INDEPENDENT BUSINESS ASSOCIATION

16541 Redmond Way NE #336C
Redmond, WA 98052

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IBA SMALL BUSINESS REPORT - Feburary 19, 2016

2016 Legislature More Than Half Way Done — **Page 1**

Senate Rejects 2/3s Vote of Legislature To Raise Taxes — **Page 1**

Good News — **Page 1**

Not So Good News — **Page 1**

State Senate Up For Grabs In 2016 — **Page 2**

Governor Inslee Could Lose Another Cabinet Member — **Page 3**

Death of Justice Scalia Affects Your Business — **Page 3**

Restricting Employees From Talking About Wages, Etc. — **Page 4**

Watch Out For “Ban the Box” Laws — **Page 5**

Data Breach and Identity Theft Affecting Small Businesses — **Page 6**

Avoiding Employee Lawsuits—4 Great Examples — **Page 7**

NOTICE: The information contained in the publication is intended to alert the reader to issues, laws, regulations and events which may affect the operations o f a small business. The information is presented is in a summary form and is not intended to assure compliance with laws or regulations which may apply to any specific business. The information is not intended as legal advice. The reader is advised to seek the advice of a qualified attorney, accountant or other advisor to obtain specific compliance advice with respect to the laws, regulations or other issues which may apply to a specific business.

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February 19, 2016

2016 Legislature More Than Half Way Done

On February 9th, the 2016 Legislature reached its midway point, the 30th day of its scheduled 60-day 2016 legislative session. The legislature is scheduled to end its regular session on March 10th. There are really only a small number of things the 2016 Legislature needs to do. They are:

- Address Initiative 1366 which requires the Legislature to pass a constitutional amendment to require at 2/3s vote by the Legislature to increase taxes or suffer a one-percent drop in the state's sales tax rate which would cut state revenues by $8 billion over 6 years. See below for more information
- Develop a plan to fully fund basic K-12 public education as required by the Washington State Supreme Court
- Adopt a state supplemental budget to address new state spending issues since the passage of the state's budget last July that includes, new costs for fighting the forest fires last summer and increasing social service costs need to be addressed.

Senate Rejects 2/3s Vote Of The Legislature To Raise Taxes

Remember **Initiative 1366** that you voted on last November? **Initiative 1366** directed the Legislature to pass a state constitutional amendment to require a 2/3s vote of the Legislature to raise state taxes or suffer a 1% reduction of the state's sales tax rate effective April 15, 2016.

SJR 8211 to enact a state constitutional amendment to require a 2/3s vote of the Legislature to raise state taxes was brought up in the Senate on Thursday, February 11th and failed to pass. All of the majority caucus (All Republicans and one Democrat) voted for SJR 8211 and all other Democrat Senators voted no. It takes a 2/3s vote of the Senate to pass a state constitutional amendment – or 33 votes. There were only 26 pro votes.

So what happens now???

Will the state's sales tax rate go down 1% on April 15, 2016???

Not likely, expect the Washington State Supreme Court to step in soon and find Initiative 1366 unconstitutional like a Superior court judge in King County has already done.

Stay tuned, this will be VERY interesting and it's all about your money.

Good News

The following legislation that will hurt small businesses has not yet passed its house of origin. Some of them could pass their chamber of origin by this coming Wednesday.

HB 1006 and SB 5567 Wage violations and damages

HB 1163 Mandatory Paid vacation leave

SHB 1273 and SB 5459 Family & medical leave insurance

HB 1354 and SB 5569 Employment Anti retaliation Act

HB 1355 and SB 5285 Minimum hourly wage increase

HB 1356 and SB 5306 Sick & safe employment leave

HB 1484 and SB 5699 Capital gains excise tax

HB 1519 and SB 5566 Employee status enforcement

HB 1701 and SB 5608 Employment applicants/convictions, arrests, etc.

HB 1894 Protection of workers

Not So Good News

The following legislation that may hurt some small businesses has passed its house of origin and is awaiting a hearing in the opposite chamber.

ESHB 1646 Equal pay and opportunities An employer may not engage in the following practices: require employee not to disclosure their wages as a condition of employment; require an employee to sign a document that prevents the employee from disclosing his or her wages; and retaliate

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against an employee for: inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of another employee; asking the employer to provide a reason for the employee's wages or a lack of employment advancement available to the employee; or aiding or encouraging an employee to exercise their rights.

