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August 2, 2019


Northwest Ohio ESC
Administrator's Retreat-
Treasurers

2019-2020 School Year Legal Update

- C. Bronston McCord III –
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Agenda

- House Bill 166 – Biennial Budget Bill
- Outside Funding
- Hot Topics to Tackle in 2019-2020 School Year
- Post-*Janus* in Ohio



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House Bill 166 – Ohio's Biennial Budget Bill

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School Facilities

- Disposal of unused school buildings- offer to community schools
 - Changes definition of "unused school facility" to those that have not been used for **ONE year** (instead of previous two years)

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Transportation

- If a district is providing transportation it is not legally obligated to provide under 3327.01, it will be prohibited from reducing that transportation after the first day of the school year.

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Bus Driver Physicals

- Authorizes the following individuals to conduct annual physical examinations for bus drivers:
 - Physician's assistant
 - Certified Nurse Practitioner
 - Clinical Nurse Specialist
 - Certified Nurse-midwife
 - Medical examiner who is listed on the national registry of certified medical examiners established by the federal motor carrier safety administration
- Additional changes implemented previously this year in HB 338 (chiropractors)

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Utility Tangible Personal Property Valuation

- No more deductions in state aid for districts that had more than 10% increase in value compared to its total taxable value in 2nd preceding tax year, which results in lower foundation aid when recalculated.
- ODE will credit districts that had such deductions in tax years 2017 and 2018.

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ESCs and Competitive Bidding

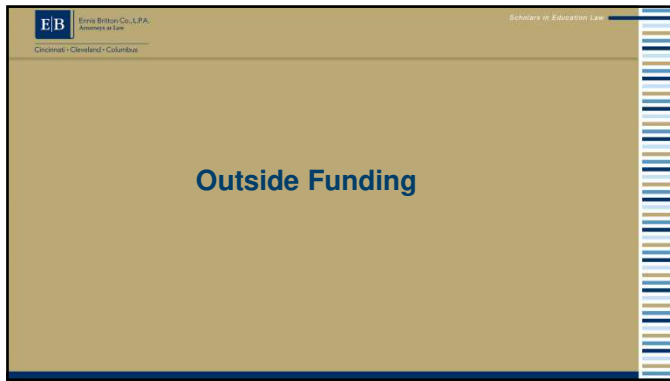
- ESCs may purchase services, supplies, materials or equipment on behalf of districts or political subdivisions that have entered into a service agreement with the ESC.
- Exempts district from compliance with competitive bidding under this section.
- May not use if district has received bids unless same terms, specs, conditions may be made at a lower price under this division.
- School districts with .843, .844, or .845 contracts are exempt from competitive bidding under federal law for personnel services if ESC is:
 - High-performing;
 - In compliance with posting requirements for services menu on website; and
 - In substantial compliance with audit rules and guidance of AoS.

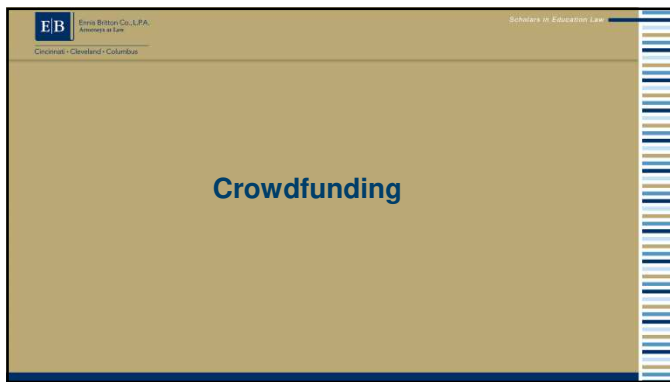
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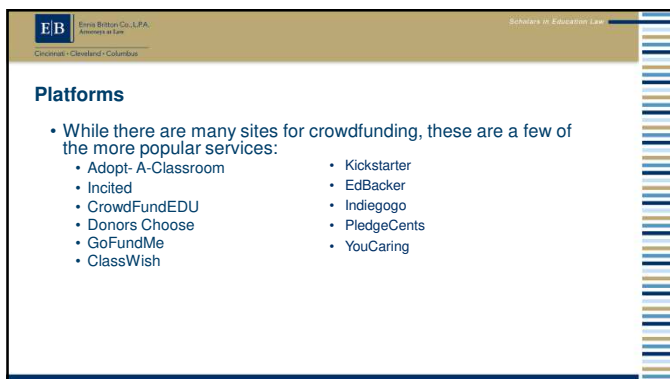
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ESC's May Apply for Grants on Behalf of Districts

- An ESC may apply for state and federal grants on behalf of school district client or community school
 - An ESC is a school district for purposes of eligibility in applying for the grants.







