“Recent Changes and Developments in the Law of Workplace.”

A presentation by the VBA Labor Relations and Employment Law Section
Presenters*

**Victor O. Cardwell**

Victor Cardwell is Chair of Woods Rogers’ Labor and Employment Law Section. He practices labor and employment law throughout the U.S., focusing on diversity, the Fair Labor Standards Act, and labor/management relations—including union-organizing campaigns and union-avoidance techniques, and workplace violence.

Victor has significant experience before state and federal courts and administrative agencies, including the National Labor Relations Board. He offers counsel to executive and human resources managers on a wide range employer concerns—from harassment, sexual orientation/transgender, retaliation, and discrimination, to workforce reductions, handbooks and agreements, unfair competition, wage/hour compliance, health and disability, discipline/discharge, and employee leave.

Victor is recognized in industry rankings including Best Lawyers in America for Employment Law-Management and Labor Law-Management. He is recognized by Martindale-Hubbell in Litigation and Labor and Employment. He is listed on the Virginia Super Lawyers roster as well. Virginia Living magazine named him a Legal Eagle and he is a member of the Lorman Education Services “Distinguished Faculty.”

Prior to joining Woods Rogers in 1991, Victor served as Deputy Associate Chief Counsel with the U.S. Department of Labor Benefits Review Board. He has served as a member of the House of Delegates of the American Bar Association, representing Virginia, and was appointed to the Human Rights Council of the Commonwealth of Virginia.

Victor lends legal counsel to many Roanoke-area nonprofit organizations including the Bradley Free Clinic, Center in the Square, Grandin Theatre Foundation, Mill Mountain Zoo, United Way of Roanoke Valley, Science Museum of Western Virginia, and Human Rights Council of the Commonwealth of Virginia. He serves on the board of directors for the Bradley Free Clinic, the Science Museum of Western Virginia and the Virginia High School League Foundation and is an active volunteer with Cosmopolitan International.

**King F. Tower**

King Tower is a member of Woods Rogers' Labor and Employment practice group. He assists employers with employment law litigation, labor-management relations, and also offers counsel to businesses on employment related matters. Best Lawyers in America named King as the 2017 Roanoke Lawyer of the Year for Employment Law-Management.

King's experience as a labor and employment attorney includes defending claims under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and Title VII. He has extensive experience providing strategic guidance to clients on conducting internal audits of corporate compliance, employment policies, and other critical decisions. King has served as

*The biographical information is provided by the speakers or collected from their websites.*
lead negotiator in collective bargaining and has represented employers in grievance and arbitration proceedings.

A native of Roanoke, Va., King earned a J.D. from the College of William and Mary Marshall-Wythe School of Law and his B.A. from the University of Virginia. He is admitted to practice before the U.S. District Court of the Western District of North Carolina, the U.S. District Courts of the Eastern and Western Districts of Virginia, and the U.S. Court of Appeals for the Fourth and Eleventh Circuits. King is licensed by the Virginia State Bar and the North Carolina State Bar.

King is recognized by Martindale-Hubbell for Employment Litigation and by Chambers USA-America's Leading Business Lawyers for Labor and Employment Law. He is also a frequent speaker at national and regional programs for organizations such as the American Bar Association, the Federal Labor Standards Legislation Committee, and Virginia SHRM.

King serves as chair of the Western Virginia Workforce Development Board, he is an advisory board member for Roanoke Public Library, and is former Legislative Affairs Chair for the Roanoke Valley Society of Human Resources Management. He has also served as an adjunct professor for labor law at William and Mary and Washington & Lee law schools.

**Thomas M. Winn, III**

Tom Winn is a Principal in the Labor and Employment Group at Woods Rogers, where his nationwide practice focuses on HR counseling, employment litigation, and traditional labor issues. Best Lawyers in America named Tom as the 2016 Roanoke Lawyer of the Year for Labor Law-Management.

Tom advises management on HR issues ranging from discipline/discharge, workforce reductions, handbooks and agreements, harassment, discrimination and retaliation, wage/hour compliance, health and disability, employee leave and benefits, and unfair competition. Tom regularly represents employers regarding these issues before state and federal courts and administrative agencies, including the EEOC, DOL, and OFCCP. He has served as “first chair” counsel at both trial and appellate levels.

Tom also counsels and represents employers in union organizing and decertification campaigns, collective bargaining, grievances/arbitrations, NLRB litigation, strike management, and other issues under collective bargaining agreements. Tom has extensive experience representing government contractors with regard to collective bargaining and Service Contract Act issues. He has served as chief spokesman in union negotiations, and he has handled more than 100 labor arbitration cases.

