

# The Employment Law Counselor hosted by Jeff Stewart Episode 14

**PLUS Staff:** [00:00:00] Welcome to this PLUS podcast, The Employment Law Counselor hosted by Jeff Stewart. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

**Jeff Stewart:** Hello everyone, and welcome to the Employment Law Counselor podcast. I'm your host, Jeff Stewart. And today we'll be talking about the rise of wage and hour claims. This podcast is a collaboration between White and Williams, LLP. And the Professional Liability Underwriting Society, commonly referred to as PLUS.

While our podcast is not legal advice, it is a practical discussion between two attorneys that deal with the maze and minefield of labor and employment laws on a daily basis. If you like what you hear, please give us a five-star review. And subscribe so you never miss an episode. Today, I'm joined by one of my colleagues of White and Williams, Vicki Fuller, who practices out of our firm's Boston office.

How are you doing today, Vicki?

**Victoria Fuller:** Hi, Jeff. I'm doing well. How are you?

**Jeff Stewart:** I'm doing great. [00:01:00] Thank you so much for joining us. And this is your first time on the Employment Law Counselor.

**Victoria Fuller:** I'm excited. I'm really excited to talk about wage and hour. It is an issue that is near and dear to my heart.

**Jeff Stewart:** Well, you are a fellow employment law nerd, and we celebrate that here on the Employment Law Counselor.

So, let's dive right in, shall we?

**Victoria Fuller:** Absolutely. What are we talking about today? Wait, we're talking about wage an hour, but what exactly is wage an hour?

**Jeff Stewart:** Well, wage an hour is essentially employees being paid. It is all the legal requirements concerning payment of wages, including timely payment, minimum wage, overtime, any required breaks like lunch or lactation breaks, paycheck deductions.

It's a little bit of everything, but it's something everyone can relate to because we all get paychecks.

**Victoria Fuller:** I think we should also talk a little bit about pay equity because it is an issue that dovetails and it's becoming very hot. I'm seeing it a lot more than I used to, and it tends to tie in with other wage and hour claims.

So maybe we [00:02:00] can spice things up with some pay equity.

**Jeff Stewart:** Absolutely. So, Vicki, I'll throw it to you first. What kind of wage and hour claims have you been seeing more of recently?

**Victoria Fuller:** So, there's a couple of ways it can come up. It can come up as a standalone claim, but more and more frequently we're seeing it tied together with discrimination and retaliation claims.

This is because, you know, many times the real driver of the claim is that wage and hour claim, but plaintiff's lawyers know that there's typically no indemnification for those types of claims under most EPL policies or employment practices, liability policies. So, they're looking for insurance coverage.

So, they're going to include both a covered claim at discrimination, retaliation, hostile work environment, which with that wage and hour claim to try to squeeze in some coverage. A side note on that for our listeners who are not familiar with EPL policies, there are a type of insurance that [00:03:00] employers can get and it provides defense and indemnification for certain types of claims, typically discrimination, retaliation.

It sometimes provides a defense sublimit. What that means is you get a certain amount of money towards hiring a lawyer to defend you in a wage and hour case, but they typically don't indemnify or pay out for things like lost wages on a wage and hour claim. So, if the employer is found to have failed to pay wages to an employee, if there are additional liquidated damages or penalty damages, that's something the employer has to pay out of pocket.

So, what's happening, as I said, we're seeing more of these plaintiff's attorneys who are trying to tie in these very expensive uncovered claims in with covered claims to try to reach the insurance policies. One more quick note on the insurance side of things, because I think this is such an important piece of the Being an employer in today's reality is there are some Bermuda insurers that are writing standalone policies now for wage and hour.

They also [00:04:00] have some blended EPL policies that do provide some wage and hour coverage. So, if you're a large employer and you don't have this coverage, I would absolutely look into it. Go talk to your broker and see if you can find a policy that's right for you. Sorry, I rambled on that for a moment, but just to tie that all back, we're definitely seeing these claims tied in together.

**Jeff Stewart:** And that's very new. Wouldn't you agree that there would be a policy that would cover the actual wage claim?

**Victoria Fuller:** Yeah. I don't know how long these Bermuda insurers have been writing these policies, but I learned about it myself last year and it typically, because of the deductibles and the self-insured retentions are on the higher side, I think it's targeted more towards large employers, but my suggestion to any listener who's interested would be to go talk to your broker about seeing if you can find a policy that works for your needs.

