Building a Better Team

Employee Onboarding and Benefit Options

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EMPLOYEE ONBOARDING

Employee Onboarding Agenda

Recruiting and Hiring Hazards

Interview Questions, Pay Equity / Salary History, Criminal History, Financial Status, Immigration, Restrictive Covenants

Diversity and Inclusion

Documenting Terms and Conditions of Employment

At-will status, Offer letter v. employment contract, Employee handbooks, policies, Anti-Harassment Policy

Misclassification and Wage & Hour Considerations

Non-exempt Employees, Hours worked and pay, Independent Contractors (and the Gig Economy), Interns

Federal and state discrimination laws

- Title VII of the Civil Rights Act of 1964
  - 15 or more employees
    - Protected categories include race, color, national origin, sex/pregnancy, religion
- Age Discrimination in Employment Act of 1967
  - 20 or more employees
    - Age (over 40)
- Americans with Disabilities Act of 1990
  - 15 or more employees
- State laws vary

Recruiting Hazards

Interview Questions

Never ask a question concerning a protected category and be sensitive not to inadvertently ask any question which may reveal a protected category and fun afoul of federal, state and local hiring laws

Salary history (pay equity laws)

Many states prohibit employers from screening applicants based on prior wages, salaries or benefits, or using that info to satisfy any minimum or maximum criteria

Criminal History

Criminal Background Checks

Financial Status

Credit record and Fair Credit Reporting Act

Immigration Considerations

Permissible pre-hire inquiries: *Are you legally authorized to work in the US? Do you now, or will you in the future, require immigration sponsorship for work authorization (for example, H-1B status)?*

Employment Eligibility: Verification form (I-9) within three days of hiring

Agreements to Watch for and Consider

Non-Competition Agreements

Prevent someone from entering into a particular profession

Non-Solicitation Agreements

Prevent someone from soliciting a company's clients or employees

Consider new restrictive covenants for key employees

Reasonable agreements for senior management

Focus on enforceability of restrictive covenants

Varies by state

Confidentiality/Inventions Assignment

Restrict someone from disclosing or using a company's proprietary information

Arbitration Agreements

With some exceptions, requires employees to resolve disputes related to employment in arbitration rather than bringing a lawsuit in court

Document Terms and Conditions of Employment

- At-will vs. contractual employment for a term
  - Be sensitive to statements concerning future earnings and length of employment
- Offer letter vs. employment agreement
  - Include contingencies (e.g., availability of funding, execution of non-disclosure/noncompete agreement, execution of arbitration agreement)
  - Right to stock or stock options
  - Compensation, commissions, and bonus arrangements
  - Tailor to particular employees or job classes

Employee Handbooks and Policies

- Employee handbooks not required by law
- Handbooks, manuals, policies, communications regarding employee expectations;
  - Within policies, include equal employment, non-discrimination, non-harassment, meal/rest, timekeeping, payroll, leaves of absence, vacation accrual and payout, scheduling, exempt vs. non-exempt status, workplace safety, social media, expense reimbursement
  - Ensure uniform application

Employer Obligations with Respect to Harassment

- Adopt a strong anti-harassment policy
- Periodically train each employee on its contents
- Vigorously follow and enforce it
- The policy should include:
  - Explanation of prohibited conduct, including examples
  - Assurance that employees who make complaints or provide information related to complaints will be protected against retaliation
  - Complaint process that provides multiple, accessible avenues of complaint
  - Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible
  - A complaint process that provides a prompt, thorough, and impartial investigation
  - Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred

Diversity and Inclusion

Recruit, hire, and promote with equal employment opportunity principles in mind

Diversify leadership
-Some states (like California) require diversity for directors of publicly held companies

Openly address workplace diversity

Approaches employers can take to reach diversity goals
-Implement policies to diversify the pool of candidates: A rule or policy that requires all candidate pools to include a minimum number of candidates of color, for example, is one strategy that has been adopted to increase diversity in hiring. Such a rule does not require hiring a person of color, or giving preference to a person of color; rather, it ensures that the selection pool includes at least one person of color

Terms and Conditions of Employment

Management Strategies

Communicate expectations; Provide feedback

Document performance or disciplinary issues

Ensure adverse employment actions are made for legitimate, business reasons, and document these reasons

