

FMLA Coverage for Same-Sex Spouses: Is Change on the Horizon?

by Marti Downey

Same-sex spouses do not currently qualify as “spouses” under the Family and Medical Leave Act (“FMLA”), but that could soon change. Under the FMLA “spouse” is defined as only as “a husband or wife, as the case may be.” The federal regulations interpreting the FMLA provide further guidance, clarifying that “[s]pouse means a husband or a wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.” 29 C.F.R. Section 825.122(a). Because the definition of “spouse” in the FMLA is limited to “a husband or a wife” as defined “for purposes of marriage,” it does not include domestic partnerships or civil unions, but the issue of same-sex spouses is more complicated.

By its plain language, the definition provided in the FMLA regulations appears to cover same-sex spouses (by marriage or common law marriage), in states that authorize same-sex marriage. However, in 1996 Congress passed (and President Clinton signed) the Defense of Marriage Act (“DOMA”). DOMA established a federal definition of marriage as a legal union between one man and one woman. In a 1998 Opinion Letter the Department of Labor—the government agency charged with enforcing and interpreting the FMLA—clearly stated that because the “FMLA is a Federal law, it is our interpretation that only the Federal definition of marriage and spouse established under DOMA may be recognized for FMLA leave purposes.”

Thus, under current law, employees are not entitled to take FMLA leave to care for a same-sex spouse with a serious health condition. However, there is a great deal of public pressure to repeal DOMA. As public opinion toward same-sex marriage shifts and more states legalize same-sex marriage, DOMA is increasingly under attack from both the courts and Congress. In recent months there have been several legal rulings that held DOMA to be unconstitutional. On February 22,



2012 a California federal judge issued a decision holding that the statute—as it applies to deny benefits to same-sex spouses—implicates a heightened level of scrutiny and violates the Equal Protection Clause of the U.S. Constitution. A second California federal court decision followed on May 24, 2012. In that decision, the court ruled that DOMA unconstitutionally discriminates against same-sex spouses by denying them long-term care insurance through a public-employee pension program. On May 31, 2012, the First Circuit Court of Appeals declared DOMA to be unconstitutional, holding that federalism prohibits Congress from interfering with states’ rights to legalize same-sex marriage. This marks the first

time a federal court of appeals has ruled on the validity of DOMA. Notably, the Obama administration has publicly stated that it will not defend the constitutionality of DOMA. That position is consistent with the President’s May 9, 2012 declaration of support for same-sex marriage. On the Congressional front, bills to repeal DOMA have been introduced in both the Senate and the House. These bills would extend FMLA coverage to employees seeking leave to care for a same-sex spouse with a serious health condition (in those states that recognize same-sex marriage).

Although not required by the FMLA, many employers provide leave for employees to care for same-sex spouses with a serious health condition—either pursuant to state law or Company policy. However, this leave does not currently count toward the employee’s FMLA allotment. That may be changing very soon.

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Are You Ready For Compliance?

by Coe Heard

July 1, 2012 is right around the corner and smaller private Tennessee employers should prepare for compliance under the Tennessee Lawful Employment Act.

Signed into law by Governor Haslam on June 7, 2011, the Act requires all Tennessee employers to demonstrate that they are hiring and maintaining a legal workforce. An employer's workforce, however, includes more than just employees. It also includes "non-employees" defined as any individual who is paid directly by the employer in exchange for labor or services. Independent contractors certainly qualify under this "non-employee" definition so employers who utilize independent contractors should prepare to verify their eligibility, too.

Initially, all state and local government agencies and private employers with 500 or more employees had to comply by the Act's January 1 effective date. By the upcoming July 1, 2012 deadline, all private employers who have between 200 and 499 employees must comply. The last round of compliance occurs on January 1, 2013 and applies to all private employers with more than six employees. For counting purposes, employers must include all employees

both inside and outside the State of Tennessee.

