

## Solicitation and Distribution Policies under the National Labor Relations Act: A Guide to Current Compliance and Anticipated Future Developments

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Employers concerned about union organizing often mount a vigorous campaign when it comes to preventing a successful organizing campaign. Employer policies and practices can, however, run afoul of the law. The National Labor Relations Act ("NLRA"), as interpreted by the National Labor Relations Board ("Board"), prohibits employers from promulgating policies that ban all union communications and enforcing lawful policies in a discriminatory manner with respect to unions. This article discusses the limits that can be placed by an employer on its workforce under the NLRA regarding solicitation and distribution, use of employer equipment, union insignia, and access to employer premises. It also discusses how these limits may change in light of the current political landscape and offers tips to employers in complying with legal requirements.

### *General Principles*

#### *Solicitation and Distribution*

Employers may have tailored non-solicitation and non-distribution rules without running afoul of the NLRA. However, the Supreme Court has ruled that an employer cannot ban employee solicitation on company premises during non-working time, absent special circumstances. *E.g.*, *Guard Publ'g Co.*, 351 N.L.R.B. No. 70 (2007) (*construing Republic Aviation v. NLRB*, 324 U.S. 793 (1945)). In addition, employers cannot infringe on the right of employees to engage in the distribution of literature in the company's non-working areas during non-working times. *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 621 (1962).

As a result, the rule is that an employer's non-solicitation policy is presumptively valid if it is limited to prohibiting solicitations during working time. An employer's policy that prohibits solicitation during "working hours," "company time," or "business hours," however, is presumptively unlawful because it implies a prohibition on solicitation from the beginning to

the end of a shift or day, including breaks or other non-working time in which employees have a right to solicit. See, e.g., *N. Hills Office Servs.*, 346 N.L.R.B. 1099, 1113 (2006).

Employers have some flexibility with respect to non-distribution policies. Non-distribution policies are presumptively valid if they are limited to prohibitions during working time and in working areas. Of course, as discussed more fully below, an employer may not limit the application of its non-solicitation and non-distribution policies to union activity or otherwise enforce facially valid non-solicitation and non-distribution policies in a discriminatory manner.

#### *Use of Employer Equipment*

While employees enjoy limited rights to solicit and distribute union materials on company property, an employee enjoys no general statutory right to use an employer's equipment for union purposes. Employer equipment includes items such as bulletin boards, copy machines, and telephones. In *Guard Publishing Co.*, 351 N.L.R.B. No. 70 (2007), a divided (along party lines) Board extended this rule to an employer's e-mail system, holding that an employer "may lawfully bar employees' non—work-related use of its e-mail system, unless the Respondent acts in a manner that discriminates against Section 7 activity." *Id.* at 1116. Underlying the majority's conclusion was its view that e-mail should be treated like any other piece of employer equipment. The two-member dissent did not agree that e-mail systems were akin to other types of employer equipment, given its less definite resource characteristics. The dissent argued that e-mail communication has dramatically changed workplace communication among employees and has replaced some face-to-face communications. As such, the dissenting Democrats would have treated e-mail communications similarly to face-to-face solicitation in the workplace, thereby striking down broad employer policies prohibiting union communications by employees through e-mail where employees have been given access to e-mail for routine workplace communication. *Id.* at 1127 (dissent). The majority Republicans left open the question of whether broader access to e-mail for union purposes must be allowed where there are no means for employees to communicate among themselves at work other than e-mail, thereby suggesting that face-to-face solicitation principles rather than traditional use of employer equipment principles may be more applicable in such circumstances. As discussed further below, the conclusions reached in *Guard Publishing* are likely to be reconsidered by the Board once new members appointed by President Obama are in place.

