2022 Payroll: Overview of important legal changes

Short-time allowance, Benefits in kind, Corona measures and other legal changes related to payroll accounting

Dear readers,

We are more than happy to once again provide you with an overview of important changes in tax law which are relevant for payroll accounting. The most regulations will take effect from January 1, 2022; individual measures apply with retroactive effect from 2021.

One relevant amendment is the new definition of benefits in kind (*Sachbezug*) for tax purposes as of January 1, 2022. Such new regulation necessitates a review as to whether non-cash benefits (*geldwerter Vorteil*) which have previously been accounted for as benefits in kind will still be subject to flat-rate payroll taxation for benefits in kind and the exemption limit for benefits in kind. A large number of tax regulations have also been extended or adapted as a result of the Corona pandemic. Particular attention should be paid to the increase in the minimum wage from 2022.

We hope that the following pages will provide you with valuable information. In case of any questions, please do not hesitate to contact us.

Your Baker Tilly Payroll Team

A. Short-time allowance

Extension of special short-time allowance regulations

The facilitated access to short-time allowance, the entitlement to increased benefit rates and the options to earn additional income during short-time work have currently been extended until March 31, 2022.

According to such extension, employers are entitled to short-time allowance from the German Federal Employment Agency until March 31, 2022, if at least 10 percent of their employees suffer a loss of earnings of more than 10 percent. Even temporary workers are eligible for support until March 31, 2022. Half of the social insurance contributions for lost working hours will be reimbursed until March 31, 2022.

Short-time allowance can be obtained up to 12 months. For employees whose entitlement to short-time allowance has arisen by the end of March 31, 2021, the period of entitlement will be extended to up to 24 months, however, not beyond March 31, 2022.

For employees subject to short-time work with a loss of earnings of at least 50 percent, short-time allowance will continue to be topped up from January 2022 until March 2022: From the fourth month of receipt – calculated from March 2020 –to 70 percent (77 percent for households with children) and from the seventh month to 80 percent (87 percent for households with children) of the lost net remuneration. This requires for the employees to have either acquired an entitlement to short-time allowance by March 31, 2021 or to have been subject to short-time work for the first time since April 2021.

B. Benefits in kind

1. Differentiation between cash benefit and benefit in kind

1.1. Compensation in kind for employees

1.1.1. Basic principle

Under the 2019 Annual Tax Act, the legislator restricted the concept of compensation in kind in Art. 8 (1) sentence 2 EStG (German Income Tax Act). As of January 1, 2022, vouchers and cash cards will only qualify as benefit in kind if they exclusively allow for a purchase of goods and services and meet the criteria pursuant to Art. 2 (1) No. 10 ZAG (German Payment Services Supervision Act). Reference to the ZAG resulted in uncertainty in practice. The German Federal Ministry of Finance (“BMF”) has therefore commented on the distinction between cash benefits and benefits in kind in a letter dated April 13, 2021, BStBl. 2021 I, p. 624.

1.1.2. Does the new regulation aim to minimize compensation in kind?

No. We wish to emphasize that the new regulation's objective is to create clearer criteria for distinguishing between money, e-money and benefits in kind. However, the administration explicitly did not intend to create the impression – which is currently assumed in the business and consulting communities – that the tax authorities wanted to exclude so-called marketplaces (such as Amazon vouchers) from the tax concession for compensation in kind.

1.1.3. What are the essential criteria of the new definition of compensation in kind?

In summary, vouchers still constitute benefits in kind if these vouchers

a) exclusively allow for a purchase of goods and services from the employer or a third party (factual relevance) and

b) as of January 1, 2022, also meet the criteria pursuant to Art. 2 (1) No. 10 ZAG (ZAG relevance).

Consequently, if both the factual relevance as first criterion for the assumption of a benefit in kind pursuant to subsection 24 of the BMF letter of April 13, 2021, *ibid.*, and the ZAG relevance have been fully met, the benefit constitutes a benefit in kind. Consequently, the exemption limit for benefits in kind pursuant to Art. 8 (2) sentence 11 EStG and the alternative lump sum taxation pursuant to Art. 37b (2) EStG might also be applicable.