Retaliation. An employer may not discharge or otherwise discriminate against an employee for filing a complaint or taking other specified actions under the EPA (Equal Pay Act) or workplace practices provision. Enforcement. The cause of action under the EPA is modified and a cause of action is allowed for a violation of the workplace practices and retaliation provisions. The EPA cause of action is no longer limited to females. Under all of these provisions, an employee may seek actual damages; statutory damages of twice the actual damages or $5,000, whichever is greater; interest; and costs and reasonable attorneys' fees. The court may also order reinstatement and injunctive relief.

Other. Rule-making by the Department of Labor and Industries is authorized. IBA members voted to oppose this legislation. HB 1646 is now in the Senate Commerce and Labor Committee awaiting a hearing. **You should contact your Senator about your position on HB 1646.**

HB 2307 Accommodating Pregnant Workers

Establishes new requirements for employers to accommodate pregnant workers. It is complex legislation and requires employers to take certain actions. Plus, it also makes it unlawful for an employer: to fail or refuse to make reasonable accommodation for an employee for pregnancy, childbirth, or a pregnancy-related health condition, including but not limited to, the need to express breast milk, unless the employer can demonstrate an undue hardship on the employer's program, enterprise, or business; to take adverse action against an employee who requests or uses an accommodation; to deny employment opportunities to an otherwise qualified employee if the denial is based on the employer's need to make reasonable accommodation; to require an employee to take leave if another reasonable accommodation can be provided, unless she declines to accept the accommodation offered in lieu of taking leave; or to require an employee to accept an accommodation that she chooses not to accept.

Reasonable accommodation means measures that enable the proper performance of the job held or desired and that enable the enjoyment of equal benefits, privileges, or terms and conditions of employment. Reasonable accommodation includes, but is not limited to: allowing for time off to recover from childbirth; acquiring or modifying equipment for an employee's work station; providing for a temporary transfer to a less strenuous or less hazardous position; providing assistance with manual labor; and modifying work schedules. An employer is not required to create additional employment that the employer would not otherwise have created, or to discharge, transfer, or promote any employee, unless the employer would do so to accommodate other classes of employees who need accommodation. The bill does not preempt or otherwise affect existing laws addressing discrimination or in any way diminish or limit the coverage for a condition related to pregnancy, childbirth, or a pregnancy-related health condition. HB 2307 is now in the Senate Commerce and Labor Committee awaiting a hearing. **You should contact your Senator about your position on HB 2307.**

Right To Use The Restroom SB 6443

Would overturn the recently adopted rules from the Washington State Human Rights Commission to allow individuals to use the restroom for the gender the individual relates to, was rejected by the Senate. This issue is now dead for the 2016 Legislative Session.

State Senate Up For Grabs on 2016

Republican Senator Don Benton and Republican Senator Bruce Dammeier

have announced that they will not run for re-election in 2016. That will leave the Senate majority at 24 majority members (23 Republicans and one Democrat) to 24 Democrats. As you can see, this is a split Senate and it takes a majority of the Senate to decide what they will and will not work on or pass. The current Senate majority members (25 Republicans and one Democrat) has been the group who has blocked higher state taxes, blocked all sorts of crazy new state labor laws, blocked excessive state spending, stopped higher fuel prices as proposed by Governor Inslee, and done much more to benefit small businesses. Senator Benton and Senator Dammeier's decision will put both of their Senatorial seats in play in the November 2016 election. This is a VERY BIG issue for small businesses as is the entire 2016 November General Election. Start now to plan to help elect legislative candidates in 2016 who will protect your business.

Governor Inslee Could Lose Another Cabinet Member

Governor Inslee was shocked and angered when the Washington State Senate Majority rejected the confirmation of his appointment of Secretary of Transportation Lynn Peterson. Ms. Peterson had been serving as State Transportation Secretary for the past three years without yet being confirmed as required by the Senate. Most of the Governor's cabinet appointments are subject to confirmation by the Senate.

Rumors abound in Olympia that the Senate may reject yet another cabinet appointment by Governor Inslee. We'll keep you informed.