Platforms

- While there are many sites for crowdfunding, these are a few of the more popular services:
 - Adopt- A-Classroom
 - Incited
 - CrowdFundEDU
 - Donors Choose
 - GoFundMe
 - ClassWish

- Kickstarter
- EdBacker
- Indiegogo
- PledgeCents
- YouCaring

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How It Works

- Sites vary in the way they go about raising funds
 - Raise Cash → School/Teacher
 - Raise Money → Buy Products → School
- Sites vary in the amount of support or advice they give to teachers in setting up their donation projects.

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State Auditor's Report

- State auditor conducted a survey to which *one-fifth* of districts responded.
- Of those districts that responded:
 - More than half (55.4%) prohibited crowdfunding
 - 26.2% of those responding **did not know** if teachers were using crowdfunding to fund their classrooms
 - 59% had no crowdfunding policy
- Of those that permitted crowdfunding, 56.2% did not know how much money had been raised by crowdfunding in the past 12 months.

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Crowdfunding Management

- Have a policy on crowdfunding that dictates who, what, when and how they may do so and with which platforms.
- The policy also should address **student record privacy**. A photo of a classroom with students on a crowdfunding page could constitute a violation of confidentiality laws (FERPA, IDEA, R.C. 3319.121)
- Descriptions or narratives which provide personally identifiable information also could constitute a violation.
- Have a centralized approval process for crowdfunding campaigns.

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Policy Options

- Ban crowdfunding
 - Creates no risk, but no benefits either
 - Hard to enforce
- Create a policy allowing crowdfunding to create minimal risk and reap the benefits
 - Ensure no violations of state or federal law
 - Account for all donations in school inventory and books
 - Money and supplies are appropriate for the district

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Auditor's Recommended Best Practices

1. Require all campaigns be reviewed and approved by administration.
2. Direct administrator to ensure proposal does not violate any federal/state law.
3. Designate permissible crowdfunding websites
4. Require donations to be used for the stated purpose
5. No donations without board approval
6. Establish all donations are property of the school
 - a. Entered promptly into district inventory
 - b. Deposited into district bank accounts

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Policy Recommendations: Financial Controls

- Register all donations under the school's name.
 - Require teachers to use sites that send donations directly to the school.
- Donations are property of the school.
- Require advance notice of campaigns and approval of pitches (photos, wording).
- Document all donations.

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Ohio Law

- **R.C. 9.38** mandates that all money received, collected by or due to a public official under color of office, or collected on behalf of a public office, must be deposited with the treasurer of that public office within a specified time.
- Specifically for public schools, **R.C. 3313.51** establishes that the treasurer of the board of education is the treasurer of **all** school funds. The law requires that all moneys received by the treasurer from any source whatsoever must be deposited in the timely manner established by the school board.

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Other Legal Considerations

- Ohio Attorney General Opinion 85-085
- Ohio ethics law, R.C. 2921.43
 - Ohio ethics opinion 2008-01
- **R.C. 3313.36** acceptance of gifts, bequests
- Use of district logo, ability to authorize use of district name and logo (or withhold the same)
- Licensure Code for Educators
 - Unauthorized solicitation of funds
 - Improper handling of funds
 - Conduct unbecoming

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Follow the Money

- Treasurers could be held liable through a finding for recovery for unaccounted for funds collected through a crowdfunding campaign.
- Make sure you are following your finance policies and guidelines.
- Make the treasurer's office part of the process.

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Ethical Considerations

- Employees are not permitted to accept additional compensation for performing their duties. (OEC 2008-01)
- Teachers should not divert any amount of the funds raised for personal gain, as a administrative fee, or for any other reason.
- The crowdfunding policy should require that all campaigns be established in the name of the district (and subject to approval process) and that all funds/items or donations should be given to the district, not the teacher who organized.
- Remember, those funds/items are district property!