Ensure others who behaved similarly are treated similarly

Misclassification: Overtime Exemptions

- Are employees properly classified as exempt or nonexempt for overtime purposes (FLSA/state law)?
  - Potential Red flag – none or very few nonexempt employees

- Potential repercussions for misclassification:
  - Liability for all unpaid overtime (may run back as far as three years in cases of willful violations)
  - Liability for withholding wages
  - Fines and penalties
  - Attorney fees exposure
  - Recordkeeping liability (e.g., where employer has failed to properly record employees' hours worked)

Issues Relating to Work Hours and Pay

Establish expected work hours, particularly for nonexempt employees

Establish mechanisms to ensure that employees are actively working (including regular responsive communications with team members)

But be sensitive to morale and PR issues related to these mechanisms

Comply with state wage payment laws (e.g., timing of payment)

Compensation Issues for Nonexempt Employees

- Accurately record *all* hours worked
  - Consider timekeeping systems and whether modifications are needed for remote setting
    - Consider attestations/acknowledgments regarding the complete and accurate recording of all time worked, and compliance with meal/rest period expectations
  - Beware of "on-call" treatment, if employees are expected to stand by for assignments
  - Remote meetings and training are generally compensable, unless *completely voluntary; not directly related to employee's job*; and no "productive work" performed
  - Meal and rest breaks
- Overtime pay for hours worked over 40 hours per week

Misclassification: Independent Contractors

Service Providers

- properly classified as a contractor, consultant, or advisor, rather than as employees?
  - How much control over the worker does the company have?

Potential repercussions for contractor misclassification

- Misclassified contractors could be entitled to retroactive participation in employee benefits
- Payment of federal and state employment taxes and amounts that should have been withheld, including interest and penalties
- Penalties for failure to contribute to state unemployment funds
- Unpaid overtime or other wage-based claims (if the employee should have been classified as non-exempt)
- State law major risk driver

The Gig Economy and Independent Contractors

- Companies are increasingly interested in entering the gig economy, but the legal uncertainties pose some discouraging risks
- A gig economy is a market model in which workers, typically through an on-line platform, contract with organizations for temporary, short-term engagements. Typically, a worker has the ability to pick and choose when he or she will work and how often.
- Types:
  - Personal Services
    - Examples: Uber, Lyft, GrubHub, Handy, Instacart, TaskRabbit, etc. – intermediary connects consumer with service
  - Goods and impersonal services
    - Examples: AirBnB, Etsy, etc. – intermediary connects buyers and sellers
    - Crowdsourcing
    - Personal shoppers/Secret shoppers
    - Brand ambassadors/social media monitors/moderators

Mitigating Operational Measures

- Hire workers as employees
  - They can be short-term or temporary employees
  - Work with reputable third-party staffing company to hire independent contractors as the staffing company’s employees
    - Include indemnification provision in services agreement
    - Include arbitration agreement with class action waiver in services agreement with employee
- If you MUST keep them as independent contractors:
  - Avoid having independent contractors perform tasks that also are performed by employees
  - Limit independent contractors to performing tasks that are <u>*outside*</u> the company’s usual course of business
  - Avoid having independent contractors who work exclusively for the company
  - Limit the amount of control exercised over the manner and means a gig worker performs his or her tasks

Interns

Fair Labor Standards Act

- requires "for-profit" employers to pay employees for their work. Interns and students, however, may not be "employees" under the FLSA—in which case the FLSA does not require compensation (minimum wage and overtime) for their work

"Primary Beneficiary Test"

- determine whether an intern or student is, in fact, an employee under the FLSA
  - In short, this test allows courts to examine the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship
  - Don't forgot state and local laws may be more stringent

