

Navigating the Washington Paid Family and Medical Leave Act

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One Thing Before We Get Started...

Jackson Lewis P.C. prepared these materials for reference in connection with an educational seminar.

The following is not legal advice.

Attendees should consult with counsel before taking any actions.

Overview of Today's Presentation

- Overview of WPFML Law
- Immediate Concerns For Employers
- Deductions from Wages
- Reporting Requirements
- Applications and Leave
- Interplay With Other Paid Leave
- Issues with Other State Paid Leave Laws
- Frequently Asked Questions in Washington

Purpose of PFML

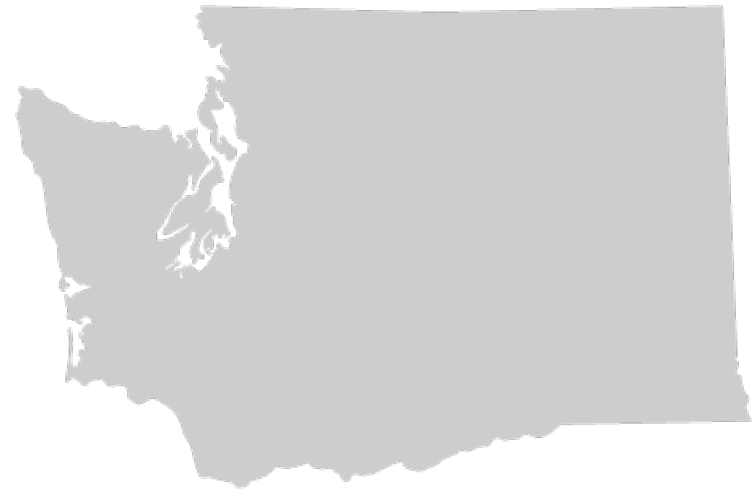
Family & Medical Needs



Overview of WPFML Law

Overview of WA Paid Family and Medical Law

- Mandatory state-wide insurance program to give paid leave under a variety of circumstances.
- Funding: WA employees, and employers with 50 or more WA employees.
- Funding started **1/1/2019**.
- Benefits started **1/1/2020**.



Overview of WA Paid Family and Medical Law

- This is **NOT** the WA Paid Sick Leave Law (RCW 49.46.210).

	Paid Family and Medical Leave	Paid Sick Leave
How much pay?	Typically, a percentage of wage	100% of wage
How much leave available?	Statutory caps on leave, but generally depends on circumstances	Depends on hours worked
How funded?	<ul style="list-style-type: none">• 63.33% by employees• 36.67% by employers with 50 or more WA employees	100% by employer

Overview of WA Paid Family and Medical Law

- Which employers?
 - All private & public employers with a WA employee.
- Not:
 - Federal government
 - Federal tribes
 - Self-employed
- Employers can apply for an “opt out” if their plan meets or exceeds WPFMLA’s requirements.



Overview of WA Paid Family and Medical Law

- Employee eligibility
 - If EE worked **at least 820 hours** — for any employer or employers in WA— during the qualifying period.
 - Shorter than the 1,250 hours needed to qualify under the FMLA.



Overview of WA Paid Family and Medical Law

- When are employees eligible?
 - There are special rules for employees covered by a Collective Bargaining Agreement.
 - There are special rules for employees temporarily working in WA.

Qualifying Period

The first 4 out of the last 5 completed calendar quarters

YES	YES	YES	YES	NO
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OR


The last 4 completed quarters

YES	YES	YES	YES
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IMMEDIATE ISSUES FOR EMPLOYERS

Immediate Issues

Paid time off. Peace of mind.



Paid Family and Medical Leave provides paid time off when a serious health condition prevents you from working, when you need to care for a family member or a new child, or for certain military-related events. It's here for you when you need it most, so you can focus on what matters.


How it works



Nearly every Washington worker—whether you work full time or part time in a small to large business—is eligible for up to 12 weeks of Paid Family and Medical Leave. You need to work 820 hours in Washington, or about 16 hours per week, over the course of about a year. You can get up to 16 weeks if you have family and medical events in the same year, or up to 18 weeks in some cases. Leave doesn't have to be taken all at once. You can use these weeks within your "claim year," which starts when you apply and then runs for the next 52 weeks. When that claim year expires you can then be eligible for leave again.

