

# **Mastering the Essentials of Wage and Hour Laws To Avoid Costly Mistakes**

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**Council on Education in Management**

**February 5, 2003**

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### Federal Labor Standards Act

- Sets Minimum Wage
  - \$5.15/hour
- Overtime
  - 1½ times regular hourly rate for each hour worked in excess of 40 hours per week
  - Exemptions
- Calculating/Recordkeeping
  - "Hours worked"
- Equal Pay
- Deductions
  - What?/How?
- Child Labor

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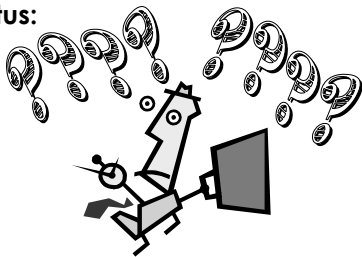
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### New DOL Regulations

Status:



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## New DOL Regulations

### Focus: Overtime exemptions

- Increase salary level
- One standard test
- Alter duties tests to new realities
- Special test for highly compensated employees

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## Philosophy & Construction

### (Both FLSA and NJ Wage and Hour Law)

- protect employees from unfair wages and excessive hours
- humanitarian
- remedial



- strictly interpreted
- vigorously enforced

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## Exemptions from Overtime Requirements

### Certain Types of Workers

- Executive
- Administrative
- Professional
- Outside Sales Personnel
- Certain Computer Specialists

### Certain Industries/Categories

- Motor Carriers
- Agricultural Workers
- Hotel Employees
- Child Care (house-based)
- Summer Camp Employees
- Etc.

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## Exemptions from Overtime Requirements

### Independent Contractors

- Only employees receive protection,

### BUT

- Do not misclassify
- Labeling one an "independent contractor" does not necessarily make it so

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## Elements of Exemptions

1. Independent Discretion in What Employee Does  
AND
2. Paid on a Salary Basis

### TESTS

Long Test – (1) salary per week, plus; (2) list of criteria  
or

Short Test – (1) "higher" salary per week, plus;  
(2) shorter list of criteria

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## Elements of Overtime Exemptions

### Independent Discretion

- Professional Judgment
- Hire/Fire
- Production/Monetary Commitments
- Organizational Responsibilities
- Control Non-Routine Processes
- Represent Organization
- Supervise

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## Elements of Overtime Exemptions

### Salary Basis

- Preetermined amount per week
  - Commission may be permitted
  - “Guarantee” plus not considered salary basis
- Not subject to reduction because of variation in quality or quantity of work
- Narrow exceptions
  - personal reasons (not sickness/accident)
  - sickness/disability pursuant to policy
  - safety infraction of major significance
- Can require that time be made up

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## Elements of Overtime Exemptions

### FLMA Exemption:

Unpaid FMLA leave (including intermittent/reduced schedule) will not result in loss of FLSA exemption status.

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## Categories of Overtime Exemptions

### Executive

- direct/manage
- lead business or division
- independent authority

### Administrative

- directly related to management policies and general business operations
- assist executive
- discretion/independent judgment

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## Categories of Overtime Exemptions

### Professional

- learned/artistic/teaching professions  
(proposed DOL regulations would split)
- original/creative/intellectual
- intellectual specialized knowledge
- exceptions for some regarding salary and fee

### JOB TITLE IS NOT DISPOSITIVE

- Fact sensitive

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## Executive Employee

| Current Long Test  | Current Short Test   | Proposed Standard Test  |
|--|--|---|
| Salary basis: \$155/week   | Salary basis: \$250/week   | Salary basis: \$425/week  |
| Primary duty (>50%): management of enterprise or a recognized department or subdivision.   | Primary duty (>50%): management of enterprise or a recognized department or subdivision. | Primary duty: management of the enterprise or a recognized department or subdivision. |
| Customarily and regularly directs work of two or more employees.                           | Customarily and regularly directs work of two or more employees.                         | Customarily and regularly directs the work of two or more other employees.            |
| Has authority to hire/fire (or recommendations given weight).                              |  | Has authority to hire/fire (or input has weight).                                     |
| Customarily and regularly exercises discretionary powers.                                  |  |   |
| Devotes no more than 20% of time not closely related to exempt work (40% retail, service). |  |   |

