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Changes and Emerging Trends in Employment Law

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EEOC

U.S. Equal Employment Opportunity Commission

Do You Need to Provide Reasonable Accommodations to Employees Infected With COVID as Part of an ADA Accommodation?

- **On December 14, 2021, the EEOC updated its guidance to clarify when COVID-19 may be an ADA-protected disability.**

Is COVID an ADA-Qualifying Disability?

You'll find this new information in section "N" of the EEOC's COVID guidance.

The EEOC starts with this premise:

An employee who suffers only mild COVID symptoms, or who is asymptomatic, does not have a disability under the ADA and is, therefore, not entitled to an ADA accommodation.

Is Covid and ADA-Qualifying Disability?

- **However, the EEOC clarified that employees with the following COVID experiences may have an ADA-covered disability that entitles them to a reasonable accommodation.**
  - **Individuals who experience ongoing but intermittent multiple-day headaches, dizziness, brain, fog, and difficulty remembering or concentrating.**
  - **Individuals who receive supplemental oxygen for breathing difficulties and have shortness of breath, associated fatigue, and other virus related effects that last, or are expected to last, for several months.**
  - **Individuals who experience heart palpitations, chest pain, shortness of breath, and related effects due to the virus the last, or are expected to last, for several months.**
  - **Individuals with "Long-Covid" who experience COVID-19 related symptoms "for many months, even if intermittently."**

EEOC Updates to COVID-19 Testing Guidelines for Employers

- On July 12, 2022, the EEOC updated its guidelines regarding COVD-19 testing for employers
- At the beginning of the pandemic, the EEOC determined that the ADA standard for medical examinations was always met for employers to conduct on-site COVID-19 viral screening tests.
- With the July 12, 2022 update, the EEOC has made clear that moving forward, employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify the testing to prevent workplace transmission of COVID-19.

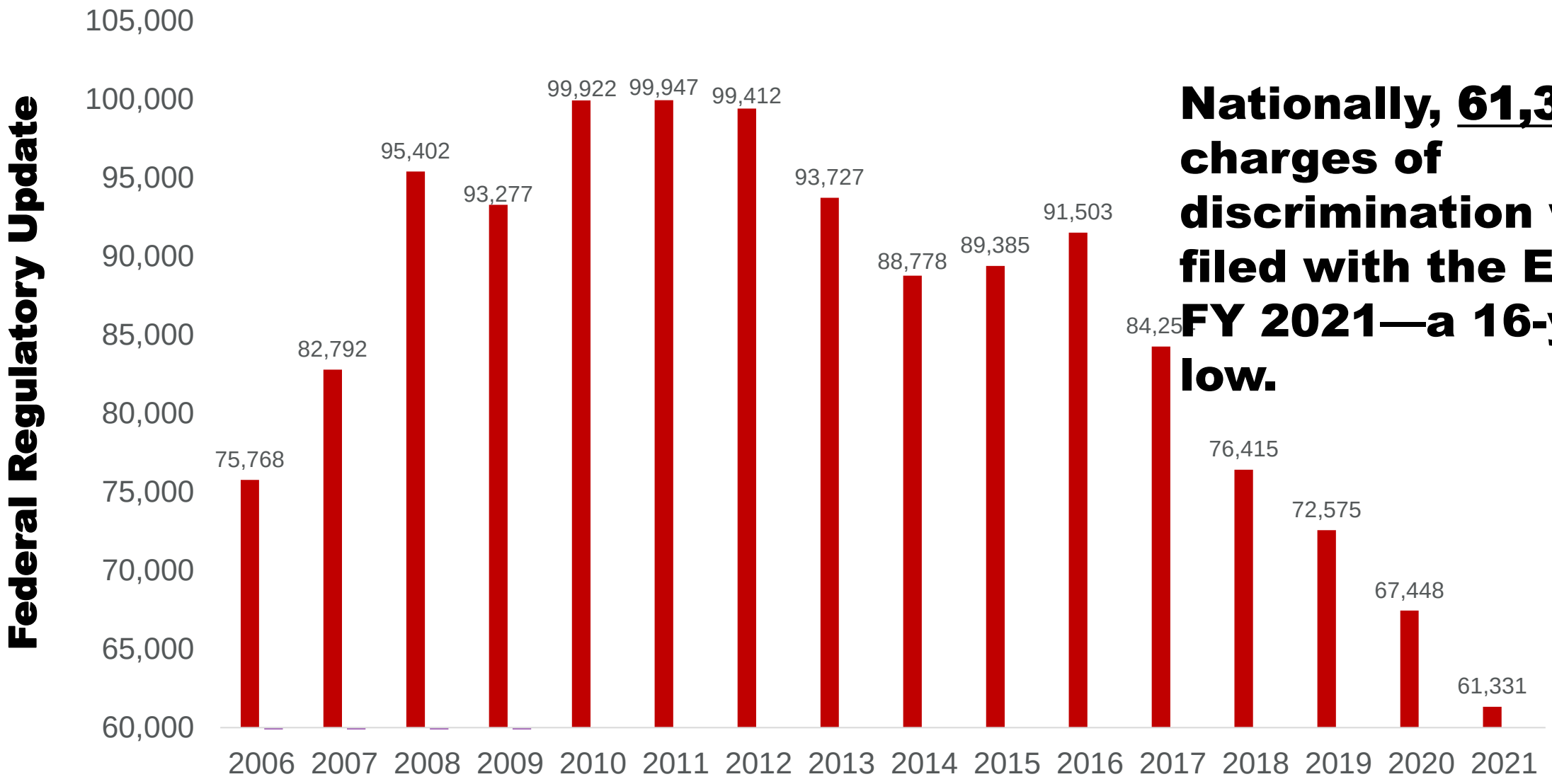
COVID-19 Testing and ADA Standard for Medical Examinations