2. Increase of the exemption limit for benefits in kind

As of January 1, 2022, the exemption limit pursuant to Art. 8 (2) sentence 11 EStG, as amended by the 2020 Annual Tax Act, will be increased for tax-exempt **compensation in kind**, from previously EUR 44 to EUR 50 per month. At the same time, the criteria according to which the tax authorities recognize cash cards and vouchers provided by the employer as compensation in kind will be amended (see above).

3. New benefit in kind values as of January 1, 2022

The per diem value for **meals** (free meals) was increased from previously EUR 3.47 to **EUR 3,57** for lunch and dinner and for breakfast from EUR 1.83 to **EUR 1.87** as of January 1, 2022. Consequently, as of January 1, 2022, the monthly values for lunch and dinner amount to **EUR 107.00** each and for breakfast to **EUR 56.00**.

The monthly value for **free accommodation** now amounts to **EUR 241.00**.

When providing employees with an apartment, the typical local rent serves as basis for the non-cash benefit from such provision. If such typical local rent cannot be determined or can only be determined with unreasonable effort, fixed square meter prices apply (Art. 2 (4) SvEV (German Compensation Ordinance for Social Insurance Purposes)). In 2020, such square meter price for the free or reduced-price provision of an apartment was EUR 4.23 per month. The benefit in kind

value for the free or reduced-price provision of a simply furnished apartment amounts to EUR 3,46 (per month per square meter).

C. Corona measures

1. Corona bonus

Employers may continue to pay to their employees a tax and social security exempt Corona bonus in the amount of up to EUR 1,500 or may grant benefits in kind up to such amount. Such option was originally applicable to payments up to December 31, 2021 and has now been extended for payments until March 31, 2022. The amount of up to EUR 1,500 can only be utilized once per employment relationship across calendar years. This means that if the maximum Corona bonus has already been paid to an employee in 2020 or 2021, no further payment will be possible in 2022.

The prerequisites for the Corona bonus are that the bonus will be paid

- in addition to the wages owed anyway and
- in order to mitigate the employee's additional burdens placed on the employee by the Corona crisis (Art. 3 No. 11a EStG).

Currently, the German Federal Ministry of Finance plans to increase the Corona bonus to EUR 3,000.

2. Home office allowance

In 2020 and 2021, employees will be able to deduct up to EUR 5 from their taxes as income-related expenses for each calendar day on which they worked exclusively from home during the Corona pandemic. According to the coalition agreement, the German government plans to extend this allowance until the end of 2022.

The allowance is limited to a maximum amount of EUR 600 per year.

3. Reimbursement of extraordinary care services

In 2022, the employer can continue to pay to his employees an amount of up to EUR 600 per calendar year, free of tax and social security contributions, for extraordinary care services in addition to the wages owed anyway. The existence of an additional need for care is assumed if the employee works at extraordinary working hours due to the Corona crisis or if the regular childcare services have ceased as a result of the closure of schools and care facilities (e.g., daycare centers, after-school care centers, company kindergartens) ordered to contain the Corona crisis. The tax- and social security-free reimbursement is only possible upon proof of corresponding costs and generally relates to care services for relatives in need of care or for children under 14 years of age.

4. Cross-border commuters

Over the past nearly two years, many countries have taken drastic measures to prevent the spread of the Covid 19 virus. Companies and their international workers have been and continue to be severely affected by border closures and international travel restrictions.

For employees who work across borders, for example, because they perform an international function, travel restrictions and changes in travel behavior also have an impact on the (wage) tax assessment of their activities.

In the following, we would like to inform you about the consultation agreements that are currently in place between Germany and various neighboring countries in the context of the Covid 19 pandemic.

Current regulations

At the end of 2021, Germany extended the previously valid CTs with the following countries initially until March 31, 2022: France, Belgium, Luxembourg, Austria, the Netherlands and Switzerland. The consultation agreements with Poland had not yet been extended by the editorial deadline. There has never been a comparable agreement with Denmark and the Czech Republic.

Taxation principles

When employees work across borders, they are subject to the following taxation principles, which are briefly described in the following on the basis of the OECD Model Tax Convention (OECD Model) for the avoidance of double taxation.

Pursuant to Art. 15 (1) of the OECD Model, an employee's worldwide income is generally taxable in his state of residence. However, the right of taxation is attributed to the state in which the work is performed if the work is actually performed in such state or if the exception pursuant to Section 2, the so-called 183-day rule, applies.