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## Executive Employee

### Adams v. U.S. (Federal Claims Court, 11/25/03)

- U.S. border patrol agents who act as shift supervisors and then manage a "recognized organizational unit" are exempt from the overtime provisions of the FLSA.
  - The fact that the patrol agents rotated from shift to shift does not mean they are not exempt. A person can function as a manager or supervisor, even if his/her responsibilities are shared with others.

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### Administrative Employee

| Current Long Test  | Current Short Test   | Proposed Standard Test  |
|--|--|---|
| Salary basis: \$155/week   | Salary basis: \$250/week   | Salary basis: \$425/week  |
| Primary duty (>50%): performed office or non-manual work directly related to management policies or general business operations.                           | Primary duty (>50%): performed office or non-manual work directly related to management policies or general business operations. | Primary duty: performing office or non-manual work directly related to the management or general business operations.   |
| Customarily and regularly exercises discretion and independent judgment.   | Customarily regularly exercises discretion and independent judgment.   | Holds a "position of responsibility" with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training. |
| Regularly and directly assists proprietors, bona fide executive or administrative employee or execute specified assignment under only general supervision. |  |   |
| Devotes no more than 20% of time not directly and closely related to exempt work (40%: retail or service).   |  |   |

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### Administrative Employee

**Bondy v. City of Dallas** (5<sup>th</sup> Cir., unpublished, 10/9/03)

- "Convention event coordinators...are administrative employees whose work requires enough 'discretion and independent judgment' to exempt them from the overtime pay requirements of the Fair Labor Standards Act..."
  - Although coordinators did not have authority to cancel convention events themselves, their decisions and recommendations regarding convention activities were "matters of significance" to the center's business.

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### Administrative Employee

**Corralez v. Farmers Group, Inc.** (Oregon; 11/6/03)

- Insurance claims adjusters
  - "Liability claims adjusters": Exempt
    - Complex claims, varied duties
    - "Exercise considerable independent judgment"
  - "Physical damage claims representatives": Not Exempt
    - "Vehicle damage is finite and limited."
    - Adjuster choices are limited
    - "Not meet discretion and independent judgment prong of the administrative exemption."

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## Professional Employee

| Current Long Test   | Current Short Test   | Proposed Standard Test  |
|---|--|---|
| Salary or fee basis: \$170/week   | Salary or fee basis: \$250/week  | Salary basis: \$425/week  |
| Primary duty (>50%): performing work that is original and creative or requiring knowledge of advanced type; in recognized field of artistic or scientific endeavor; results depend primarily on invention, imagination, and talent. | Primary duty (>50%): advanced knowledge in a field of service or learning; or work original and creative in character. | Primary duty: performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. (Creative Professional)<br>or<br>Primary duty: performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. (Learned Professional) |
| Consistently exercises discretion and judgment.   | Consistently exercises discretion and judgment.  |   |
| Performs work: predominantly intellectual and varied. Output or result cannot be standardized.  |  |   |
| Does not devote more than 20% of time to activities not essential or incidental to exempt work.   |  |   |

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## Disciplinary Docking of Salary

- In order to keep exemption: No partial docking of exempt employee. Suspend for a week or not at all.
- “Salary basis”: predetermined, not subject to reduction because of variation in quality or quantity of work.
- Effect of improper docking:
  - lose exemption
  - liability might be imposed on entire class of individuals (all “similarly situated”)
  - liability can extend back 2 years or 3 years (if willful)

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## Window of Correction

### Salary Test

- Employer can remedy certain improper deductions from an exempt employee’s salary without losing the exemption.