- **Whether a medical examination, like a COVID-19 screening, is permissible under the ADA if it is job-related and consistent with business necessity.**
- **The EEOC has provided some factors that employers should consider when determining whether to test employees:**
  - **The current level of community transmission;**
  - **The vaccination status of employees;**
  - **The accuracy and speed of tests;**
  - **The degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations;**
  - **The ease of transmissibility of the current variant(s);**
  - **The possible severity of illness from the current variant(s);**

COVID-19 Testing and ADA Standard for Medical Examinations

- **The EEOC has provided some factors that employers should consider when determining whether to test employees:**
  - **What types of contacts employees may have with others in the workplace or elsewhere that are required for work; and**
  - **The potential impact on operations if an employee enters the workplace with COVID-19.**
- **The EEOC has reiterated that COVID antibody tests (as opposed to viral tests) do not meet the "business necessity" standard for employee testing and are prohibited under the ADA.**

EEOC Charge Statistical Report



Nationally, <u>61,331</u> charges of discrimination were filed with the EEOC in FY 2021—a 16-year low.

EEOC/UALD Charge Statistics

In 2021, the top 5 charges of discrimination nationally were:

Retaliation (56%)

Disability (37%)

Race (34%)

Sex (30%)

Age (21%)

In 2021, the top 5 charges of discrimination in Utah were:

Retaliation (62%)

Disability (50%)

Sex (28%)

Age (20%)

Race (18%)

Utah Legislative Update

Bereavement Leave Amendments
Government Record Amendments

SB 63 – Bereavement Leave Amendments

Requires public employers (including "municipal governments") to implement rules that will provide three workdays of paid bereavement leave for employees who suffer the loss of a child as a result of a miscarriage or stillbirth.

Signed by Gov. Cox on March 22, 2022

https://le.utah.gov/~2022/bills/static/SB0063.html

HB 399 – Government Record Amendments

Prior to the passage of HB399, there were 83 categories of protected records in Utah code. HB399 brings that total to 84. The records protected are statements made by an employee of a governmental entity in relation to an investigation related to potential misconduct by the employee.

Protects Garrity statements from records access.

Utah Code §§ 63G-2-305 (85).

