

The right of female workers in exercising their motherhood: A critique in Vietnam labor law

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ABSTRACT

Motherhood is perceived as one of the greatest duties of women in any society. In today world, protecting motherhood in any aspect is appraised since it reflects the high level of social development, where feminist rights are highlighted. In working environment, labour law is the key legal instrument where the protection of this right can be firstly seen with certain privileges designed for female workers. Through the legislation of these rights in Vietnam labour law, motherhood is not only protected, but the values of feminist legal theory are further manifested by the way this right is embedded in law. Since the right to motherhood is a broad perception about a bundle of woman rights facilitating the state of being a mother, this article demonstrates the innovation of Vietnam labour laws through the stipulation of breastfeeding right, which secures the female worker right in fulfilling their motherhood at the workplace. Discussions around this right will provide the statement that the labour laws of Vietnam enable female worker to exercise their motherhood with favourable conditions, and this is solid evidence to confirm that the spirit of legal feminist theory is innovatively embedded. Accordingly, a legal comparative method will be used to signify the innovative definition of breastfeeding rights in Vietnam labour law compared to other countries as well as standards set by the International Labour Organisation. The result of such legal comparison confirms Vietnam labour law has been shifted toward enshrining the legal feminist legal theory. Finally, suggestions about an essential requirement of providing milk expressing facilities should be embedded in law to ensure the right to motherhood of female workers in the current context of the Vietnam business environment.

Key words: Feminist Legal Theory, Vietnam labour law, Breastfeeding, Motherhood, gender equality

INTRODUCTION

The latest Vietnam labour code showed certain important updates which illustrates the approach of Vietnam labour legislation toward the international standards¹. New provisions of this law not only present substantial developments in regulating the working conditions of employees, but further enhanced the moral norms and values which have already been previously available. While the equality between male and female workers are one of the chronological topics in the law-making process, the current Vietnam labour code can be regarded as a success in this matter since it witnessed a great improvement in balancing the gender issues^{2,3}. In this new law, some rights which are considered exclusive to women are reviewed and improved in the direction of enhancing their state of being a mother, which is also commonly called motherhood. Among these improvements, the breastfeeding right is one of the prominent examples about securing female worker's motherhood in the workplace, particularly in the dynamic context

of social development in Vietnam. Since this right is solely enjoyed by the women, securing the conditions for female workers to exercise well this right means their motherhood is secured. Upon reflection of this change to current legal theories, a statement can be made that the more the positions as well as the rights of women are improved, the stronger evidences of the legislation toward respecting feminist legal theory are thus confirmed.

Against that backdrop, this research will argue that the latest labour law of Vietnam embedded international standards to protect the breastfeeding right and such protection is even better than countries with similar conditions. Furthermore, discussions around this right showed that feminist legal theory has been innovatively embedded in Vietnam labour legislation. This is a positive approach of Vietnamese law makers in protecting feminist rights and moreover, suggestions are made based on such approach to enhance the employers' responsibility about the breastfeeding right in the course of employment.

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REVIEW OVER THE RIGHT TO MOTHERHOOD AND LEGAL FEMINIST THEORY

Although there has been no explicit definition of the right to motherhood as well as its protection stipulated in the system of international treaties, this is regarded as a fundamental right of woman and is drawn in the discussion of human rights lawyers and activists as a human right. This can be found in international legal instruments, namely the Convention on the Elimination of All Forms of Discrimination Against Women⁴, International Covenant on Economic, Social and Cultural Rights⁵ and the Convention on the Rights of the Child⁶. The right to secure the duty of mother to their child, particularly in the course of employment, is strongly identified and protected with emphasizing on the equal position between male and female in these listed legal instruments. Since breastfeeding is without doubt a basic instinct of women while excreting their motherhood, this right can be argued as human rights of women and thus must be ensured in any circumstances⁷. Standards set by the International Labour Organization (ILO) in its conventions and recommendations do confirm this point of view. As we can find in the article 3 of the Maternity Protection Convention 1919, a woman will be allowed half an hour twice a day during her working hours for nursing her child⁸. Therefore, protecting the breastfeeding right of female workers in the working place also means partly promoting their right to motherhood. Since Vietnam is a signatory of these treaties as well as a member of ILO, it is without doubt that the definitions of breastfeeding right in Vietnam labour law should be consistent with the international requirements^{9,10}.

As presented earlier, breastfeeding right is a feminist right because only female workers can enjoy this in the conducting place of employment. Hence, a question could be raised that if there is an existence about a positive relationship between securing the breastfeeding right of female workers and the feminist legal theory in Vietnam labour law. In order to identify this matter, we should firstly understand the feminist legal theory as well as the Vietnam labour statute. Accordingly, feminist legal theory has been identified as a legal theory which enhances and protects the rights of women in law, bypassing all the hindrances of sexual discrimination toward escalating the position of women to be equal to men¹¹. Feminist legal theory has been resulted from the chronic debates around the weak positions of women comparing to men in

numerous aspects of life. In the context of law making, this theory facilitates the need of having certain mechanisms to not only maintain gender equality, but also create favourable conditions to protect the disadvantages of women in social participation¹². Therefore, since providing the conditions which protect the breastfeeding right of female workers in law is obviously protecting the feminist right, the relationship between feminist legal theory and the right to motherhood is confirmed positively. From an overall perspective, this relationship has promoted the right of women in laws and particularly, in the labour legislation. The more the motherhood is protected in laws, the stronger the embedment of the feminist legal theory in legislation and vice versa, once law maker employed feminist legal theory in law making, the protection level of feminist right is thus increased.

