

A Guide to Non-Compete Clauses in the Middle East 2018-2019

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Introduction

Non-compete clauses are sometimes incorporated into the contracts of employees to ensure the security and protection of the employer if an employee decides to move to another company. When working for an entity, individuals will likely pick up on and be privy to highly confidential information and practices of their employers. In the modern and extremely competitive business environment, companies look to obtain every advantage they possibly can. A company's unique selling points are what allows them to rise above their competitors, and these unique characteristics can include everything from trade secrets to working practices and even knowledge of specific customers and interacting with them. These are all things that an entity would seek to protect.

Placing a non-compete clause in a contract restricts an individual's future employment in specific ways. That employee will be unable to obtain jobs at similar competing establishments, though the duration and specifics of how this will work, will vary based on the country. The clause will have the effect of preventing one from obtaining employment under certain circumstances to ensure one company will not lose business to a competitor due to the profession of the ex-employee.



It is no small matter, and so there are regulations in place within all of the GCC countries to ensure employers do not take advantage of employees. An individual working for a company in a particular field and at a specific position, when looking for a new job, will most probably be seeking in a similar sector. Realistically, this related sector will also be the one they would be most likely to find work in, and so this gives rise to something of a problem. If a non-compete clause is present, how will an employee find further employment?



There are solutions to this, such as time limits, though more often than not, these limitations have to be reasonably specific. Non-compete clauses are not intended to give any single party an advantage over the other, and they are indeed not intended as oppression to the employee. Preferably it is merely a preventative measure used by the employer to secure their business.

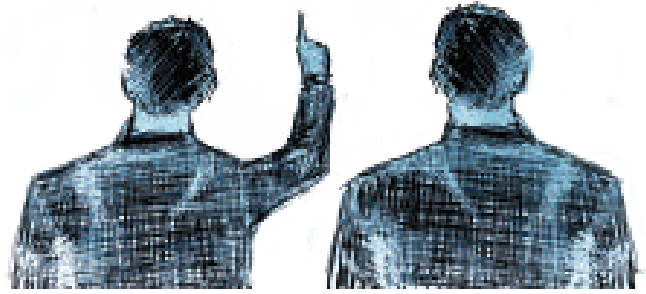


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"Fairness is what justice really is"
– Potter Stewart, Supreme Court Justice



1. Non-compete Clauses in the UAE

The UAE is a highly competitive business market, being the most famous and popular in the Middle Eastern region; this is made clear when looking at its population, which consist of around 90% expatriates. Non-compete clauses are quite well regulated although the matter can often be complicated. On top of this, the ADGM and DIFC free zones have differing regulations.

The principal regulations on this matter are:

- i.* Federal Law Number 8 of 1980 (**Labour Law**)
- ii.* Ministerial Resolution Number 297 2016

I. Federal Law Number 8 of 1980

- i.* Federal Law number 8 of 1980 is the general labour law of the UAE. It does not explicitly mention non-compete clauses, though Article 127 does concern the matter
- ii.* Within Article 127, it says that in the case that an employee's work allows them to become familiar with the clients of their employer, or if that work exposes them to the trade secrets of the company, the employer will be in a position to oblige a non-compete restriction upon the employee.
- iii.* These are the conditions under which a non-compete clause may be allowed as per the law, though the Article also states conditions.
- iv.* Article 127 States that for this restriction to be applicable, the employee must be over the age of 21 from the time of the contracts initial formation.
- v.* On top of this, the clause must be limited regarding the time and place. Further, it should also be limited to similar forms of work that would directly allow for competition with the original employer and will not be permitted unless it is necessary for them to protect and safeguard their lawful interests.
- vi.* From this, a point that can be noted is that the law is stated in such a way to ensure a fair system. A non-compete clause cannot be used to take advantage of the

helpless. The age restriction is present to provide that those who are very young do not have the early and crucial stage of their careers unnecessarily restricted, as this could have more considerable repercussions on them.

vii. On top of this, the time and place restrictions are just a matter of fairness. For time limitations, markets change and so there must be an absolute time limit after which the employment of that employee will not have a noticeable or competitive impact. Further to this, employees employed within the UAE will be less likely to interact with clients and competitors in other jurisdictions, and with the international market and competition on such a scale being far more unpredictable, a limitation will have to exist.

viii. Of course, the non-compete clause must prevent work in a similar business that would be in direct competition with the employer. They should be able to demonstrate that in the ex-employee working in the new company, they will suffer losses directly as a result.

ix. Due to Article 127, it is more often than not, more senior employees who receive these clauses in their contracts. Those at a decision-making level who would potentially be able to impact the interests of a company and their competitiveness with their knowledge may genuinely require a non-compete clause; there will be little to no positivity to arise from applying non-compete clauses to lower level employees or those privy to less insider knowledge.