Governor Inslee has already lost 3 of his appointed cabinet members. (1) Secretary of Transportation Lynn Peterson, (2) Department of Corrections Secretary Dan Pacholke who tendered his resignation to Governor Inslee as a result of the ongoing investigation of the Department of Corrections for a computer error that allowed the early release of about 3200 prisoners from the state' prisons. News reports say that those releases resulted in the death of two individual by some of the prisoners who were released early, and (3) Department of Social and Health Services, Secretary Kevin Quigley told Governor Inslee in early January that he was resigning as soon as the Governor could find a replacement. It is not uncommon as cabinet members often leave after the first term of any administration to pursue other interests.

Death of Justice Scalia Affects Your Business

With the unexpected death of U.S. Supreme Court Justice Antonin Scalia, many important issues impacting small businesses will likely be left undecided. Justice Scalia was one of the conservative justices on the U.S. Supreme Court. He voted with other conservative justices on most issues and thus gave the U.S. Supreme Court a conservative majority – 5 to 4. With his passing, it leaves the Court with a 4-4 split. Below is a list of the biggest issues that the U.S. Supreme Court is expected to hear and decide in the next year – many of which have direct or indirect impacts on your small business.

Below are policy areas that hang in the balance:

Union Dues

The California Teachers Association has a pending case before the U.S. Supreme Court dealing with whether teachers can be required to pay union dues to the teacher's union if an individual teacher does not want to participate in the union. This is a HUGE public employees' case which makes it a HUGE taxpayer case, and a HUGE small business case. The teachers challenging the union say that their union dues are being used against their political stand on important issues and are also being used to support candidates the teachers do not support. The lower court had ruled for the unions and required the teachers to pay "agency fees" (part of the full union dues) to the union to support the union in its negotiating work on behalf of the teachers. With the passing of Justice Scalia, the Supreme Court is likely to come to a 4:4 decision that would leave the lower court decision the final decision.

Health Care

Obama Care is the focus of a lawsuit by charities, schools, and religious organizations about the requirement in Obamacare requiring employers to provide females with birth control. With the passing of Justice Scalia, the Supreme Court is likely to come to a 4:4 decision that would leave this issue unresolved.

Abortion

The State of Texas put significant new requirements on abortion clinics. The abortion clinics brought a challenge of those requirements to the courts. A lower court has upheld the requirements imposed by the State of Texas. Pro-abortion advocates have appealed the lower court decision and the U.S. Supreme Court is scheduled to hear

this appeal this year. With the passing of Justice Scalia, the Supreme Court is likely to come to a 4:4 decision that would leave the lower court decision the final decision.

Affirmative action:

A lower court has upheld the university's use of race as a factor in admissions based on affirmative action. The lower court upheld the university's use of race as a factor in admissions. . With the passing of Justice Scalia, the Supreme Court is likely to come to a 4:4 decision that would leave the lower court decision the final decision.

Separation of church and state

A preschool in Missouri was denied a state grant for installing recycled tire material to make its playground safer. The school challenged the decision saying that the state was discriminating against the school because it was a religious school. Several states have laws that limit state grant programs to public schools, not private or religious schools. The decision in this case by the U.S. Supreme Court would effectively undo all of those laws. Some state courts have struck down the voucher programs that do not include private and religious schools. . With the passing of Justice Scalia, the Supreme Court is likely to come to a 4:4 decision that would leave this question unresolved in many states.

Climate change

President Obama, through the EPA imposed some very strict emission limits on fossil fuel electricity generating power plants. The power plants have challenged those regulations. Justice Scalia was expected to be one of five votes to reject the power plant emission regulations. With the passing of Justice Scalia, the Supreme Court is likely to come to a 4:4 decision that would leave this issue to be decided by the Federal District Court in D.C. which is likely to uphold the emission regulation decision.

Immigration

President Obama has issued an executive order to allow up to five million immigrants to apply for legal work status. With the passing of Justice Scalia, the Supreme Court is likely to come to a 4:4 decision that would leave the executive order in place.

Restricting employees from talking about wages, etc.