Tom has received an AV® Preeminent Rating and a Client Distinction Honor from Martindale-Hubbell, and a 10.0 Superb rating from Avvo. He is recognized by Best Lawyers in America in the following practice areas: Employment Law-Management, Labor Law-Management, and Litigation-Labor and Employment. He has been acknowledged in Virginia Business magazine as a Legal Elite, as a Super Lawyer by Super Lawyers magazine, and as a Legal Eagle by Virginia Living magazine.

Tom is a member of the Virginia Bar Association’s Board of Governors.

*The biographical information is provided by the speakers or collected from their websites.*
Tom received his undergraduate degree from Duke University and graduated cum laude from the University of Richmond Law School where he was a member of the McNeill Law Society. A native of Roanoke, his community involvement has included the Roanoke Regional Chamber of Commerce, Boy Scouts of America, Opera Roanoke, Pathfinders for Greenways and DePaul Community Resources, among many others.

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Virginia Bar Association
Labor Relations and
Employment Law Section

Recent Changes and Developments in the Law of the Workplace

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EEOC DEVELOPMENTS

EEOC Charges
Notable Trends: FY ‘95 to ‘15

<table>
<thead>
<tr>
<th>CHARGE</th>
<th>FY 1995</th>
<th>FY 2015</th>
<th>UP / DOWN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Charges</td>
<td>87,529</td>
<td>89,385</td>
<td>Slight Increase</td>
</tr>
<tr>
<td>Retaliation-All Statutes</td>
<td>19.5 %</td>
<td>44.5 %</td>
<td>Up</td>
</tr>
<tr>
<td>Disability</td>
<td>22.6 %</td>
<td>30.2 %</td>
<td>Up</td>
</tr>
<tr>
<td>National Origin</td>
<td>8.0 %</td>
<td>10.6 %</td>
<td>Up</td>
</tr>
<tr>
<td>Religion</td>
<td>1.8 %</td>
<td>3.9 %</td>
<td>Up</td>
</tr>
<tr>
<td>Color</td>
<td>0.8 %</td>
<td>3.2 %</td>
<td>Up</td>
</tr>
</tbody>
</table>

Source: EEOC.gov
EEOC Issues Statement on Workplace Discrimination/Muslim or Middle Eastern

12/23/2015

• Urges ERs and EEs to be mindful of harassment or discrimination against vulnerable communities
• Offers resource documents for both ERs and EEs
• Full news release found at: http://1.usa.gov/1ZpXNeV
### Rhino Energy Pays $62,000 in EEOC National Origin & Discrimination Suit

1/20/2016

- Harassment based on Polish ancestry
  - Ethnic slurs, graffiti on walls in workplace
- Co. failed to take prompt action & fired EE for complaints
- Co. must now report to EEOC how it handles internal complaints

### Nat. Fed. for the Blind (NFB) to Pay $25,000 for Religious Discrimination

2/8/2016

- EE requested time off on his Sabbath
  - Sunset Friday-sunset Saturday
- NFB refused accommodation & fired EE
- EEOC: “ERs must be prepared to address requests for reasonable accommodation”
**EEOC Sues Hospitality Staff for Religious Discrimination**

7/12/2016

- Prep cook at Disney resort
- Fired for Rastafarian practices - dreadlocks
- Hair tucked in cap over year w/o incident
- After Disney compliance inspection, EE told to cut hair if he wanted to return to work
- No effort to accommodate, EE fired

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**PREGNANCY**
Quality Solutions, LLC to Pay $22,500 to
Settlement EEOC Pregnancy Suit
Feb. 22, 2016
• Medeiros sought temp. job at Quality Solutions
• Mgr. would not send her b/c she pregnant
• Mgr.: job in warehouse - she could get hurt

First Call Ambulance Service to Pay $55,000
May 27, 2016
• EE informed ER of pregnancy and restriction from lifting patients >200 lbs. without assistance
• Co. refused to accommodate
  • removed EE from schedule
  • forced unpaid leave
• Co. allowed non-pregnant EEs to use “power cot”
• Discrimination under Young v. UPS
• 3-year consent decree
Shefa Wellness Center EEOC Sues for Pregnancy Discrimination

Dec. 2, 2015

• EE fired 2 days after informing co. of pregnancy
• Worked for only 2 weeks
• Told she “deceived” ER by not disclosing pregnancy during hiring process
• Shefa will pay $37,000 settlement to EE
• EEOC’s attorney: “Firing woman simply because she is pregnant is against law.”
Joy Mining Machinery Settles EEOC GINA Lawsuit
1/7/2016
• Joy required “post-offer” medical examination
• Joy requested family medical history on pre-placement medical form
• Joy must train all mgrs. and HR on GINA
• EEOC will monitor compliance

