Legal INSIGHTS
Ottosen DiNolfo Hasenbalg & Castaldo, Ltd.
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Are Employers Liable to Family Members of Their Employees Who Contract Covid-19?

by Ericka J. Thomas

COVID-19 has presented challenges to all of us in a variety of different ways. It has changed how we do business, how we educate, and how we communicate. For the essential industries that have been able to remain operational, business is definitely not "as usual." These industries have had to create plans to keep their workers protected from the spread of COVID-19, such as adjusting the distance between workers and providing personal protective equipment (PPE). Workers' compensation laws have also changed to provide coverage to employees who contract COVID-19 during the course of their work. But what about the families of employees who catch the coronavirus at work and bring it home? Do employers also owe a duty to protect their employees' families? This question has now been posed to the legal system through a number of recent lawsuits filed after a family member of an employee became seriously ill or died after the employee was exposed at work.

Two Illinois cases have been filed by family members of employees who contracted COVID-19 after work exposures. The first case was filed in Kane County after the wife of an employee at a meat packing plant died from COVID-19 on May 2, 2020. The employee was a butcher at the plant and asserts that he had to stand "shoulder to shoulder" with his co-employees in a processing line and sit "shoulder to shoulder" with his co-employees during his lunch break. After the employee contracted the coronavirus, his stay-at-home wife caught the virus from him and later died. The lawsuit alleges that the employer failed to warn employees about the virus and failed to implement a plan detailed by the Centers for Disease Control (CDC) to mitigate the spread of the virus. Although the packing plant was closed in April for a "deep cleaning," the lawsuit claims that there was no deep cleaning actually done and that requests by employees for PPE were ignored.

The second case comes out of an assembly plant in Lockport. The employee was a parts assembler who became ill with COVID-19 in April. While the employee's wife was caring for her husband, she contracted the disease and suffered "serious injuries to multiple

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Municipal Fees and Fines Must Be Carefully Distinguished

by Michael Castaldo III

Municipal income is generated mostly from sales and property taxes. Consequently, many municipalities rely on fines and fees to bolster their revenue. Some of the most common fees come from towing and impounding vehicles connected to criminal activity. The ordinances imposing those penalties, though, often invoke court challenges where plaintiffs claim the fees or fines are unconstitutional. If the ordinance creating the fee or fine structure is not narrowly drafted, the challengers could be successful.

Many such cases involve a Village ordinance imposing a $500 charge to the vehicle owner in addition to the other fees related to the towing and storage of the vehicle and the penalties imposed for the specific wrongdoing. The premise behind these claims is that such administrative

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Ottosen, DiNolfo, Hasenbalg & Castaldo, Ltd.'s newsletter, ***Legal Insights***, is issued quarterly to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts.

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Are Employers Liable?

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organs." The lawsuit alleges that the company failed to provide PPE, failed to sterilize work areas, and failed to implement social distancing guidelines. The company strongly denies the allegations and points to the fact that employees routinely wore masks and gloves even before COVID-19, due to the dust in the plant. Additionally, after the pandemic began, the company took all employees' temperatures when they arrived for work each day. The employee who filed the lawsuit was the one employee who refused to have his temperature taken and was the first employee at the plant to contract COVID-19.

Both of these lawsuits are in the early stages of litigation and it remains to be seen how these theories of liability will hold up. The main issue for the plaintiffs will be to establish a "causal chain" to show that the businesses failed to implement safety measures, which led to the worker getting sick and infecting his family. The plaintiffs will also have to show that they took proper precautions so that they did not become ill from other sources.

To avoid liability, businesses should take extra precautions to protect their employees from contracting COVID-19. At a minimum, businesses should consult with and follow CDC guidelines, provide or make PPE available to employees, educate their employees on the spread of COVID-19, and increase the frequency of cleaning and sanitation. Because the coronavirus situation is rapidly and constantly evolving, it is always advisable to consult with your attorneys to assure that your business remains compliant with current protocols.