An employer has two options for verifying the status of employees. The first option is enrollment in the federal E-Verify program. If an employer chooses this option, it must maintain records for



three years from the date of hire or one year from the date of termination, whichever is later. The second option is to request all employees provide one of the Act's eleven enumerated pieces of identification (e.g., a valid Tennessee driver's license, a passport or a certificate of citizenship) prior to beginning work and to maintain a copy on file. The federal E-Verify program is not applicable to

non-employees, such as independent contractors, so employers must utilize the second option for these individuals. Recordkeeping under this option similarly requires an employer to maintain records three years from the date the document is received or one year after the employee or non-employee stops providing labor or services, whichever is later.

Employers should pay close attention to their obligations as the potential penalties are significant, especially for repeat offenders. Any Tennessee resident or federal agency employee may file a complaint with the Tennessee Department of Labor and Workforce Development alleging a violation of the Act. A complaint then triggers an investigation. Upon concluding a violation has occurred, the Commissioner has the authority to impose fines up to \$2,500, plus an additional \$2,500 for each employee or non-employee who was not verified. Beware: there is no statutory cap. The penalties do not end here. An employer has 60 days after the imposition of a penalty to remedy the violation, and a failure to do so could result in a suspension of the employer's business license until compliance is achieved.

Tipped Food and Beverage Servers May Now Waive Meal Break

By Stephanie Roth



In Tennessee, employers are required to give employees an unpaid, 30-minute meal break if the employee is scheduled

to work six or more consecutive hours. Section 50-2-103(h) of the Tennessee Code includes an exception for employers whose work environments, by their nature, provide ample opportunity to rest or take an appropriate break. The issue for employers has been whether they can successfully argue their work environments fit within the exception. This issue has been of particular concern to the hospitality industry whose workers' duties often fluctuate with customer demand.

On May 17, 2012, an addition to § 50-2-103(h) took effect. The new provision

permits employers to offer employees the option to waive their unpaid, 30-minute meal breaks. The waiver applies only to employees who report tipped income to their employers and principally serve food and beverages to customers. This option allows employees to maximize earnings during their shifts and allows employers to streamline scheduling and service, particularly during peak service hours.

Employers eager to take advantage of this option should note the statute requires

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SNOPA to Make Snooping on Applicants/Employees Illegal – Nationwide

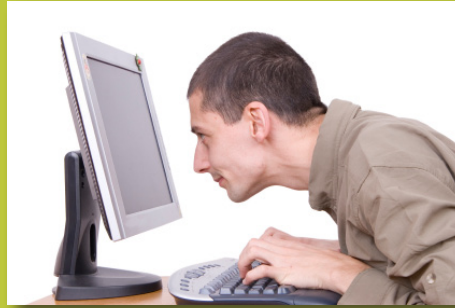
by Brian M. Clifford

New federal legislation, the Social Networking Online Protection Act (“SNOPA”), was recently introduced in response to increasing concern regarding employers requesting or requiring job applicants and employees to divulge their private social-media access information.

The proposed law, introduced by Rep. Eliot Engel (D-N.Y.) and co-sponsored by Rep. Jan Schakowsky (D. IL), would essentially ban employers from doing so nationwide. Several states have similar legislation in the works, including Michigan, Minnesota, Missouri, New York, South Carolina, and Washington, however, Maryland lays claim as the first state to pass such a law. Facebook also recently implemented new privacy provisions in its Statement of Rights and Responsibilities as a direct result of these disclosure requirements.

The new legislation was mainly introduced in response to employment-setting privacy concerns and so called “Facebook snooping,” however, supporters argue its protection will extend even further. Rep. Schakowsky said, “the American people deserve the right to keep their personal accounts private” and “no one should have to worry that their personal account information, including passwords,

can be required by an employer.” Rep. Engel extended it further saying, “passwords are the gateway to many avenues containing personal and



sensitive content – including email accounts, bank accounts, and other information” and “several states, including New York have begun addressing the issue, but we need a federal statute to protect all Americans across the country.”

SNOPA, coupled with existing federal laws, is sure to lead to increased litigation risk for employers. Several federal statutes already prohibit employers from considering age, color, race, religion, sex, national origin, disability, medical conditions/information, and family history in making employment decisions. If passed, SNOPA would also “prohibit current or potential employers from requiring a username, password or other access to online content from applicants

and employees” and would “not permit employers to demand such access to discipline, discriminate, or deny employment to individuals, nor punish them for refusing to volunteer the information.”- Rep. Eliot Engel.