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Other Considerations

- Ensure that no one receives a benefit from the fundraiser in proportion to their level of participation. Benefits of a donation should be provided uniformly to the class of persons or purpose for which it was raised.
- Ensure that the description of the crowdfunding campaign does not indicate or imply that the district is falling short of its obligations under law in terms of levels of service, providing obligated supplies and equipment, etc.

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Crowdfunding Tips

- Use specific projects instead of general fundraising
- Break campaigns down into smaller steps and keep them short
- Market your project, and do so in a professional manner
- Consider offering incentives, such as handwritten notes from students
- Tell a story, people are more likely to donate if they are invested emotionally in the project

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Teachers pay Teachers- who wants to talk about that?

- Copyright ownership
- Works made for hire
- Accounting for money
- Developing a policy-
 - existing policy
 - Developing, amending, implementing policy
- Creative ideas

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Working with Boosters

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Acceptance of Funds from Boosters

- No gift or donation may be accepted by the board if conditions remove any portion of the public schools from control of the board. R.C. 3313.36(A)
- Board may adopt resolution directing treasurer to pay proceeds of an unrestricted bequest, gift, or endowment given to the district into the educational foundation fund. R.C. 3313.36 (B)
- Boards may run into problems under Title IX if they accept funds from booster groups if group tries to control how the money or resources are used.
 - Money generated by and earmarked for a specific sport that may lead to an imbalance between boys' and girls' sports. When inequity results from gifts given along gender lines, it is the responsibility of the district to correct this by allocating their own resources.

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Acceptance of Funds from Boosters

- *Daniels v. School Bd. of Brevard County*
 - **Facts:** Booster money was used to give the boys' baseball team new bleachers, an announcer's booth, an electronic scoreboard, a batting cage, bathrooms, and lights for night games. The softball field had none of the above.
 - **Decision:** The court ordered the district to provide comparable facilities for the girls' softball team.

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Acceptance of Funds: Case Scenario

- OCR Title IX complaint – Michigan, 2013
- District was not providing equal athletic opportunities in the high school interscholastic athletic program.
- District agreed to provide the girls' lacrosse team with access to a practice facility that is substantially equivalent to that provided to the boys' lacrosse team.
- District agreed to make modifications to the varsity softball field or the varsity baseball field, or both, with respect to such areas as the provision of seating and a scoreboard.
- District dismantled the \$15,000 seating deck purchased by the baseball boosters!

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Involvement of School Staff

- School staff may participate in activities on their own time.
- However, best practices can help to avoid major issues:
 - Do not require employees to participate.
 - If on board of directors, they should be nonvoting members.
 - Employees should not maintain or control funds for group – your job is on the line!
 - Do not – **do not** – allow employees to accept or maintain funds for booster groups through personal or board accounts.
 - Employees should **not** make purchases for booster groups with personal money or board funds.

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Ethical Considerations with Employees Who Receive Benefits

- Ethics laws prohibit a school employee from receiving compensation or anything of value for performance of their job duties from anyone other than their employing board of education.
- The Ohio Ethics Commission has determined that nominal gifts may be acceptable, but has not defined *nominal*.
 - Key chains, pens, etc. are nominal
 - However, the *Licensure Code of Professional Conduct for Ohio Educators* draws the line at \$25.

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Booster-Supported Construction Projects

