



CALIFORNIA
RESTAURANT
ASSOCIATION

***Webinar:* Staffing your
Restaurant for Reopening
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Presented by:

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Today's topics

- Reopening logistics – with restaurant-oriented guidance
- Layoffs, furloughs, and return to work protocols
- Guidance on workforce reentry
- Dealing with leaves, accommodation requests and attempts to game the system

Re-Opening Logistics

**Shelter-in-Place Orders
Social Distancing Protocols
CDC and OSHA
Recommendations**

Know which orders to follow

Multiple Layers of Authority:

- Federal Recommendations
- Governor Newsome's Executive Orders and plan to reopen California
- City or County "Shelter in Place" or "Stay at Home" Ordinances and Emergency Orders from Health Officers

Comply with MOST restrictive/specific order for each location.

CA 4-Phase Plan to Reopen

1. Full shelter-in-place
 - Only essential businesses may operate if they can do so while following CDC guidelines
 - Includes retail food sellers, restaurants that prepare and serve food but only via curbside pickup, drive-thru, delivery, or carry out
2. Lower risk (curbside retail, outdoor activities, daycare)
 - As of **5/8**, still excludes indoor and outdoor dine-in restaurants, cafés, bars
 - In coming weeks, expected to expand to include sit-down restaurants, cafés, bars – at reduced capacity?
3. Higher risk (gyms, nail salons, barbers, movies)
4. Everything else (concerts, live sports)

City and County Shelter-in-Place Orders

- Even as State guidelines relax, cities and counties can decide to remain under *stricter* guidelines
- Many counties deferring to State guidance
- Counties *can* accelerate to phase 2(b) but not phase 3. County can apply for “[County Variance](#)” upon certification that it meets CDPH readiness criteria
- Check all cities/counties and follow for each location

Social Distancing Protocols

- Until further notice, businesses that are allowed to open must:
 - Practice social (physical) distancing
 - Follow infection control precautions
 - Implement/post a compliant “Social Distancing Protocol” and signs
 - Scale down non-essential operations to minimize employees working at the workplace

Social Distancing Protocols – Are They Required Or Recommended?

- Many City/County Orders mandate that Essential Businesses prepare a “Social Distancing Protocol” that explains how the business is achieving objectives to reduce spread of COVID-19
 - Bay Area: deadline to comply is April 2, 2020
 - Los Angeles: deadline to comply is April 15, 2020
 - Sacramento: effective May 1, 2020
- Many counties are providing their own templates, signage
 - Post by entrance to any facility that is open to public *or employees*
 - Provide a copy to each employee
 - Follow the protocols

Social Distancing Protocols - Contents

General requirements - specifically list the measures business has in place to protect employee and public health:

- A. Signage – at any entrance & provide to employees
- B. Measures to protect employee health
- C. Measures to prevent crowds from gathering
- D. Measures to keep people 6' apart
- E. Measures to prevent unnecessary contact
- F. Measures to increase sanitation

Appendix A: Social Distancing Protocol

Business name: [redacted]
Facility Address: [redacted]
Approximate gross square footage of space open to the public: [redacted]
Businesses must implement all applicable measures listed below, and be prepared to explain why any measure that is not implemented is inapplicable to the business.

Signage:

- Signage at each public entrance of the facility to inform all employees and customers that they should: avoid entering the facility if they have a cough or fever; maintain a minimum six-foot distance from one another; sneeze and cough into a cloth or tissue or, if not available, into one's elbow; and not shake hands or engage in any unnecessary physical contact.
- Signage posting a copy of the Social Distancing Protocol at each public entrance to the facility.