The development of modern legal theories can create different views about feminist legal theory. According to the result of the literature review while preparing for this research, author found agreed with Professor Cynthia Grant Bowman and Professor Elizabeth M. Schneider that there are four main legal schools in approaching to the feminist legal theory as well as their roles in legislation¹³:

- Formal equality theory: this theory characterises the arguments grounded within the liberal democratic thought. Accordingly, women should enjoy the same rights, status and positions as men. Equally treating in terms of the gender is the main feature of this theory.
- Cultural feminism: This approach takes in to account the different characteristics between male and female and enshrines such feminist differences in the course of law making to protect better feminist rights. Pregnancy and motherhood are regarded as unique that only female can experience and thus such differences deserve to be considered in the law-making process.

- Dominance theory: This theory studies the dominant power of men in the social reality and to realise the disadvantages of women. Such different advantages are the initial foundation where feminist rights and protection will be structured upon. From this point of understanding, dominance theory outlines a theoretical framework where harmful actions against women will be scrutinised. The result of this process will contemplate to form the women's rights to prevent any conduct against them. It is important to know that since the first approach of formal equality theory focuses on securing the rights on the basis of gender equality, this approach thus will not provide a comprehensive approach to the patriarchal structures of power in society, which led to the fact that women

may not escape from perpetration. Therefore, dominance theory is hopefully developed to fulfil the gap that formal equality theory remains.

- Post-modern or anti-essentialist theory: This theory set its theoretical approach on a wide range of perspectives to struggle for the right of women. Particularly, feminist rights should be defined and constructed from the intersection of gender, race and class rather than a single category. Due to the dynamic movement of today world, the right of women should be escaped from the conventional consideration but should be engaged and contemplated with new challenges, namely immigrant women, rights of feminist transgenders or cultural integrations.

Through the process of development, these schools of feminist legal theory provided us with fundamental knowledge about the relationship between women right protection and law. Once being manifested while legislating, feminist legal theory highlights the issue of gender in law and serve law makers a critical envisage in considering the rights of women.

With new emerging challenges in today world, treating women with the same conditions as men is inadequate to protect what is so called women right¹⁴. Obviously, equal treatment cannot fulfil the disadvantages in terms of health, psychology or social duties that are exclusive to women, and motherhood fulfilment is an example. Hence, the approach to promote feminist rights through legislation should be set on two main arenas: (1) equally treat women as men and (2) protecting the exclusive difference that only women have. Otherwise saying, the four schools of feminist legal theory should be employed in law making process if we seek for a good solution to protect woman right, or particularly the right to motherhood. This approach is manifested in the legislation of the breastfeeding right of female workers in Vietnam labour law.

RESEARCH METHODS

This research employs the combination of legal doctrinal and comparative approaches. While the legal doctrinal approach helps to appropriate the right to motherhood as well as the breast feeding right in Vietnam labour law via the lens of legal feminism theory, legal comparative approach will be used to signify the innovative definition of breastfeeding rights in Vietnam labour law compared to other countries and standards set by the International Labour Organisation. Common methods in legal researches, which are analysing, interpreting, inductive and deductive reasoning, are also used to address the relevant questions raised from this topic.

RESULT OF THE RESEARCH OVER BREASTFEEDING RIGHT IN THE VIETNAM LABOUR CODE

The current labour code in Vietnam does not straightforwardly define how female workers can have the breastfeeding right in the workplace in such exact words. Specifically, session 4 of article 137, Vietnam labour code 2019 generally states that female workers who have children under 12 months old can have a break of 60 minutes during working time and this is a fully paid period¹⁵. However, this provision of law is specifically guided in session 4, article 80 of the degree No. 145/2020/ND-CP on elaboration of some articles of the labour code on working conditions and labour relations¹⁶. Accordingly, female workers who nurse any under 12 months old child can enjoy a 60-minute break during the working time every day for breastfeeding, expressing, storing milk as well as resting with fully paid. The enjoyment of this break may be continued after the child is over 12 months old provided that there is a mutual agreement between employer and employee¹⁵. More favourable conditions to female workers are offered in this article that they can negotiate with employers for the most suitable arrangement of working time to exercise this duty of motherhood¹⁵. To further highlight the importance of firms in promoting this right, session 5 of the same article encourages employers to deploy facilities serving for expressing and storing breast milk¹⁵. This is a compulsory duty of employers when the number of their female workers is over 1000¹⁵.