Determining "Maintenance, Use, and Benefit" for Foreign Fire Insurance Boards

by Shawn P. Flaherty

A foreign fire insurance board is quite possibly the most superfluous layer of government in the State of Illinois. The statutory purpose of a foreign fire insurance board is to create a seven-member board to adopt rules and procedures to expend the revenues that municipalities and fire protection districts collect from out-of-state insurance companies that issue fire insurance policies in the State of Illinois. Revenues that could otherwise be spent for the general good of the municipality or fire protection district have, when applicable, been placed in the hands of that entity's Foreign Fire Insurance Board (FFIB) and must be spent "for the maintenance, use, and benefit" of the fire department. 65 ILCS 5/11-10-1, 70 ILCS 705/11i.

Background

Section 11-10-1 of the Illinois Municipal Code allows Illinois municipalities and fire protection districts to assess a "tax or license fee" by ordinance against foreign (a/k/a out-of-state) fire insurance issuers in a "sum not exceeding 2% of the gross receipts received from fire insurance upon property situated within the municipality or district." 65 ILCS 5/11-10-1. The amounts owed are calculated and collected by the municipality, or by a third-party organization such as the Illinois Municipal League, and are annually forwarded to the corresponding municipality or fire protection district.

The initial impetus of the FFIB legislation was to earmark fire insurance benefits for use of the fire department in a municipality, so the money would not be spent on other public purposes such as police, public works, or parks. Organized labor was able to advance this bill in the Illinois General Assembly and it has applied to municipalities for more than 100 years.

Municipalities with fewer than 500,000 residents that have an organized fire department are required to form an FFIB with a seven-member board. Six of the seven members of the board are elected by the sworn members of the fire department and the Fire Chief serves as the seventh member. 65 ILCS 5/11-10-2(a). A separate provision forms a FFIB board for the City of Chicago. 65 ILCS 5/11-10-2(b).

In 2009, the Illinois Fire Protection District Act was amended to require the formation of a FFIB in each fire protection district that has an organized fire department, employs full-time firefighters, and is subject to a collective bargaining agreement. 70 ILCS 705/11i(a). Part-time and non-union departments are not required to form a FFIB board. When required, the seven-member FFIB is created in the same manner as set forth for municipalities.

In all cases, FFIB officers are elected, including a FFIB treasurer, who is required to be bonded. This treasurer

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School Board Collective Bargaining in a Virtual Setting

by Maureen Anichini Lemon

When the pandemic hit, some school board negotiating teams put their negotiations on hold, thinking that the March 'shut down' would be a temporary setback. The current escalation of COVID-19 cases, however, should have all school boards with a soon-to-expire collective bargaining agreement (CBA) contemplating the pros and cons of virtual collective bargaining.

In general, employers are expected to meet with union representatives in-person at mutually agreed upon times and locations to resolve bargaining issues. The National Labor Relations Board (NLRB) has historically concluded that conducting face-to-face negotiations is a statutory right, and that a party that refuses to negotiate in-person creates an impasse on a permissive topic of bargaining. Yet, in a September memo, NRLB's General Counsel stated that, while the pandemic does not privilege an employer to refuse to hold bargaining sessions, it may justify convening such sessions by teleconference. The Illinois Educational Labor Relations Board (IELRB) has not opined on this issue.

Hopefully, school board and union teams can jointly agree to postpone negotiations or to convene such sessions via a virtual platform when it isn't safe to meet in person. With that latter decision, though, comes several unique challenges.

Preparation and Organization

Virtual negotiations might be hampered by a team member's technological struggles. Just as it is important to ensure that each student has consistent WI-FI and internet access to participate in remote learning, the

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Municipal Fees and Fines

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fees are unconstitutional, as they are not reasonably related to the recovery of the Village's administrative costs, thus constituting an unlawful attempt to use police powers to produce revenue. In a recent case in which this argument was made, the City of O'Fallon argued that the administrative fee was actually a fine intended to deter criminal behavior. The trial court dismissed the case, but the plaintiff appealed, arguing that the ordinance provided for a fee, not a fine. That subtle distinction is significant.