HB399 Background

- **What are Garrity Rights?**
  - **Garrity v. New Jersey (Supreme Court) Governments can compel police officers to make statements or lose their jobs. Prosecutors cannot use these statements against the officers in a criminal case.**
  - **Garrity Rights protect public employees from being compelled to make statements that might incriminate themselves during investigatory interviews by their employers.**
  - **Fifth Amendment doesn't require someone to speak, but under Garrity an employee can be compelled to.**
  - **These statements are coerced statements that are protected and cannot be used in a subsequent criminal prosecution.**

HB399 Background

- **Salt Lake Tribune GRAMA requests to each law enforcement agency in Utah for records related to officer involved shootings.**
  - **West Jordan PD – State Records Committee found *Garrity* statements of officers made during investigations of officer involved shootings are public records.**
    - **"Simply because officers are required to participate in Garrity interviews, their privacy interests do not rise to the level of a 'clearly unwarranted invasion; of personal privacy because they are public officials with public responsibilities subject to public oversight."**
    - **Weighing various interests and public policies regarding classification of the records, "the public's right to know 'substantially exceeds' individual interests of public officials or police officers."**
- **HB399 has now made these records protected.**

Takeaways

- **Law Enforcement Agencies receive a disproportionate number of records requests**
  - **Duchesne County received 828 GRAMA requests between Jan. 1 2017 and Jan. 31, 2018**
  - **Of those, 775 were directed at the Sheriff's Office**
- **Pursuant to Utah Code § 63G-2-801(1)(a), it is a class B misdemeanor for a public employee to intentionally disclose a private, controlled, or protected record knowing that the disclosure is prohibited under GRAMA.**
- **Just because an officer has a different perspective it doesn't mean they have violated Garrity.**

Case Law Updates

US Supreme Court Cases
10th Circuit Court Cases
Utah Court Cases

Kennedy v. Bremerton School District

- **Facts:**
  - **Joseph Kennedy, a high school football coach, engaged in prayer with a number of students during and after school games.**
  - **His employer, the Bremerton School District, asked that he discontinue the practice in order to protect the school from a lawsuit based on violation of the Establishment Clause.**
  - **Kennedy refused and instead rallied local and national television, print media, and social media to support him.**
- **Procedural History:**
  - **Kennedy sued the school district for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.**
  - **The district court held that because the school district suspended him solely because of the risk of constitutional liability associated with his religious conduct, its actions were justified.**
  - **Kennedy appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed**

Kennedy v. Bremerton School District

- **Issue: Is a public school employee's prayer during school sports activities protected speech, and if so, can the public school employer prohibit it to avoid violating the Establishment Clause?**
- **Holding:**
  - **The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression.**
  - **The District disciplined Coach Kennedy after three games in October 2015, in which he "pray[ed] quietly without his students." In forbidding Mr. Kennedy's prayers, the District sought to restrict his actions because of their religious character, thereby burdening his right to free exercise.**

Kennedy v. Bremerton School District

- **Holding:**
  - **As to his free speech claim, the timing and circumstances of Kennedy's prayers—during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities—confirm that Kennedy did not offer his prayers while acting within the scope of his duties as a coach. The District cannot show that its prohibition of Kennedy's prayer serves a compelling purpose and is narrowly tailored to achieving that purpose.**
  - **The Court's Lemon test, and the related endorsement test, are "abandoned," replaced by a consideration of "historical practices and understandings." Applying that test, there is no conflict between the constitutional commands of the First Amendment in this case.**

Dennis v. Fitzsimons

- **Facts:**
  - **In early 2016, Officer Dennis was promoted to Detective Sergeant.**
  - **But on July 27, 2016, Dennis's wife pursued criminal charges against him for domestic violence.**
  - **Sheriff Fitzsimons immediately placed Dennis on paid leave, but directed him to be available (on duty) the next day from 9:00-5:00pm and to contact the office at the start and end of the "shift."**
  - **The next day, Dennis went to the jail for arraignment on the domestic violence charge. When he arrived, he blew a .107. Dennis failed three more tests that day and was unable to be arraigned. He remained in custody and failed to call in as directed.**
  - **A corporal at the jail, called the sheriff and let him know what happened.**