II. In the Case of Litigation

Escalating a case to litigation is a serious matter, and so there must be a certainty of a breach. However, the UAE's outlook and handling of these cases can be quite a complicated procedure. Certain things must be understood:



*“Number one, cash is king...
Number two communicate...
Number three, Buy or bury the competition”
– Jack Welch*

X. In the case, a breach of a non-compete clause occurs, and litigation commences, this will not immediately result in negative repercussions for the defendant. Every situation requires judging on its merits, and with this is considered, there is room for some variation here from the clause present in the contract.

XI. The court will be able to look to the clause and decide whether the specific limitations are equal to the situation.

XII. For example, if the business doesn't have that strong an international presence, but still decides to restrict an employee from joining a similar business abroad for a particular time, this section of the clause would likely not carry much weight.

XIII. Due to the complex nature of non-compete clauses and the variance that may arise between them and whether a court views them as being relevant or necessary, taking legal action against someone who is in breach of such a clause may not result in the expected or contractually expected outcome.

XIV. This uncertainty plays a large part in dictating how parties produce these clauses and ensure that they make them as relevant and fair as possible. In the end, the goal is to allow for the least mutually damaging outcome for both parties.

III. Ministerial Resolution Number 297 of 2016

Before the introduction of this Ministerial Resolution, the Federal Law Number 8 of 1980 was the only applicable law concerning non-compete clauses. This introduced legislation aimed to provide some form of a mechanism through which the old federal law could act. Due to the briefness of said regulation, confusion and uncertainty was a highly likely outcome of a case which attempted to solve a dispute on this topic.

XV. The Ministerial Resolution provides that, should a case result in the court upholding a non-compete clause, the Ministry of Human Resources (previously known as the Ministry of Labour) would be able to withhold new working permits for the employee for the duration of the clause, and so long as the work was relevant to the type of work performed.

XVI. The Ministry will also be in their right to revoke any permits they have already issued if a court finds it to be in breach.

XVII. Once again, all of this must still adhere to the limitations previously stated, such as the time and place constraints.

While this new resolution does not entirely solve the issue of the highly complex and unpredictable nature of these types of clauses and conditions, it does now mean that there is a set mechanism in place to enforce the law.

2. Non-compete Clauses in the DIFC

The Dubai International Financial Centre is a free zone located in Dubai and is one of only two financial free zones in the country. It is not considered part of the UAE mainland and has its separate employment regulations and regulatory authorities.

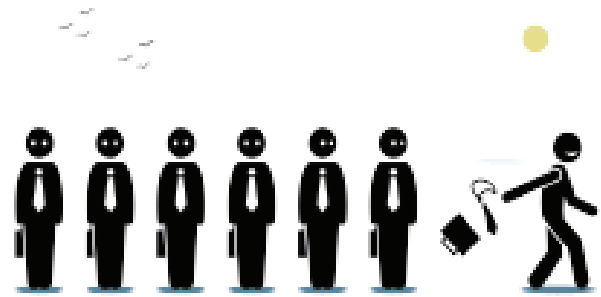
I. DIFC Law Number 6 of 2004

i. The DIFC Law Number 6 of 2004 governs the contract formation within the free zone. It specifies the structures of contracts and what will and will not be valid in an agreement.

ii. Article 144 of this regulation concerns post-termination of agency duties.

iii. Generally speaking, once a termination of a contract occurs, the relationship between the parties is also over.