**Jeff Stewart:** I would absolutely echo that. And another reason for the rise in wage and hour claims that we've seen is that a number of states have, I'll say very punitive statutes and laws in the areas of wages and [00:05:00] wage payments, because frankly, they want to make sure employees receive their paychecks on time, in the right amount.

And if an employer fails to do that, there are some harsh, harsh penalties in Pennsylvania, for instance, where I practice the Pennsylvania wage payment collection law says if an employee has to bring an action for wages that were not paid, the employee, in addition to recovering the wages also is entitled to liquidated damages.

And the amount of either 25 percent of what was withheld or 500, whichever is more. And all of their attorney's fees. So, if an employer doesn't pay a paycheck that let's say was 300, very small, they're looking at 300 plus 500 liquidated damages, plus literally thousands of dollars in attorney's fees. So improperly withholding 300 can lead to four or 5,000 of liability.

**Victoria Fuller:** That gets expensive fast, huh?

**Jeff Stewart:** [00:06:00] Absolutely.

**Victoria Fuller:** So, we have a slightly different statute, but also similarly punitive in Massachusetts, which is where I practice. We've seen actually a huge uptick in wage and hour claims since the Supreme Judicial Court's decision in *Reuter versus Methuen* a couple of years ago.

In that case, the SJC held that liquidated damages are owed on all late paid wages. That means if the employer is late by a day. Unfortunately, they are on the hook, even if it's a mistake, even if they tried to make payment, they're on the hook. So, it's a strict liability statute. And like you said, the actual lost wages on a single claim can be very small, say even just a few thousand dollars.

But most employers will typically settle a lot of these claims quickly because it's just the cost of litigating them is just so exponentially more expensive that they just try to get rid of it quickly.

**Jeff Stewart:** And I think the plaintiff's bar has really [00:07:00] taken notice of some of these things and they know that it is better for the employer to settle than to litigate.

So, the plaintiff's bar is looking for plaintiffs in this area. Whereas in the past it used to be, ah, it's kind of small. It's not worth my time. Now they are actively seeking. That's one of the reasons we're seeing that rise of claims.

**Victoria Fuller:** Absolutely. And they're smarter about it too. They know the law that the employees have gotten wise to this punitive nature of the statute.

One thing that we've seen here are employees who intentionally avoid payment of a final paycheck to try to trigger a late payment by the employer. I can't even make this up. I know it sounds bananas, but they know the statute is out there and this stuff is actually happening,

**Jeff Stewart:** which just seems completely counterintuitive to me.

But. You know, hey, employees will always try and find a way to game the system.

**Victoria Fuller:** Well, I think it's the nature of the employment environment that we're in now. And I think this is an [00:08:00] area where being prophylactic, making sure that your policies and procedures are shored up that you're following all compliance with wage and hour laws at a state and federal

level really will save you a lot as an employer in time and in other costs like time, money, distraction, things like that.

We also, just to dovetail back into what we were talking about, another reason this is coming up a lot in Massachusetts is beyond that case from a couple of years ago and on the note of policies where you have an employer who doesn't have a clear vacation policy. We see employees demanding payout for their accrued but unused vacation time, but also for that trouble damages.

So, employers will say, I give them four weeks. Well, how does it accrue? I don't know. I've never had to think about it before. Well, if you don't track accrual, you're not tracking usage. Okay. You better be ready to pay out four weeks unless you have some evidence to back up either the accrual or the usage or both because they know that this [00:09:00] is considered a wage under the statute and they also know that if you don't pay it out on termination for a terminated employee, they're entitled to treble damages on it.

**Jeff Stewart:** And kind of bouncing off what you were saying there, that's a specific Massachusetts law. And one of the things that I have found employers struggling with, especially in the last five years, is the incredible rise of remote workers. And they're working in different states that have different laws. And depending on how that law is written, what laws apply to that employee?

You know, is it where the employer is, where their base is, where the employee is, where they're based. Is it a combination of the two? Is it whichever is more beneficial to the employee, which is how some laws are written. There are a lot of things and employers need to really be proactive and know what they're dealing with and where their employees are, because they may never have had an [00:10:00] employee in Montana.