If an employee's physical presence is taken as a basis for determining in which country the employee is liable to tax, the change in travel behavior due to the measures against Covid-19 (i.e., in particular the recommendation to work from the home office) would generally lead to a shift in the right of taxation from the originally intended state in which the work is performed to the state of residence. Therefore, the OECD encouraged countries in Europe as early as April 2020 to take measures against unplanned tax effects and burdens on employees.

The provisions of the Income Tax Treaties are applicable despite these agreements. However, they are modified by the individual consultation agreements for a limited period of time.

General rule - Fictitious working days

All consultation agreements qualify the Covid-19 pandemic as a force majeure event. As a result, working days performed in the country of residence due to the pandemic related measures are allocated for tax purposes to the country in which the employee would have worked under normal conditions (i.e., without Covid-19). If an employee divides his or her working days between two countries, this division remains in place even during the pandemic, even if the employee no longer works according to this division, e.g., by working from home.

However, this provision does not apply to working days that have been contractually agreed as "normal" home office working days.

The employees are obliged to keep corresponding records and to make them available to the tax authorities upon request. Of course, this regulation can only be applied if the respective salary for the working days in the home office is actually taxed by the country in which the employee would have worked without the Covid 19 related measures.

If the employee stays at home and continues to receive salary payments for days of inactivity, the above statements also apply.

Particularities

a) Cross-border commuters

Cross-border commuters are generally subject to the special regulations contained in several Income Tax Treaties (for example, between Germany and Austria/France/Switzerland), i.e., the right of taxation belongs to the country of residence. Special regulations for the crediting of withholding taxes must be observed. The cross-border commuter must generally return to the place of residence on a daily basis in order to preserve the right of taxation in the state of residence. In this respect, the Income Tax Treaties also contain limits for days on which the employee does not return to his state of residence (so-called non-return days), which must be observed in order not to lose the cross-border commuter status.

Due to the Covid 19 pandemic, Germany and its neighboring countries, with which cross-border commuter regulations exist, agreed that working days spent in the home office due to the Covid 19 pandemic do not have to be counted as so-called non-return days and thus there is no risk of employees losing their cross-border commuter status.

In this case, too, employees are required to keep appropriate records.

b) Payments from social security authorities (unemployment benefit, short-time allowance, etc.)

Some of the consultation agreements contain principles on how the above-mentioned payments are to be treated. In relation to Austria, Luxembourg and Switzerland, short-time allowances and unemployment benefits paid in one country are generally taxable in the country making the payment.

In addition, the Germany-Switzerland agreement stipulates that Germany may tax Swiss payments if these are not taxed in Switzerland. Furthermore, Switzerland will not tax German payments for short-time allowance or unemployment benefits.

The consultation agreements between Germany and France as well as Germany and the Netherlands, on the other hand, contain the following deviating provisions:

According to the consultation agreement between Germany and France, the above-mentioned payments become subject to taxation in the state in which the taxpayer is considered domiciled from the agreement's perspective, i.e., in the state of residence.

According to the consultation agreement between Germany and the Netherlands, the above-mentioned payments from Germany to a tax resident in the Netherlands are taxable in Germany if the annual amount exceeds EUR 15,000. Otherwise, the right of taxation falls to the country of residence.

c) Permanent establishment risk

Home office activities can also entail tax risks for the employer, in particular if the internationally active employees are allowed to negotiate and/or sign contracts on behalf of the employer company or have an exposed position while working in the home office.

The consultation agreement between Germany and Austria contains a rule which prevents the risk of a permanent establishment for income tax purposes. In this respect, it is agreed that activities performed from the home office due to the Covid 19 measures do not lead to a permanent establishment for the employer in the country of residence. However, this clear clarification is only contained in the consultation agreement with Austria. For all other countries, a case-by-case review should be made.

Conclusion

If you employ cross-border workers, it is worth checking and consulting with the country in which the work was originally performed in order to withhold taxes in accordance with the consultation

agreements already in the payroll accounting. In any case, the employees concerned should be offered support in preparing their income tax returns for 2021 and 2022.

D. Other legal changes related to payroll accounting

1. Increase of the minimum wage

The minimum wage refers to the minimum wage level set by collective agreements or by law. Until December 31, 2021, the minimum wage was EUR 9.60 per hour. Since January 1, 2022, the minimum wage has been EUR 9.82. From July 1, 2022, the minimum wage will increase to EUR 10.45. This minimum wage is generally applicable to all employment relationships with a place of employment in Germany. Exceptions may apply to certain employees, such as interns and trainees.