Measures To Protect Employee Health (check all that apply to the facility):

- Everyone who can carry out their work duties from home has been directed to do so.
- All employees have been told not to come to work if sick.
- Symptom checks are being conducted before employees may enter the work space.
- All desks or individual work stations are separated by at least six feet.
- Break rooms, bathrooms, and other common areas are being disinfected frequently, on the following schedule:
 - Break rooms: [redacted]
 - Bathrooms: [redacted]
 - Other: [redacted]
- Disinfectant and related supplies are available to all employees at the following location(s): [redacted]
- Hand sanitizer effective against COVID-19 is available to all employees at the following location(s): [redacted]
- Soap and water are available to all employees at the following location(s): [redacted]
- Copies of this Protocol have been distributed to all employees.
- Optional—Describe other measures: [redacted]

Measures To Prevent Crowds From Gathering (check all that apply to the facility):

- Limit the number of customers in the store at any one time to Select (or other enter [redacted]), which allows for customers and employees to easily maintain at least six-foot distance from one another at all practicable times.
- Post an employee at the door to ensure that the maximum number of customers in the facility set forth above is not exceeded.
- Placing per-person limits on goods that are selling out quickly to reduce crowds and lines.
Explain: [redacted]
- Optional—Describe other measures: [redacted]

Appendix A: Social Distancing Protocol

Measures To Keep People At Least Six Feet Apart (check all that apply to the facility)

- Placing signs outside the store reminding people to be at least six feet apart, including when in line.
- Placing tape or other markings at least six feet apart in customer line areas inside the store and on sidewalks at public entrances with signs directing customers to use the markings to maintain distance.
- Separate order areas from delivery areas to prevent customers from gathering.
- All employees have been instructed to maintain at least six feet distance from customers and from each other, except employees may momentarily come closer when necessary to accept payment, deliver goods or services, or as otherwise necessary.
- Optional—Describe other measures: [redacted]

Measures To Prevent Unnecessary Contact (check all that apply to the facility):

- Preventing people from self-serving any items that are food-related.
 - Lids for cups and food-bar type items are provided by staff; not to customers to grab.
 - Bulk-item food bins are not available for customer self-service use.
- Not permitting customers to bring their own bags, mugs, or other reusable items from home.
- Providing for contactless payment systems or, if not feasible, sanitizing payment systems regularly.
Describe: [redacted]
- Optional—Describe other measures (e.g. providing senior-only hours): [redacted]

Measures To Increase Sanitization (check all that apply to the facility):

- Disinfecting wipes that are effective against COVID-19 are available near shopping carts and shopping baskets.
- Employee(s) assigned to disinfect carts and baskets regularly.
- Hand sanitizer, soap and water, or effective disinfectant is available to the public at or near the entrance of the facility, at checkout counters, and anywhere else inside the store or immediately outside where people have direct interactions.
- Disinfecting all payment portals, pens, and styluses after each use.
- Disinfecting all high-contact surfaces frequently.
- Optional—Describe other measures: [redacted]

* Any additional measures not included here should be listed on separate pages, which the business should attach to this document.

You may contact the following person with any questions or comments about this protocol:

Name: [redacted] Phone number: [redacted]



Best Practices – improve sanitation/hygiene

- Sign at entrance: do not enter if you have fever, cough, shortness of breath
- Provide hand sanitizer or disinfectant at entrances and where there is high-frequency interaction (i.e. cashier, host station)
- Provide for contactless payment (or disinfect after each use)
- Disinfect and provide disinfecting wipes to wipe down high-touch surfaces (door handles, guest check holders, host station computer keyboard/tablets, phones, timeclocks) and shared equipment/tools
- Eliminate “self service” of food bar items, soda fountain, lids, straws
- Do not permit BYO cup/mug/bags
- Require public entering to wear face covering to enter (for take out)
- Perform enhanced cleaning/disinfection after employee suspected/confirmed to have COVID-19 has been in the facility

Best Practices - Physical workplace

- Encourage hand washing, covering cough/sneeze, other hygiene measures – signs in break room and public/employee restrooms
- Kitchen: increase distance between food prep stations/stagger food prep times
- Office: increase space between work stations
- Discourage sharing tools/equipment
- Provide face coverings for employees
- Direct employees to stay home if sick until meet CDC criteria to discontinue isolation
 - If tested: 2 negative tests in a row, 24 hours apart; or
 - If no test: 72 hours no fever + other symptoms improved + 7 days since symptoms first appeared
- Pre-screen or ask employees to self-screen for symptoms before entering – fever, cough, shortness of breath

WE ARE PRACTICING SOCIAL DISTANCING

We are implementing the mandatory social distancing protocols, as per the Sacramento County Public Health Order until it is extended, rescinded, superseded or amended by the Health Officer.