BENEFIT OPTIONS

Benefit Options Agenda

Overview Of Benefit Options

Tips to Mitigate Risk

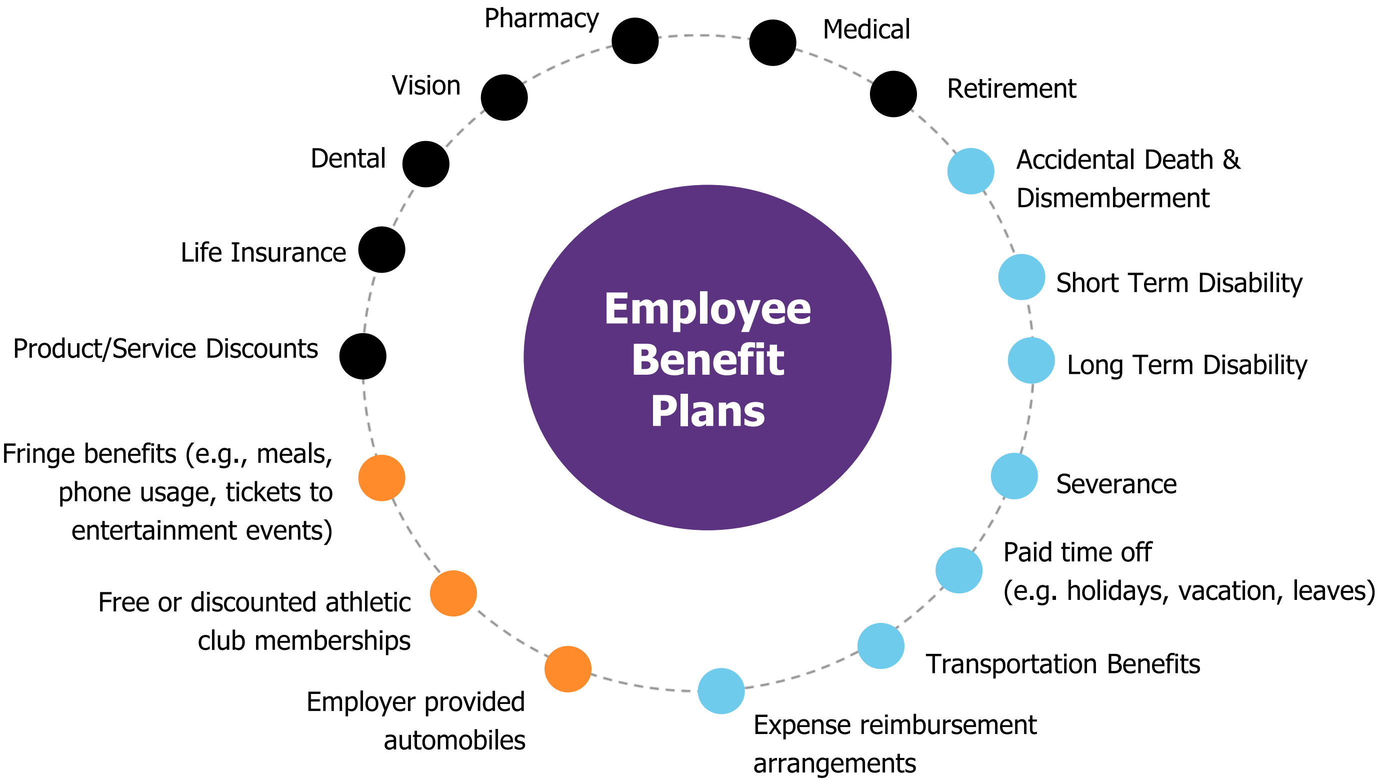
Compliance Hurdles

Ideas for Startups and Smaller Employers

Why Employee Benefits Matters?

- Competition for talent is fierce
- What you offer beyond salary can go a long way towards setting your company apart from the competition
- Offering a competitive benefits package can:
  - Help you attract talent
  - Help you retain talent
  - Increase employee engagement
  - Create loyalty among your employees

Types of Employee Benefit Plans



Governing Laws

- Laws and rules governing the design, operation and administration of employee benefit plans are complex.
- Some of the key federal statutes that govern this area include:
  - ERISA: The Employee Retirement Income Security Act of 1974, as amended
  - The Code: Internal Revenue Code of 1986, as amended
  - ACA: Patient Protection and Affordable Care Act of 2010, as amended
  - HIPAA: Health Insurance Portability and Accountability Act of 1996, as amended
  - COBRA: Consolidated Omnibus Budget Reconciliation Act of 1985, as amended

