

# Legal Update

May 8, 2020

## FAQ: RETURNING TO THE WORKPLACE IN A COVID-19 WORLD

By Jon Vegosen

### INTRODUCTION

As the COVID-19 pandemic evolves, the government and our communities are planning to reopen our society and our workplaces. This newsletter addresses a number of questions that we are receiving from businesses about reopening. Because the situation is so fluid, some of these answers may change.<sup>1</sup> It is therefore important to keep abreast of the most current guidance from the CDC and other governmental authorities. We have also put together some helpful links at the end of this newsletter.

### REOPENING

#### **1. When and how should we reopen?**

This will depend in large part on government regulation and guidance, especially from the CDC, OSHA, state and local agencies, the EEOC, and the Department of Labor. It will also depend on the needs of your business and how well it can operate safely. While employers are eager to “get back to normal,” it is more advisable to take a slow and measured approach to reopening, as safety is important.

#### **2. How do you recommend we proceed?**

- a. Prepare a thoughtful and clear **written plan** with a strong internal team and capable external advisors.
- b. Review it with executives and key managers so they will be prepared to execute it and will speak with one voice.
- c. Communicate the plan clearly with all employees and be prepared to respond to questions and concerns.

#### **3. Whom should we bring back to our facility?**

Focusing on employees’ knowledge, skill sets, and experience, determine which employees are critical to have working in your facility and who can still contribute remotely. Look at multiple shifts, rotating schedules, or staggered start times to reduce the number of employees at your facility and to promote safe distancing. The fewer employees you bring back, the safer they will be. It is important to remind employees that working at home is a privilege and not a right and they must still meet performance expectations. If you have a unionized workforce, check labor contracts to verify whether seniority or other issues should factor into your decision-making and whether you need to negotiate over new work rules that may be a part of your plan. Be sure there are sound reasons for your decisions and actions, and document them.

### SAFETY

#### **4. What are some of the safety considerations for the building in which we are located?**

If your business does not own your building, or if you are a tenant in a multi-tenant property, then the owner will make some decisions that can affect safety. You will want to determine if the property owner is taking

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<sup>1</sup> Some of the information contained in this *Legal Update*, especially regarding EEOC matters, has been derived from publications of various government agencies, including EEOC Guidance and webinars, and some of the answers in this FAQ include verbatim or near verbatim statements from these resources. These sources should be reviewed as the guidance may change.

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appropriate precautions with respect to matters such as: (a) airflow; (b) building access; (c) elevator usage; and (d) cleaning services if provided by the owner. You may want to request limits on the number of passengers in an elevator or share other concerns. If your business does own your facility, consider engaging a contractor with expertise in health and safety requirements.

**5. What kinds of things can we do to make our space safe?**

Consistent with CDC and OSHA guidelines, be sure that your space is clean and disinfected not only before it reopens but also on a regular basis after it reopens. Establish and follow cleaning protocols for equipment, common areas, surfaces, and door handles. Make sure that masks, gloves, wipes, and sanitizers are readily available for employees. Assess how your space is currently set up and decide what changes, if any, you can make to separate employees. Consider installing partitions, especially in open work areas. Decrease the number of chairs in conference rooms, breakrooms, and other common areas. Institute protocols to eliminate, minimize, or distance employee interaction with each other as well as non-employees (such as customers, vendors, and delivery personnel) and follow federal, state and local guidelines that may be established.

**6. What are some safety-focused actions we can take with respect to our employees?**

Educate employees about the symptoms of COVID-19: fever; cough; shortness of breath or difficulty breathing; chills; repeated shaking with chills; muscle pain; headache; sore throat; new loss of taste or smell; including the emergency warning signs for COVID-19, such as trouble breathing; persistent pain or pressure in the chest; new confusion or inability to arouse; or bluish lips or face.