2. Mandatory additional contributions by the employer to the company pension scheme

Under the Occupational Pensions Strengthening Act, employers are required to pay an additional 15% of the employer’s deferred compensation as an employer's contribution to the pension plan, pension fund or direct insurance, to the extent the employer saves social insurance contributions through such deferred compensation.

Since January 1, 2019, this has already applied to new company pension scheme contracts concluded from this date. From January 1, 2022, the obligation now also applies to all existing contracts, regardless of the contract’s start.

If collective bargaining agreements exist, the obligation to make additional contributions may be waived.

3. Employer's contribution to unemployment insurance for employees who reach the statutory retirement age

Employees become exempt from unemployment insurance at the end of the month in which they reach the statutory retirement age. As of such date, the employee no longer pays employee contributions to unemployment insurance.

The obligation to pay the employer's contribution to unemployment insurance is suspended for the period from January 1, 2017 to December 31, 2021. As of January 1, 2022, employers are again obliged to pay the employer's contribution.

4. Higher allowances for employee shareholdings (Art. 3 No. 39 EStG new)

The granting of employee shares as part of the salary package for employees is becoming increasingly popular. In this case, the employer transfers or assigns capital participations (in particular

shares) in the employer's company or a group company[1] of the employer to its employees. The employees can thus participate in the company's success.

The discounted or free transfer of such asset participations to the company's own employees generally constitutes wages subject to tax and social security contributions, as the employment relationship is generally the reason for this transfer. For asset participations that took place until December 31, 2020, an allowance of EUR 360 per year per employee applied. Such allowance has been quadrupled retroactively for transfers from January 1, 2021 to EUR 1,440 euros per year and employee (Art. 3 No. 39 EStG new and Fund Location Act of June 3, 2021[2]). If the difference between the so-called fair market value (in the case of tradable shares, this is the stock market price) and the price paid by the employee for the asset participations does not exceed a total amount of EUR 1,440 per year, the transfer is exempt from payroll tax and social security contributions. The tax-exempt amount must already be taken into account in the payroll. But:

The prerequisite for this allowance is (furthermore) that the asset participation is available to at least **all** employees who have been in a current employment relationship with the employer's company for one year or longer without interruption when the offer is announced. The participation offer must also include marginally employed persons, part-time employees, trainees and pensioners who continue to be employed. Therefore, if the employer offers the participation only to a selected group of employees (e.g., executives), this allowance does **not** apply.

In addition, promises of bonuses under the law of obligations, such as virtual participations, do not meet the requirements for the granting of this allowance.

5. Deferred taxation of employee shareholdings in SMEs (Art. 19a EStG)

If employees receive asset participations in their employer's company at a discount or free of charge, this generally results in a non-cash benefit subject to payroll tax. Often, employees do not have the necessary liquidity available at the time of the transfer to pay the payroll tax on the shareholding received. This can lead to employees having to sell parts of the shareholding again a logical second after receiving it, which counteracts the actual purpose of the employee shareholding.

The legislator has recognized this and now allows deferred taxation for capital participations in micro, small and medium-sized enterprises. To this end, it has inserted the new Art. 19a EStG into the Income Tax Act. According to such Article, the employee does not have to pay wage tax on the capital participation received until he or she resells the participation or transfers it free of charge, however, not later than after twelve years or upon the employment relationship’s termination. This is intended to prevent the employee from having to pay payroll tax on the shareholding in the employer's company at the time it is received, without having received any liquid funds.

[1] Group company pursuant to Art. 18 AktG (German Stock Corporation Act)

[2] BGBl. 2021 I p. 1498, BStBl 2021 I p. 803

However, this rule has some pitfalls. For example, such deferred taxation is only possible if, at the time of the transfer of economic control, the employer's company in which the employee acquires an interest does not exceed the thresholds for micro, small and medium-sized enterprises as recommended by the European Commission[3]. Accordingly, the following thresholds currently apply:

- Less than 250 employees according to the number of annual work units as per the reporting date of the last financial statements. Partner companies and affiliated companies are to be included.