Avoid entering the facility if you have a cough or fever

Maintain a distance of 6 feet from others

Sneeze or cough into a cloth or tissue, if not available, use your elbow

Do not shake hands or engage in any unnecessary physical contact

Max # of customers allowed at one time:

Per person limitation on High-Demand Goods:



Best Practices – Policy measures to protect employees

- Rotating/staggered/flexible schedules to minimize # of employees present
- Discourage “group” lunch and smoke breaks
- Ensure sick leave policies flexible and consistent with public health guidance
 - Note: Cities (SF, San Jose, LA) enacting emergency orders expanding coverage of FFCRA paid sick leave
 - *SF Workers and Families First Program* – incentivizes employers to offer 5 extra days of leave, City subsidized
- Actively encourage sick employees to remain home.
 - Relax return to work/leave qualification/illness validation requirements
 - *SF OLSE temporary rule change*: Employers may not require a doctor’s note or other documentation for the use of paid sick leave taken pursuant to SF Paid Sick Leave Ordinance for duration of the Local Health Emergency re: Novel Coronavirus Disease 2019.

Best Practices – measures to prevent crowding

- Limit # of people entering facility to maintain 6' distance at all times except to complete the “essential business activity”
 - Dine-in restaurants likely to be required to remove/cordon off some dine-in seating
- Establish where lines may form - markings on the floor, partitions, and signage
- Signs to indicate separate “order” areas from “pick up” waiting areas (i.e. service at deli counter)
- Increase barriers (host station)
- Eliminate self-service buffets
- Implement “curbside” pickup and delivery
 - Separate parking/waiting area for takeout and DoorDash, UberEats, GrubHub delivery drivers – text when ready

Best Practices – planning for the future

Suggestions to keep operations running smoothly for this and future events:

- Develop and implement an infections disease preparedness and response plan based on level of risk associated with worksite/job tasks
- Consider rotating/staggered schedules to minimize number of employees in a given work area
- Shift employees temporarily to locations where shelter-in-place order has been lifted or is less restricted
- Cross-train employees to perform essential functions so workplace can operate if key employees are absent
- Identify alternate supply chains for critical goods and supplies
- Work with industry groups (CRA) to adopt coordinated approach

FURLOUGHED AND LAID OFF EMPLOYEES

Layoffs

- A layoff is a termination of employment
- Employees no longer on payroll
- Employees are eligible for unemployment benefits
 - Not eligible for statutory leave
- Be mindful of obligations in employment contracts and CBAs
- Provide separation documents

Furloughs

- A furlough is essentially an unpaid leave of absence
- Still eligible for unemployment benefits
- If furlough lasts longer than one pay period, effectively treated like a lay off for wage payment purposes
 - Final pay, vacation/PTO
- Employees still on payroll:
 - Consider impact on health coverage and other benefits, workers' compensation, insurance rates, etc.
 - Tied to number of employees
- No statutory leaves, but possibly vacation/PTO

Layoffs vs Furloughs

- Laid off employees are removed from payroll
 - Difference can impact employee head count for EDD/ACA/Workers' Compensation purposes
- Both eligible for unemployment benefits
- Both entitled to final pay on last day worked
 - Includes accrued vacation and PTO
 - Exception: furlough lasting less than one pay period
- Furloughed employees might still retain benefits while laid off employees will not
 - Check the language in your plans and policies
 - Sick pay may be retained (furloughs) or reinstated (lay offs), depending on length
- Need to re-verify employment eligibility if layoff lasts longer than 3 years
- If indefinite or long furlough, might as well lay off instead

Cal-WARN Suspension

- On March 17, 2020, Gov. Newsom issued an Executive Order temporarily suspending Cal-WARN requirements
 - In place through “the end of this emergency”
- Must still provide notice as far in advance as practicable, but need not be 60 days
- Must be COVID-19 related per EDD FAQs
- Must still provide notice to all same people/government agencies
- Resource: https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs/WARN.htm