But now they do because they're using someone remotely. So, they have to figure out what Montana law is, for example.

**Victoria Fuller:** Absolutely. I feel like we're just layering on here all the scary things that can happen with wage and hour claims. I'm going to add one more to the pile. The other issue, and this is an issue that comes up with employers just sort of in general, is lack of documentation.

So, where you don't have proper documentation that an employee was timely paid, you as the employer can run into trouble. You know, you might say, yes, I paid them timely. They'll say, no, I wasn't timely paid. I was paid a day or two

later. And if you don't have the documentation to back it up, you're talking about a factual issue that you're going to have to litigate.

When the employee can recover attorney's fees on the back end and multiple damages, are you really going to litigate that question or are you just going to pay them and move on? So, you know, this is another area where I know we've talked about this with respect to other employment issues, but documentation is just so important.

**Jeff Stewart:** And when you talk about things that are scary, [00:11:00] That dovetails nicely into if you think the claim of one employee for unpaid wages is scary. What is really scary is when you get a class action of wage and hour claims. Because then instead of one employee saying, hey, I wasn't paid properly, or, you know, there was something missing in my pay, you have.

All of your employees, which could be 2,000, 3,000, 5,000. And even if that claim is only worth 150. If you have 2000 of them, all of a sudden, it's 300,000. And that is something that gets people's attention, especially when there's usually liquidated damages on top of it, attorney's fees on top of it. And the value of that claim just jumps so high and frankly has the potential to put some employers out of business.

**Victoria Fuller:** Absolutely. And again, this is an area where you don't want to get caught unawares, not having insurance. If it's a policy [00:12:00] that you can get coverage for it, you know, I would absolutely recommend it. Like you were saying, this is not your one employee 3,000, let's just make it go away. This is some number of employees, a hundred employees, you know, a thousand employees who are all claiming failure to pay and they're seeking liquidated damages and attorney's fees.

And those cases get expensive real fast. And actually, so one thing I think is interesting on the wage and hour aspect of it, there are multiple types of employment class action suits. But wage and hour is just one of those. Reuters actually reported earlier this year that labor and employment class actions had increased 10 percent over the last year with reporting that these class actions accounted for the largest component of their defense spending on class actions and that they expected such actions to continue to increase.

Within that same article, though, it said that there has been a year over year increase in labor and employment. Class action since 2020. [00:13:00] And I believe it also said that the wage and hour ones were a big component of that. So, we really want to keep this on our radar as employers, like you said, these



are the types of claims that can take an employer down because they are so expensive.

**Jeff Stewart:** Absolutely. And I know I've handled several in the last few years. And Vicki, I know you've handled a couple as well. And these are ones where you really need to take proactive action right away, get in there. And a lot of the success of the case is whether or not you can defeat class certification and essentially show that it should not be lumped as a class, but depending on your jurisdiction can be a very difficult hill to climb.

**Victoria Fuller:** Yeah. The class certification piece can be difficult for sure.

**Jeff Stewart:** So, let's shift gears a little bit and I want to talk about some of the. Things that frankly have changed here in 2024. One of the big ones is the Fair Labor Standards Act has updated salary levels [00:14:00] for exempt employees. So, just back on July 1, they increased from a minimum salary of 684 per week to 844 per week as the minimum salary for what are known as the white collar exemptions, your executive, your professional, your administrative.

But the big increase is actually coming this coming January one, 2025, where the salary is set to increase to 1, 128 per week, the equivalent of 58, 656 per year. And what that means is that if you have an employee that is paid less than, 58, 656 a year, less than 1, 128 per week, they have to be treated as a non-exempt.

And that means they are entitled to overtime for hours worked in excess of 40 in a work week. And that is a major shift from where it [00:15:00] has been for the last several years.

**Victoria Fuller:** I think a lot of employers are going to see many more of their employees swept under the non-exempt status. And thank you. You know, you need to be on top of that, so you're not caught unawares and inadvertently end up with a failure to pay overtime claim.

**Jeff Stewart:** Absolutely. And the double bump both in July and then in January, again, just needs to be planned for and employers should be aware and in some instances may just increase employees pay above that level so that they can maintain the exemption. Another area that we've seen changing literally every year in some places and never changing at all in other places is minimum wage.