- Annual sales of no more than EUR 50 million or annual balance sheet total of no more than EUR 43 million as per the reporting date of the last financial statements. Partner companies and affiliated companies are to be included.

The SME status is only lost for the employer's company if it exceeds the threshold in two consecutive fiscal years.

In addition, deferred taxation requires the employee’s consent. It is only permissible until the payroll tax certificate is sent.

When determining the non-cash benefit, the tax-free allowance under Art. 3 No.39 EStG of currently up to EUR 1,440 per year and employee must be taken into account if the requirements pursuant to Art. 3 No. 39 EStG are met. However, deferred taxation is expressly not possible if shareholdings in group companies of the employer are transferred[4].

Furthermore, this deferral of the payroll tax liability does not apply to any social security contributions that may be due. Transfers of employee shareholdings which have not been taxed yet are therefore already subject to social security contributions at the time of transfer, as was previously the case.

Deferred taxation in accordance with Art. 19a EStG is applicable for the first time to capital participations transferred after June 30, 2021.

6. BSG ruling on net wage optimization dated February 23, 2021 (file no. B 12 R 21/18 R)

Following the reasoning of the BSG (German Federal Social Court) ruling, the top social insurance organizations redefined their legal opinion regarding the treatment of tax-exempt or flat-rate taxed remuneration components granted in addition to remuneration for contribution purposes in a meeting on November 11, 2021, as the previous legal opinion contradicts the BSG ruling. This has an impact in particular on circumstances in which no additionality of the employer benefit was required

[3] Threshold values pursuant to Article 2 Sec. 1 of the Annex to the Commission Recommendation dated May 6, 2003 in connection with SMEs (ABI. L 124 dated May 20, 2003, p.26)

[4] BMF letter dated November 16, 2021, BStBl. 2921 I, p. 2308, marginal note 34

for tax exemption (example: private use of company PCs and telecommunications equipment as well as accessories and software pursuant to Art. 3 No. 45 EStG).

In the case of deferred compensation in the sense of a prior waiver of compensation and the resulting new contributions by the employer, one must therefore generally assume that the new contributions are not additional and cannot/can no longer be exempt from contributions.

This amended legal interpretation of the top social insurance organizations is to be applicable for payroll accounting periods from January 1, 2022 at the latest.

7. Increase of tax-deductible relocation expenses

In connection with relocation expenses which can be reimbursed by the employer free of tax and social security contributions, the following changes apply with retroactive effect from April 1, 2021 and April 1, 2022, respectively. The day before the loading of the goods being moved is decisive.

7.1. Additional tuition fees

If a relocation necessitates additional tuition for the children of the moving employee:

	as of 01.04.2021	as of 01.04.2022
Tax-exempt amount per child	€ 1,181	€ 1,160

7.2. Sonstige Umzugsauslagen

Pauschbetrag für die sonstigen Umzugskosten für Umziehenden ab 01.04.2021 = 870 €:

	as of 01.04.2021	as of 01.04.2022
Moving person	€ 870	€ 886
Every other person living in a common household after the relocation	€ 580	€ 590
Standard deduction if, prior to loading the goods to be moved or after the relocation, no own apartment was furnished (Art. 10 (2) BUKG (German federal law on relocation costs)	€ 174	€ 177

For all relocations prior to April 1, 2021, the standard deductions pursuant to the old BMF letter dated May 20, 2020 will be applied.

8. Employer's contributions to health promotion

In its letter regarding the promotion of health dated April 20, 2021, the German Federal Ministry of Finance (BMF) defined under what circumstances employer-funded disease prevention and operational health promotion measures are subject to tax exemption pursuant to Art. 3 No. 34 EStG. What needs to be observed by companies in connection with the tax exemption?

According to the explanatory memorandum, tax-exempt measures include

1. measures for individual, behavior-oriented prevention (prevention courses) certified in accordance with Art. 20 (2) sentence 2 SGB V (German Social Code, Book V), or

2. **non**-certified measures at the workplace which are beneficial to the employee's health (promotion of health in the workplace) which comply with the criteria defined by the Central Federal Association of Health Insurance Funds.

Please note that typical membership fees in sports clubs, gyms and similar facilities continue to **not** be subject to tax exemption pursuant to Art. 3 No. 34 EStG. In these cases, the employer must examine whether another tax exemption option applies (for example the EUR 50 exemption limit for benefits in kind).