BENEFITS CAN BE RISKY BUSINESS -- WHY YOU WANT TO GET IT RIGHT

Benefits Can Be Risky Business

- Because of the complex legal landscape, offering employee benefits can present risk and potential exposure for "plan sponsors" and "fiduciaries"
- Power to enforce laws, interpret laws and investigate compliance rests with multiple governmental agencies:
  - DOL: U.S. Department of Labor (Employee Benefits Security Administration)
  - IRS: Internal Revenue Service of the Department of the Treasury
  - PBGC: Pension Benefit Guaranty Corporation
- Individuals (current, former and would-be participants and beneficiaries) can sue in federal court…resulting in a very active plaintiffs' bar!
  - Class-action litigation is active; targets plan sponsors, fiduciaries and service providers

Your Responsibilities as a Plan Fiduciary

Four Basic Fiduciary Duties Under ERISA

- Duty of loyalty
- Duty of prudence
- Duty to diversify
- Duty to follow plan terms

Prohibited Transaction Rules under the Internal Revenue Code

- A fiduciary cannot, among other things:
  - Receive money from the plan’s assets.
  - Deal with plan assets in his or her own interest.
  - Note that there are exceptions for necessary expenses, reasonable expenses properly and actually incurred.

You Cannot Delegate Your Risk Away Entirely

- While it is often advisable to engage service providers to help manage your fiduciary responsibilities, you must monitor the delegation
- Co-fiduciary liability under ERISA: a fiduciary is liable for a breach of fiduciary duty by another if the fiduciary
  - Participates in the breach or conceals the breach, knowing it to be a breach
  - Fails to comply with fiduciary duties
  - Facilitates a breach
  - Has knowledge of, but does not take reasonable actions to correct, a breach

Consequences of Breach of Fiduciary Duty are Serious

- Personal liability for fiduciary breach (limits on exculpation using plan assets)
- Obligation to restore loss (and income) to the plan
- Monetary penalties to DOL equal to 20% of the recovery amount or IRS excise taxes
- Reputational risk
- Possible removal from position
- Criminal penalties (fines and incarceration) for failure to make 401(k) contributions, willful violations of reporting and disclosure requirements, kickbacks, bribes, and embezzlement
  - E.g., soliciting gifts or things of value with the intent to be influenced regarding plan decisions
  - E.g., directly or indirectly offering or promising to do so

Preparing for the Deal

- If you want to sell your company, remember that prospective buyers and investors are looking to minimize liabilities and exposure
- Employee benefits compliance issues can be a major source of risk
- Deal structure can impact the amount of risk that a buyer will assume
- Diligence will focus on uncovering compliance issues and liabilities associated with employee benefit plans and arrangements
- Employee benefits exposure and liabilities can impact the deal
  - Representations and warranties
  - Indemnification provisions
  - Negotiation of purchase price adjustments
  - Impact escrow requirements

Possible Exposure Related to Benefit Plan Administration

A few examples of conduct that can result in benefit plan exposure:

- **Improperly excluding certain workers from participating in or receiving benefits (e.g., worker misclassification, not following plan terms)**
- **Failure to provide required plan information**
- **Failure to file and furnish required reports**
- **Failure to timely respond to requests for information**
- **Improperly disclosing Protected Health Information**
- **Failure to timely and fairly respond to claims for benefits**
- **Failure to administer benefits in accordance with the terms and rules of the plan**
- **Failure to update and amend plan documents to reflect current law**
- **Mishandling plan assets**
- **Breaching fiduciary duties**
- **Failure to timely provide a COBRA notice**

IDEAS FOR STARTUPS TO OFFER BENEFITS AND AVOID COMPLIANCE RISK

Consider Professional Employer Organizations (PEOs)

- Consider engaging a PEO to provide broad range of human resource management and employee benefits services to your employees
- Under the PEO business model, the company and PEO enter into a **co-employment agreement** where:
  - The PEO is the employer of record for tax purposes
  - The company manages the day-to-day employment relationship with employees
- Typical PEO services include:
  - **Employee benefits and administration**
  - Payroll processing and tax filing
  - workers' compensation coverage,
  - Risk management and workplace safety programs
  - human resource administration
  - Training and development