If employers are openly asking for private social-media access, they already risk a possible employment discrimination claim by a rejected applicant. For example, the Age Discrimination in Employment Act (“ADEA”) protects persons age 40 and over from discrimination in the workplace based on age. In most instances, employers may not require” applicants to state when they were born or when they graduated from high school. A person’s age, however, is usually listed prominently on Facebook profiles. There are many ways to judge an applicant’s or employee’s ability to perform a job without requiring Facebook “snooping.” SNOPA will simply make the practice illegal.

While there has been outcry over employers requesting such information due to privacy and employee-rights concerns, this new proposed legislation already has significant support and public social-media concerns are sure to remain high. Employers are encouraged to tread lightly in this area and should stay tuned to further developments.

(meal break continued from page 2)

several criteria to be met for a waiver to be valid. First, offering the waiver is at the employer’s discretion; the employee has no right to waive the meal break. Second, the employer must develop a reasonable policy for waiving the meal break and post the policy in a conspicuous place in the workplace. Third, the policy must include: a waiver form containing a statement of the employee’s right to an unpaid 30-minute meal break during a six-hour work period and a statement the employee is waiving the right knowingly and voluntarily; the length of time the waiver will be in effect;

and the procedures for rescission of the waiver, which either party may initiate by providing at least seven days notice of its intent to rescind. Fourth, an employee desiring to waive the meal break must submit a written request to the employer on the employer’s waiver form.

Employers in the hospitality industry likely welcome the new provision which provides an option for them to forgo unpaid, 30-minute meal breaks for employees who fit the statutory description rather than having to determine whether

their workplace environment fits within the general exception. Employers must remember that once they make the option to waive meal breaks available, each employee decides whether to exercise the option and cannot be coerced into doing so.

Finally, proper documentation is critical. Employers must make the effort to create a reasonable policy and comply with the posting and documentation requirements if they want to benefit from the new waiver option.

Avoiding FCRA Pitfalls: What Employers Should Know Before Using Consumer Reports in Employment Decisions

By Bahar Azhdari

The popularity of social media made everyone with an internet connection a private investigator and allowed everyone to conduct informal background checks on friends, coworkers, potential mates, and employers. Employers, in turn, began using social media as a way to screen their applicant pool with a just few clicks of a button, some unfortunate Spring Break photographs, and no need to pay a third-party consumer reporting agency for a background check. As employment counsel sounded the alarms on this practice, employers returned to their old standby: credit checks.

Credit checks, also known as consumer reports, are not without their problems, especially when their results are used in employment decisions. For that reason, when an employer chooses to use consumer reports for employment decisions, including hiring, retention, promotion, or reassignment, it must comply with the Fair Credit Reporting Act (“FCRA”). Compliance with the FCRA is vital, and below are some of the steps employers should take to follow its requirements:

1. Give notice. Before you may obtain a consumer report on an individual, you must tell the individual you might use information contained in his/her consumer report for employment-related decisions. The notice must be in writing, separate from your employment application, and in a “stand-alone” format.

2. Get permission. The individual must provide written permission for you to obtain a report, which can usually be included as a signature at the bottom of the notice given in Step 1. If you want the ability to get consumer reports throughout the individual’s employment, you must say so clearly and conspicuously in the notice and authorization.

3. Certify compliance. You must certify to the company from which you are requesting the consumer report that you:

- (a) have complied with Steps 1 and 2;
- (b) have complied with all other FCRA requirements; and



- (c) will not discriminate against the applicant or employee or otherwise misuse the information.

4. Provide a summary of rights. If you decide to reject an applicant, reassign or terminate an employee, deny a promotion, or take any other adverse employment action based on information contained in a consumer report, you must give the individual notice of the potential decision, a copy of the consumer report you relied on to reach your decision, and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” (available at: <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf>). You must

provide this notice before you take the adverse action because it allows the individual an opportunity to review the report and explain the information contained in it.