Establish written health and safety guidelines and protocols that all employees must follow, including the following:

- a. engage in social distancing, including, whenever possible, staying at least six feet apart from others;
- b. wear a mask or other face covering at work when interacting with others in person;
- c. do not touch others;
- d. cover coughs and sneezes in your sleeve or elbow, and not with your hands;
- e. wash your hands frequently throughout the day using soap and warm water for at least 20 seconds each time, and/or use hand sanitizers;
- f. use a paper towel to dry your hands and then immediately throw it away; and
- g. observe other recommended guidelines and protocols required by applicable law.

Where possible, have employees work remotely. If they cannot work remotely, consider encouraging them not to take public transportation to and from work or to take it during non-rush hour times. Also, consider subsidizing the parking fees of employees who drive to and from work.

**7. For their own safety, should we decline to return vulnerable or pregnant workers to the office?**

No. While you will want to accommodate vulnerable and pregnant workers by allowing them to work remotely (if feasible), denying such workers the opportunity to return to work could lead to discrimination claims based on factors such as age, disability, or pregnancy.

**COVID-19 INQUIRIES, MEDICAL EXAMS, TESTING, AND CONFIDENTIALITY**

**8. What may an employer do to determine if employees physically coming into the workplace have COVID-19 or symptoms associated with the disease?**

Employers may ask all employees who will be physically entering the workplace if they have COVID-19, symptoms associated with COVID-19, or been tested for COVID-19. Employers may exclude those with

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COVID-19, or symptoms associated with COVID-19, from the workplace because, as the EEOC has stated, their presence would pose a direct threat to health or safety. Teleworking employees, however, are not physically interacting with coworkers to pose a direct threat to health or safety, and an employer would generally not be permitted to ask these questions of teleworkers.

**9. In order to protect the rest of its workforce during the COVID-19 pandemic, how much information may employers request from an employee who calls in sick?**

According to the EEOC, during a pandemic, employers covered by the Americans with Disabilities Act (the “ADA”) may ask employees calling in sick if they are experiencing symptoms of the pandemic virus.

**10. Is it permissible for employers to take employees’ temperatures during the COVID-19 pandemic?**

While taking an employee’s temperature would ordinarily be a medical examination restricted by the ADA, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may take employees’ temperatures. Some people with COVID-19, however, are asymptomatic and do not have a fever, so taking temperatures is not a panacea for employers.

**11. Does the ADA allow employers to require employees to stay home if they have COVID-19 symptoms?**

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not prevent employers from following this guidance.

**12. May employers administer a COVID-19 test before permitting employees to enter the workplace?**

The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore employers may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Having said the foregoing, if an employer is not a hospital or in the business of administering medical tests, or if it does not have trained personnel to conduct tests, it may want to think long and hard before the employer itself administers COVID-19 testing. It would be advisable to leave any testing to organizations and facilities that are well equipped to administer them. Regardless of whether it or a third party administers the test, employers should ensure the test used is approved, safe and accurate under applicable guidelines, and that they understand what the results mean. Information on testing can be found at the websites for the [U.S. Food and Drug Administration](#), the [CDC](#), and other public health authorities. These sites should be regularly reviewed for updates. Employers should bear in mind that even accurate testing may have false positives or negatives, and will only reveal if the virus is currently present. A negative test does not mean the employee will not acquire the virus later (including between testing and receiving results).

If an employer is going to require COVID-19 testing, it should do so on a consistent basis for all employees to try to prevent discrimination claims.

**13. Suppose a manager learns and confirms that an employee has COVID-19, or has symptoms associated with COVID-19. The manager knows she must report it but is worried about violating ADA confidentiality. How does she do so?**

Under the ADA, employers must maintain all medical information about an employee as **confidential**. Information about whether an employee has symptoms or a diagnosis of COVID-19 is medical information. That, however, does not prevent the manager from discreetly reporting this information to a small number of appropriate employer officials well versed in ADA confidentiality requirements, so that they can take actions consistent with guidance from the CDC and other public health authorities. An employer may

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generally disclose to employees that an employee has contracted or been exposed to COVID-19; however, an employer **may not disclose the identity** of that employee to employees.