Downriver Community Services Denied Reasonable Accommodation
1/20/2016
• EE requested extended unpaid leave after surgery
• ER fired and refused to rehire her based on herniated disc
• EEOC— “ER must demonstrate an accommodation would impose undue hardship on business operations...cannot fire or refuse to rehire because EE has a disability.”
Fox Settles Roger Ailes Sex Harassment Claims

The New York Times

Breaking News Alert

Gretchen Carlson, a former anchor, won $20 million and an apology in her sexual harassment case against Fox News and Roger Ailes

TUESDAY, SEPTEMBER 6, 2016 10:02 AM EDT

The parent company of Fox News said on Tuesday that it had settled a lawsuit with its former anchor Gretchen Carlson, who said that Roger Ailes had sexually harassed her when he was chairman of the network.

A 21st Century Fox Corporation news release did not specify a settlement amount but a person briefed on the settlement said that it amounted to $20 million, and that Mr. Ailes was responsible for a portion of the payment. The person also said Fox News was in settlement talks with other women at the network.
LGBT Protection Current State of the Law

- No current federal legislation
- Equality Act
  - July 23, 2015: Bills introduced in House/Senate
    - Bans LGBT discrimination in employment, housing, pub. accommodations, pub. ed., fed. funding, credit, and jury system
  - Sept. 8, 2015: Referred to Subcommittee
  - Sept. 2016: Still there....
Non-Discrimination Laws: State by State

Title VII: Transgender Protections
EEOC Rulings

- Macy v. Dept. of Justice (4/12/12)
  - Discrimination based on gender identity is sex discrimination in violation of Title VII
EEOC’s Strategic Enforcement Plan

• Adopted in December of 2012
• The SEP includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply" as a top EEOC enforcement priority

President Obama Signs Executive Order to Protect LGBT Workers
7/21/14
• Prohibits federal contractors from discriminating on basis of sexual orientation or gender identity
• “…today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are – lesbian, gay, bisexual, transgender. And that’s wrong.” – President Obama
EEOC Files First Transgender Lawsuits

9/25/2014

• EEOC v. Harris Funeral Homes (E.D. Mich.) and EEOC v. Lakeland Eye Clinic, P.A. (M.D. Fla.)
• EEs fired b/c transgender, transitioning, and/or did not conform to gender-based stereotypes

Title VII: Transgender Protections – EEOC Rulings

• Lusardi v. Dep’t of the Army (3/27/15)
  • Denying equal access to restroom corresponding to gender identity is sex discrimination
  • Cannot condition on EE providing proof of surgery
  • Cannot restrict EE to single-user restroom
    • ER can make single-user restroom available to all EEs
Deluxe Financial Settles Transgender Discrimination Suit

1/21/2016
• 6/5/2015: Third transgender lawsuit filed
• EE started job as male
• Informed supervisor transitioning to woman
• Deluxe refused to let her use ladies restroom
• 1/21/2016: Deluxe to pay $115,000, issue apology and provide reference for future Ers
• Deluxe’s health benefits will not exclude medically necessary care based on transgender status

Title VII: Sexual Orientation Protections – EEOC Ruling

• Baldwin v. Foxx, (7/15/15)
  • EEOC held for first time that Title VII bans sexual orientation discrimination
<table>
<thead>
<tr>
<th>EEOC Sues Scott Medical Health Center for Sexual Orientation Discrimination</th>
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<tbody>
<tr>
<td>3/1/2016</td>
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<tr>
<td>Mgr. made anti-gay comments to gay male</td>
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<tr>
<td>EE complained to director</td>
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<tr>
<td>Director: “Mgr. just doing his job”</td>
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<tr>
<td>Refuses to take action to stop harassment</td>
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<tr>
<td>EE quits</td>
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<table>
<thead>
<tr>
<th>EEOC Sues IFCO Systems for Sexual Orientation Discrimination</th>
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<tbody>
<tr>
<td>3/1/2016</td>
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<tr>
<td>Female EE harassed by supervisor</td>
</tr>
<tr>
<td>“You would look good in a dress”</td>
</tr>
<tr>
<td>“I want to turn you back into a woman”</td>
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<tr>
<td>EE complained &amp; called hotline</td>
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<tr>
<td>EE was fired</td>
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<tr>
<td>Case subsequently settled</td>
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<tr>
<td><strong>NC Legislation (HB2)</strong></td>
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<td>--------------------------</td>
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<tr>
<td>• March 23, 2016: NC Governor signs HB2 requiring bathroom use according to birth certificate gender</td>
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<td>• March 28, 2016: LGBT supporters file suit</td>
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<td>• UNC Prof: “I think there is no question that this could wind up at the Supreme Court.”</td>
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<th><strong>VA Gov. Vetoes Anti LGBT Bill</strong></th>
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<tr>
<td>• March 30, 2016: Gov. McAuliffe vetoes anti-LGBT bill</td>
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<tr>
<td>• Bill allowed businesses to refuse services to LGBT community on basis of religious belief</td>
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<tr>
<td>• Gov. McAuliffe: “Nothing more than an attempt to stigmatize.”</td>
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Bathroom Access Rights for Transgender Employees Under Title VII