5. Give notice (again). If you still decide to take the adverse action, you must notify the individual of that fact. Notice may be verbal, written, or electronic, and it must include the following:

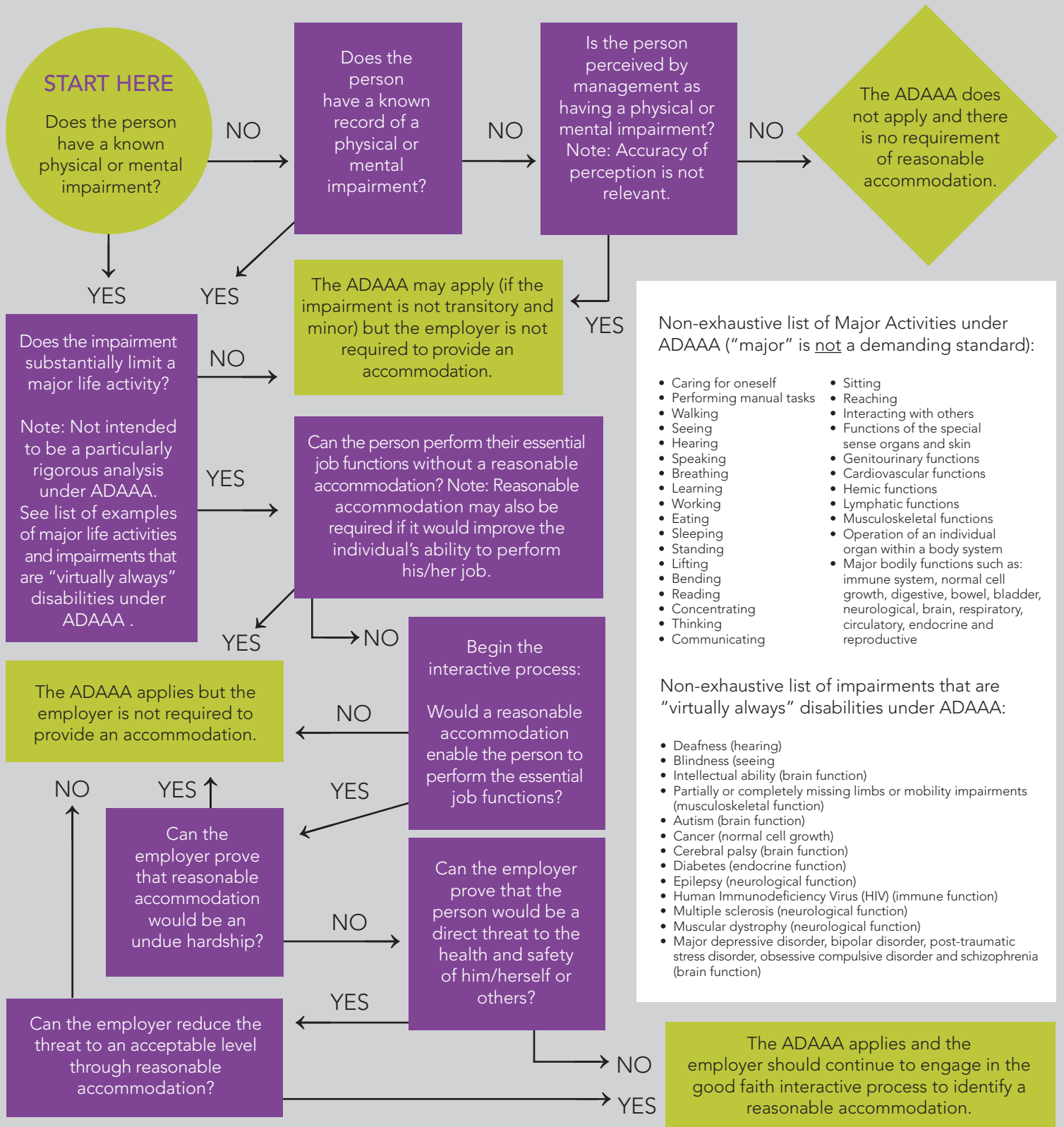
- (a) the name, address, and phone number of the consumer reporting company that supplied you with the report;
- (b) a statement that the agency supplying the report did not make the employment decision and cannot give specific reasons for it; and
- (3) a notice of the individual’s right to dispute the accuracy or completeness of any information the agency furnished and to get an additional free report from the agency if the individual requests it within 60 days.