Consider Professional Employer Organizations (PEOs)

- PEO employee benefits and administration services are comprehensive and include:
  - Comprehensive group health coverage (medical, dental, vision, prescription)
  - EAP (Employee Assistance Program)
  - Retirement vehicles (typically a 401(k) plan)
  - Health savings accounts
  - Flexible spending accounts
  - Disability insurance
  - Life insurance and accident insurance
  - COBRA administration

Key to Vendor Engagement – Negotiate the Services Agreement

- Engage experienced service providers, consultants and advisors to help make decisions and manager your benefit plans
- When choosing a vendor, use a prudent selection and evaluation process
- Carefully negotiate and review service provider agreements
  - Do <u>not</u> just accept the provider's template agreement
  - Understand the scope of services and what your responsibilities are
  - Understand the fees
  - Carefully review the limitation of liability and indemnification provisions
  - Carefully review the term and termination provisions

Consider "Plans" for Smaller Employers to Help Employees Save for Retirement

These options are designed with smaller employers in mind. They enable employees to save for retirement on a tax-deferred basis and are less onerous for employers to administer than "traditional" qualified plans.

- **SIMPLE IRA Plans**
- **SEP IRA Plans**
- **Payroll Deduction IRAs**

Retirement Plans That Are "Easier" to Administer

Simplified Employee Pension Plan (SEP)

- Any size employer
- Employer contributions only
- Higher level of contributions permitted
- IRS Model Form 5305/SEP

Savings Incentive Match Plan for Employees (SIMPLE)

- Employers with 100 or fewer employees
- Employee contributions with required employer match or non-elective contribution
- Higher level of contributions that traditional IRA, but not as much as SEP
- IRS Model Forms 5305/SIMPLE and 5304/SIMPLE

Other Retirement Savings Options

Payroll Deductible IRA

- Not really a "plan"
- Employee establishes an IRA with a financial institution
- Employee authorizes a payroll deduction for the IRA
- Employer transmits the employee's deduction to the financial institution
- No reporting requirements if plan is voluntary, employer makes no contributions, employer does not "endorse" the plan and employer receives reasonable comp

State-Administered IRAs

- Some states require employers of a certain size to enroll their workers in the state savings program if they do not offer their own retirement savings plan
- Business are responsible for registering with the state program, sending required employee data to the program administrator, enabling auto-enrollment of new employees, and transmitting the payroll deductions

Consider Pooled Employer Plans to Offer Retirement Savings Opportunities

- Relatively new option (created by the SECURE Act, which was enacted in 2019)
- Pooled employer plan (PEP) is a centrally administered defined contribution plan that can be joined by multiple unrelated employers
- Advantages of PEPs:
  - Remove significant administrative burdens to maintaining a retirement plan
  - Allow for significant economies of scale and scope
  - Can help avoid state-mandated savings schemes (through preemption)
  - Impose relatively limited administrative responsibilities on adopting employers
  - May limit (but do not eliminate) fiduciary responsibilities for adopting employers
- Registered Pooled Plan Providers have begun to offer PEPs

Things to Remember

Keep Track of Your Employee Headcount

Certain legal requirements and obligations that you may be exempt from now because you have little or no employees will kick in as you grow.

- E.g., Under ACA, businesses with at least 50 full-time equivalent (FTE) employees must offer health insurance to their full-time employees that meets the ACA minimum coverage requirements. Failure to offer such coverage will result in a tax penalty.
- E.g., SIMPLE IRA Plans are only for employers with 100 or fewer employees. There is a 2-year grace period to account for growth or acquisition.

Worker Classification Matters

If you rely on contactors to help you with your business, you want to make sure that you minimize your exposure under your benefit plans and arrangements for potential worker misclassification.

- Make sure your plans and contracts include "Microsoft language" (so that benefit plan eligibility will not extend retroactively to individuals who are hired as independent contractors and later reclassified as employees)

Monitor Vendors

Periodically review service provider delegations, performance and fees – do not act on auto-pilot

Mitigate Risk

Use indemnifications and fiduciary liability insurance to minimize exposure for breach of fiduciary duty

Keep Your Benefit Documents and Agreements Together

If your goal is to attract a buyer, the buyer will want to review your benefit plans and arrangements


QUESTIONS?