You apply for leave with the Employment Security Department and will get partial wage replacement, up to 90 percent of your typical pay, capped at \$1,000 per week.

Your rights



If you meet the requirements, you have the right to take paid time off using Paid Family and Medical Leave.

If you qualify for Paid Family and Medical Leave, your employer cannot prevent you from taking it. Your employer also cannot require you to use other types of leave, such as sick or vacation days, before or after taking Paid Family and Medical Leave. The program is funded by premiums shared between workers and many employers. The premium is 0.4% of your wage. You may pay about 2/3 of that total, and your employer (if they have 50 or more employees) pays the rest. A calculator to estimate premiums is available on our website.

To file a complaint against your employer about Paid Family and Medical Leave, email or call our Customer Care Team at paidleave@esd.wa.gov or (833) 717-2273.

You may also contact the Office of the Paid Family and Medical Leave Ombuds. The Ombuds is appointed by the governor and serves as a neutral, independent third party to help workers and employers in their dealings with the Department. The Office of the Ombuds investigates, reports on and helps settle complaints about service deficiencies and concerns with the Paid Family and Medical Leave program. Learn more at www.paidleaveombuds.wa.gov or call the Ombuds' office at 844-395-6697.

Learn more and apply at paidleave.wa.gov

Washington
Paid Family & Medical Leave

- Poster
- Display ESD's approved poster in a common area

Immediate Issues



Employer requirement to provide notice to employees

Employers with employees working in Washington state must provide the following notice to employees who may be eligible for Paid Family and Medical Leave the later of:

- Five business days after an employee's seventh consecutive day of absence due to family or medical leave, or
- Five business days after an employer becomes aware that the employee's absence is due to family or medical leave.

Paid Family and Medical Leave

Statement of Employee Rights

You may qualify for Paid Family and Medical Leave

As of Jan. 1, 2020, Washington employees who have worked 820 hours or more in the qualifying period and experience(d) a qualifying event have access to Paid Family and Medical Leave.

Employees who have missed work due to family or medical reasons may be eligible for paid family or medical leave for the following qualifications:

- Care for and bond with a child younger than 18 following birth or placement
- Care for yourself or a family member experiencing a serious health condition
- Certain military-connected events.

Paid Family and Medical Leave requires that you give your employer(s) written notice at least 30 days in advance of when you plan to take leave. However, if the reason you need leave was not foreseeable, you may notify your employer(s) as soon as possible.

The Paid Family and Medical Leave Benefit Guide provides information on how to apply for benefits and submit weekly claims. It also explains your rights and responsibilities under the law. Download the guide at www.paidleave.wa.gov/benefit-guide.

For more information about how to apply, contact us at 833-717-2273 or visit www.paidleave.wa.gov.

Important information for when you apply

Employer UBI #: _____

This employer offers supplemental benefits: Y _____ N _____

Note: Except during the waiting week, employees cannot use employer provided paid time off at the same time as Paid Family and Medical Leave, unless the employer chooses to offer a "supplemental benefit." Supplemental benefits can be used along with Paid Family and Medical Leave to provide additional pay while an employee receives partial wage replacement through Paid Leave benefits. Employees may accept or reject supplemental benefit payments.

- Notice to EEs
 - Not given to all WA EEs.
 - Give to EEs who are out on family or medical leave issues for **7 or more work days**.

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- Complete form
 - Add Unified Business Identifier (UBI) number.
 - Decide whether ER offers "supplemental benefits" and check yes or no.

