2.4 Collective Bargaining Relationship or Union Organizational Campaign**

One exception to New Hampshire's employment at-will model is collective bargaining and other forms of employment contracts. The National Labor Relations Act (NLRA), passed by Congress in 1935 and amended substantially since, permits employees in the private sector to organize for the purposes of collective bargaining with their employers. In many instances, pursuant to the rights provided by the NLRA, employees have won important concessions to curtail the ability of employers to discharge employees.

Union membership in New Hampshire is largely found in the public sector, so acquisition and successor liability issues do not apply in those settings. Those are considerations in the private sector but are not of major concern in most corporate transactions due to the limited presence of unions in the private sector in New Hampshire.

# **3. Interviewing Process**

## **3.1 Legal and Practical Constraints**

In New Hampshire, a few restrictions apply to the hiring and interviewing process.

First, in accordance with the state's law against discrimination, employers are prohibited from (i) printing or circulating any statement, advertisement, or publication, (ii) using any form of application, or (iii) making inquiries or records in connection with employment that expresses any limitation, specification, or discrimination as to age, sex, race, color, marital status, physical or mental disability, religious creed, national origin, gender identity, or sexual orientation, unless based on bona fide occupational qualifications.

In many states, an employer cannot ask about an applicant's criminal history generally, but in New Hampshire an employer can still ask the following: "Have you ever been arrested or convicted of a crime that has not been annulled by a court?"

Second, an employer cannot request a consumer report for employment purposes unless the applicant or employee is first informed that a credit report may be requested. In addition, an employer must inform an applicant if adverse action is taken (eg, employment is denied) based on information contained in that report, and must provide the applicant with the name and address of the consumer reporting agency used to obtain the report.

Third, no employer may solicit, require, or administer genetic testing relating to any individual as a condition of employment, nor may an employer affect the terms, conditions, or privileges of employment based on genetic testing.

Fourth, employers are prohibited from requiring employees or job applicants to disclose social networking, email, or other non-business personal account login and password information, add anyone to a list of contacts associated with a social media or e-mail account, or change privacy settings associated with any e-mail or social media account.

Fifth, employers may not require applicants or employees to pay the costs of drug or alcohol tests as a condition of employment.

Finally, while New Hampshire employers can prohibit smoking on premises, they cannot refuse to employ an individual because of his/her use of tobacco products.

## 4. Terms of the Relationship

### 4.1 Restrictive Covenants

In New Hampshire, noncompete agreements are prohibited for nurses and podiatrists, but are narrowly construed for all others. Restraints on employment are allowed only if the restraint is no greater than necessary for the protection of the employer's legitimate interest, does not impose undue hardship on the employee, and is not injurious to the public interest. Legitimate interests of an employer that may be protected from competition include the following:

- the employer's trade secrets;
- other confidential information, such as information regarding a unique business method;
- an employee's special influence over the employer's customers, developed during the course of employment;
- contacts developed during the employment; and
- the employer's development of goodwill and a positive image.

Additionally, if an employee's position involves client contact, the employer has a legitimate interest in preventing the employee from appropriating goodwill that would otherwise be directed to the employer. Also, prior to or concurrent with making an offer of employment, every employer must provide a copy of any noncompete agreement that is part of the employment agreement to prospective employees, or else the contract will be void and unenforceable. This provision does not apply to changes in job classification.

Finally, New Hampshire law requires employers to provide copies of nonsolicitation, noncompete and/or nondisclosure agreements to job applicants with a job offer. Failure to do so could render the agreement unenforceable.

### 4.2 Privacy Issues

See above.

### 4.3 Discrimination, Harassment and Retaliation Issues

New Hampshire's law against discrimination in many ways parallels federal laws that prohibit workplace discrimination (eg, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Family and Medical Leave Act), but there are some ways in which New Hampshire's anti-discrimination laws are unique (RSA 354-A).

New Hampshire's law against discrimination applies to employers with six or more employees. Private employees are included, as is the state and all of its political subdivisions, boards, departments and commissions. Certain charitable, religious, and educational employers are exempt from this law. Federal discrimination laws have higher thresholds for jurisdiction (15 to 50 employees, depending on the statute).

New Hampshire's workplace discrimination laws prohibit employment discrimination because of the age, sex, sexual orientation, gender identity, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual. This includes the refusal to hire an employee or to bar or discharge from employment such protected individuals, or to discriminate against any such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

The New Hampshire Commission for Human Rights enforces the state employment and discrimination laws by investigating complaints of violations and holding hearings. Also, because most violations of Title VII of the Civil Rights Act of 1964 are also violations of New Hampshire's law against discrimination, the Equal Employment Opportunity Commission (EEOC), which enforces Title VII, has an arrangement with the New Hampshire Commission for Human Rights whereby most complaints are investigated by the state agency, at least initially.