**14. What may an employer do under the ADA if an employee refuses to permit his employer to take his temperature, or refuses to answer questions about whether he has COVID-19 (or symptoms associated with COVID-19) or whether he has been tested for COVID-19?**

The ADA allows an employer to bar an employee’s physical presence in the workplace if he refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19, as well as the ability to bar this employee’s presence if he refuses to have his temperature taken. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee’s refusal. Employers may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace. Sometimes, employees are reluctant to provide medical information because they fear an employer may spread personal medical information throughout the workplace. As noted above, the ADA prohibits such broad disclosures.

**15. May an employer ask only one employee (rather than all employees) questions to determine if the has COVID-19, or require that this employee alone have his temperature taken or take a test?**

The ADA requires an employer to have a reasonable belief based on objective evidence that the employee might have COVID-19. It is important for the employer to consider why it wishes to take these actions regarding a particular employee and document the decision. For example, if an employer notices an employee has a persistent, hacking cough; it could ask about the cough, whether the employee has been to a doctor, and whether the employee knows if he has or might have COVID-19. These questions are permissible now because this type of cough is one of the symptoms associated with COVID-19.

**16. When an employee returns to work, may an employer require a doctor’s note certifying fitness for duty?**

Yes. Such inquiries are permitted under the ADA because either they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus or employee self-certification.

**POLICY REVIEW AND NEW POLICY IMPLEMENTATION**

**17. Why should employers conduct a policy review?**

It is always advisable for employers to review their policies and employee handbooks to make sure that they are up to date and comport with applicable law. In the context of the pandemic crisis, it is unwise to believe that current policies will suffice. In addition, new policies will be necessary to deal with the fast-changing dynamics of the pandemic. Situations will arise that managers may not anticipate or will be ill equipped to address without guidance. Managers may make up or develop policies “on the fly.” This can result in rogue policies, inconsistent treatment of employees by managers, discrimination, and lowered employee morale. Before employees return to work, it is far better to review and revise existing policies, prepare new ones, and train managers how to anticipate situations and administer policies.

**18. What kinds of existing policies might employers want to review and possibly revise?**

Equal Opportunity	ADA	Sick Leave	Work from Home	Discipline/Discharge
Non-Discrimination	Life-Threatening Illness	Vacation	Safety	Severance
Anti-Harassment	FMLA	Other PTO	Layoffs	References

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## 19. What kinds of new policies might employers want to consider implementing?

Temperature Checks	Hand Washing	Quarantining / Tracing
COVID-19 Testing	Meeting Size	Working Remotely
Duty to Report COVID-19	Staggered Hours / Shifts	Appropriate Attire for Video Meetings
Social Distancing	Limitations on Visitors	Confidentiality of Employee Matters
Masks	Travel Disclosures & Restrictions	Use & Security of Computer Equipment at Home

## 20. Is there anything else an employer can or should do with respect to policies?

Yes. Document employees' receipt of them! It behooves an employer to have all employees complete, date, and sign an acknowledgment form confirming that they have read, understand, and will abide by the employer's policies. In this way, an employer (a) can document employee health and safety awareness, and (b) have a written record of answers to certain questions.

This is an opportunity to ask employees if they have COVID-19, have any symptoms of COVID-19, or have been exposed to someone who has COVID-19. If they answer yes, the form could state that they understand and agree that they will stay home and self-quarantine until after the quarantine period defined under current CDC guidelines has expired. The form could also state that employees acknowledge that they are under a "continuing duty to report or disclose." That is to say, to ensure that safety is a two-way process, employees need to advise their employer if, in the future, they have COVID-19, have any symptoms of COVID-19, or have been exposed to someone who has COVID-19.