### Auer v. Robbins (Supreme Court, 1997)

- Window of correction can be used for both inadvertent and intentional deductions.
- Exemption denied where there is either (1) actual practice of making deductions for disciplinary infractions or (2) employment policy that creates a significant likelihood of such impermissible deductions.

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## Windows of Correction

### Moore v. Hannon Food Service Inc.

317 F. 3d 489 (5<sup>th</sup> Cir. 2002)

Permits employers who have made improper deductions from employees' salaries that would otherwise cause the employees to lose their exempt status to correct the improper deductions which are "inadvertent" and "made for reasons other than lack of work."

- Employer deducted recurrent cash register shortages from restaurant managers salaries.
- Policy was subject to correction by repayment.

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## Collective Actions Under The FLSA

"The hottest topic in labor and employment litigation is collective actions under the Fair Labor Standards Act (FLSA). These FLSA collective actions - which are the form of 'class actions' that can be brought under the FLSA - have replaced discrimination cases as the most popular type of class action in the employment context. Unfortunately, more and more plaintiffs are winning these cases or forcing sizable settlements to avoid litigation, liability, or legal fees. ...

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## Collective Actions Under The FLSA

"FLSA litigation is driven by alleged non-compliance with the numerous DOL regulations, particularly alleged misclassifications of employees as "exempt." If such a misclassification is proven, the employees (or class of employees) may be entitled to back pay, including overtime, for at least a two-year period, or possibly a three-year period for willful violations. The damages available also includes attorneys' fees and may include liquidated damages (double the back pay award)."

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## Judgment: Violation of Overtime Pay Rules

**Bell v. Farmers Insurance Exchange** (California Court of Appeals, 2001)

- 2400 current and former insurance claims adjusters held not to be exempt administrative employees because, according to the California courts, their primary duty consisted of producing a product (claims adjustment) instead of working directly on management policies or business operations.
- \$90 million in overtime pay

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## Settlements: Violation of Overtime Pay Rules

**Belazi v. Radio Shack**

- 1300 current and former managers claim that they spent more than 50% of their time selling to customers and not regularly exercising independent judgment and discretion
- Settled for \$30 million

**Kelly v. Pacific Telesis Group**

- 1500 current and former Pacific Bell engineers
- Settled for \$35 million

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## Settlements: Violation of Overtime Pay Rules

**Trotter v. Perdue Farms Inc.**

- 25,000 chicken processing employees sue for failure to pay for time spent putting in, taking off, and cleaning protective equipment.
- Settled for \$10 million

**Oral v. Aydin Corp.**

- Former employees and executives allege that they were docked pay when they were absent for part of each day.
- Settled for \$4.1 million

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## Settlements: Violation of Overtime Pay Rules

### Other Settlements

- **Evans v. Coca Cola:** \$20.2 million settlement
- **Bank of America:** \$22 million settlement
- **Shields v. Starbucks:** \$18 million settlement
- **Belcher v. Shoney's Inc.:** \$18 million settlement

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## Compensatory Time Off ("CTO") In Lieu of Overtime

### Public Employees

- Time off is credited at 1 ½ times the amount of overtime.
- Time off must be taken within a reasonable period after requested.

### Private Employees

- Allowed under FLSA under very limited circumstances
- Revision being considered

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## Calculating Overtime

### Regular Rate

- 1 ½ times "regular rate"
- total compensation in a given week divided by total number of hours worked in the same workweek

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## Calculating Overtime

### Counted in Regular Pay

- Salary and wages
- Non-discretionary bonuses
- Commissions
- Shift differentials
- Piece work
- Room and board

### Excluded from Regular Pay

- Gifts
- Discretionary bonus
- Holiday and absences
- Profit sharing/savings plan pay/ Welfare plan contribution
- Per diem payment for travel expenses

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## Hours Worked

- Time spent by employees on incidental activities which are part of their principal duties is generally compensable regardless of when it is done and any contrary contract or practice.
- Time spent by employees during the work day on activities which are not integrated into their principal duties is compensable if:
  - a. spent for the employer's benefit,
  - b. controlled or required by the employer,
  - c. "suffered or permitted" by the employer, or
  - d. requested by the employer.