Also of note, the New Hampshire Supreme Court has ruled that an individual employee may be held personally liable for aiding and abetting discrimination or harassment by an employer covered under the law. It also ruled that an individual employee may be liable for retaliation.

### 4.4 Workplace Safety

Under the New Hampshire Workers' Compensation Act, every employer with one or more employees is required to carry workers' compensation insurance, which ensures that employees who are injured on the job receive appropriate medical and disability benefits. For example, if an employee is injured on the job, their medical treatment costs will be paid for by the insurer, and if they are disabled following an on-the-job injury, they will receive weekly income from the insurer until they are able to return to work.



After coverage is in effect, the employer will receive a NOTICE OF COMPLIANCE (Form No. WCP-1) from the insurance carrier, which needs to be posted in a conspicuous spot in the place of business. This poster contains basic information regarding the rights and responsibilities of both employer and employee, as well as the name of the insurance carrier underwriting the workers' compensation coverage.

New Hampshire's workers' compensation law has several unique features:

- First, an employer is required to reinstate an injured worker who returns to duty within 18 months of the relevant injury.
- Second, an employer is required to establish a temporary alternative duty program to assist employees with workplace injuries when they return to work.
- Third, employers with five or more employees must form safety committees composed of representatives from management and labor to develop and administer workplace safety programs (ie, alternative work programs that encourage injured employees to return to work and programs for continuing education on workplace safety).
- Fourth, employers with ten or more employees must prepare a written safety program of rules, regulations, policies, and procedures for discipline in the event of a safety violation, and must file a summary of developments under the plan with the Department of Labor on a biannual basis.

### **4.5 Compensation & Benefits**

It is vital for every employer to have a comprehensive employee handbook in place, which clearly explains the company's policies with regard to employees. Employers should require employees to sign a form acknowledging that they have read and understand such handbook, so that no employee can later claim that they were unaware of a certain policy or procedure.

## **5. Termination of the Relationship**

### **5.1 Addressing Issues of Possible Termination of the Relationship**

In the case of an at-will employment arrangement, there are really only two things that an employer needs to worry about at the outset of the employment relationship in terms of a possible future termination. First, the employee's offer letter should make clear that the employment relationship is, in fact, at will, and should explicitly state that, because of that, either the employer or the employee may terminate the relationship at any time for any reason, with or without notice. Second, the company should ensure that its employee handbook includes a provision that states that the handbook does not establish an enforceable contract, and that all company employees are employed on an at-will basis, unless otherwise

agreed upon in writing by a high-ranking member of the company (eg, the president or a board member).

If an employer chooses to employ someone pursuant to an employment contract, then it is important they retain the right to terminate the employee for cause, and to define "cause" very broadly. The narrower the term is defined, the more likely that a terminated employee will be able to successfully argue that the reason for the termination did not fall within the definition, which could expose the company to a wrongful termination claim.

Unfortunately for employers, it is not possible to require an employee to preemptively waive the right to make a claim for wrongful termination, employment discrimination or the like, which means that any such provision in an employee's initial contract would not be enforceable. Such waivers can be included in severance agreements, however, but only if the employee receives something in return (ie, additional compensation) for releasing their right to file a claim based on their time with the company.

Additionally, it is best not to entitle employees to a notice period prior to any termination. If an employer does so (eg, entitles the employee to two weeks' advance notice) and fails to comply with that provision, the company could be exposed to liability for breach of contract.

This last point is not something that an employer has to consider specifically at the outset of an employment relationship, but it is worth pointing out. Under New Hampshire law, certain protections may apply in the event of multiple terminations. Such protections are found in New Hampshire's Worker Adjustment and Retraining Notification (WARN) Act (please note that there is also a federal WARN Act with which employers may need to comply).

New Hampshire's WARN Act applies to employers with 100 or more employees (excluding part-time employees), or with 100 or more employees who in the aggregate work at least 3,000 hours per week (excluding overtime hours). The Act's protections apply only in the event of a "plant closing" (defined as the permanent or temporary shutdown of a single site of employment that results in an employment loss for 50 or more employees in any 30-day period), or in the event of a "mass layoff" (defined as a reduction-in-force that results in an employment loss for at least 25 employees, if that represents at least 33% of the workforce, or in an employment loss for at least 250 employees generally).

Any employer enacting a plant closing or mass layoff must provide at least 60 days' advance written notice of the closing or layoff to (i) each affected employee (or his or her representative), (ii) the Commissioner of the New Hampshire Department of Labor, (iii) the New Hampshire Attorney

General, and (iv) the chief elected official of each municipality in which the plant closing or mass layoff occurs.

If a former employee files a claim for unemployment benefits, the employer must respond to the Department of Employment Security with, among other things, the effective date, the reason for the employee's separation from employment, and the wages and other payments due to the employee upon or following separation.