## DEALING WITH EMPLOYEES, ESPECIALLY OBSTINATE EMPLOYEES

### 21. What is one of the best things an employer can do to deal with employees?

To communicate effectively with them. Many employees likely have tremendous anxiety about COVID-19, their safety and the safety of their loved ones, and their job security. Effective communication can (a) help reduce their anxiety; (b) make them feel reasonably comfortable about returning to work; (c) help manage their expectations; (d) contribute to a positive working environment that inspires employees to perform their duties effectively; and (e) help mitigate the risks of lawsuits and employer liability.

### 22. What seven things can employers do if an employee refuses to return to work?

1. With sincere empathy, try to find out why the employee is refusing to return to work. There may be a very good reason, or the employee may have an unfounded fear or concern that you can address. By communicating, you may be able to resolve the issue or easily accommodate the employee.
2. Explore whether the employee can carry out his or her duties reasonably effectively by teleworking.
3. Examine whether the employee has paid time off available or if a leave of absence is appropriate.
4. Let the employee know that if he or she persists with an unwarranted refusal to return to work, discipline or termination of employment may be the next step.
5. Absent a legitimate and documentable reason to the contrary, treat employees consistently.
6. Do not retaliate against employees who express concerns.
7. Document (a) the employee's refusal to return to work; (b) the efforts you made to learn the reasons for the refusal; (c) the things you offered to address the employee's concern; and, (d) if applicable, the consequences that would befall the employee if the employee continued to refuse to return to work.

### 23. What can an employer do if employees fail to observe its social distancing policy or fail to wear a mask when required?

The employer needs to hold the employees accountable for violating its policy. For the first infraction, progressive discipline is likely in order. If the misconduct is egregious or if it continues, the discipline should be more severe, up to and including termination of employment. The possibility of these

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repercussions should also be stated in the employer’s policies. Whatever the consequences, the employer should properly document the employee’s infractions and its decision.

**24. What can an employer do if an employee who is immunocompromised or otherwise has a greater risk if he contracts COVID-19 returns to work and his performance is deficient?**

In most instances, the employer should focus on correcting his performance deficiencies and counsel the employee to make immediate, significant, and sustained improvement, just as it would for any other employee. If, however, the employee is requesting a reasonable accommodation to be able to perform the essential functions of the job, the employer may need to engage in the ADA interactive dialogue process to explore whether the accommodation is reasonable and does not place an undue burden on the employer. Whatever course of action the employer takes, the employer should document the situation.

**MINIMIZING LEGAL RISKS TO AVOID LAWSUITS AND EMPLOYER LIABILITY**

**25. Can you provide a baker’s dozen measures employers can take to reduce the risk of lawsuits?**

- a. Stay up to date on recommendations and requirements from federal, state and local governmental entities and agencies.
- b. Prepare a well-conceived, written re-opening plan and train managers to understand and honor it.
- c. Communicate, communicate, communicate.
- d. Put safety first. Before employees return to work, advise them what safety steps you are taking and invite them to share specific needs, concerns, and priorities.
- e. Make appropriate inquiries about COVID-19, but protect employee confidentiality.
- f. Let employees know that safety is a two-way street – that everyone should endeavor to create and maintain a safe working environment. Encourage employees to self-report if they have COVID-19.
- g. Review and update existing policies and adopt relevant new policies.
- h. Consider having employees sign an acknowledgment and release form.
- i. Be clear about your performance expectations, but also show employees that you care.
- j. Treat employees fairly, and well document decisions and employee interactions.
- k. Post / display all required employment law posters in the workplace and make them available on the employer intranet.
- l. Speak in terms of endeavoring rather than guaranteeing. COVID-19 has already taught us that there are no guarantees, so under-promise and over-deliver.
- m. Consult with legal counsel.