Some businesses are imposing rules/ restrictions on their workers not to talk with their co-workers about their wages, their terms of employment, etc. The Lunt Law Group advises that businesses doing this may be violating the National Labor Relations Act (NLRA).

Most people know the NLRA as the federal law that governs the relationship between private companies, their employees, and unions. What they miss is that the NLRA law also protects employees who engage in concerted, protected activity, regardless of whether a union is involved or not.

One of the concerted, protected activities protected by the NLRA happens to be employees discussing terms and conditions of employment with co-workers. This includes co-workers discussing wages, salaries, commissions, bonuses, and any other type of compensation. It also includes discussions about any workplace policies, such as breaks rules, overtime requirements, appearance standards, discipline policies, etc. Essentially, if a topic is directly related to an employee's compensation, job duties, or performance standards, he or she can discuss it with co-workers.

One additional thing to keep in mind is that, under the NLRA, you can violate the law simply by having a policy in place prohibiting employees from discussing their wages or other terms and conditions of employment. It does not require that you actually take disciplinary action against them. This is because the NLRA also prohibits businesses from discouraging employees from engaging in protected, concerted activity. Thus, a rule, whether written or verbal, that discourages employees from discussing working conditions with co-workers by itself is illegal. Acting on the rule constitutes a separate violation. For more information, read the Lunt Law Group blog post: Something you need to know before you tell your employees not to discuss wages with co-workers

To be protected from improperly discouraging or disciplining employees when engaging in the protected activity of discussing wages with each other, businesses should remove from their handbook any policies that explicitly or implicitly prohibits the behavior. After that is done, they must make sure managers and supervisors understand that prohibiting employees from discussing terms and conditions of employment is improper. This is important because, even if you have removed all written traces of an illegal policy, all it takes is one manager or one supervisor, with the best intentions of protecting your business, to get you into trouble by verbally communi-

cating the policy to employees.

Watch HB 1646 now moving through the 2016 Washington State Legislature.

Watch Out For "Ban The Box" Laws

If you hire employees and you haven't heard the term "ban the box" or don't know what it means, now is a good time to learn. The Lunt Law Group advises that depending on where your employees work, failing to do so may leave you open to an increasingly common type of discrimination claim.

What does the term "ban the box" refer to?

The term "ban the box" is used by advocates who want to make it illegal for businesses to include a criminal history question on job applications. Job applications historically have required applicants to answer a criminal history question by checking either a "yes" or "no" box. Thus, the term "ban the box." It is important to note that advocates don't necessarily seek to completely prohibit employers from inquiring about an applicant's criminal history; their purpose is to delay the inquiry until later in the hiring process.

The reason for the ban-the-box movement

The ban-the-box movement is rooted in the fact that convicted criminals have a high rate of unemployment. Advocates believe that having the criminal history question removed from job applications will give these criminals a better chance at employment because businesses will no longer be able to automatically disqualify them from interviews based solely on their criminal background. Advocates argue and some studies show (see the National Institute of Justice's Research on Reentry and Employment) that convicted criminals who are able to interview are more likely to be offered jobs.

Advocates also believe this type of blanket rejection of applicants with criminal convictions ignores factors such as the severity of the crime, how long ago the crime was committed, and whether the criminal act is at all related to the job duties to be performed. They assert that such factors may result in the conviction having little to no bearing on the applicant's qualifications and suitability for a job.

A growing list of state, counties, and cities with ban-the-box laws

The ban-the-box movement has had substantial success over the past several years. Currently, 19 states and over 100 counties and cities have some form of ban-the-box law. See National Employment Law Project (NELP). That is an increase from only 13 states and 66 counties and cities in 2014. See SHRM: Ban-the-box movement goes viral. States that have added ban-the-box laws in 2015 include Georgia, New York, Ohio, Oregon, Vermont, and Virginia. For more information on which states, counties, and cities have ban-the-box laws, you can read NELP's Ban the Box Guide.

As recently as November 2, 2015, President Obama announced an initiative to implement a ban-the-box rule for all federal employers. Moreover, ban-the-box legislation has recently been introduced in Congress with support from both democrats and republicans. MSNBC: Obama bans the box. These actions by both the President and Congress may signal that a federal version of a ban-the-box law may not be too far away.