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## Hours Worked

### Keys:

- Employer control/benefit/knowledge
- Employee freedom: If the employee is freed of duties for the employer for sufficient time to use as he desires, it is not compensable time.

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## Hours Worked

**Beasley v. Hillcrest Medical Center** (10<sup>th</sup> Circuit, 10/9/03)

Hospital nurses and technicians who rarely were able to take a meal break without being interrupted by patient care demands may proceed to trial on their FLSA claim.

- Unpaid ½ hour lunch
- Continuously interrupted

“The question is the degree of interruption causing [plaintiffs] to spend their meal periods primarily for the employer’s benefit.”

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## Hours Worked

### Generally

- Preliminary and postliminary activities are generally excluded from minimum wage and overtime provisions of the FLSA
- Compensable if “integral” and “indispensable” part of employee’s principal activities
- Exceptions –
  - Contractual obligations otherwise
  - Custom/practice otherwise

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## Hours Worked

### De Minimus Activity

Not compensable if de minimus in terms of :

- daily time spent on additional work
- administrative difficulty in recording additional time
- size of aggregate claim
- whether performed on a daily basis

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## Hours Worked - Examples

### Travel Time

- To and from work: not compensable
- To and from work sites during day: compensable

### Overnight Travel

- Compensated for time traveled during normal working hours

### Training Time

- Generally compensable
- Not compensable if
  - voluntary
  - no productive work
  - not directed towards proficiency in present job
  - outside normal work hours

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## Hours Worked - Examples

### Meal Periods

Not compensated if:

- relieved of duty for 30 minutes or more
- free from all work duties
- free to leave work area (although can be restricted to facility)

### Breaks/Rest Periods

- Compensated if less than 20 minutes

### Sleep Time

Up to 8 hours are not compensable if:

- on duty more than 24 hours
- at least 5 hours uninterrupted sleep
- employer furnishes sleeping quarters
- employee agrees

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## Hours Worked - Examples

### On-Call Time

- Compensate non-exempt employees who are required to remain "on-call" or who are required to remain near the employer's premises
- Pay if the employee can not use the time effectively for his/her own personal purposes
- Use of beepers or cell phones: compensable only if employee is repeatedly contacted by employer and employee is no longer able to conduct personal activities.

### "Donning & Doffing"

- Compensate if "indispensable" to the performance of the employee's work or is required by law

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## Retaliation

Unlawful for any person to discharge or discriminate against any employee because an employee "filed any complaint" or caused commencement of or testified in a proceeding under FLSA.

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## Child Labor Restrictions

- General minimum wage: 16
- Specific hour limitations

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## Record Keeping Requirements

Accurate Wage and Hours records are essential!

### General information

- address/date of birth/sex
- occupation or position
- time and day work week begins
- hourly rate of pay
- daily and weekly hours worked
- straight time earnings
- overtime earnings
- total wages each work week
- credits or deductions
- pay period/date of payment

Maintain for 3 years

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## New Jersey

### Wage and Hour Law

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## New Jersey Wage and Hour Law

### General Principles

- Enacted in 1966 (NJS 34:11 et seq.)
- Policy: "To safeguard [workers] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well being". [34:11-56(a)]
- Social legislation designed to correct abuses. Therefore, it is humanitarian and remedial in nature. The exemptions from coverage narrowly construed.
- State law is not preempted

Employee gets most favorable treatment provided by NJ W&H law and FLSA

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## New Jersey Wage and Hour Commission

[www.nj.gov](http://www.nj.gov)