**26. What kinds of claims can be brought against an employer reopening after COVID-19, and what can an employer do to mitigate the risk of those claims and minimize liability?**

While there is no guarantee against lawsuits, if an employer takes the following additional steps, the employer may be able to reduce its exposure to the following claims:

SOME POTENTIAL CLAIMS	SOME STEPS TO AVOID OR REDUCE EXPOSURE
Discrimination and harassment claims based on factors such as disability, age, pregnancy, sex, race, color, parental status, marital status, and national origin, especially in connection with a discharge or layoff, or requirements to come to work	<ul style="list-style-type: none"> <li>• Make consistent decisions based on objective factors such as skill set, experience, performance, and economic factors</li> <li>• When appropriate, engage in the interactive process</li> <li>• Safeguard employee privacy and confidentiality</li> <li>• Do not put employees’ medical information in their personnel files</li> <li>• Thoroughly document decisions and actions in real time to head off pretextual claims</li> </ul>



Retaliation and whistleblower claims against an employee for having exercised his or her rights	<ul style="list-style-type: none"> <li>Do not retaliate against employees for exercising their legal rights, such as leave rights under the Families First Coronavirus Response Act (“FFCRA”), the Family and Medical Leave Act (“FMLA”) or other laws</li> <li>Thoroughly document decisions and actions in real time</li> </ul>
Unfair labor practice charges under the National Labor Relations Act	<ul style="list-style-type: none"> <li>Do not retaliate against employees for exercising their legal rights to engage in concerted protected activity (such as complaining about cleanliness or whether the workplace is safe)</li> <li>Thoroughly document performance problems of employees in real time</li> </ul>
Wage and hour claims, especially for overtime pay, under the Fair Labor Standards Act and/or applicable state wage and hour laws	<ul style="list-style-type: none"> <li>Unless it is trivial, screening / testing time is likely working time that must be paid</li> <li>Have a policy that non-exempt employees should only work during set hours. If, for example, employees answer e-mails outside of their set hours, an employer can be liable for overtime pay</li> <li>Have a policy against unauthorized overtime, especially for non-exempt employees working remotely. Overtime should not be permitted unless there is prior written authorization from an employee’s supervisor</li> <li>Have a system to verify and record all hours that employees work, especially those still working from home</li> </ul>
Claims under the FMLA and state law counterparts	<ul style="list-style-type: none"> <li>Respond promptly to employee FMLA requests</li> <li>Provide eligible employees with notice of rights and responsibilities under the FMLA</li> <li>If an employee is not eligible for FMLA leave, provide the employee with the reason and document it in real time</li> <li>Honor leave eligible entitlements, benefits, and employee protections, including the right to return to their same or a comparable position</li> </ul>
Claims under the FFCRA for paid expanded family and medical leave or emergency paid sick leave	<ul style="list-style-type: none"> <li>Respond promptly to employee requests</li> <li>If an employee is not eligible, provide the employee with the reason and document it in real time</li> <li>Honor employee rights under the FFCRA as well as existing company policies</li> <li>Make required payments on a timely basis</li> </ul>
Employee claims for unemployment compensation benefits when employees feel uncomfortable returning to work	<ul style="list-style-type: none"> <li>Usually, essential employees or those not subject to a stay-at-home order can be required to work and are not eligible for unemployment benefits if they refuse to return to work</li> <li>Make sure employees do not have a right to stay home per state law, FMLA, or paid expanded family and medical leave or emergency paid sick leave under the FFCRA</li> <li>Make sure employees need not be reasonably accommodated due to factors such as a disability, pregnancy, or religious belief</li> </ul>
Employee claims for vacation pay and other paid time off on termination of employment	<ul style="list-style-type: none"> <li>Check state law and the organization’s employee handbook re: right to vacation pay and other paid time off upon termination of employment</li> <li>Some states, including Illinois and California, require employers to pay earned and unused vacation pay. Make any required payments on a timely basis</li> <li>Note that vacation time may have built up during the stay-at-home orders, resulting in higher than usual payments</li> </ul>
Employee claims for workers’ compensation benefits	<ul style="list-style-type: none"> <li>Have strong safety policies in general and for addressing COVID-19 in particular</li> <li>Before sending employees to customer or other locations, call to confirm the site’s COVID-19 safety precautions and document the confirmation</li> <li>If you become aware that employees have contracted COVID-19 outside of work, be sure to document as much so that you can defend against unwarranted workers’ compensation claims</li> <li>Remember, workers’ compensation is far less expensive than the kind of large pain and suffering verdicts that juries have awarded to injured plaintiffs in traditional personal injury litigation</li> </ul>
Third party negligence claims from family members of employees or from customers, clients, or vendors who have allegedly been exposed to coronavirus through your business	<ul style="list-style-type: none"> <li>Have strong safety policies in general and for addressing COVID-19 in particular</li> <li>Make sure the workplace is safe</li> <li>Follow federal (including CDC, OSHA and other agencies), state, and local rules and guidelines</li> </ul>