A pat "The secret of success is to know something nobody else knows"
– Aristotle Onassis



However, this article states the specific conditions and areas under which there is still an ongoing duty between the parties, and what this entails.

iv. Firstly, Article 144 (a) states that the agent, following a termination of a contract, does not have a duty upon themselves to not compete with the principle. Simply put, this means that an expansive and overarching non-compete clause will not affect the working party. They will not have restrictions from finding employment with competitors of the principle.

v. However, while there may be no restriction in this broad sense, there are limitations in place. For example, Article 144 (b) states that the agent shall not be allowed to share confidential information or practices of the principle with their new employers. They shall not be able to practice these methods themselves or teach others to do so if this could be used to the detriment of their former employer.

vi. Further to this, Article 144 (d) states that the agent shall not be allowed to take advantage of subsisting relationships that they formed as a result of their work for the principle.

The DIFC regulations, therefore, do not explicitly allow for non-compete clauses in their contracts. However, upon termination of an individual's contract, when they move on to further employment, they will be unable to reveal or practice the trade secrets of the principle or use the connections they obtained while working there if it would lead to the detriment of that principle.

There are remedies in place for breaches such as these, and they are best summed up in Article 148 of the Law.

vii. Article 148 (a) states that if an agent receives benefits as a result of breaching their duties as laid out by the Law Number 6 of 2004, they shall be liable to

provide the principle with what they have received, its value or its proceeds. On top of this, any damages that may have resulted will also require remedying.

3. Non-compete Clauses in the ADGM

The ADGM is the other financial free zone in the UAE and is in Abu Dhabi. It is a relatively new free zone, though it has seen rapid growth in recent years.

i. The rules and regulations within this free zone are many. However, one of the most important things to note is that the legal system used within the free zone is a Common Law system, rather than a Civil Law system that can be found to be used in the UAE.

ii. To begin with, unlike the DIFC, there are no regulations in place in the ADGM that restrict or prevent the use of non-compete agreements. Therefore, if the employer sees it as being a fit inclusion in a contract, they will be free to implement it.

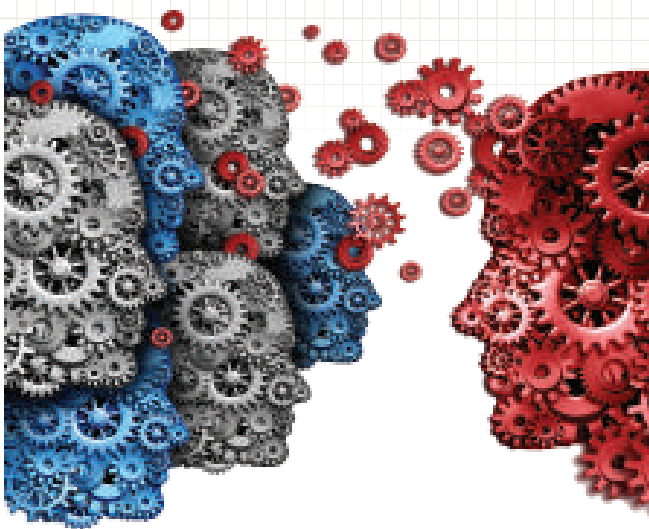
I. The Employment Regulations 2015

iii. The Employment Regulations of the ADGM cover the basis of most aspects of employment. The law itself does state that this regulation entails the minimum requirements in employment agreements between parties, and there are further regulations that they may be subject to such as UK Common Law regulations and more.

iv. Article 10 of the law concerns the duties of the employee, and also specifies where these duties will prevail even following the termination of a contract. Section 1 (g) of this Article states that the employee must not disclose the confidential information of the employer to any third party, and this condition will survive the contract's termination.

II. The UK Common Law and Equity

v. The legal system used in the ADGM is very much similar to the one used in the UK and what this means is that the law of equity also applies in the zone.



“There is no secret that time does not reveal”

– Jean Racine

vi. This information is all confirmed in the ADGM Application of English Law Regulations 2015

vii. As per the law of equity, the employer should be able to obtain the equitable remedy of injunctive relief upon the employee in the case that they should breach either the non-disclosure as mentioned above stated within the 2015 employment regulations or in the fact that they should violate any non-compete clauses found within their contract.

viii. The entire concept of equity revolves around fairness and considering every case based on the specific details therein. As such, pursuing litigation over a breached non-compete clause may not result in the employer receiving the exact outcome they would expect. Instead, the damages claimed would more likely depend on the extent of the breach and the damage caused as a result of it.