The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent, and the plain language of the statute is the best indication of that intent. The language of a municipal ordinance is treated similarly. The best indicator of the intent of an ordinance is the plain language used by the municipality in creating an ordinance. Despite this, oftentimes a municipality opts for simple language, which can be beneficial. At other times, though, the intention of the corporate authority might be misconstrued without spelling out the intent in those pesky recitals that many municipal attorneys like to avoid.

Generally speaking, legislation and ordinances do not violate substantive due process if they bear a rational relationship to a legitimate governmental purpose and are neither arbitrary nor discriminatory. However, in *Saladrigas v. City of O'Fallon*, 2020 IL App (5th) 190466, the Fifth District Appellate Court questioned whether the intent of the ordinance was to impose a fee or a fine before even applying the rational basis test. Fines and fees serve different purposes and are scrutinized under differing constitutional standards. A "fine" is considered a pecuniary punishment payable to the public treasury that is imposed as a part of a sentence on a person convicted of a criminal offense. In contrast, a "fee" is a charge to recoup expenses incurred for providing labor and services. Due process requires that a fine be rationally related to the offense on which the defendant is sentenced, whereas a fee must be in an amount that bears some reasonable relationship to the actual costs that the fee is intended to recoup.

In *Saladrigas*, the City adopted an ordinance imposing an "administrative fee" to be paid by the vehicle owner, the amount of which varied depending on the severity of the violation. The court noted that despite having specific characteristics suggesting that it was a fine, the ordinance specifically labels it as a fee. Furthermore, the preamble of the ordinance specifically stated that "the administrative fees are based upon the amount of resources expended by the members [of the police department] and designated to help . . . recoup costs associated with processing certain arrests." The court then reiterates the importance of the municipalitys intent as shown by the plain and ordinary language of the ordinance. If the language of an ordinance is clear and unambiguous, the court must interpret it according to its terms.

Here, the Appellate Court reversed the circuit court's finding that the "administrative fee" was actually constitutional. Instead, the case was remanded back to circuit court to make a determination as to whether the amount of the fee was rationally related to the City's legitimate government interests in recouping costs.

With respect to municipal towing ordinances, the reason why fees can become potentially troublesome is that each instance of towing is unique. If challenged, the municipality would bear the burden of proving the fee amount was reasonably related to the recoupment of expenses for any services provided by the municipality. Alternatively, imposing a fine can also be potentially troublesome absent any additional language setting forth the intent of the fine; for example, to deter certain behavior. Interestingly, the court in *Saladrigas* specifically noted that its analysis would have been different had the City's ordinance stated that its intent in imposing the charge was to punish vehicle owners and to deter crime. This serves as a fine example of the importance of clearly crafting ordinance language to effectively match the corporate authorities' intention. If you have any questions about the effectiveness of your municipal towing ordinance, or any other fee- or fine-based ordinance, contact your attorney to help navigate those complicated waters.

Pension Consolidation: Where Are We?

by John E. Motylinski

Last year, the Illinois General Assembly decided to consolidate Article 3 and 4 pension funds' investments. The legislature enacted Public Act 101-0610, which created two statewide investment pools to manage downstate police and fire pension funds. The Act also laid out an ambitious goal: to transition all affected pension monies to the consolidated funds by July 1, 2022.

In early 2020, temporary members were named to the Transition Board of Trustees of the Illinois Firefighters' Pension Investment Fund (IFPIF) and the Illinois Police Officers' Pension Investment Fund (IPOPIF). The transition boards are charged with getting the Funds up and running and conducting an election for the permanent boards.

The IFPIF Transition Board recently concluded the election process for permanent board members. Importantly, there was no election for the active participant spots as Kevin Bramwell (Bolingbrook), Matthew Kink (Springfield), and George Schick (Orland FPD) ran unopposed for those offices, with Schick's being a two-year term. All three participants are also members of the Transition Board.

However, elections were held for the Beneficiary Trustee and Executive Trustee positions. Gregory Knoll (Homewood) defeated Russell Hunt (Bolingbrook) for the Beneficiary Trustee 2-year Term position. Patrick Nichting (Peoria Treasurer) and Herb Roach (O'Fallon Mayor) were elected Executive Trustee for four years, while Jeff Rowitz (Northbrook CFO) won the race for a two-year Executive Trustee.