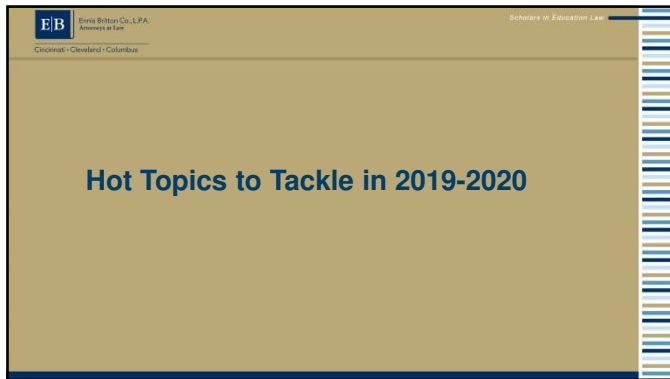
- If funded 100% by school support organization, board does not have to solicit bids and award contracts mandated by RC 3313.46.
- However, if board is responsible for \$50k or more, then must competitively bid.
- Board oversight of booster-supported construction project:
 - Verify organization has **sufficient funds** to complete their fiscal obligations under the project
 - Ensure that they obtained **necessary permits, zoning approval**, etc.
 - Input and agreement over the **design** of the facility or building
 - **License agreement** for access to school premises
 - **Liability insurance** on the construction project
 - Waivers, releases, indemnification agreements
 - Contract to donate if this is the plan. Contract may require all the necessary items above in one document.

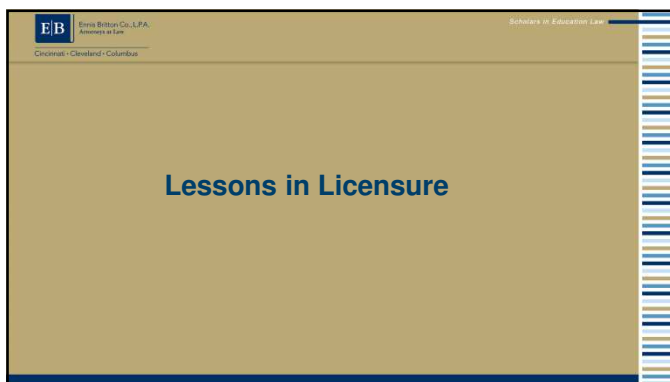
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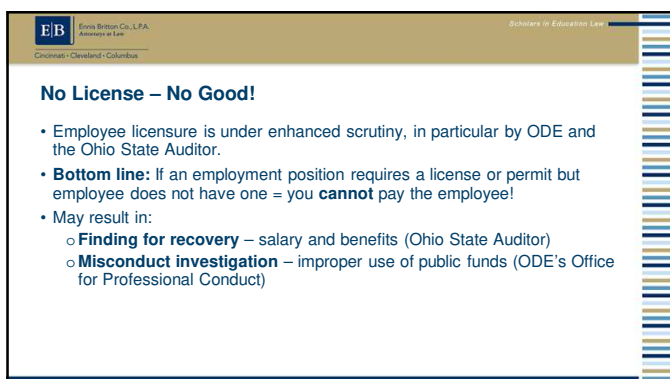
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Practical Questions & Strategies

- Check board policies, make sure they are up to date (and properly enforced!)
- Educate staff about limits of working with boosters
- Be careful about the money and work with the treasurer's office to make sure proper rules are followed







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No License – No Good!

- Required licenses and permits
 - Teachers & substitute teachers
 - Administrators
 - Pupil services personnel (OTs, PTs, nurses, SLPs, etc.)
 - **Coaches**
 - Educational aides and student monitors
 - Career tech teachers
 - Adult education instructors

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When Issues Arise

- At time of hire
 - Employee has not applied for a license or permit when hired
 - First step in application for new coaching permits and aide permits – complete the hiring process!
 - Employee is in “pending” status for permit or license application at the time of hire
- During employment
 - Employee whose assignment requires a permit or license loses the license at some point during employment
 - Common scenarios:
 - Criminal convictions
 - Failure to renew license or permit in a timely manner

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Coaches

- Coaching or pupil activity permits are required for individuals who will **direct, supervise, or coach** a student activity program that involves athletics, routine or **regular physical activity, or activities with health and safety considerations.**
- Requires background checks and completion of certain trainings
- Types of permits:
 - Three year – no educator license
 - Four year – resident educator
 - Five year – professional license

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Coaches Who Are Not Licensed Teachers

- “Non-licensed individual” means an individual who does not hold a valid educator license, certificate, or permit issued by the state board of education under section 3319.22, 3319.26, or 3319.27 of the Revised Code
- Is this permissible? Yes, but only if a teacher is not available.
- May not include a class for credit, or any part of a class for credit

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FAQs – Coaches

- Is it permissible to pay a coach if he/she obtains a permit by the end of the season?
Technically, perhaps, but ...
The right thing to do is keep them off the field until the permit is approved.
- Can we hire a coach but call her a volunteer until a license is approved? If it isn't approved, can we refuse to pay the salary?
Maybe as long as we have the criminal background checks on hand.