- IMPORTANT CONCEPT IN LIGHT OF RECENT DEVELOPMENTS

- Transgender bathroom access rights under Title VII trump contrary state law

- State law is not a defense under Title VII (or Title IX)

Virginia A.G. Opines on LGBT Rights

Virginia Attorney General Mark Herring said Tuesday that courts would probably rule that discrimination on the basis of sexual orientation or gender identity violates state law.

The opinion, which came in response to a request by a conservative lawyer and not as a reaction to a specific case, follows the increasing recognition by courts and federal agencies that anti-discrimination laws protect gay and transgender people, LGBT advocates say.
But Wait! 7th Cir: Sexual Orientation Not Protected under Title VII
7/29/16
• Hively v. Ivy Tech Comty. Coll.
  • Ct. rejected the EEOC’s Guidance
  • Bound by precedent rejecting orientation claims
  • Reviewed EEOC’s Baldwin decision.
  • “Perhaps the writing is on the wall” for a change in Federal Law but that change must come from Congress or SCOTUS
• En Banc Review

SCOTUS to Review Gloucester Co. Case
8/3/16
• 4th Circuit decision stayed based on Gloucester Co. School Brd’s emergency application, Ct. ruled 5-3.
  • Justice Breyer joined the court’s conservative members “as a courtesy” to preserve the status quo.
• SCOTUS will determine whether Title IX requires schools to allow transgender students to use bathroom consistent with gender identity.
Ohio judge orders girls' bathroom access for transgender student

Published September 27, 2016 - Associated Press

COLUMBUS, Ohio — A federal judge rejected a school district’s challenge to President Barack Obama’s rule on transgender bathrooms on Monday, ordering a biologically male student who identifies as female be treated “like the girl she is.”

Judge Algenon Marbley said the Highland Local Schools in Morrow County had failed to provide a persuasive argument that giving the student access to the girls’ restroom would jeopardize other students’ privacy or safety. He further ordered that Highland use a female name and pronouns in referring to the 11-year-old.

“(S)chool districts that have encountered these very issues have been able to integrate transgender students fully into the academic and social community without disruption, and certainly without the doomsday scenarios Highland predicts, such as sexual predators entering an elementary-school restroom,” he wrote.
NEW "BATHROOM BILLS" PROPOSED IN 2017

- 8 states with 2017 legislative proposals that would restrict access to multiuser restrooms, locker rooms, and other sex-segregated facilities on basis of “biological sex”
  - Alabama, Kentucky, Minnesota, Missouri, South Carolina, Texas, Virginia and Washington
- Source – National Conference of State Legislatures (Jan. 11, 2017)

NC Blues

North Carolina is leaking sporting events. On Sept. 12 the NCAA announced that it would move its championships from the state, and the ACC followed suit two days later. In July the NBA pulled its 2017 All-Star Game from Charlotte. And the Southern Conference is considering moving its basketball tournament, scheduled for March, out of Asheville. Each organization offered the same explanation: North Carolina's Public Facilities Privacy and Security Act, known as HB2.

Commonly called “the bathroom bill,” the legislation was signed into law by Governor Pat McCrory in part as a response to a Charlotte ordinance that extended anti-discrimination protection to the city’s LGBTQ community. Although the statute is best known for its mandate that people use bathrooms that correspond with the gender listed on their birth certificates, its critics are more concerned that it removes LGBTQ anti-discrimination protections. Almost from the beginning, the law has been unpopular among residents. And that was before it cost them—literally. The Williams Institute at the UCLA School of Law estimates that the act could be responsible for a $5 billion loss per year.