Immediate Issues



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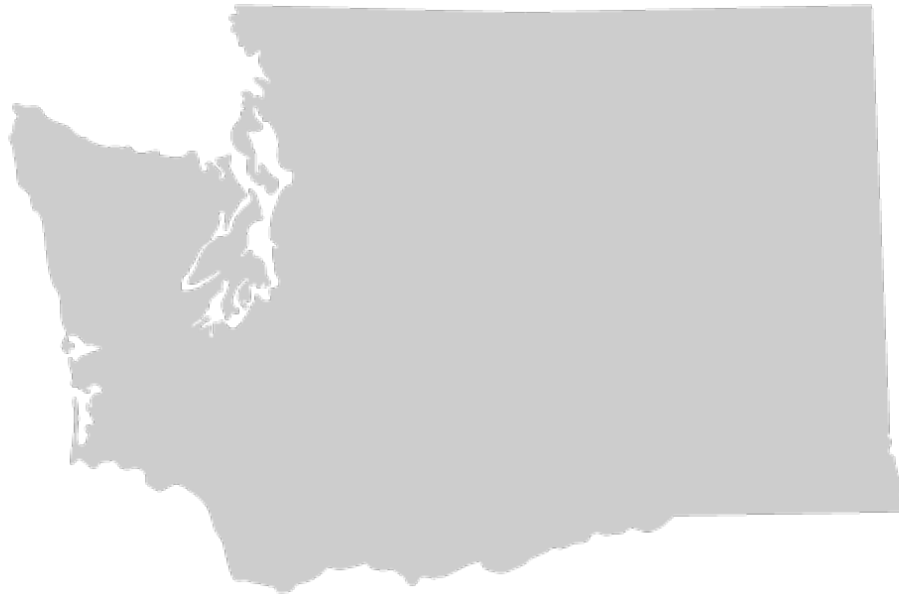
- Send notice to those EEs by:
 - the 5th business day after the EE's 7th consecutive missed work day, or
 - 5th business day after the ER is aware that EE's absence is due to family or medical leave,
 - whichever is later.
- The clock may already be running with regard to some EEs.

Immediate Concerns

- Handbook Policy
 - Not required
 - Recommended
- Why?
 - Inform EEs of this new program
 - Good place to address “supplemental benefits” to employees on leave

Localization

- Relatively complicated “localization” test to determine which employees are WA employees who are subject to the law.



Localization

- Work is “localized” in WA when:
 - All work done in WA; or
 - **Most** work done in WA, but some is temporary or transitory in nature, or consists of isolated transactions is performed outside of WA.

Localization

- Services that are not localized in WA will be subject to reporting requirements and premiums when the services are not localized in any state, but some of the services are performed in WA, and:
 - EE's base of operations is in WA; or
 - If no "base" then the place from which services are directed or controlled is in WA; or
 - If the "base" or location from which work is "directed" is in not in any state, but the EE's residence is in WA.

Localization

Example:

- A storm hits WA. An ER in Oregon dispatches an EE who typically lives and works in Oregon to help with repair work. The EE works temporarily in WA for the ER for **one week**, and then returns to work in Oregon for ER.
- This employment is localized within Oregon and **is not subject to WPFML premium assessment**.

Localization

Takeaway

- Localization test is fact-specific.
- *Best Practice: Consider applying for **conditional waiver form** for EEs who will perform fewer than 820 hours of work in WA in a year.*
- If granted, ER's obligation to withhold premiums for that EE is waived, unless the EE ends up exceeding 820 hours.

Conditional Waiver Forms

Washington
Paid Family & Medical Leave

Section 1: Employer information/Sección 1:
Información del empleador

All fields are required. /Complete todos los casilleros.

Legal Entity Name/Nombre de la entidad jurídica

Unified Business Identifier number/ Número
de identificación de negocio:

Employer Identification Number/ Número de
identificación de empleador:

Or/O

Phone Number/Teléfono:

Email Address/Correo electrónico:

First Name/Nombre:

Last Name/Apellido:

Section 2: Employee information/Sección
2: Información del empleado

All fields are required. /Complete todos los casilleros.

First Name/Nombre:

Last Name/Apellido:

Social Security Number/Número de seguro
social:

Individual Taxpayer Identification Number/Número
de Identificación Personal del contribuyente

Or/O

Email Address/Correo electrónico:

Permanent Address/ Dirección permanente:

City/Ciudad:

State/Estado:

Zip/Código Postal:

Conditional Waiver Forms

- ER must still file quarterly reports for EE on waiver.
- If an EE with a waiver exceeds 820 hours in a qualifying period, the conditional waiver expires and the ER and EE will be responsible for their shares of premiums that would have been paid.
- Upon payment of the premiums, the EE will be credited for the hours worked and will be eligible for benefits.