Mayors, village presidents, and fire protection district presidents each received one vote in the election. All ballots must have been received by December 1, 2020 to be valid. Fire protection districts had been pushing for the election of Lisle-Woodridge FPD Trustee John Perry and Wauconda FPD Chief David Geary so that not every executive board member would hail from a municipality. Perry fell just three votes shy for the four-year term, while Geary was six votes short on the two-year position.

The IPOPIF also elected its permanent board of trustees this month. No election was needed for the municipal or beneficiary representatives based on the number of interested candidates, so the current trustees were appointed by acclamation. On the participant side, though, six candidates vied for three spots. Lee Catavu (Aurora), Shawn P. Curry (Peoria), and Paul Swanlund (Bloomington) were victorious. The IPOPIF reported about 37 percent of eligible ballots were cast.

After the elections, the newly seated permanent boards will likely review the consolidation plans recommended by the transition boards. Significantly, the Act provides that the permanent boards are not bound by any contract or agreement with custodians, investment consultants, or other professionals engaged by the transition boards. So, once the elections are complete, the permanent boards may shuffle their lineup of vendors and staff.

They will also likely commence the transition of funds from local funds to the Investment Fund. Broadly, this process will first involve an audit performed by the Illinois Department of Insurance. Within ten business days after the results of the audit are received, the permanent boards should initiate the transfer of assets from the local pension fund. William Atwood, the Executive Director of the IFPIF, has stated that his goal is to transition all funds to the statewide system by July 2021, a full year ahead of the statutory deadline.

Updates on the IFPIF, including agendas and minutes of meetings, can be found on its website, www.ifpif.org. The IPOPIF posts information to its Facebook page.

NEWS YOU CAN USE

Personal Email Accounts Subject to FOIA

The ongoing debate over whether elected officials' personal emails and text messages are subject to disclosure under FOIA was the subject of another recent court case, *Better Gov't. Ass'n v. City of Chicago*, 2020 IL App (1st) 190038. The BGA submitted a FOIA request seeking communications from several City officials, but the City did not search those officials' personal emails and devices.

The City argued FOIA does not apply because the officials are not 'public bodies' on their own, which means personal communications are not "public records." The Illinois Appellate Court agreed with the first part, but concluded that emails exchanged by those individuals were "prepared for, used by, received by, or in the possession of" the City, which is a public body, making them FOIA-able. Previous caselaw stated that only personal communications sent during a public meeting were subject to FOIA, but this decision expands that to any time.

Collective Bargaining

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same is true in remote collective bargaining. However, it is not the school district's responsibility to provide technology to a union team member just for negotiating. Your ground rules may require each negotiation team member to agree that they are personally responsible for accessing the necessary technology. Also, to avoid unnecessary technical difficulties, run a sample session so team members can familiarize themselves with the chosen platform.

Speaking of technology, now is the time to switch from a physical binder with tabs to an electronic folder containing the current CBA, ground rules, master list of outstanding items, proposals, counter-proposals, tentative agreements, and bargaining notes. A basic topic that should be addressed by your ground rules is how the parties will exchange proposals and counter proposals. It will be critical to properly label email groups so that information doesn't accidently get sent to the wrong individuals.

For tentative agreements (TAs), one option is to electronically send a pdf of the 'final' TA to both parties, and have the individual from each team who would sign the TA send a 'reply all' email acknowledging their team's agreement. Then, update your side's master list of outstanding items after getting those emails and that TA saved in the electronic folder.

Participant Engagement

Certain aspects of traditional bargaining get lost in translation by going virtual. Reading body language and facial expressions can provide a wealth of information but isn't easy to do during virtual settings, especially if individuals are allowed to keep their cameras off. A ground rule might be that each participant keeps their camera on unless they've been granted a specific exemption during a particular negotiation session. Even if all participants are visible on camera, you have to use caution when observing any notable gestures or expressions. The individual might be reacting to something that their pet just did, not what was communicated at the virtual bargaining table.