Presenter

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Sariyah S. Buchanan ensures that benefit plans and compensation arrangements comply with US state and federal laws including ERISA and the Internal Revenue Code. Sariyah drafts employment agreements, equity plans, grant agreements, and proxy materials, and prepares custodial agreements, disclosures, and election and beneficiary designation forms for IRA custodians. She assists clients in corporate transactions and represents clients before the IRS, PBGC, and DOL. Sariyah’s clients include startup and Fortune 500 clients in financial services, insurance, real estate, pharmaceutical and life sciences, technology, and energy.

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Eleanor R. Farrell's practice includes an array of employment law and benefits matters, including wage and hour, ERISA, and discrimination and harassment litigation. She represents employers in complex class and collective action litigation and single-plaintiff cases before US state and federal courts and administrative agencies, and in arbitrations. In addition to her litigation work, Eleanor counsels clients on a variety of employment issues, including decisions regarding adverse employment actions and background check procedures, as well as compliance with state and federal wage and hour and employment laws.

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Douglas E. Kingston counsels clients on a wide variety of business law matters, focusing on mergers and acquisitions (M&A), venture capital, and financing transactions. He represents entrepreneurs, startup and emerging growth companies, as well as privately held companies, through their entire life cycle, including start-up matters, equity and debt financings, corporate restructurings, and sale transactions. Douglas has represented clients across numerous industries, including beverage distribution, pharmaceutical, medical device, digital health, consumer products, technology, data management, energy, and fintech. In addition, he serves as a counselor to privately and publicly held companies on a wide variety of general corporate matters.

Our Global Reach

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North America

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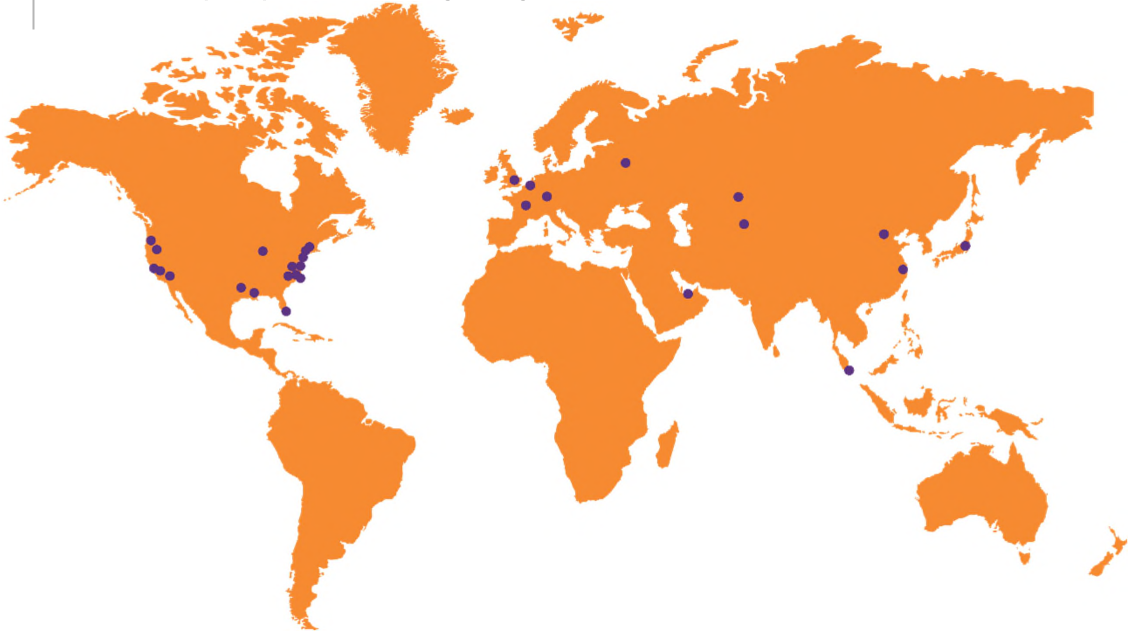

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