#### *Union Insignia*

Employees have a right under the NLRA to make known their concerns and grievances regarding the employment relationship, which includes the right to wear union insignia, such as union buttons, at work. *E.g., Starwood Hotels & Resorts Worldwide, Inc.*, 348 N.L.R.B. No. 24 (2006). This right, however, is not absolute, and the Board has recognized that an employer may curb such expressions where "special circumstances" exist. Where an employer seeks to curtail an employee's ability to wear union insignia, including union buttons, at the workplace, the employer bears the burden of establishing that "special circumstances" exist. "The Board has previously found such special circumstances justifying the proscription of union slogans or apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.*, 342 N.L.R.B. 649, 650 (2004). In *Komatsu*, for example, the Board found that the employer properly prohibited factory employees from protesting an outsourcing decision made by their Japanese parent company by wearing a shirt that read "December 7, 1941" on the front and "History Repeats Negotiate Not Intimidate" on the back. A split Board reasoned that this message was especially inflammatory and offensive given that the employer was a Japanese-owned company and that the employer was properly concerned about the potential disruption to the employee-management relationship. The dissent argued that concern over disrupting employee-management relations did not constitute "special circumstances." Whereas *Komatsu* involved a factory setting where workers did not have interaction with the employer's customers, employers often seek to establish "special circumstances" where workers have direct contact with customers.

The Board has made clear that customer exposure to union insignia, standing alone, does not constitute "special circumstances." Such exposure, however, can constitute "special circumstances" in select situations. In *Starwood Hotels & Resorts Worldwide, Inc.*, 348 N.L.R.B. No. 24 (2006), a split Board held that the employer could prohibit its in-room delivery servers from wearing a union pin while in contact with guests. The employer operated a hotel in downtown San Diego and marketed itself as providing an alternate hotel experience, referred to as a "Wonderland," where guests could get what they wanted when they wanted it. To further that image, the employer adopted a strict dress code in which servers making in-room deliveries had to wear black pants, a black shirt, and a black apron. Public-contact employees had to wear a one-half-inch company pin on the uniform, but no other adornments were permitted. A majority of the Board concluded that prohibiting a server from wearing a two-inch square union pin (blue or red lettering on a yellow background) with the words "JUSTICE NOW! JUSTICE AHORA! H.E.R.E. Local 30" while in

contact with guests was lawful. The majority distinguished this case from a previous Board decision involving a smaller union pin with less controversial language where employees were permitted to wear adornments not related to the employer's business, which the majority deemed less likely to interfere with a particular customer image. A different majority, however, concluded that there were no such "special circumstances" justifying the employer's refusal to allow the server to wear the pin while not in public areas. One dissenting member disagreed, arguing that the impracticality to the employer of trying to enforce such a rule presented "special circumstances." Finally, the unanimous panel of the Board concluded that the employer was justified in prohibiting kitchen employees from wearing loose-fitting union stickers with similar wording. The evidence showed that there was a real danger that the stickers could fall off of the employee's uniform and into food or onto food preparation surfaces, thus contaminating the food or food preparation area. These health and safety concerns constituted "special circumstances."

The partial ban on union insignia for in-room servers was justified in *Starwood Hotels* based on the unique ambiance. In contrast, in *P.S.K. Supermarkets, Inc.*, 349 N.L.R.B. No. 6 (2007), the Board found that there were no such special circumstances permitting a grocery store from prohibiting its employees from wearing union buttons. Citing the general rules, the Board rejected the employer's arguments that the prohibition was justified because the employees had contact with customers, they were required to wear uniforms, and the rule was applied indiscriminately to all buttons, not only union buttons.

Union insignia threatening an employer's relationship with clients is especially likely to constitute "special circumstances." In *Pathmark Stores, Inc.*, 342 N.L.R.B. 378 (2004), for example, the Board found that union employees were permissibly forbidden from wearing certain union hats and shirts while working. The union and employer were involved in a dispute involving the employer's decision to begin to sell prepackaged meats at its grocery stores, thus reducing the number of hours of the union meat, deli, and seafood employees and the number of new employees needed. Several employees were suspended after refusing to remove union shirts and hats bearing the message, "Don't Cheat About the Meat." The Board agreed that the slogan was ambiguous, reasonably causing the employer to suspect that its customers would believe that, aside from the prepackaging dispute, the grocery store was cheating its customers with respect to the meat offered for sale.