While each side has the right to select its own representatives, fewer participants will make a virtual setting more manageable, since only so many screens can be viewed at the same time. It might benefit the process for each side to limit the number of individuals on its team. District participants should also keep a 'cheat sheet' handy listing each member of the union team by name, title, building, seniority, and years until retirement.

While bargaining teams often 'break bread' or have other opportunities to get to know their counterparts during traditional bargaining, those opportunities are all but lost in a virtual setting. Such personal connections can be instrumental to fostering the trust and relationships necessary to reach an agreement. Teams may wish to creatively consider icebreakers and other ways for team members to get to know one another.

Taking the discussion online lends itself to having spokespersons for each side who would do the majority of the talking. Unfortunately, those non-speaking individuals tend to 'check out' during lengthy sessions. More frequent but shorter sessions might be beneficial. At the very least, the parties should agree to take short 5-10-minute breaks each 1-1 ½ hours to allow participants to stretch and refresh themselves.

Caucuses

Caucuses are extremely important to move negotiations along and to connect with the team members who are not as active at the bargaining table. The parties will need to set up separate sessions or breakout rooms within these virtual platforms. Always use two breakout rooms, rather than allowing one caucus to remain in the main room, since people may return from their breakouts and hear the other side's discussion. Sidebars should work the same way.

COVID
Related Bargaining Topics

The pandemic will certainly lead to new bargaining topics in the coming months and years. Districts can anticipate discussing the following topics, among others, at the bargaining table:

- Requests for hazard pay for essential workers during pandemic
- Requests for extensive PPE for all employees groups
- Conducting evaluations of employees working remotely
- A possible pension shift from the State to local school districts
- Payments of stipends regardless of games/events being cancelled
- More virtual teaching options post-pandemic

Summary

While virtual collective bargaining is a poor substitute for meeting face-to-face, it may become necessary as union negotiations can be 'put off' for only so long. At the same time, school district budgets have been decimated and fewer financial resources are available. Ottosen DiNolfo attorneys are available to assist your school district navigate its collective bargaining obligations, whether in a virtual or traditional setting.

Courts Adjusting Procedures Due to Pandemic

by W. Anthony Andrews and Shontia Fox

COVID-19 has drastically changed the way individuals interact. Employees project their voices through face masks, doctors diagnose patients via Zoom, and students shuffle between virtual links rather than classrooms. Legal traditions and customs also have been altered to better protect the health of litigants. For the most part, face-to-face interactions with clients, opposing counsel, and judges are gone, as lawyers must instead participate in depositions and court appearances from their office computers.

Most circuit courts now require status hearings to be conducted remotely. Sometimes, even the judge participates from home, though usually using a virtual background. Parties are encouraged to submit agreed orders in advance to avoid overflowing waiting rooms. In rare circumstances, individuals have been required to be present in open court, but they must adhere to standard pandemic safety measures prior to entering the courthouse.

Routine or motion hearings typically involve only four people: the judge, two attorneys, and a court clerk. Though there are unique challenges to those remote proceedings (muting microphones is a constant plea from judges), the few number of participants has allowed them to continue after a hiatus in the spring. Trials, however, are more unwieldy, with parties, witnesses, jurors, and the public to consider.

All circuit courts suspended jury trials from March through May. When some courts outside Cook County resumed operations in the summer, they prioritized criminal jury trials where defendants were in custody, often installing plexiglass shields throughout the courtroom. Now, though, in light of increasing COVID-19 numbers, those trials are being delayed again. Each circuit court takes a slightly different approach. The 16th Judicial Circuit (Kane County) has mandated that all bench trials (no jury) be conducted remotely, while jury trials are postponed until January 29, 2021. The 18th Judicial Circuit (DuPage County) went further by postponing bench trials until January 4, 2021, with jury trials resuming February 1, at the earliest. The 22nd Judicial Circuit (McHenry County) chose to postpone all trials indefinitely.

Once trials do resume again, at least one stage will avoid any risk of COVID-19 transmission: jury selection. The Illinois Supreme Court recently entered an order allowing civil trial jury selection to be conducted remotely. This avoids dozens of potential jurors, chosen across demographics, sitting in a courtroom waiting to be chosen. Those who lack reliable internet service may be provided an alternative by the court. The temporary rule change does not affect criminal jury selection or any other aspect of the civil jury trial.