Dennis v. Fitzsimons

- **Facts:**
  - **Sheriff Fitzsimons met with his staff and decided to terminate Dennis.**
  - **Multiple policies were violated:**
    - **Deputies will behave in a manner that does not discredit the SCSO or themselves.**
    - **An employee shall not consume alcohol to a degree that impairs his performance on duty.**
    - **An employee shall not consume alcohol eight hours before going on duty.**

Dennis v. Fitzsimons

- **Procedural History:**
  - **Dennis sued under ADA claiming he was discriminated against for having the disability of alcoholism.**
  - **To win on a disability case, a plaintiff must identify some affirmative evidence that his disability was a "determining factor" in his termination.**

Dennis v. Fitzsimons

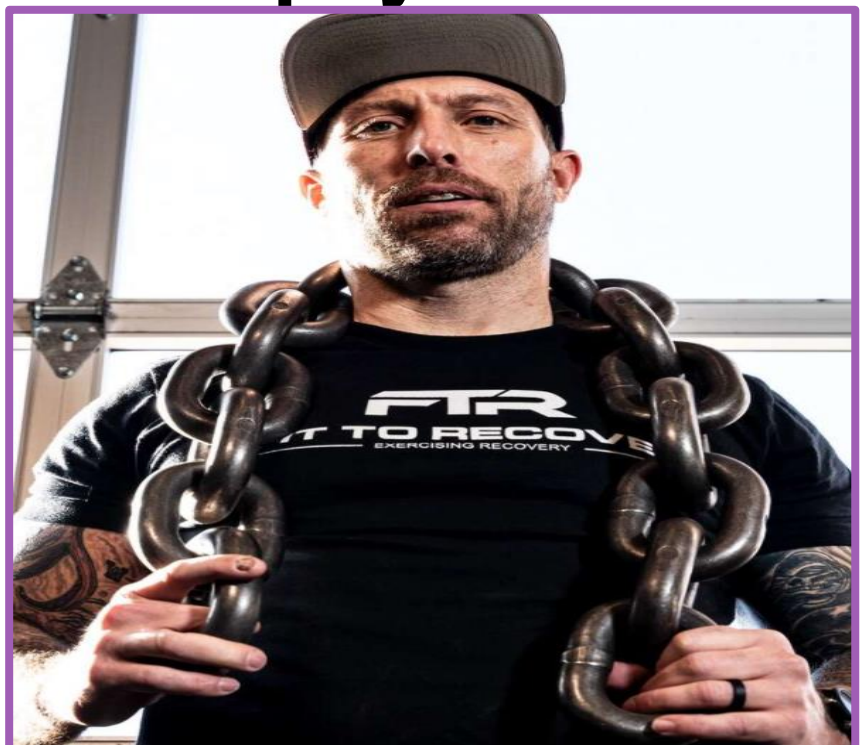
- **Procedural History:**
  - **Evidence of comments about his disability or a close temporal proximity to the employer learning about the disability may give rise to an inference of discrimination.**
  - **District court sided with the Sheriff saying that the plaintiff couldn't prove that the termination was based on the officer's alcoholism but rather on his conduct.**
  - **According to the court, Dennis offered no affirmative evidence. Instead, the record showed:**
    - **Sheriff promoted him to detective after learning of negative incidents associated with drinking.**
    - **Sheriff knew of his alcoholism for over a year before taking action in response to Dennis's conduct.**

Dennis v. Fitzsimons

- **Holding:**
  - **Alcoholism as a disability is a protected class, but misconduct is not protected.**
  - **The ADA does not protect misconduct "merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability."**
  - **Under the ADA, an employer can still prohibit an employee from being under the influence of alcohol at the workplace and hold an alcoholic employee "to the same qualification standards for employment" as other employees.**
- **Takeaways:**
  - **Alcoholism as a disability is a protected class, but misconduct is not protected.**

Dennis v. Fitzsimons

- **Takeaways:**
  - **The ADA does not protect misconduct "merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability."**
  - **Under the ADA, an employer can still prohibit an employee from being under the influence of alcohol at the workplace and hold an alcoholic employee "to the same qualification standards for employment" as other employees.**