#### *Access to Employer Premises by Employees and Nonemployees*

Employers often attempt to thwart union organizing campaigns by prohibiting union organizers, off-duty employees and nonemployees alike, from accessing the employer's

premises and thus its employees. In this area, the Board distinguishes between employees and nonemployees. These two groups enjoy different access rights.

An employer policy prohibiting all access to the employer's premises by off-duty employees is presumptively unlawful. A policy restricting access of off-duty employees is generally valid if it is limited to the interior of the employer's buildings and other working areas, it is clearly disseminated to all employees, and it applies to off-duty employees seeking access for any purpose and not just those employees seeking access to engage in union activities. *E.g.*, *NLRB v. Pizza Crust Co. of Pa.*, 862 F.2d 49, 53 (3d Cir. 1988) (*quoting Tri-County Med. Ctr., Inc.*, 222 N.L.R.B. 1089 (1976)); *Teletech Holdings, Inc.*, 333 N.L.R.B. 402 (2001). Rules that deny an off-duty employee access to an employer's parking lots, gates, and other outside non-working areas are generally held to be invalid, unless there is a specific business reason for the exclusion. *Id.* This limited right of access has been extended by the Board to apply to employees assigned to one facility of the employer who seek access to outside non-working areas of the employer at another facility. *See, e.g.*, *U.S. Postal Serv.*, 318 N.L.R.B. 466 (1995).

Whereas off-duty employees cannot be completely banned from an employer's premises absent special business circumstances, nonemployees generally have no right of access to an employer's property. An employer, therefore, can lawfully prohibit nonemployees from solicitation and distribution on the employer's property. As discussed more fully below, an employer cannot enforce its non-access policy in a discriminatory fashion by allowing access to all nonemployees other than union organizers. In fact, granting access to outside groups for solicitation purposes can put employers at a greater risk of being required to allow union organizers similar access.

#### *Discriminatory Enforcement of Workplace Policies*

Promulgation of lawful workplace policies regarding solicitation, distribution, use of company resources, access to company premises, and similar topics do not insulate an employer from charges under the NLRA. Even if an employer's written policies are facially valid, employers can be liable if the facially valid policies are enforced in a discriminatory manner.

#### *A Wave of Change*

In 2007, the Republican-majority Board brought about a sea change in this area of the law with its decision in *Guard Publishing Co.*, 351 N.L.R.B. No. 70 (2007). *Guard Publishing* involved the discipline of an employee who used her employer's e-mail system to send

union solicitations. The employer, a newspaper publisher, instituted a Communications Systems Policy, which provided that "[c]ommunications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." *Id.* at 1111. The employer "tolerated personal employee e-mail messages concerning social gatherings, jokes, baby announcements, and the occasional offer of sports tickets or other similar personal items," although there was no evidence that the employer "permitted employees to use e-mail to solicit other employees to support any group or organization." *Id.* at 1119. A union employee was disciplined after sending e-mail messages urging other employees to wear green to support the union and to participate in the union's entry in a local parade. The union asserted that the employer discriminatorily enforced its Communications Systems Policy.

In its decision, a slim majority of the Board overturned long-standing precedent and established a new test to determine if an employer has enforced its solicitation and distribution policies in a discriminatory manner. *Id.* at 1117–19. Applying this new standard, the Board held that the union did not enforce its policy in a discriminatory manner. This new test is more generous to employers than the one it replaced and is similar to the standard applied by courts when considering disparate treatment employment discrimination claims. Under this new test, an employer can allow certain types of solicitations and distributions under the NLRA (even those regarding non—work-related subjects), provided that the line between what is permissible and what is not permissible is not drawn along union lines or for an impermissible union-related motive. *Id.* at 1118 ("[U]nlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status."). That is, an employer will run afoul of the NLRA where it treats equal groups differently because of their union status. The Board further explained:

For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use.

*Id.* at 1118 (footnote omitted). The Board announced that it would apply this new standard "in the present case and in future cases." *Id.* at 1119.