There are many free zones within the UAE. However, the ADGM and DIFC are the only ones that are notably different or have their unique and specific regulations on the matter of non-compete clauses. The remaining free zones generally apply the UAE regulations on these matters, should they ever arise.

4. Non-compete Clauses in Kuwait

Kuwait is a relatively small country with a population of only around 4 million people. However, it is still a vastly wealthy country, with massive oil reserves and a highly developed and prosperous economy. The state is considered to be high-income, and the capita per income is the fourth highest in the world. Also, having the strongest currency in the world, the nation is a massive business centre with around 70% of the current population being expats. With this considered, the regulations are quite comprehensive.

i. Kuwait’s legal system is one that shares various inspirational aspects with many other legal systems around

the world. For example, it shares concepts with the UK Common Law system, the French Civil Law system and the Egyptian legal system.

I. Law Number 10 of 2007 (Competition Law)

ii. The Law Number 10 of 2007 concerns competition within the country. It looks into unfair tactics and activities that may be performed to restrict competition and when these may become issues that will require some form of rectification.

iii. Article 4 of the law discusses non-compete clauses.

iv. Although this law and this specific Article does provide some guidance with regards to non-compete clauses, the term non-compete clause never arises, and therefore, one should use this legislation as more of a guide on the topic.

v. Within Article 4, it states that activities that may destroy the competitive nature and opportunities by leaking information by one of the competitors that are not available to the other, this will be considered a harmful practice and will, therefore, be prohibited.

vi. There is little else mentioned in the law that can provide clarity with regards to approaching non-compete clauses. As such, generally the case is that should the parties agree to a provision of non-competition, the court will uphold it.

II. Damages for a Breach of Contract

vii. Concerning damage claims by the employer against one who breaches such a clause, they will be entitled under the country’s civil law practices to be compensated by the employee.

viii. Generally, damages are split into either specific performance by the breaching party to right the wrong, or through damages that will be payable to the wronged.

"If a worker has a particular set of skills that can only be employed in a certain field, the non-competition agreement can't prevent him from getting a new job using those skills"

- Arnoud Engelfriet.



ix. However, Law Number 67 of 1980 (**Civil Law**) states under Article 284, that a remedy of specific performance will only be available as per the discretion of the court.

x. Further to this, damages would also have to be as per the courts' discretion. The reason here is that these damages must be calculated accurately to ensure that no party is at an unfair loss.

xi. The courts of Kuwait have a high level of discretion in these cases, so much so that what is awarded (regarding total value of the awards) is up to them. But also, if they find that specific performance would work better as a remedy in a situation, they may call for it even where the contract and clauses within may say the opposite.

xii. More so, the courts are generally reluctant to hand out awards of specific performance, preferring to deal in damages, even where the values may be difficult to calculate.

Kuwait's legal system is one which can be quite complicated when it comes to the matters of damages and other forms of legal remedies. However, under their laws, non-compete clauses are permitted, and competition is highly valued as this is healthy for both the companies and the country's economy.

5. Non-compete Clauses in Bahrain

Of the GCC countries, Bahrain has the smallest population at around 1.3 million. Approximately 50% of this population is made up of expatriates. The state has far less oil than the other GCC countries, and as such, they have had to diversify more so than the likes of the UAE and Saudi Arabia.

With one of the first post-oil economies in the region, Bahrain diversified through investing in the banking sector, becoming a world leader.

Business has therefore boomed in Bahrain, and the contract and employment regulations cover all areas including non-compete clauses and post-termination obligations of employers and employees.

I. Law Number 36 of 2012

i. Law Number 36 of 2012 is the labour law of Bahrain, and within it is stipulated the regulations regarding employees and the working conditions they should be entitled to receive. Further, this legislation also lays out the responsibilities of both the employer and the employee.

ii. Article 73 of this legislation concerns what would be the equivalent of a non-compete clause in the country.

iii. Firstly, stated in this Article is the condition upon which a non-compete clause may be allowed within an employment contract. It says that, if an employee is made aware through their job, the trade secrets of the company or if their work allows for them to meet and get to know the clients, an action may be required. The parties shall be able to agree upon a clause stating that there shall be a restriction upon the employee in the case of the termination of their contract.

iv. For this to be valid though, the employer must also ensure that the employee is at least at the age of 18 years at the time of the completion of the agreement, and also that the restriction is limited to no more than one year.

v. Further, the restriction should also be limited to work that is similar or as such that the employer would require the protection to safeguard their legitimate interests.

vi. A further final condition also arises in Article 73. It says that in the case that the termination or non-renewal of the employee occurs in an unfair or uncalled for manner (at no fault of the employee), the non-compete clause will not be applicable.