It's been a hot button topic for years and the federal minimum wage has remained in place for over 15 years now, still seven and a quarter an hour. Some states still about 20. Maintain that seven and a quarter an hour, [00:16:00] but a lot of states are higher. New Jersey just increased theirs to 1513 an hour. New York does everything differently.

They have a 16 minimum wage in New York city. And if you were the surrounding counties, but the rest of the state, it's 15, you know? So, it's an unusual, they've got like a two tier thing and Massachusetts where you are, they increased as well. Right, Vicki?

**Victoria Fuller:** Yeah, they're up to 15 an hour for most workers. And there's actually a ballot question on for November, whether to raise the minimum wage for tipped workers from 6.

75 an hour to 15 an hour. So basically, to put them on par with other minimum wage workers. This would not eliminate tipping. I would just raise their base pay so that employers of tipped workers like restaurants would have to pay 15 an hour regardless of tips. The voices on both sides are very, very loud right now and I'm curious to see how this will come out.

**Jeff Stewart:** I am interested as well [00:17:00] because it is an area that many states are looking at. So, if Massachusetts passes it, I wonder if they will simply be one of the first or if they will be on an island by themselves.

**Victoria Fuller:** Well, I think we're actually not the first jurisdiction to enact a law like this, but you're right.

We're on sort of the forefront of it. And like other laws, like pay equity or the salary discussions during interviews, you know, these things roll across the country and wave. So, if we do pass this law, I wouldn't be surprised if it starts coming up in other jurisdictions.

**Jeff Stewart:** Yeah, that pay transparency law, when talking about interviewing, I know it was New York has it, New Jersey has it, and again, it is working its way and expanding to a lot of different jurisdictions.

**Victoria Fuller:** You know, Jeff, we should also mention that minimum wage is not just at the state level, that there are some localities where minimum wage has also changed. [00:18:00]



**Jeff Stewart:** Absolutely. And in some instances, incredibly high compared to, you know, federal minimum wage. Like for example, Denver. Right now, their minimum wage is 18.29 an hour, Washington, D. C. is 17.50, Los Angeles is over 17 as well.

And it's not just the major metropolitan areas, it's other places like Portland, Maine. I mean, it's not a major metropolitan area. Metropolitan market, but they're at 15 an hour. So again, you need to know where you are and know what the rules are.

**Victoria Fuller:** Absolutely. And to your point about remote workers, I think it's very easy for employers who are operating in multiple jurisdictions or who have remote workers to get tripped up on minimum wage laws because they do vary from state to state but also potentially in certain localities in the state. So this is an area where I would absolutely consult with council just to make sure you know that you're paying minimum wage to your workers if you do have minimum wage workers.[00:19:00]

**Jeff Stewart:** Now, Vicki, there's also been a couple of new wage and hour laws that have been passed in the last couple of years. I want to talk for a minute about the New York law requiring a 30-minute paid lactation break. Have you had any dealings with that law as of yet?

**Victoria Fuller:** I haven't yet, but I am aware of it. And I think what employers need to be aware of is, this is a new type of break.

You know, everybody sort of knows that there are standard breaks like for lunch, but this is a paid break for a new mother or a lactating mother to express breast milk for up to three years after the birth of their child. So, I would make sure that this is in your handbook, that it's in your policies, that managers are aware of it because you're going to end up with inadvertent violations if the folks who need to be enforcing these breaks don't know that this is a thing now.

**Jeff Stewart:** Absolutely. And it'll be interesting to see the kind of [00:20:00] litigation that comes out of this new law.

**Victoria Fuller:** Absolutely. And this is another one where I wouldn't be surprised if this is a law that spreads across the country now that it's been enacted in New York.

**Jeff Stewart:** Absolutely. So, one of the most common kinds of, I'll say, wage and hour type claims is a failure to pay overtime.

We talked about the exemption levels increasing quite a bit because of that, I think we're going to see more overtime claims as people who were exempt. And not subject to overtime, all of a sudden are subject to overtime and employers who are not necessarily treating it that way, either allowing work off the clock, just kind of looking the other way and not putting them on the clock for that, or, uh, Or expectations that work be done outside of the normal workday yet only paying them for the normal workday.