DEDUCTIONS FROM WAGES

Deductions from Wages

- 50 or more WA EEs: The combined or “total” premium is **0.4% (or .004) of pretax wages**, not including tips.
- Fewer than 50 WA EEs: Employee premiums are **0.25332% (or .0025332) of pretax wages**, not including tips.
- Social Security Cap: For 2020, ER must stop wage deductions for an EE when premiums are paid on **\$137,700** of the EE’s wages.



Deductions



- ERs may either pay the EE-side premiums or deduct from EEs.
- **No penalty if ER is not taking deductions.** By law, an ER that is not taking deductions has chosen to pay its EEs' premiums.
- ER who wants to start taking deductions now, must give EEs at least **one pay period's notice.**

Deductions



- Retroactive deductions are not allowed.
- However, there is a small exception: ER may take retroactive deduction if ER was unable to deduct the maximum allowable EE-side premium in a pay period because there were insufficient EE wages in that pay period.

REPORTING REQUIREMENTS

Reporting and Remitting

Washington
Paid Family & Medical Leave

- ERs must report EE information and remit premiums quarterly to the WA Employment Security Department (ESD).
- Different from unemployment insurance reporting.

Reporting and Remitting

Reporting Quarter	Reports and Premiums Due to ESD
January, February, March	April 30
April, May, June	July 31
July, August, September	October 31
October, November, December	January 31

Reporting

- What to report?
 - SSNs (or ITIN) for every WA EE.
 - First and last names, plus middle initials.
 - Wages paid and hours worked in the reporting quarter.



Reporting Hours

- What hours should an ER report to ESD?
- Hourly employees – total number of hours.
- Salaried employees – 40 hours per week in which an EE worked.
- Fractions of hours – **round up** to the next higher whole number.
- Overtime – report the **number of hours actually worked** for which overtime pay or compensatory time is provided, regardless of wages.
- Vacation pay, sick leave pay, paid time off – report the number of hours an EE is on paid leave, but not hours for a cash out.
 - But **do not** report to ESD any wages/hours that the employee took as a **supplemental benefit**.

Reporting Hours

- **Commissioned or piecework employees** – report the actual number of hours worked by EE paid by commission or by piecework.
- **Severance pay** – **do not** report hours for severance pay.
- **Wages in lieu of resignation notice** – report the actual number of hours for which an employee was paid.
- **On-call and standby hours** – report the actual number of hours for which an EE receives wages for being on call or standby.

Reporting Wages

- What should be reported?
 - Salary or hourly wages;
 - Bonuses and holiday pay;
 - Cash value of goods, services, meals, lodging when given in the place of money;
 - Cash value of gifts or prizes;
 - Commissions or piecework;
 - PTO, including vacation leave and paid sick leave, as well as associated cash outs,
 - **BUT NOT if EE takes PTO as a “supplemental benefit” during WPFML.**

Reporting Wages

- **What should be reported?**

- Bereavement leave;
- Separation pay including severance pay, termination pay, and wages in lieu of notice;
- Value of stocks at the time of transfer to the employee if given as part of a compensation package;
- Compensation for use of specialty equipment, performance of special duties, or working particular shifts; and
- Stipends/per diems unless provided to cover a past or future cost incurred by the employee as a result of the performance of the employee's expected job functions.

Reporting Wages

- What shouldn't be reported?
 - Payments from an ER benefit that is not part of the EE's standard compensation, like **short term disability**.
 - Any payment made (including any amount paid by ER for insurance) to, or on behalf of, an EE or dependents under a plan or system established by ER for:
 - Retirement, sickness, or accident disability; or
 - Medical or hospitalization expenses in connection with sickness or accident disability.
 - Payments made to cover cost incurred by EE related to job performance, like meals and travel.

Reporting Wages

- **Example of Non-Reportable Wages**

- While on WPFML, an EE receives 61% percent of the EE's typical weekly wage from ESD.
- Through an internal **short term disability benefit**, ER pays EE the remaining 39% of her typical weekly wage as a supplemental benefit payment, bringing her total benefit to 100%.
- Because this supplemental benefit payment is not part of EE's standard compensation, **it is not considered a wage, and should not be reported** on ER's quarterly report (or EE's weekly claim to ESD).