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Practical Questions & Strategies

- Check that all your current employee licenses and permits are up-to-date and think before you assign!
- Coordinate your process for this important task.
- Review coach licensure annually.
- Monitor status of new (and old) employees until approved.
- Be cautious about “pending” status.
- If someone is not properly licensed at any point during employment, act immediately.

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Sick Leave Bank Limitations for Non-bargaining Unit Members

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AG Issues Opinion on Sick Leave Banks for Those Not Covered by a CBA

- The Attorney General released a formal opinion which concluded a joint vocational school district board of education has no authority to establish a sick leave donation program for employees who are not covered by a collective bargaining agreement.
- A sick leave donation program requires sick leave contributions from other staff members who may not be using the leave themselves.
- The AG determined that a board of education is limited by language in the sick leave statute which permits an employee to use sick leave only for the employee's illness or illness of a family member.
- Since a board is a creature of statute, it cannot do anything without being granted authority to do so by law.
- The AG stated that the opinion does not apply to those covered by a CBA.

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Practical Strategies

- Be cautious about permitting sick leave donation programs outside of the confines of a CBA.
 - What do you do if you already have this?
- It is possible that this opinion could be the basis for a finding for recovery?!!

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DOL Opinion Recognizes Limits on FMLA Entitlement

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DOL Weighs in on FMLA Entitlement

- Department of Labor's Wage and Hour Division released an opinion on March 14th, 2019.
- Opinion was in response to an inquiry by an employer asking the following questions:
 - Can an employer delay designating leave as FMLA leave if the employee has some type of paid leave available?
 - Is an employer authorized to lengthen FMLA-qualifying leave beyond the 12-week/26-week entitlement?
- In short, the answer to both questions was "no."

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Practical Strategies

- Review your board policies and procedures in light of this guidance.
- Make sure your FMLA administrator is aware of DOL's guidance (by the way, how important is this guidance anyway??).
- Remember that failure to follow the proper procedure for notice of designation may result in claim of interference with, restraint on, or denial of the exercise of an employee's FMLA rights.
- Also note that there is nothing which prohibits an employer from providing its own type of job-protected leave (and don't forget what state law entitles an employee to for paid and unpaid leaves).

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Post-*Janus* in Ohio

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Post-*Janus* Case in Ohio Resolved

- In a 5-4 decision made last June, the U.S. Supreme Court ruled that the extraction of agency fees from Illinois State's nonconsenting employees of the public-sector violates their First Amendment rights.
- SCOTUS stated that, "States and public-sector unions may no longer extract agency fees from nonconsenting employees. ... employees must choose to support the union before anything is taken from them."
- In Ohio, a *lawsuit* was filed by several employees across Ohio who are employed by local government agencies.
- The employees claimed that they were each denied their First Amendment rights when union officials continued to extract dues after they attempted to withdraw from the union.
- Union officials relied on the "15-day window period" that only allowed employees to withdraw from the union 15 days prior to the expiration of the collective bargaining contract.

Smith v. AFSCME

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Post-*Janus* Case in Ohio Resolved

- At the end of January 2019, the case was finally settled.
- Under the terms of the settlement agreement, AFSCME agreed to pay back all union dues that were extracted after the employees attempted to withdraw their consent.
- The union will not deduct any agency fees or dues that were previously subject to the window policy. This is a significant case because it is the first class action lawsuit since the *Janus* ruling in which union officials have reversed their policy on the window period.
- The employees were represented by the National Right to Work Legal Defense Foundation, who also represented Mark Janus in *Janus*. As of January 24th, Foundation was litigating 20 cases nationwide to enforce employee rights.

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Practical Strategies

- The *Janus* and *Smith* cases are important for your district because it is no longer legal to require a fair share fee from non-member's and may not be legal to enforce any version of the "15-day window policy" on withdrawing union membership.
- Not every school in Ohio has agency fee provisions or window policies in their collective bargaining contracts. For those that do, it is essential that you contact your union regarding information about those provisions.

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Questions?

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