Bahrain's regulations most certainly allow for non-compete clauses. They are limited similar to the UAE with an age requirement for a non-compete agreement to be valid. The other conditions are also essential and what are to be expected such as time and location limitation.

6. Non-compete Clauses in Oman

Oman has a population of around 4 million with approximately 40% of that consisting of expats. However, there has been a somewhat firm push for Omanisation in recent years, and the expat population is expected to fall in upcoming years.

The country is an absolute monarchy. The legal system derives elements from the civil law systems and also sharia law.

The country has a strong economy and is considered a high-income nation. Its reserves of natural resources are not the greatest in the world, though they have quite large quantities of natural gas and oil available.

I. Royal Decree Number 50/90

This decree is the country's Commercial Code. It sets out all of the principal regulations with concerns to commercial activities.

While it does not provide the complete legislation for non-competition, it still contains relevant information.

i. Article 50 states that one company (referred to as merchant within the law, though it will likely hold the same sway over companies) shall not be allowed to entice employees of a competitor to assist them through the reveal of trade secrets and practices of that competitor. This idea also applies in the case that the company employs the trade secret holder old employees.

ii. Now, this is quite vague, especially in comparison to other of the GCC countries and their regulations. However, it does confirm the protection of a company and

"It is not sufficient that I succeed, all others must fail"

– Genghis Khan

their regulations. It ensure that the practices of that company are safe from their competitors through their ex-employees.

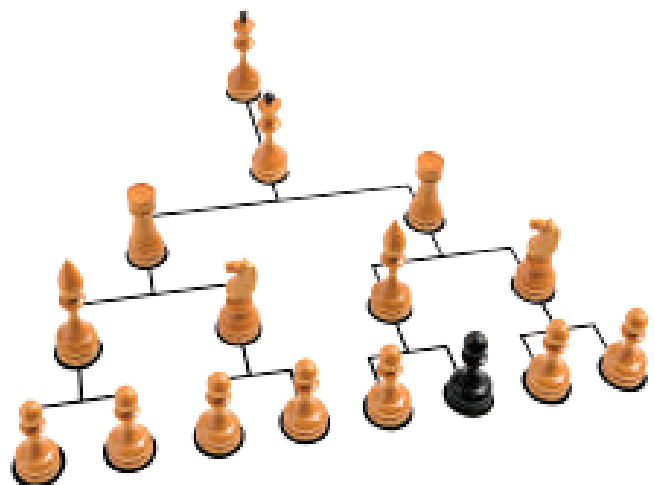
II. Sultan's Decree Number 35/2003

iii. The Sultan's Decree Number 35/2003 is the Labour law of the land. It dictates all elements that employees and employers must consider when entering into contractual agreements.

iv. This law does not explicitly mention non-compete clauses, though it does state Under Article 27 (4), that an employee is bound to keep the secrets of their employer so far as it relates to their work. This point will be more important to consider in the cases of employees that are regularly interacting with important and vital areas of the business which are not widely known.

v. However, this law does not provide further specific details as to limitations placed upon the employees.

Oman does not explicitly have a non-compete regulation and what it does have is not as encompassing as some of its neighbouring nations.



*“Train people well enough so they can leave,
treat them well enough so that they don’t want to”*
– Richard Branson

What is covered under the law is the protection of trade secrets and practices that would result in the unbalancing of the competitive market. The statutes as mentioned earlier when considered together provide decent protection, though time and place limitations are not stated.

There are no laws explicitly preventing the formation of non-compete agreements under the law, and so the repercussions of including one in a contract are not immediately apparent. However, if they are in line with protecting the interests mentioned previously in the Labour Law and Commercial Code, they could potentially be acceptable so long as they are fair.

7. Non-compete Clauses in Saudi Arabia

Saudi Arabia is the largest economy found in the Middle Eastern region, and it also has the highest population. With just over 30 million people living in the nation of Saudi Arabia, it has a clear margin over the others. It also possesses vast quantities of natural resources and is therefore highly experienced with business.