Who's covered by ban-the-box laws

Many of the ban-the-box laws in these states, counties, and cities are restricted to only public employers, but there are several that have expanded coverage to private employers as well. For example, states that have extended their ban-the-box law to cover private employers include Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island.

Ban-the-box laws also vary regarding the number of employees a business must have before they become subject to the laws' requirements. This threshold is frequently set at either 10 or 15 employees, but can be any number the state, county, or city chooses. Also, not all such laws exempt small employers, meaning employers with as few as one employee must ensure they are aware of their obligations.

More than just check boxes on applications

Some ban-the-box laws require employers to go even further than just removing the criminal history question from job applications. Many require employers to delay the request for an applicant's criminal history until after the first interview. Other versions delay the request period until after a tentative job offer has been extended. These rules can also apply to background checks, whether conducted by the employer or a third party.

The most extreme of the ban-the-box

laws don't just require employers to delay their request for an applicant's criminal history until some later point in the hiring process. They also prohibit employers from declining to offer jobs to applicants with criminal histories, unless they have considered certain factors before doing so. Common factor include the nature of the criminal act, how long ago the act was committed, and how the job duties and the criminal act are related. If employers fail to consider the factors or fails to weigh them properly, they may violate the ban the box law applicable to them.

Seattle's Ban The Box Law

Seattle adopted a "ban the box" law in 2013 and more cities are likely to follow Seattle's lead. Seattle's "ban the box" ordinance prohibits employers from inquiring into an applicant's criminal history until after the employer has identified qualified applicants. Employers are permitted to conduct criminal history investigations and may exclude individuals from employment based on the applicant's criminal history if there is a legitimate business reason for doing so. Before an employer makes a negative employment decision based on an applicant's criminal history, the employer must identify to the applicant what information they are using to make the decision and provide the applicant with a minimum of two days in which to correct or explain that information.

Seattle Resources

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Seattle Information and Contact
Seattle Office for Civil Rights http://www.seattle.gov/civilrights/
City of Seattle contact person, Karina Bull: Karina.Bull@seattle.gov

Conclusion

As you can see, understanding the term "ban the box" and how it impacts you can help you avoid legal problems.

Data Breach and Identity Theft Affecting Small Businesses

While we hope you never have to deal with a data breach at your company or the release of company, employee, or customer personal information, IBA wants to share with you information from a recent workshop on Data Breach and Identity Theft affecting small businesses. Data Breach and Identity Theft are rapidly growing problems for small businesses. Small businesses are now a target of computer hackers because most small businesses are relatively unsophisticated in protecting their IT systems and the data they contain. Thus, it is critical for any small business that has any company data or any personal data for its employees or customers to take steps to avoid that data being accessed by unauthorized people. The FTC and the IRS held a joint workshop on this issue because data breaches and identity theft have gotten so serious, that they need you to help stop it. The IRS is paying out billions of taxpayer dollars in illegal refunds every year due to the filing of false tax returns by thieves who have obtained personal identity information about people and then file these false and illegal tax returns in the name(s) of the people who had their personal identity information hacked and using the individual's social security number because they got it when hacking into an unprotected data system. It is extremely important for you to review this information and make the necessary changes in your business. Once a data breach happens at your business, you face HUGE potential costs to protect those who are scammed due to your data breach. As business security experts currently say, "*There are only two types of business people in this world, **those who know they've been hacked and those who don't.***" You can view the information from this workshop via the Internet at: www.ibaw.net/databreachidentitytheft.pdf

Some of the biggest take-aways from this workshop were:

- Don't collect personal information you don't need.
- Hold on to information only as long as you have a legitimate business need to keep it.
- Don't allow employees who don't have to use company, employee or customer personal information as part of their job, to have access to it.
- Require strong authentication procedures to access and identity data held by your company – use sensible password that require (letters, upper and lower case, numbers and special characters – and no words found in the dictionary) – to help ensure that only authorized individuals can access the data.
- Change passwords frequently, not less than every three months
- Don't store passwords in any form that can be compromised or hacked.
- Use strong cryptography to secure confidential material during storage and transmission. Transmit only encrypted data. Hackers love to intercept transmitted data and they are good at it.
- Hackers are now using business FEIN's to file false 1120, 720 tax returns to claim false and illegal tax refunds
- Hackers are now stealing employee SSNs and filing false 1040 tax returns for those employees to claim illegal and false refunds.
- Hackers also file fraudulent employer Forms 941 and W-2 to support a bogus Form 1040 to claim a fraudulent refund.
- Make sure your computer programs are current as computer program providers provide regular updates to fix