The key to defeating a discrimination charge under the *Guard Publishing* standard is the articulation of a non-discriminatory standard regarding which solicitations are permitted, provided that the articulation is not either a pretext for union discrimination or a post hoc explanation. If an employer has written policies, it should clearly articulate which categories of solicitations are permitted and which categories are not permitted. At the very least, an employer must enforce a policy along permissible lines and articulate this enforcement policy in any challenge by a union or union supporters that may be brought. Failure to articulate a permissible enforcement policy can be fatal to an employer accused of discriminatorily enforcing its policies with respect to unions, as evidenced by *Guard Publishing*.

The Board's *Guard Publishing* decision was appealed by the parties to the United States Court of Appeals for the D.C. Circuit. See *Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). Although a number of the issues addressed by the Board in its decision were not at issue on appeal, the D.C. Circuit refused to enforce the part of the Board's order in which the Board found that the employee was lawfully disciplined for sending union-related solicitations by company e-mail. Applying its new standard, the Board concluded that although the employer allowed some personal solicitations by e-mail, there was no indication that the employer had permitted employees to use the company's e-mail system to solicit other employees to support a particular group or organization. The D.C. Circuit refused to enforce this finding of the Board, where neither the employer's written policies nor its enforcement rationale relied on an organizational justification for precluding union solicitations and permitting other types of solicitations. The court viewed this explanation as a post hoc rationalization. *Id.* at 59–61.

Although *Guard Publishing* involved use of an employer's e-mail system for union purposes, which the majority treated as use of an employer's equipment, there is nothing in the Board's decision to suggest that the new standard announced in the case regarding discriminatory enforcement of policies should be applied narrowly. Logically, the new standard should apply to all claims of discriminatory enforcement of solicitation and distribution policies. Indeed, subsequent decisions have suggested that it will be applied to all charges of discriminatory enforcement. See *Fremont-Rideout Health Group*, No. CA-33521 (ALJ Jan. 29, 2009) (applying *Guard Publishing* standard to various charges of

discriminatory enforcement, including alleged discriminatory enforcement of employer premises access policy).

*Guard Publishing* overturned long-standing Board precedent regarding the proper standard to be applied in determining whether an employer has discriminatorily enforced its solicitation and distribution policies. There is a significant likelihood that this new, employer-friendly standard will be short lived. *Guard Publishing* was a split decision by a 3-2 majority highlighting ideological differences in the Board. There are only two current members on the Board: Peter Schaumber and Wilma Liebman. Member Schaumber was part of the majority in *Guard Publishing*, whereas now-Chairman Liebman was in the minority. The majority of President Obama's picks for the three Board vacancies will almost certainly be closer to Chairman Liebman's (designated Chairman by President Obama) position rather than Member Schaumber's position, and the Democrats will by tradition hold a three-person majority on the newly constituted Board. The dissent in *Guard Publishing* believed that the newly adopted standard was fundamentally flawed in that it misunderstood the essence of a Section 8(a)(1) violation. The dissent argued that Section 8(a)(1) does not focus on discrimination but on interference with an employee's Section 7 rights. According to the dissent, the pre-*Guard Publishing* standard appropriately focused on whether an employer's actions impermissibly interfere with an employee's exercise of Section 7 rights rather than discrimination. As a result, given the current political landscape, employers must be aware of the pre-*Guard Publishing* standard, which may be resurrected in the not-too-distant future.

#### *Pre-*Guard Publishing* Standard*

Prior to the change in standard announced in *Guard Publishing*, the Board applied a standard regarding discriminatory enforcement of solicitation and distribution policies that was less favorable to employers. Under the prior standard, if employers allowed solicitation or distribution for non-work-related subjects but denied solicitation or distribution for union-related purposes, the employer could be found to have violated the NLRA. *E.g.*, *Fremont-Rideout Health Group*, No. [CA-33521](#) (ALJ Jan. 29, 2009). This rule, however, was not absolute. If the employer permitted solicitations or distributions for only a small number of beneficent acts and/or related to its business functions and purposes, these actions did not cause the employer to run afoul of the NLRA if it denied access to union solicitations. The employer, however, ran afoul of the NLRA if it denied access to unions but permitted commercial enterprises to solicit on its premises or even charities, if the instances of solicitation were frequent. *E.g.*, *Lucile Salter Packard Children's Hosp. at Stanford*, [97 F.3d](#)

583, 587–89 (D.C. Cir. 1996). The Board tended to look at both the quality and quantity of the other solicitations and distributions permitted by an employer in applying the standard.