Loudermill Rights

- **Due process requires that before a public employee can be dismissed from his job he must be notified of the grounds for termination and given a pre-termination meeting in which he has an opportunity to respond.**
- **Established by Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).**
- **Public employers should coordinate the Loudermill notice and meeting with the employee investigatory interview.**

The Emerging Post-Pandemic Workplace

Remote Work

- **First, step is to determine why an employee has requested to work in a remote capacity. If an employee simply prefers remote work, you may compel them to return onsite. However, if an employee cannot work onsite for health reasons—physical (e.g., immunocompromised conditions) or mental (e.g., anxiety or depression)—the employee may be eligible for leave under the Family & Medical Leave Act (FMLA) or an accommodation under the Americans with Disabilities Act (ADA) and related state law.**

When employees list a health reason for wanting to work remotely

- **Municipal employers should initiate the FMLA process by providing eligible employees with the FMLA's Notice of Eligibility and Rights and Responsibilities form.**
- **Employers also should initiate the ADA's interactive process to determine if the employee's condition qualifies as a disability under the ADA and if the employer can provide an accommodation without undue hardship, e.g., remote work.**

Remote Work Accommodations and the ADA

If an employee asks for a remote work accommodation because of their own disability, follow these FIVE steps to ensure ADA compliance.

1. **First, consider if onsite work is essential –i.e., does the employee have a job where you should require onsite presence?**

- **If onsite work is essential, you may deny the request for telework (although you will need to consider alternative accommodations, e.g., reassignment to a vacant position that can be performed remotely).**

Remote Work Accommodations and the ADA

2. **Second, if needed, ask the employee to verify that they have a disability (physical or mental) that prevents them from working onsite (i.e., get a doctor's note).**
3. **Third, engage in the interactive process and evaluate "undue hardship" and alternative accommodations.**
   - **Avoid denying accommodations based on expense. Instead, focus on disruption to operations and other employees.**
   - **EEOC: "consider all the options before denying an accommodation request", e.g., telework, isolation, heightened safety protocols, and reassignment.**

Remote Work Accommodations and the ADA

4. **Fourth, if no hardship or reasonable alternative exists, and if onsite work is non-essential, then you should grant a disabled employee's request for a remote work accommodation.**

   How should managers respond to non-disabled employees who think it is unfair that their coworker received telework and they must come onsite?

   - **EEOC: "it is unlawful for employers to disclose that an employee is receiving an accommodation . . . ."**
   - **EEOC: you may explain that the company is "acting for legitimate business reasons or in compliance with federal law."**

5. **Document, Document, Document!**

If you provided remote work only in response to the pandemic, will that be some evidence that onsite work really isn't essential?

- **From Q&A D.16 of the EEOC's COVID guidance:**
- **"…the temporary telework experience could be relevant to considering [a] renewed request [for telework post-pandemic]. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information."**

Establishing that onsite work is essential?

If you believe onsite work is essential, here are some strategies to avoid telework as an accommodation post-pandemic:
Document how telework was a challenge.
Review your job descriptions—is there something there about onsite work? If not, add it.
Consider a statement like this when you communicate with employees about returning onsite:

"We are excited to return you to onsite work so that you can resume all the essential functions of your job."

Remote Workforce Moonlighting

How Common Is Remote Work Moonlighting?

- **A recent survey by Resume Builder revealed 69% of remote workers had a second job.**
  - **37% of those have a full-time second job.**
  - **Almost 40% of those with two remote jobs say they do not work more than forty hours total for both jobs.**
- **Forbes reported on a survey that revealed approximately 50% of respondents had worked for another employer while on the clock**

Remote Workforce Moonlighting

- **Decide what limitations the City will set on outside employment and communicate those limitations to your employees and applicants. Possible limitations on outside employment include:**
  - **Does not interfere with job performance or availability during expected work hours.**
  - **Does not create a conflict of interest such as work involving a vendor of the City.**
  - **Does not involve the use or disclosure of confidential or other non-public information.**
  - **Does not use City-provided equipment or resources.**

Enforce relevant company policies, and train managers to effectively address performance issues.

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Questions

Thank you

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