Penalties for Not Reporting



- Willful violation = penalty
- Incomplete or untimely reports
 - 1st occurrence: Warning letter
 - 2nd occurrence: \$75.00
 - 3rd occurrence: \$150.00
 - 4th+ occurrences: \$250.00

Penalties for Not Remitting

- Willful failure to remit payment when due = penalties + interest.
- Penalty = doubling
- **Example**: If an ER owes \$300 in premium payments and \$20 in interest, then the penalty for willful failure to remit is doubling it. Total = \$640.

Audits



- **What ER must provide:**
 - Any files and records as needed to prove compliance to ESD.
- **When ER must provide it:**
 - Within 10 business days or a time frame agreed to by ESD.
- If ESD discovers violations, ESD may expand audit.

MECHANICS: Reasons for Leave, Leave entitlements, and Application Process

What can trigger this leave?

- **Medical Leave**

- An employee's own serious health condition

- **Family Leave**

- Care for family member's serious health condition (child, grandchild, grandparent, parent, in law, sibling, spouse)
 - Birth or placement of child (under 18 yo) during the first 12 months, or
 - Qualifying military exigency under FMLA, like when a spouse leaves for military active duty.



How much paid leave?

12 weeks of paid *family* leave

12

How much paid leave?

12 weeks of paid *medical* leave

12

How much paid leave?

14 weeks of paid *medical* leave if the employee experiences a *pregnancy-related serious health condition that results in incapacity*

$$12 + 2 = 14$$

How much paid leave?

16 weeks of *combined* paid family and medical leave

16

How much paid leave?

18 weeks of *combined* paid family and medical leave if the employee experiences a *pregnancy-related serious health condition that results in incapacity*

$$16 + 2 = 18$$

When is an employee disqualified?



- Expiration of Leave Entitlement
 - For birth or placement of a child:
 - **12 months** after birth or placement
 - For a Serious Health Condition:
 - **12 months** after the employee applied for benefits (for self or family member)

Notice to ER

- Foreseeable: ***30 days' written notice*** before paid leave starts.
- Unforeseeable: ***as soon as is practicable***.
- Military leave: ***as soon as is practicable***.
- One-Time: Written notice need only be given once, regardless of whether leave is to be continuous, intermittent, or for a reduced schedule. But the EE must inform the ER as soon as practicable if the dates of scheduled leave change, are extended, or were initially unknown.
- If EE fails to provide notice to ER, the EE's benefits will be denied for a period of time equal to the number of days that notice was insufficient.

EE Applications

- EE must apply to ESD to open a claim (online, phone, etc.).
- ER cannot require EE to apply.
- Applications can be backdated for good cause or for ESD's convenience.
- "Good cause" = factors that prevented an EE from applying before or at the time of need, such as serious health condition, incapacity, or natural disaster.
 - EE has burden to prove good cause.
 - EE who wants to backdate must file application during first week in which good cause no longer exists.

EE Applications

- ESD will notify an ER when an EE applies for benefits.
- ERs must respond within ESD's provided time frame. If not, ESD will determine eligibility without the ER's input.
- The minimum claim duration = **8 consecutive hours** in a week.
- If an EE on leave typically works less than 8-hour shifts, the EE will meet the requirement of a minimum claim when the EE has missed 8 consecutive hours in a week the EE typically would have been scheduled.

EE Applications

- Once an EE opens a claim with ESD, EEs should file weekly to specify what days pay is sought for.
- No more than 4 weeks of claims can be made at one time, except in limited circumstances, such as backdating for good cause.

JOB PROTECTION

Job Protection/Restoration

- EE has job protection while on WPFML if:
 - ER has 50 or more EEs;
 - EE has been employed by the current ER for 12 months or more; and
 - has worked for the current ER for at least 1,250 hours during the 12 months immediately preceding the date of leave.
- Question: Hold job for EE with fewer than 1250 hours who takes leave?

Job Protection/Restoration

- Restoration to:
 - same position (if it still exists); or
 - an equivalent position (benefits, pay, terms and conditions).

Job Protection/Restoration

- “Equivalent position” = virtually identical (pay, duties, skill, effort, etc.)
- “Employment benefits” refers to all benefits provided or made available to employees by an employer including, but not limited to, insurance, PTO, educational benefits, and retirement benefits.
- An EE is entitled to reinstatement **even if the EE has been replaced or his or her position has been restructured to accommodate the EE’s absence** unless the ER can demonstrate the exception in the regulation.