6. Dispose of the report. Once you are done using the consumer report, you must dispose of it and any information gathered from it. However, if you used the report in making an adverse employment decision, you should retain a copy of it for 5 years.

Consumer reports can contain information relevant to an applicant or employee’s potential success. Nevertheless, employers should exercise caution when obtaining or utilizing such reports for employment-related decisions, and they should be sure to abide by the requirements of the FCRA when doing so.

ADAAA Decision Tree

The ADAAA and its progeny have significantly altered employers' obligations for addressing disability-related concerns in the workplace. All of these changes can be confusing and, if we are not careful, can lead to increased legal exposure. This flow chart is a helpful starting point for navigating the requirements of the ADAAA. Be sure to keep it handy for the next time you are faced with a disability-related inquiry.



Non-exhaustive list of Major Activities under ADAAA ("major" is not a demanding standard):

- Caring for oneself
- Performing manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working
- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating
- Sitting
- Reaching
- Interacting with others
- Functions of the special sense organs and skin
- Genitourinary functions
- Cardiovascular functions
- Hemic functions
- Lymphatic functions
- Musculoskeletal functions
- Operation of an individual organ within a body system
- Major bodily functions such as: immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive

Non-exhaustive list of impairments that are "virtually always" disabilities under ADAAA:

- Deafness (hearing)
- Blindness (seeing)
- Intellectual ability (brain function)
- Partially or completely missing limbs or mobility impairments (musculoskeletal function)
- Autism (brain function)
- Cancer (normal cell growth)
- Cerebral palsy (brain function)
- Diabetes (endocrine function)
- Epilepsy (neurological function)
- Human Immunodeficiency Virus (HIV) (immune function)
- Multiple sclerosis (neurological function)
- Muscular dystrophy (neurological function)
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia (brain function)

All information and material in this diagram is believed to be accurate. Nonetheless, it should not be considered legal advice on any particular topic. All fact patterns are potentially different and you should consult with an employment law attorney prior to taking any action based upon this information.

Upcoming Events

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Tennessee Hospitality Association Hospitality Law Symposium

When: July 12

Who: Marcus Crider, Bahar Azhdari, Vinh Duong

Where: Waller Lansden Conference Center, 511 Union Street, Suite 2700, Nashville, TN 37219

Employment Law Issues and Trends: Get it Right Before the Fight*

When: July 25

Who: Andy Naylor, Vinh Duong, John Park,
Bahar Azhdari, Marti Downey, Brian Clifford,
Coe Heard, Stephanie Roth

Where: Hampton Inn & Suites, 325 N. Thompson Lane, Murfreesboro, TN 37129

Employment Law Issues and Trends: Get it Right Before the Fight*

When: July 27

Who: Andy Naylor, Vinh Duong, John Park,
Bahar Azhdari, Marti Downey, Brian Clifford,
Coe Heard, Stephanie Roth

Where: Holiday Inn Express, 1228 Bunker Hill Road, Cookeville, TN 38506

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Employment Law Issues and Trends: Get it Right Before the Fight*

When: August 2

Who: Andy Naylor, Vinh Duong, John Park,
Bahar Azhdari, Marti Downey, Brian Clifford,
Coe Heard, Stephanie Roth

Where: Waller Conference Center, 511 Union Street, Suite 2700, Nashville, TN 37219

Lorman FLSA Seminar

When: August 16

Who: Andy Naylor, Stan Graham, Marti Downey

Where: Nashville, TN

Human Resources Association of Middle Tennessee Legal Workshop

When: August 22

Who: Waller Lansden Employment Law Group

Where: Nashville, TN

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ACI's 16th National Wage & Hour Conference

When: September 28

Who: Andy Naylor

Where: San Francisco, CA

If you are interested in more information about any of these upcoming events, please contact Melanie Delconte at 615.850.8899 or melanie.delconte@wallerlaw.com.

* Events hosted by Waller Lansden

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