The country is known for using a Sharia Law system to regulate many areas of life and business, though there are numerous areas and modern commercial business practices which do not entirely fall under any specific Sharia law.



I. Royal Decree Number M/21 of 1969

This Law relates to Labour and Workmen issues. It covers aspects from contracts to the duties of employers and employees to one another.

i. Within this law, the term non-compete is never actually used. However, there are some other points to be considered

ii. Firstly, Article 96 states that the employee must ensure they keep the technical, commercial and industrial secrets that they are made aware of through their work, private between themselves and their employer.

iii. There are no specific limitations in place for this regulation, though Article 13 does state that no complaint shall receive a hearing concerning any of the provisions of this legislation in the case that a period of 12 months has elapsed since the contracts termination or the occurrence of the event in question.

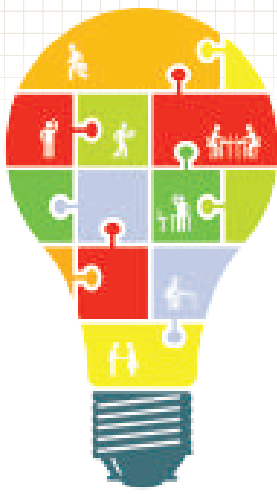
II. Royal Decree Number M/51 of 2005

This decree is the Saudi Labour Law. The previously mentioned regulation was vaguer due to its production occurring and enacting in 1969. This new legislation contains further details concerning non-compete agreements.

iv. As per Article 83 of this regulation, it is stated that in the case that a workers work enables and allows for him to become familiar with the trade secrets or clients of the employer, the employer may demand that they not join a competing company following the termination of their current employment contract.

v. For this to be valid, it must be presented in writing and should state the time and place limit and the type of work that is restricted; this must also be to ensure the protection of the legitimate interests of the employer.

vi. The time limit, which is a maximum of two years following the termination of the contract, also appears.



"Startups with intellectual property achieve greater long-term success than startups without it."

- Forbes magazine

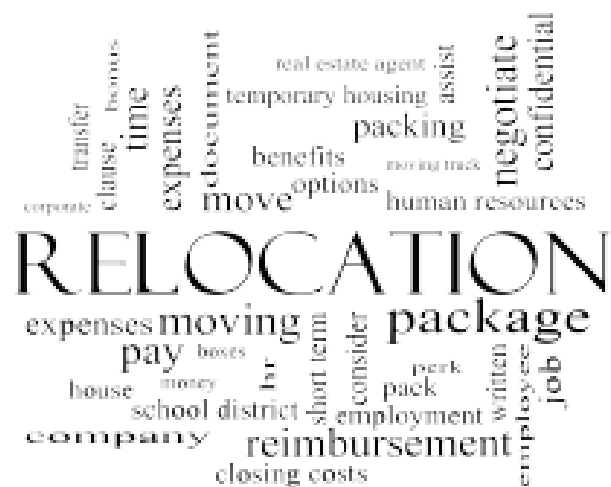
This last mentioned legislation more clearly indicates the points of primary importance within a non-compete clause and may be seen as an expansion of the old law.

8. Conclusion

Across the GCC, the attitude towards non-compete clauses is quite similar. Some countries such as Oman and Kuwait have fewer regulations on the area or do not specifically refer to it, though their laws do still allow for these agreements.

The consensus is that their agreements should be fair and only used to such an extent as they will be required to safeguard the legitimate interest of an employer. The limitations are also much the same across most of the jurisdictions, with the necessary time and place restriction as well as limiting the clauses to the required field of work.

Some of the jurisdiction go a step further with additional caveats like the age requirement for such a clause to be enforceable though, and it will be likely in time that as the laws further develop, these will become more commonplace. At present, there is still potential for uncertainty, though the jurisdictions are attempting to minimise this to allow businesses to have trust that the system will protect them and help their businesses to flourish.



We can assist you in understanding the complex nature of non-compete agreements and how to handle them.

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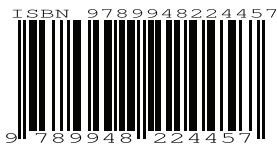
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