And that is an area [00:21:00] where not only do you have penalties, like we were talking earlier with. liquidated damages or treble damages, depending on where you're at, but also makes it very ripe for a class action type of a claim. Would you agree?

**Victoria Fuller:** Absolutely. And again, just to stress the point that the law can be different on the federal and state level.

So, while a worker may not be subject to overtime under a federal law, they may be under the law of your state or your local jurisdictions. So again, this is an area where if you've got employees in multiple jurisdictions, if you have remote workers, you want to make sure that you know what the laws are in each of these jurisdictions.

**Jeff Stewart:** And jurisdictions have laws on all kinds of things. And one of them that I became familiar with not too long ago, was a law on what is required on the employee's pay stub. There's certain information that is required and again, very state to state, [00:22:00] but the issue that I was dealing with had to do with whether or not there was an employer phone number on the pay stub itself.

Because if there wasn't, then it did not comport with the law, which was a 50 penalty for the employer. For every paycheck for every employee, for every week in this case that they were paid. So, to say that that added up very, very, very quickly, and there's not much of a defense when you look at a pay stub and it's not there.

So again, that's one where employers need to be aware of requirements that may be there.

**Victoria Fuller:** It's funny, as you described that I had the thought in my head if I had a nickel for every time, but it's in this case, it's 50 if I had 50 for every time. And yes, that adds up really fast. And going back to the point I made earlier as an employer, making sure you have your evidence, that information

that goes on the pay stubs is so important because it also provides some of that information.

You know, what is the pay period for which the [00:23:00] paycheck aligns? What was the pay rate? Were there breaks? What deductions were made? All of those things create evidence that you may need in a wage and hour case. So, it's absolutely important, not just to make sure that you're giving out a pay stub with your paychecks, but to make sure that it has all the information required by the law in the locations in which you're operating.

**Jeff Stewart:** Absolutely. And again, and in the locations where your employee is, because if they are remote, you may not be familiar with the Montana or Wyoming rules or, you know, pick a state that is not near where you are, but you may have an employee there now. You know, you need to make sure you're following that law as well.

**Victoria Fuller:** That's an excellent point.

**Jeff Stewart:** So, Vicki, as we kind of move from, let's talk about the issue to how do we fix the issue or how do employers attack this? What should they be doing proactively? Do you have one or two things that you'd say, this is the absolute first thing they should do to. Try and avoid this liability.

**Victoria Fuller:** [00:24:00] Yeah, there is a lot of really low hanging fruit here for employers to shore up their wage and hour practices a lot. The first would be to ensure that your handbook is up to date with all relevant wage and hour policies. You can have a main handbook that's, you know, sort of the general policies that go to all employees and then you have state addenda.

That address laws that differ in other jurisdictions, including wage and hour laws. This is really important, not just because it provides a guide to employees, but it also provides a guide to HR and to managers because wage and hour laws are changing rapidly across the country and have changed rapidly in the last couple of years.

If you as an employer have not had your handbook updated recently, this is a great day to call your lawyer.

**Jeff Stewart:** Every day is a great day to call your lawyer in my book. And I would piggyback on that. I think that's an excellent idea. I always think that once every two years or so, I think a company should perform an internal [00:25:00] self audit.

Okay. Now, internal audit doesn't always mean self-audit, but it means you're doing it proactively and you're going to look at literally everything. And I know I've performed these where we essentially go into a business and we say, all right, I want to see your pay stubs. I want to see your time records.

How are you keeping them? I want to see the last couple of years so I can see what's there and make sure you're keeping the records that you need to, I want to pull a few people and make sure that they're being paid properly. I'm going to look at classification. Is this person rightfully exempt or nonexempt?

What are we doing? And let's make sure everything is in order so that we're not surprised by something, and we make sure that we are compliant with a lot of regulations in whatever States we're in.

**Victoria Fuller:** Yeah, and you know, one thing that I think discourages employers from doing these types of audits, frankly, is the [00:26:00] cost because yes, there's an upfront cost to doing them, but they are an actual bargain compared to the monetary and non-monetary costs of litigation.

Particularly as we talked about class action litigation, it's just better to find the problem areas prophylactically and address them prior to being served with a lawsuit.

**Jeff Stewart:** Absolutely. And again, the other is if there's ever a question, make the phone call. To one of us, you know, to your attorney to say, hey, I've got an issue.