The BMF concludes that services provided by the employer to promote health in the workplace can be provided tax-free if they are **predominantly in the interest of the company**, irrespective of the provisions of Art. 3 No. 34 EStG. These can include, for example, the provision of height-adjustable desks, the provision of sports equipment for a company fitness room, the provision of advice to individual employees on individual problems relating to the workplace or the effects on individual performance in the workplace (e.g., psychological counseling by specialist staff) and vaccinations in accordance with the recommendations of the German Standing Commission on Vaccination (STIKO).

9. Short-term employment – BSG decision of November 24, 2020 (B12 KR 34/19 R)

Short-term employment exists if the employment is limited to a maximum of three months or 70 working days within one calendar year according to its nature or is contractually limited in advance, unless the employment is performed on a professional basis and the remuneration exceeds EUR 450 per month.

According to a BSG decision, the distribution of the working days within one working week is irrelevant. Consequently, the time limit of three months or 70 working days are equal alternatives to classify as short-term employment, irrespective of whether the employment is performed on more or less than 5 days per week.

10. German social insurance: authorized representative in Germany

Foreign employers with no registered office in Germany which employ workers subject to social insurance contributions in Germany, must appoint an authorized representative in Germany as of January 1, 2021 (Art. 28f (1b) SGB IV). Such representative must keep and store payroll records in German language and hold them available for future tax audits. The employee or a third party (for example, a tax advisor) may act as representative. However, the employer remains liable for the fulfilment of obligations.

One must observe that a foreign employer with no registered office, management, permanent establishment or permanent representative in Germany pursuant to Art. 38 (1) EStG does not qualify as German employer pursuant to wage tax law. Consequently, a foreign employer's obligations under tax and social insurance law are subject to different tax regimes.

11. Standard deductions for accommodation abroad and additional meal allowances

The tax and social insurance-exempt standard deductions for additional meal allowances and accommodation abroad applicable as of January 1, 2021 continue to apply for 2022.

The values of the foreign daily allowances and foreign accommodation allowances were not redefined for 2022 and will thus be carried over from 2021 for all federal states. This step on the part of the BMF is due to the Covid 19 pandemic.

12. New contribution assessment limits and calculation parameters in 2022 social insurance

2022 social insurance calculation parameters			
2022 contribution assessment limits		**monthly**	**annually**
Health and nursing care insurance		EUR 4,837.50	EUR 58,050.00
Pension and unemployment insurance (west)		EUR 7,050.00	EUR 84,600.00
Pension and unemployment insurance (east)		EUR 6,750.00	EUR 81,000.00
2022 annual earnings limit		**monthly**	**annually**
General (Art. 6 (6) SGB V)		EUR 5,362.50	EUR 64,350.00
Special (Art. 6 (7) SGB V)		EUR 4,837.50	EUR 58,050.00
2022 contribution rates	**Contribution rate**	**Employer's contribution rate**	**Employee's contribution rate**
Pension insurance	18.600 %	9.300 %	9.300 %
Unemployment insurance	2.400 %	1.200 %	1.200 %
Health insurance: • general • reduced	 14.600 % 14.000 %	 7.300 % + ½ % individual* AC 7.000 % + ½ % individual* AC	 7.300 % + ½ % individual* AC 7.000 % + ½ % individual* AC
Average additional contribution (AC) **depending on the respective health insurance fund*	1.300 %	0.650 %	0.650 %
Nursing care insurance	3.050 %	1.525 %	1.525 %
Nursing care insurance for the childless	3.400 %	1.525 %	1.875 %
Saxony nursing care insurance	3.050 %	1.025 %	2.025 %
Saxony nursing care insurance for the childless	3.400 %	1.025 %	2.375 %
Employee eligible for state aid	1.525 %		1.525 %
Employee eligible for state aid for the childless	1.875 %		1.875 %
Insolvency payment contribution	0.09 %	0.09 %	
Artists' social security contribution	4.20 %	4.20 %	
Maximum subsidy for privately insured persons		**Total contribution**	**Employer contribution**
Health insurance		Individually	EUR 384.58
Health insurance without additional allowance to sickness benefit		Individually	EUR 370.07
Nursing care insurance		Individually	EUR 73.77
Saxony nursing care insurance		Individually	EUR 49.58

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