Bringing Back Furloughed Workers and/or Rehiring Laid Off Workers

- Reinstatement of paid sick leave
 - If the worker returns in under a year, accrued but unused statutory sick leave is reinstated
- All hours count toward FMLA/CFRA eligibility
- Possible immediate eligibility for benefits
 - Check policy language
 - Check handbook
- Do not need to re-verify employment eligibility
 - Section 3 of I-9 only

Bringing Back Furloughed Workers and/or Rehiring Laid Off Workers (cont.)

- If not all of the workforce will return, articulate legitimate business reason for selections
 - Seniority: first out, first in
 - Select positions
 - Merit-based decisions will be difficult to support
- If consolidating/or reassigning duties, be mindful of leave and accommodation issues
 - Employees returning from job-protected leave must be reinstated to the same or a similar position
 - Exception: can show the position would have been eliminated anyway

Salary Reduction

- Can be combined with a reduced schedule/furlough
- Check contracts/CBAs to ensure compliance
- Exempt employees: do not drop below minimum salary unless reclassifying
- Non-exempt employees: do not drop below minimum wage
- EDD and Labor Code § 2810.5 notices

EEOC/DFEH Guidance to Common Questions Regarding Workforce Re-Entry

May We Screen Employees for COVID-19 Before They Return to Work?

- Employers may make disability-related inquiries and conduct medical exams (e.g., temperature screening)
 - *If necessary to screen for a "direct threat" to health or safety of workplace.*
 - Comply with most recent advice from the CDC and other local health authorities
 - May vary - location and type of workplace
 - EEO considerations: decision to screen/exclude employees not based on any protected characteristic (national origin)

May We Take The Temperatures Of Our Employees?

- Yes
 - During a pandemic, taking temperature is considered a permissible “medical examination” under the ADA, given the community spread of COVID-19 and when done to assess the general workplace safety.
- If you are going to take temperatures:
 - designate one person to conduct temperature checks;
 - train the individual; and
 - determine what mitigation efforts can be taken to protect that employee (personal protective equipment)

Should We Retain The Temperature Data?

- Probably not.
 - Maintaining documents with this information increases likelihood of privacy violation claim.
 - Better to use temperature check as daily “check-in.”
 - Retaining “biometric” data may trigger California Consumer Privacy Act (CCPA) notice, privacy policy updates
- But if you do, file *separately* confidential medical information

May We Ask Our Employees If They Are Exhibiting COVID-19 Symptoms?

- Yes, if focused on determining *direct threat to health or safety* of workplace
- Rely on the CDC's guidance on emerging symptoms associated with the disease.

May We Send Employees Home Who Exhibit Symptoms At Work?

- Yes, sending an employee home who displays symptoms of COVID-19 – no violation of ADA's restrictions on disability-related actions.

May We Ask about Employee's Travel History/Plans?

- Yes, absent a claim that an employee has a recognized privacy interest in their travel activities.
 - Update policies/give notice to reduce any reasonable expectation of privacy that employees might have
 - Ask *all* employees – avoid EEO claims
- Check the CDC and State Department websites for the latest information regarding affected regions.

May We *Prohibit* Travel?

- No, cannot prohibit otherwise legal activities outside of work
- But you can:
 - Enforce federal self-quarantine requirements (whether personal or work travel) if travel to CDC Warning Level 3 advisory country
 - Enforce self-quarantine orders for travel to high risk areas
 - Ask employee to complete CDC's Risk Assessment to determine level of risk to workplace

What Should I Do If My Employee's Family Member Has COVID-19?

- Member of the family in the same household
 - employers may require employee to stay away from work
 - Same is true for employees who have notified the employer of an exposure to COVID-19
- Follow the CDC's guidelines for bringing back a sick employee in determining when the individual may return to work.
- Employers may (and should) ask employees to notify them of a COVID-19 exposure.

May I Require Employees to Get Tested for COVID-19?