 Commissioners for each league have said they remain open to returning to the state if the law is repealed. McCrory is locked in a tight re-election race, and his opponent, Roy Cooper, has criticized the law. McCrory may discover this November that North Carolinians prefer their sports to their governor. —David Gardner
EEOC Changes Are Coming, But May Be on Slow Track

What the Trump presidency could mean at the EEOC?

EEOC Changes Are Coming, But May Be on Slow Track – con’t

**Employer’s Wish List**

- EEOC plan to:
  - collect pay data from employers, agency regulations that limit employer incentives for wellness programs
  - and the general counsel’s litigation authority.
- EEOC’s moves to protect lesbian, gay, bisexual, transgender individuals may be less vulnerable to challenge.
- Republicans still may try to dilute Obama’s Exec. Orders banning discrimination based on sexual orientation or gender identity
EEOC Changes Are Coming, But May Be on Slow Track – con’t

Pay Data Collection at Risk

• EEOC’s new EEO-1 form, is top candidate for reversal
• New EEO-1 would require employers w/100+ ees submit summary pay data categorized by race, sex and ethnicity.
• Republican-majority EEOC will revisit and perhaps rescind the new EEO-1

Wellness Rules Could Be Revisited

• Revisit agency limits on incentives Ers can offer Ees for participation in Er-sponsored wellness programs
• Ers want EEOC’s rules “harmonized” w/ ACA
• Ers want incentives to support wellness programs, as encouraged ACA
EEOC Changes Are Coming, But May Be on Slow Track – con’t

Reining In EEOC Litigation

• EEOC under Trump administration might focus on law enforcement (not law creation)
• Republican-led EEOC could revisit delegation of litigation authority to GC
• It’s “common sense” that the commissioners should have a greater say in who is sued by the EEOC

EEOC Changes Are Coming, But May Be on Slow Track – con’t

Staffing, Budget Could Be Cut

• Trump supports hiring freeze - EEOC already operating on flat budgets (2016 budget $3million less than 2010)
• EEOC has 2,200+ ees in D.C. and 53 field offices
  • but 30% fewer investigators
• Civil Rights advocates concerned about GOP-led EEOC
  • “When you’re starving the agency, it makes it a lot harder to do the work”
Joint Employment Update

1/20/2016

• New Administrator’s Interpretation (No. 2016-1): Joint Employment under the FLSA
• FLSA broadly defines employment relationship and scope of joint employment
• Discusses horizontal and vertical joint employment
• Economic realities test
BREAKING NEWS: DOL/FLSA

Updated FLSA Regulations on “White Collar” Exemptions”
STOP THE PRESSES!
DOL FLSA Rule Enjoined

- On November 22, 2016, a federal judge in Texas issued a preliminary injunction against the much-anticipated DOL rule increasing the salary level for exempt employees.
The Board

- McFerran (D) - term expires 2019
- Pearce (Chair) (D) - term expires 2018
- Miscimarra (R) – term expires 2017

How Will Trump Shape Board Policy

- Two vacancies on Board – will have first Republican majority in 9 years
- Changes could come from Board decisions or Congress
- Top Issues from Employer perspective
  - Joint Employer Standard (Browning-Ferris)— issue of direct vs. indirect control; currently on appeal b/f D.C. Circuit
  - Appropriate Voting Units (Specialty Healthcare) – issue of micro units;
Clues to Board Reversals Lie in Republican Dissents

- Many contentious Board decisions fell along party lines
- Potential areas where we may see a shift
  - Employee use of corporate e-mail for union activity
  - Restrictions on EE use of social media, including criticism of employers
  - Unionization of grad. students and Tas
  - Protected concerted activity (Section 7) cases
SUPREME COURT ISSUES

A 9th Justice?

- Will a new justice be seated? When? Who will it be?
- Court has operated with 8 justices since last February.
- No word yet on who is the front-runner on the list of 21
L&E Cases on SCOTUS Docket

• NLRB v. SW General
  • Whether Federal Vacancies Reform Act barred NLRB atty from serving as Board’s acting GC after the President nominated him for full term as GC

• McLane Co. v. EEOC
  • Whether a fed. appeals ct. may review de novo district ct. decision on enforcing an EEOC subpoena or the appeals ct. or whether abuse of discretion/clear error standard applies

• Advocate Health Care Network v. Stapleton
  • Whether ERISA’s church-plan exemption applies to religiously affiliated hospitals’ pension plans

L&E Cases on SCOTUS Docket

• Gloucester Cnty. Sch. Bd. v. G.G.
  • Whether Title IX’s prohibition on sex discrimination embraces gender identity discrimination.

• NLRB v. Murphy Oil USA
  • 3 cases consolidated
  • Whether employers can require class action waivers in arbitration agreements
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