### *Charitable Solicitations and Distributions*

Under pre—*Guard Publishing* precedent, an employer will not be found to have violated the NLRA by refusing access to a union where it consistently applies its no solicitation/no distribution rule, other than "permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule." *Hammary Mfg. Corp.*, 265 N.L.R.B. 57, 57 n.4 (1982). In evaluating the applicability of this exception, the Board considered both the quantum and frequency of incidents. Regular visits by a small number of charities as well as infrequent visits by a large number of charities rendered the exception inapplicable. Compare *Serv-Air, Inc.*, 175 N.L.R.B. 801 (1969) (finding exception applied where employer permitted solicitation on approximately four occasions on behalf of approximately three charities) with *Four B. Corp. v. NLRB*, 163 F.3d 1177 (10th Cir. 1998) (finding exception inapplicable where two charities solicited on the employer's premises daily or weekly for several months and one or two other charities solicited on the employer's property on one occasion).

Despite the Board's relatively consistent application of this exception, several federal appellate courts have been unwilling to enforce Board orders predicated on such a narrow exception for charitable solicitations. Chief among them is the Sixth Circuit, which has defined discrimination in this context narrowly. In *Albertson's Inc. v. NLRB*, 301 F.3d 441 (6th Cir. 2002), the Sixth Circuit refused to enforce a Board order finding that a retail grocer discriminatorily applied its no solicitation rule by refusing access to unions (and all non-charities) while regularly permitting access to a host of charitable groups. The Second Circuit has recently taken a similar view. See *Salmon Run Shopping Ctr. LLC v. NLRB*, 534 F.3d 108, 115–17 (2d Cir. 2008) (refusing to enforce Board order finding discriminatory access to mall property by allowing charitable and civic causes access but denying union access to distribute literature); see also *Reisbeck Food Markets, Inc. v. NLRB*, 91 F.3d 132 (4th Cir. 1996) ("[W]e find legally significant differences between the charitable solicitation which Reisbeck allowed and the union's 'do not patronize' solicitation which Reisbeck prohibited."); *NLRB v. Pay Less Drug Stores Nw., Inc.*, 57 F.3d 1077, 1077 (9th Cir. 1995) ("A business should be free to allow local charitable and community organizations to use its premises, whether for purely altruistic reasons or as a means of cultivating good will, without thereby being compelled to allow the use of those same premises by an organization that seeks to harm that business."). The circuit courts, however, were not all in

agreement. In *Lucile Salter Packard Children's Hosp. at Stanford*, 97 F.3d 583, 587–89 (D.C. Cir. 1996), for example, the D.C. Circuit applied the Board's narrow charitable exception.

In addition, the presence of even a single non-charitable permitted solicitation or distribution could be enough to find that an employer discriminatorily enforced its solicitation and distribution policies. See *Am. Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 136 (8th Cir. 1979) (noting that "granting permission to the Girl Scouts and charity groups while denying permission to [a union] is fairly innocuous" but enforcing Board finding of discriminatory application of policies where a political candidate was permitted to distribute on the employer's premises). In addition, where employees have the unfettered ability to use an employer's equipment, even where the equipment has in actuality only been used for charitable or social purposes, an employer can be found to have violated the NLRA where it refuses to permit e-mail distribution of union information. See *Media Gen. Operations, Inc. v. NLRB*, 225 Fed. App'x 144 (4th Cir. 2007) (involving use of e-mail system).