- COVID-19 test is considered a medical examination under the ADA, prohibited unless job-related and a business necessity.
- Employer must have a reasonable belief based on objective evidence that the employee:
 - will be unable to perform the essential functions of their job because of a medical condition; or
 - will pose a **direct threat** because of a medical condition that cannot otherwise be eliminated or reduced by reasonable accommodation.
- Consider the following when considering request and act cautiously:
 - Have other employees in similar situations been required to be tested?
 - How available is a COVID-19 test in your area?
 - How reliable is the testing data?

When My Employee Returns To Work, May I Require That They Provide A Doctor's Note Certifying Fitness For Duty?

- Yes. Such inquiries are permitted under the ADA either because they are not disability-related or, are justified under the circumstances.
- Practically, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.
- Working with the employee on acceptable documentation is recommended.
 - i.e., reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have COVID-19.

May I Ask if Employees are Especially Vulnerable?

- Generally, no.
- However, if the pandemic becomes severe or serious according to local, state, or federal health officials, ADA-covered employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19. Only then may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications.

What About Job Applicants?

- Employers should continue to apply their normal policies of non-discrimination to the hiring process.
- If applicant has COVID-19 or related symptoms, they should not be in the workplace and start date may be delayed.
- **If** there is documented immediate need, an employer may withdraw the job offer.
 - **Act cautiously!**
- High risk individuals (65+, pregnant, etc.) should not be treated different.
 - The EEOC has opined that generally being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer.
 - May consider accommodations (i.e., telework).

May I Require A Job Applicant To Be Screened?

- Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.
- EEO considerations still apply

**FFCRA AND OTHER LEAVES
AND/OR REASONABLE
ACCOMMODATIONS
RELATED TO COVID-19
AFTER RE-ENTRY TO THE
WORKSITE**

FFCRA Entitlements Upon Re-Entry

- FFCRA is in effect through December 31, 2020.
- **E-PSL** – up to 80 hours (f-t E'e/pro-rata for p-t E'e) of emergency paid sick leave for a qualifying COVID-19 related reason.
- **E-FMLA** – up to 12 weeks of emergency FMLA leave for eligible employees to care for child due to school/childcare closure.
- What about furloughed employees who are recalled to work when the worksite opens?
 - The CARES Act provides that employees who: (1) were laid off on or after March 1, 2020; (2) had worked for the employer for at least 30 of the last 60 days prior to their layoff; and (3) were rehired by the employer, **are** eligible for E-FMLA.

FFCRA (con't)

- Leave under FFCRA is in *addition* to other forms of leave.
- Cannot require employees to use other forms of available leave (e.g. PTO or sick leave) before taking E-PSL for a qualifying reason.
 - Possible exception: First two weeks of E-FMLA leave
- More information about E-PSL and E-FMLA can be found in the DOL's FAQs at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- More information about tax credits for amounts paid to employees on E-PSL and E-FMLA can be found in the IRS's FAQs at <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

FFCRA (con't)

- **Can an employee elect to take E-PSL when an employer opens up the worksite because the employee is afraid to come back to work?**
- No. FFCRA does not provide emergency paid sick leave for an employee's general fear or anxiety about COVID-19.
- BUT, other laws may apply...

Employee “Afraid” to Return to Work – Other Laws

- **OSHA** – employees can refuse to report to work if there is an “imminent danger” to their health and safety.
- **ADA/FEHA** - dialogue with the employee to see if the fear is more than a generalized anxiety about COVID-19 [like most of us have].
 - Example: employee is high risk – underlying medical condition, etc.
 - Evaluate possible need for reasonable accommodation
- Educate supervisors – refer up to GM, HR so proper evaluation can be done before making any employment decisions. Work with counsel.

Gaming the system?

- **Query: What if a furloughed employee doesn't refuse to return to the worksite because they are making more money on unemployment (UI)?**
- Earning more on UI is not usually the case but with the \$600 supplemental UI benefit under the CARES Act, some employees are earning more on UI than they would if they were working at their regular rate.
- Absent any other information that may justify the employee's refusal to return to work, an employer does not have to, and should not, accommodate this. The DOL has opined that the employee's actions could constitute UI fraud.