"holes" in their programs that allow hackers access to your computer.
- Never click on an email attachment from any person or entity you don't know and trust as you are probably downloading malware or spyware on your computer that can transmit your data to some identity thief.
- Don't download a file or picture from a friend because that file could be infected with malware or spyware.
- One of their strongest recommendations was, **Don't store any company, employee or customer identity data on any computer that is connected to the Internet.**
- Be very suspicious of any phone call or email from the IRS about your taxes. The IRS does not call or email you. Their correspondence is via the U.S. Postal System. The IRS cautions that the phone calls from thieves are extremely well done and sound very official but are not. Never provide any business or personal identify information to anyone on the phone claiming to be from the IRS.

Details about all of this are available via the Internet at:
www.ibaw.net/databreachidentitytheft.pdf

Avoiding Employee Lawsuits: 4 Lessons For Employers And Managers

The HR Weekly advises employers that when it comes to employment law, it's very wise — and less expensive — to learn from others' mistakes rather than your own. Here are five classic court cases in the past year that serve up good lessons for any employer and manager:

1. Nix the nicknames: 'Grandma' and 'Hank' will get even

The case: Soon after a 54-year-old employee who'd worked at an electronics store for 17 years was demoted, she sued for age discrimination. Her evidence? A new supervisor had the habit of calling her "Grandma" and suggesting that she retire to spend time with her grandchildren. The court agreed, saying, "Calling someone 'Grandma' does suggest ageism." (McDonald v. Best Buy, DC IL)

In another case, a supervisor insisted on referring to employee Mamdouh El-Hakem as "Manny," saying the name would help him do better with clients. The employee protested, so the supervisor started calling him "Hank." As you can guess, the employee sued for racial discrimination and the court agreed. (El-Hakem v. BJY Inc., 9th Cir.)

The lesson: Avoid attaching to employees nicknames that carry even the perception of being tied to a protected characteristic, such as race, age, gender, religion, national origin or disability.

2. Avoid strict 'English-only' language laws on employees

The case: A supervisor at a Macy's department store told six Somali workers who sorted clothes in a basement office that they'd be fired if they spoke "even one word of Somali" to each other at work.

Luckily for the store, the case didn't make it to court. After some bad publicity and threats of a lawsuit, the store stepped in, apologized to the workers and disciplined the manager.

Lesson 1: You can require employees to speak English only for clear business reasons, such as customer service (talking to customers in English) or safety (talking to each other in one language at risky jobs).

Never mandate that English be spoken in break rooms or during off-duty hours. Make sure language rules don't carry any hint of discrimination.

Lesson 2: You can avoid making a bad situation worse by quickly acting to correct a bad situation and avoid a costly and losing lawsuit.

3. Inconsistent discipline: A sure loser in court

The case: An employee of Indian descent felt she was criticized for her work mistakes far more harshly than her white co-workers. So she set out to prove her thesis. She kept a notebook and tracked when she was critiqued compared with her colleagues.

When she was fired for insubordination, she sued, saying that the real reason was national-origin discrimination. The court sent the case—and the woman's notebook—to a jury trial and she won. (Reddy v. The Salvation Army, SD NY)

The lesson: Trouble will come to supervisors who issue oral and written rebukes to certain employees, yet overlook the same actions by co-workers. Such inconsistency will kill you in court, as this case shows.

4. **Porn on computers can count as sexual harassment**

The case: A female office employee claimed that her co-workers on three occasions exposed her to pornographic images on their computer screens. She sued for sexual harassment, saying the company did nothing to protect her. The court sided with her, saying the images "were severe enough to have altered the terms" of her employment. (Criswell v. Intellirisk, 11th Cir.)

The lesson: Don't take a casual attitude toward employees viewing inappropriate websites on their computers. As this case shows, courts are clamping down on companies that don't do enough to protect employees from their co-workers' online pornography.

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