(609) 292-3658 Wage Collection Section

Questions. On a "no name" basis

(609) 292-2305

(609) 292-2306

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## New Jersey vs. Federal

|                 | NJW&H  | FLSA   |
|-----------------|--|--|
| Minimum Wage    | \$5.15   | \$5.15   |
| Overtime Rate   | 1 ½ times regular hourly wage  | 1 ½ times regular hourly wage  |
| Overtime Begins | Over 40 hours in any work  | Over 40 hours in any work  |
|                 | No overtime required for one 8 hour in any day or for weekend/holiday work | No overtime required for one 8 hour in any day or for weekend/holiday work |

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## Payment of Wages

### Wages:

- Direct monetary compensation for labor or services rendered.
- Wages do not include fringe benefits, unless there is a contractual right to such benefits.

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## Payment of Wages

### Frequency of Pay:

- Employers must pay employees at least twice during each calendar month.
- Exception: Employers can pay bona fide executives, supervisors and other special classifications of employees once a month.
- Payments must be made no later than 10 days after the pay period in which the wages are earned.
- Upon termination, employee must be paid not later than the regular pay day.

Direct Deposit: Requires employee consent

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## Hours Worked

- Criteria similar to FLSA
- When employees are not required to remain on the employer's premises and are free to engage their own pursuits, subject only to the understanding that they leave word at their home or with the employer as to where they may be reached, the hours are not considered hours worked.

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## Hours Worked

- When an employee is on an "on call" assignment, only the time actually spent in making the call is counted as hours worked. If calls are so frequent or the "on call" conditions so restrictive that the employee is not really free to use the intervening periods effectively for his own benefit, however, the waiting time counts toward hours worked.
- New Jersey law does not require that employees be given time off for meals or to vote. There is no requirement for break time.

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## Deductions

Employers are generally prohibited from withholding any portion of an employee's wages.

### NO SELF HELP

Deductions allowed in same 3 general circumstances as FLSA:

- Required or allowed by state/federal law
- Authorized in writing
- Without authorization for specific set of circumstances: payroll errors, prior loans and agreements, etc.

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## Deductions

### Wage Deductions Allowed

- Employer can deduct payments where required or empowered to do so by New Jersey or federal law.
  - state and federal taxes
  - Court Orders for child support, levies (payment for past due taxes) and garnishments

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## Garnishment

Court order/repay debt

Amount garnished limited

Termination for single garnishment prohibited

### Special rules

- amount based on "disposable earnings" with statutory limits (amount or percentage)
  - Federal: 25% or \$153.00
  - New Jersey
- Priorities
- Notices
- implementation

State vs. federal: Method that provides employee with maximum pay

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## Deductions

### Wage Deductions Allowed

- Employer can withhold or deduct wages for contributions or voluntary deductions where authorized in writing by the employee (or pursuant to a collective bargaining agreement).
  - directed payments to third party
  - repay employer loans
  - benefit plans
  - retirement accounts/stock plans
  - personal saving account
  - uniform rentals
  - contributions: charities, political

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## Deductions

### Wage Deductions Allowed

- Employers may deduct or withhold wages without written authorization.
  - Correct payroll errors
  - Union dues
  - Pay for safety equipment
  - Pay employer loans (loan agreement)
  - Pay for purchase of U.S. Government Bonds
  - Pay for company products (Purchase Agreement)

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## Vacation and Holidays

- Time off is a benefit not required by law.
- New Jersey is an “at will” state where the employer establishes the terms and conditions of employment.
- Time off policies are left to the employer’s discretion but must not be discriminatory.



An employer’s policies, employment agreements or Union Contracts which limit the number of vacation days carried over from one year to the next will be upheld.

If there is no stated policy, unused holidays will have to be paid.

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## Good Faith Defense

Requires an employer to:

- 1) act in good faith;
- 2) rely on written regulation, administrative practice, or enforcement policy of the Wage and Hour Commission.

Need not be correct/just “reasonably believe”

If qualify:

Defense is a complete bar to an action or proceeding even if the regulation etc. is later found invalid.

- No liability
- No punishment

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