Job Protection

- However, an EE is **not entitled** to job protection if:
 - an ER exercises its right to deny restoration and the EE has elected not to return to employment after receiving notice, or
 - the EE would not otherwise have been employed when reinstatement is requested.

Small Business Grants

- ESD offers monetary grants to
 - ERs with between **50-150 WA employees**, or
 - ERs with between **1-49 WA employees who choose to pay the employer portion** (even though not required).
- \$3,000 for a temporary worker to replace an EE out on WPFML for 7 days or more.
- \$1,000 as reimbursement for significant additional wage-related costs due to an EE's WPFML (e.g., paying additional wages to existing employees, outsourcing costs, certification, equipment purchases, or other costs).

INTERPLAY WITH OTHER PAID LEAVE

Interplay with Other Paid Leave

- **Family and Medical Leave Act (FMLA)**
 - Runs **concurrently** if EE receives WPFML.
 - But **not concurrent** if EE takes FMLA and does not apply for or receive WPFML.
 - Cannot require EE to apply for WPFML.
- **Pregnancy/Childbirth Sickness or Temporary Disability**
 - Not concurrent with WPFML.
- **Paid Sick Leave, Vacation, PTO, Short Term Disability**
 - ER cannot require EE to take this concurrently with WPFML.
 - If ER offers it as supplemental benefit, EE may choose to take concurrently.

Interplay with Other Paid Leave

- **Workers' Compensation**
 - Cannot run concurrently with WPFML.
- **Unemployment Compensation**
 - EE cannot receive unemployment compensation and WPFML pay in the same week.
- **Washington Family Leave Act**
 - Law has sunset.

MULTI-STATE CONSIDERATIONS

Other States with PFL

- California (S.F. too)
- Connecticut
- D.C.
- Massachusetts
- New Jersey
- New York
- Oregon
- Rhode Island

Other States

Interaction with Company Paid Leave

- **California:** EEs NOT eligible if they have no wage loss as result of leave
- **Connecticut:** PFL runs concurrently with any state or federal wage replacement
- **D.C.:** ER provision of supp. Benefits does not affect rights to PFL
- **Massachusetts:** Private plans are permitted; must be approved
- **New Jersey:** Private plans are permitted; must be approved
- **New York:** ER who pays EE's full comp during leave may request reimbursement
- **Oregon:** State benefits are in addition to any ER-provided paid leave
- **Rhode Island:** Unspecified

Other States

Tips for Multistate Employers Regarding PFL

- Work with counsel in drafting EE-facing policy and HR/MGT facing guidance
- Policy: state-by-state addendums
- Guidance: recommend FAQs

FREQUENTLY ASKED QUESTIONS

Frequently Asked Questions

We just have one employee working in Washington. Does the WPFML law really apply to us?

- **Yes, but no need to pay employer share of premiums.**

We are a nonprofit/religious/charitable employer — are we exempt?

- **No.**

Frequently Asked Questions

Can our WA employees opt out? They don't want this.

- **No.**

Can our company opt out? We already provide paid leave benefits.

- **No, but ERs may apply to the state to run a “voluntary plan” as long as the ERs can meet or exceed all of the benefits and conditions under the state plan.**

Frequently Asked Questions

I heard that the deduction is actually 0.4% (or 0.004).

- No, 0.4% (or .004) is the “total premium,” which combines ER and EE shares. The most that EEs can pay in premiums is .25332% (or .0025332) of gross wages, up to the social security cap.
- Otherwise, you may be wrongfully withholding EE wages.

Frequently Asked Questions

How much will an employee be paid while on leave?

- It depends on their wage.
- Relatively low earners will be paid a relatively higher percentage of their wages. The minimum weekly benefit will be \$100.
- Relatively high earners will be paid a relatively lower percentage of their wages, up to the maximum weekly benefit of \$1,000.

Still Have Questions?

- Please feel free to contact Jackson Lewis.
- You can contact ESD:
 - paidleave@esd.wa.gov
 - 833-717-2273 (WPFML Hotline)
 - <https://paidleave.wa.gov>

Thank You

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