DOL Letter re: Integrity of CARES Act UI Program

- The DOL issued a Letter on 4/2/2020 addressing the importance of the integrity of the UI program under the CARES Act
 - if an employee quits without good cause to obtain additional benefits, this would be fraud
 - the individual is ineligible for any additional benefit payments, must pay back the benefits, and is subject to prosecution.
- Document an employee's refusal to return
- Advise the EDD
- Work with legal counsel re: evaluating whether separation of employment warranted.

Executive Order – Paid Sick Leave for Food Sector Workers

- On April 16, 2020, Governor Gavin Newsom signed an Executive Order N-51-20 to support employees of large employers in the food sector industry with two weeks of paid sick leave if employees are unable to work due to:
 - Quarantine/isolation order;
 - Advised by HCP to self-quarantine due to COVID-19 concerns;
 - Prohibited by hiring entity from working due to COVID-19 concerns.
- “Food sector workers” include farmworkers, agricultural workers, those working in grocery stores, restaurants, or fast food chains and delivery drivers.
- A “hiring entity” is defined any kind of private entity that has 500 or more employees in the United States.
- More details about the paid sick leave can be found in the Executive Order at <https://www.gov.ca.gov/wp-content/uploads/2020/04/4.16.20-EO-N-51-20.pdf>

Other Statutory Leaves

- Employees may also be entitled to other forms of statutory leave due to exigencies caused by COVID-19. For example, the following statutes may apply to certain situations:
 - An employee's illness/medical condition - FMLA/CFRA, HWHF (statutory paid sick leave).
 - Leave as reasonable accommodation under ADA/FEHA.
 - Illness/medical condition of the employee's family member – FMLA/CFRA, HWHF (statutory paid sick leave), Organ & Bone Marrow Donation.
 - School or childcare emergencies – Leave under Labor Code section 230.8 (School/Childcare Activities Leave).
- Local paid sick leave and medical leave ordinances may also apply (e.g. SF, San Jose, LA).

Other Leaves (con't)

- Employer's discretionary leave policies (e.g. personal leave, bereavement leave, etc.)
- Pursuant to the DFEH, if an employer sends an employee home because the employee is sick or exhibits signs of COVID-19, and employee has no paid leave benefit available, the leave may be unpaid, but it is job protected.

COVID-19 and Reasonable Accommodations (RA)

- The DFEH has said that whether illnesses related to COVID-19 rise to the definition of a disability under state law is a fact-based determination.
 - Do not over-think this determination
 - Focus on determining if they can accommodate employees with COVID-19 related illnesses.
- EEOC guidance/FAQs regarding RA related to the COVID-19 pandemic. The full guidance/FAQs can be found at:
https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm

POTENTIAL IMPACT OF COVID-19 ON EMPLOYMENT POLICIES

Recommended Review of Policies

- Below is a list of policies employers may want to review and possibly amend, even if only temporarily, to address some changes caused by COVID-19.
 - Attendance policies;
 - Work hours and scheduling policies;
 - Rest breaks and meal period policies;
 - Remote work policies;
 - Leave of absence policies (including paid sick leave policies);
 - Accommodation policies;
 - Travel policies;
 - Expense reimbursement policies

Additional Resources

Weintraub | Tobin

COVID-19 Resource Hub:

<https://www.weintraub.com/covid-19-resources>

Resources - OSHA

- **DOL – OSHA: Guidance on Preparing Workplaces for COVID-19**

- Guidance is advisory in nature and informational in content

- <https://www.osha.gov/Publications/OSHA3990.pdf>

- **Cal/OSHA: Guidance on Requirements to Protect Workers from Coronavirus**

- <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>

Resources - CDC

- CDC published Interim Guidance for Business and Employers to Plan and Respond to COVID-19

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

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COVID-19 Websites and resources:

California Restaurant Association:

<https://www.calrest.org/coronavirus-resources>

Weintraub Tobin: <https://www.weintraub.com/covid-19-resources>

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