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	<ul style="list-style-type: none"> <li>• Before sending employees to customer or other locations, call to confirm that the site is COVID-19-safe and document the confirmation</li> <li>• If you become aware that employees have contracted COVID-19 outside of work, be sure to document as much so that you can defend against unwarranted claims</li> <li>• Institute safety protocols restricting third-party access (e.g., customers, clients, vendors, and delivery personnel) to your premises</li> <li>• Before engaging with customers, clients, and vendors, have them sign a coronavirus notice, acknowledgment, consent, waiver, and release of liability agreement</li> </ul>
Occupational Health and Safety Administrative Claims from OSHA and state counterparts	<ul style="list-style-type: none"> <li>• Have strong safety policies in general and for addressing COVID-19 in particular</li> <li>• Follow OSHA, CDC, and other guidelines for preventing and dealing with COVID-19</li> </ul>
Claims for breach of contract, whether an individual or a union contract	<ul style="list-style-type: none"> <li>• Review contracts prior to taking action to ensure you are not breaching them</li> <li>• Consult with legal counsel</li> </ul>
Claims for failing to comply with plant closing / layoff laws (e.g., the Worker Adjustment & Retraining Notification Act of 1988 (“WARN”) and similar state laws	<ul style="list-style-type: none"> <li>• Review federal and state WARN laws</li> <li>• Bear in mind that employers may need to aggregate the headcounts of series of layoffs in determining whether WARN laws apply</li> <li>• Bear in mind that, while there are exceptions to lengthy notice requirements, notice is still required</li> </ul>
Layoff and Severance pay issues	<ul style="list-style-type: none"> <li>• Examine how laying off an employee can impact forgiveness of any PPP loan</li> <li>• Absent an applicable state law or a contractual or policy obligation, severance pay is not required when laying off an employee</li> <li>• When offering severance for a release to employees 40 or older, be sure to follow the requirements of the Older Workers Benefit Protection Act to obtain a valid age discrimination waiver</li> </ul>

### SOME ADDITIONAL RESOURCES

- White House – [Guidelines for Opening Up America Again](#)
- CDC – [Coronavirus \(COVID-19\)](#)
- OSHA – [Guidance on Preparing Workplaces for COVID-19](#)
- Department of Labor – [COVID-19 and the American Workplace](#)
- EEOC – [Coronavirus and COVID-19](#)
- EEOC – [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)
- EEOC – [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#)
- EEOC – COVID-19 “Ask the EEOC” March 27, 2020 Outreach Webinar (To view the webinar video, please [click here](#). To read the webinar transcript, please [click here](#).)
- Illinois Department of Public Health – [COVID-19: Business and Organization Guidance](#)
- [FVLD Legal Update: Updated Breaking News: Families First Coronavirus Response Act](#)
- [FVLD Legal Update: Breaking News: CARES Act Relief for Small Businesses and Individuals](#)
- [FVLD Legal Update: Frequently Asked Questions Regarding the Coronavirus Aid, Relief and Economic Security Act and the Families First Coronavirus Response Act](#)
- [FVLD Legal Update: Employment Termination: Trickier Than You Might Think](#)

### CONCLUSION

While this FAQ does not cover every aspect of returning to work, we hope that it will provide you with food for thought and answer many of your questions. For more information, please feel free to contact us.

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