#### *Activities Regarding an Employer's Business Functions and Purposes*

In addition to the exception for isolated charitable solicitations, there is an exception for solicitations or distributions regarding an employer's business functions and purposes. By way of example, a manufacturing employer who did not otherwise allow solicitation or distribution on its property would not run afoul of the NLRA under the pre—*Guard Publishing* standard if it denied access to union organizers but had a store on its property in which employees could buy the employer's manufactured products. An employer must be careful, however, not to decide which outside organizations will be permitted on its property based on the employer's own judgment as to which organizations may provide a benefit to employees. Applying its pre—*Guard Publishing* standard, the Board and D.C. Circuit previously concluded, for example, that an employer discriminated in its enforcement of its solicitation and distribution policies by precluding union access to the premises while permitting access by a credit union and others. See *Lucile Salter Packard Children's Hosp. at Stanford v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996). In fact, the D.C. Circuit agreed with the Board that there was "no meaningful basis" for distinguishing between solicitations by the credit union and the union since both had as their primary purpose the "enticement of the [employer's] employees to avail themselves of membership, products, or services." *Id.* at 590, 591 n.10. Just as an employer may believe a credit union is beneficial for employees, some employees may hold the same opinion of unions.

Informational solicitations relating to employer-subsidized fringe benefit programs have also been deemed to fall within this exception. See *Lucile Salter Packard Children's Hosp. at Stanford*, 97 F.3d at 589. In *Lucile Salter Packard Children's Hosp. at Stanford*, for example, the Board adopted the administrative law judge's findings that solicitations and distributions by Section 403(b) plans and health insurance plans were acceptable because each of these specific plans were offered as an option under the employer's benefit package. 97 F.3d at 590.

### *Personal Office Solicitations*

Even those employers that have written policies prohibiting all non—work-related solicitations and distributions often turn a blind eye with respect to typical office solicitations and distributions for items such as Girl Scout cookies, school sales of items, and office pools. Employers should be aware that the Board has previously considered such solicitations and distributions in determining whether an employer unlawfully discriminated against a union in applying its solicitation and distribution policy. See, e.g., *United Parcel Serv., Inc. v. NLRB*, 228 F.3d 772, 778–80 (6th Cir. 2000) (affirming Board decision that employer discriminatorily applied distribution policy by prohibiting distribution of union paper in area where workers routinely distributed papers such as magazines, entry forms for tournaments, and information about contests); *Alle-Kiski Med. Ctr.*, 339 N.L.R.B. 361 (2003) (noting discriminatory enforcement of policy where employer permitted solicitations such as Girl Scout cookies, office pools, and hoagie sales to benefit a local school); *BRC Injected Rubber Prods., Inc.*, 311 N.L.R.B. 66, 73–74 (1993) (finding disparate treatment where employer permitted sale of candy, Girl Scout cookies, and other products by employees).

### *What's an Employer to Do?*

There are several steps that employers can take to reduce the likelihood of a successful challenge to the promulgation and enforcement of solicitation, distribution, and access policies. First, employers should consider developing and distributing written policies and procedures regarding solicitation, distribution, use of company equipment, and access to company premises. If such written policies already exist, they should be reviewed to ensure that they comply with the principles previously discussed. If an employer decides to adopt or continue written policies, the employer should consider whether any type of solicitations or distributions will be permitted. If so, the written policy can delineate permissible versus impermissible solicitations and distributions, provided that the policy is not drawn to effectively permit all activity other than union activity and is consistent with the standard

presently being applied by the Board in discriminatory enforcement cases. Electronic communications policies, for example, could be written to state that e-mail is provided and to be used for business purposes and may not be used for solicitations or distributions other than the occasional personal or charitable solicitation. If the employer decides to implement written policies, the employer should act in the near future rather than after an organizing campaign begins.

Second, and at a minimum, employers must enforce their existing policies in accordance with the policy and in an evenhanded manner. Third, in the event the Board reverts back to its pre—*Guard Publishing* standard, employers must reconsider their policies and practices and severely curtail all solicitations and distributions, except for the occasional charitable and business-related activities.

Finally, employers should consider providing training to their managers and supervisors so that they are aware of the Board's rules and restrictions, and so that they know how to react to union organizing activity.

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