Federally, the U.S. District Court for the Northern District recently suspended all criminal and civil jury trials, saying health and safety outweighed parties' interest in a speedy trial. The District Court will still hold bench trials without restriction as long as out-of-state witnesses comply with relevant quarantine requirements or testify remotely. Other federal court formalities have also been suspended to encourage non-traditional appearances at the courthouses in Chicago and Rockford. Any public gatherings must be authorized by the Chief Judge. Other rules have been placed on hold to minimize lawyers' contact with court staff.

In the early stages of the pandemic, the judicial system across Illinois was at a virtual standstill. Courts eased into remote appearances and altered procedures. Now, though, most courts have grown relatively comfortable with the process, even for important hearings and bench trials, in order to protect the public while keeping the wheels of justice turning. Whether these changes outlast the pandemic remains to be seen, but for now, our litigators at Ottosen DiNolfo have become accustomed to emailing court staff, arguing motions by phone, and virtually participating in depositions to keep our clients' cases moving forward.

Foreign Fire Insurance

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shall receive all funds turned over by the municipality or fire protection district, and the expenditures must be used "for the maintenance, use, and benefit of the department." The FFIB must develop and maintain a listing of appropriate expenditures under this statute and shall generally make rules for the proper management of FFIB funds and allowable expenditures.

Crystal Lake Litigation

From time to time, disputes arise between a FFIB and the sponsoring municipal entity as to the amount of input and control the entity is able to assert over FFIB expenditures and the propriety of those expenditures.

The City of Crystal Lake and the City's FFIB were recently involved in a legal dispute concerning the level and amount of input the City was able to have on Crystal Lake FFIB purchases. This dispute resulted in a lawsuit by the FFIB against the City challenging the actions of City officials to suspend collection of the foreign fire insurance tax and to adopt two ordinances limiting the control of the FFIB over its revenues and expenditures. The City countersued and the matter made its way up to the Illinois Appellate Court for the Second District. *City of Crystal Lake Fire Rescue Department Foreign Fire Insurance Tax Board et al. v. City of Crystal Lake*, 2020 IL App (2d) 190956-U.

The Appellate Court largely avoided reviewing any of these matters by dismissing the appeal on jurisdictional grounds. However, it is interesting to note the Circuit Court's determinations in this matter as they have instructive points to consider. First, the McHenry County Circuit Court upheld the concept that the City has full power to decide not to levy a foreign fire insurance tax for one or more years, and the FFIB was unable to compel the City to assess this tax. The Circuit Court also ruled that the Crystal Lake FFIB lacked legal capacity to sue and be sued, and that the individual FFIB board members and the Firefighters' Union lack standing to bring suit.

These three rulings still remain unsettled questions of law subject to possible future judicial interpretation. However, it appears likely that an FFIB will never be able to compel a municipality or fire protection district from ceasing to collect the foreign fire insurance tax, which might serve as a negotiation wedge in the event that a FFIB engages in wrongful expenditures that are beyond those considered in the enabling statute.

Conclusion

The phrase "maintenance, use, and benefit" is broad enough to cover a wide range of equipment and materials, from fire gear, tools, hose and EMS equipment to fire station furniture, kitchen appliances, and other household items for the fire station. Other reported expenditures such as cash payments to the firefighters or the Union, or expenditures for Union parties or personal items for the firefighters, would be prohibited as falling outside of the scope of this definition. The intent of FFIB expenditures is to supplement fire department operations, and the ownership of all equipment and items purchased ultimately will be turned over to the municipality or fire district.

The overwhelming majority of municipalities and fire protection districts seem to work in concert with their FFIB's to purchase equipment and materials for the overall benefit of the fire department. A cooperative and respectful approach between the municipal entity and its FFIB in analyzing what qualifies as "maintenance, use, and benefit" of the fire department will go a long way. Intramural disputes and litigation over FFIB authority or expenditures often prove to be a waste of time and financial resources.

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