We want to withhold so and so's pay because they haven't returned their laptop. Are we allowed to do that? You know, things like that, which is a question that I know I've gotten. probably 200 times in my career. It's common, but it's always something we need to talk through. And again, different states have different requirements.

**Victoria Fuller:** Yeah. And in addition to what you're talking about, another issue that I've seen a lot is pay equity issues where you [00:27:00] talk to an employer and you say, well, why was she paid less than the male employee who's comparably situated? And unfortunately, many times there's not really a great answer. There's not an objective set of metrics that they've been using.

It's just kind of the way things have always been. And that's from a defense perspective, not a great place to be. It's much better to do this prophylactically. Again, do the audit, see if there are anomalies in pay between men and women

or between other protected categories and men. And. If there are, and they're not explainable, we need to correct that.

And if you're not using objective metrics, well, what objective metrics can we use for different employee classifications to make sure that everybody is being paid equitably.

**Jeff Stewart:** And again, that's where the self-audit will help quite a bit to be able to have those conversations, not reacting to a lawsuit, but.

How are we going to take care of this when we have some time? And maybe we're going to correct this issue, [00:28:00] not tomorrow, but over the next six months or year, or we're going to develop the metrics that we need to make proper decisions.

**Victoria Fuller:** Yes, 100%. And again, just to your point, this is not necessarily something that we need to correct in one day.

It's not like, and tomorrow everybody gets a raise. It's something that you find the problems and then you work out a plan to address them.

**Jeff Stewart:** Absolutely. Now, one of the things I always tell employers also is you need to train your supervisors. Because they're the ones who are boots on the ground. They're the ones who are dealing with things on a day-to-day basis.

And if they don't know the rules. For example, there is a law in New York City in the restaurant industry where you can't change a person's shift without sufficient notice. And if you do, then you have to pay them extra, okay? If the supervisor doesn't know that and is changing shifts left and right, well, guess what?

[00:29:00] He's putting a lot of liability on the company, but as the supervisor has never been trained, that's where the problem is. So, we need to make sure that our supervisors know what the rules are so that. We can make sure the rules get followed.

**Victoria Fuller:** That's a great suggestion. The other thing that I would recommend here is we've been talking about class actions is if a class action waiver is allowed in your jurisdiction, and they're not allowed in all jurisdictions, but if they're allowed in yours, consider entering into those agreements with your employees.

Also, arbitration agreements, again, not allowed in all jurisdictions or they're allowed under narrowed circumstances in some jurisdictions but consider using them because it's a way to minimize your costs or streamline your costs. One of the unfortunate Realities of litigation is unless you're in a rocket docket, you could be fighting a case for two, three, four, five years.

That's a lot of money at the end of the day. And [00:30:00] interest is accruing the entire time. Attorney's fees are accruing the entire time. So, if you can get into arbitration and resolve the dispute that way, it doesn't necessarily mean you as the employer are going to win. It just means it's a more cost-effective means of dispute resolution.

**Jeff Stewart:** Absolutely. And I have utilized those agreements and basically stopped a class action before it could start, you know, where instead of talking in the millions of dollars, we were talking in the tens of thousands of dollars. And we were able to resolve that rather quickly because a class action was then off the table.

**Victoria Fuller:** It's a great suggestion. I also want to just talk directly to small businesses for a minute. To the extent we have listeners who are small businesses, one of the things we've talked about today is how expensive these types of claims can get. And that gets borne by the employer. And many small businesses are just not in a position to self-insure against these types of claims.

[00:31:00] For small businesses, especially startups, get legal counsel right away. Make sure you're compliant with all applicable state and federal wage and hour laws. Don't let these types of claims threaten your future funding, the viability of your business. It is much cheaper to get counsel involved early and get your employment practices shored up than to get a lawsuit and have to go find a lawyer that you have to pay for out of pocket.

**Jeff Stewart:** I agree completely. And I think that's an excellent way to end. So, with that, I'm going to thank everyone for joining us here on the Employment Law Counselor podcast, where we try to make sense of the world of labor and employment law. On behalf of myself and Vicki Fuller, we thank you for listening. If you enjoyed this episode, please leave us a five-star review, tell your friends, and subscribe to the podcast.

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