## 6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

### 6.1 Contractual Claims

New Hampshire courts recognize the common law claim known as "wrongful discharge". In order to succeed on such a claim, a former employee must show that the underlying termination violated public policy in some way. More specifically, the employer's decision to terminate the employee must have been motivated by bad faith or malice. This assessment is made on a case-by-case basis, and no specific law or regulation needs to have been violated by the employer in order for the employee to succeed on the claim.

Situations that might give rise to a claim for wrongful discharge include the following:

- an employee is fired for filing a workers' compensation claim;
- an employee is fired for reporting a dishonest act of the employer;
- a personnel director is fired for criticizing the employer's hiring practices as discriminatory;
- a store manager is fired for refusing to carry cash receipts to the bank without an armed guard;
- an employee is fired for refusing to seek some exemption from jury duty; or
- a financial officer is fired for refusing to misrepresent the financial condition of the company.

In addition to wrongful discharge, New Hampshire has recognized related causes of action available to a discharged employee, including intentional infliction of emotional distress, intentional interference with economic relations, implied duty of good faith and fair dealing, fraud/misrepresentation, and defamation.

### 6.2 Discrimination, Harassment and Retaliation Claims

See 4.3 Discrimination, Harassment and Retaliation Issues.

### 6.3 Wage and Hour Claims

Wage claims under state law may be submitted to either the New Hampshire Department of Labor or the appropriate court within 36 months of the alleged violation.

If an employer willfully and without good cause fails to pay an employee wages as required, that employer may be additionally liable to the employee for liquidated damages of up to 100% of the unpaid wages. Attorneys' fees may also be awarded to a successful wage claimant.

As a result of a recent change in the law, the New Hampshire Department of Labor must now give employers a written warning of state wage violations and 30 days to correct the violation before assessing civil penalties. This warning is not available to employers who, in the opinion of the Labor Commissioner, intend to cause harm or pose a threat to public safety, or are in violation of the following state wage laws:

- failure to pay employees in full or on time;
- payment of wages by checks drawn on financial institutions not convenient to the employee;
- failure to pay final wages;
- failure to pay amounts withheld to pay child support;
- continuation of wage withholdings for cancelled insurance benefits;
- illegal withholdings for damage to employer property;
- violation of the law regarding the employment of illegal aliens; and
- requiring employees to perform illegal activities under a threat of job loss.

The definition of an employer includes individuals as well as traditional business entities. In recent years, the New Hampshire Supreme Court has ruled that officers (eg, President, Vice President, CEO, CFO, COO, etc) who knowingly direct or permit a company to violate state wage payment laws could be found personally liable for the payment of the wages.

### 6.4 Whistleblower/Retaliation Claims

In accordance with New Hampshire's Whistleblower Protection Act, employees cannot be fired for (i) reporting employer violations of federal, state, or local law or regulation, (ii) participating in proceedings or court actions involving allegations of employer violations, or (iii) refusing to carry out illegal employer directions

In order for the Act's protections to apply, the employee must have acted in "good faith" and have had reasonable cause to believe that the employer was violating a law or regulation. The employee should also have made a reasonable effort to use any internal grievance procedures before filing a complaint under the Act.



An employee alleging a violation of this Act may obtain a hearing before the New Hampshire Commissioner of Labor, following which the Commissioner may render an “appropriate” order that may include reinstatement, back pay, payment of fringe benefits, seniority rights, and “injunctive relief.” Decisions of the Commissioner may be appealed to the New Hampshire Supreme Court.

In regards to retaliation generally, under New Hampshire law no employer may discharge or in any other manner discriminate against any employee because they filed a charge or complaint, or instituted or caused to be instituted any investigation, proceeding, hearing, or action, under or related to their wages (including an investigation conducted by the employer), or because they testified or are planning to testify or have assisted or participated in any manner in any such investigation, proceeding, hearing, or action about wages. Furthermore, an employer cannot be disciplined or otherwise discriminated against because they inquired about, discussed, or disclosed their wages or those of another employee (unless the disclosing employee’s essential function at the company includes access to wage information).

### **6.5 Dispute Resolution Forums**

The New Hampshire Department of Labor investigates wage & hour claims and other violations of state labor laws. The state’s Workers’ Compensation Division is included in the Department of Labor.

The New Hampshire Commission for Human Rights is tasked with investigating claims of discrimination in employment and public accommodations based on an individual’s age, sex, sexual orientation, gender identity, race, creed, color, marital status, familial status, physical or mental disability, or national origin.

### **6.6 Class or Collective Actions**

There is no prohibition against class or collection actions under New Hampshire law, but such actions are rare in the state. Waivers are permitted.

### **6.7 Possible Relief**

Back pay and liquidated damages are available under state wage laws. Potential remedies available under state discrimination laws include equitable relief as well as back pay, front pay, compensatory damages and attorney’s fees.

## **7. Extraterritorial Application of Law**

Out-of-state and foreign entities have operations in New Hampshire. The state courts will generally recognize controlling or governing law from other (US) jurisdictions, but out-of-state and foreign employers should still be aware of the requirements for employers under New Hampshire law.

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