While being compared with previous Vietnam labour law, we can see that the new labour code 2019 and its legal guidance documents reserves and extends the stipulation of the breastfeeding right. The wording of breastfeeding right in the labour code 2012 and subsequent legal texts have been inherited entirely in the new law with certain extensions in the requirements of breastfeeding facility^{17,18}. Specifically, the new law has a step forward in defining the facility serving for breast-feeding is a compulsory requirement to any employer having more than 1000 female workers in the labour force. This condition has not been found in the previous law, which regarded that installing breastfeeding facility in the undertakings is optional and depending on employer's capability. Although there was not much change, but the breastfeeding right as defined in the new labour law of Vietnam signified the principle of inheritance in Vietnam's legislation, while integrating more favourable conditions to enhance protection of female rights. Furthermore, the current expression of law makers as read in the

length and the detail about this right does illustrate the innovation of Vietnam labour legislation in terms of caring more about the right to motherhood of female worker.

The innovation of the breastfeeding right in Vietnam labour law is clearer once compared with the international standards as well as the labour regulation of other countries. From the perspective of international standards, the World Health Organization (WHO) recommended in its statement that children should be fed by their mother's breast milk for at least six months and this should continue until they reach the age of two or more¹⁹. ILO has long recognized this as a standard to recommend its national members to define in their domestic laws. As seen in the article 3 of Maternity Protection Convention (No.3) and session III of the Recommendation 1952 (No. 95)^{20,21}, the minimum standards for breastfeeding break and breastfeeding facilities for female workers in the private sector are set with half an hour, twice a day during her working hours for breastfeeding. The break is defined under various forms such as one or more daily breaks or a daily reduction of hours of work²². All breaks of breastfeeding mothers are fully paid and the employers are recommended to establish the facilities for nursing or day care²². These facilities are preferably outside the workplace and matched with the adequate standards in respect of the equipment and hygienic requirements²¹.

It is clear that Vietnamese labour law respects these ILO's requirements while providing the right of female workers to breastfeeding. The translation of ILO's standards into the domestic legislation of Vietnam is appropriately understandable since Vietnam is a member of ILO¹⁰. Certain adjustments to match with the reality of the general working conditions in Vietnam can be found, such as the recognition of the mutual agreement between female workers and their employers for certain conditions about time and facility serving for breastfeeding. It is reasonable because when the law strictly imposes this obligation to the employers, it will have a certain impact on the economy since Vietnam is characterised by producing industries in which the participation of female workers is even higher than the average percentage of the world. However, it can be observed that these adjustments are made without significant variance from ILO's. Moreover, such legislative embedment is an innovative step of Vietnam toward harmonising its legal system to the world and as a result, the rights of Vietnamese female workers as well as their right to motherhood is thus secured.

From another perspective, the innovation of Vietnam labour law in respecting the breastfeeding right can also be identified while comparing with other countries' laws. The legal comparisons showed different level in the extent to which this feminist right is recognized. In the UK, the approach to breastfeeding right is different from ILO's recommendations. The UK law does not provide explicitly that employers should allow female worker a breastfeeding break but rather, female workers are entitled to breastfeeding breaks and breastfeeding facilities on request or collective bargaining^{23,24}. The UK applies a long length of maternity leave up to 52 weeks with about 90% of their average weekly earnings paid, so female workers can have longer time to stay home and take good care of their child while in Vietnam, the mother only has a maternity leave of 6 months as defined in labour laws^{15,25}. Although the breastfeeding facility is not obviously defined in the UK laws, generally this facility is fully equipped with essential tools for breastfeeding, milk expressing or storing²³. In Germany, this country totally respects the recommendations of ILO when allowing female workers to break twice a day with 30 minutes/ each break, or once a day with 60 minutes for breastfeeding. If the breastfeeding facility is far from the undertaking, female workers will be allowed a 90 minutes break for this activity²⁶.

On the other hand, rights to breastfeeding breaks and breastfeeding facilities are not provided to female workers under the laws of Thailand. We can find nowhere in the Thai Labour Protection Act B.E. 254 or any in-forced document that ILO's minimum standards about breastfeeding breaks and breastfeeding facility are translated into this law. Therefore, Thai female employees are only entitled to a normal break of at least an hour every day without pay as stipulated in session 27 of this act²⁷.

After demonstrating the approaches of countries to the breastfeeding rights of female workers, some identifications can be extracted. Firstly, although differently defining this right to standards provided by ILO, the UK law shows a higher level of enjoyment of this right to female workers. This is demonstrated through the length of maternity leave, the amount of pay as well as the facilities equipped in the working place as a standard although this is not required by law. This is easy to understand since the UK is often on top of countries with the highest living conditions. While Germany totally respects and enshrines the ILO's standards, Thailand characterises a total nonexistence of this right in their laws although its economic position and social living standards are often regarded higher than Vietnam.

Those legal comparisons demonstrate a certain understanding about the right of breastfeeding in Vietnam law. Firstly, international standards about breastfeeding are interpreted into the labour law of Vietnam with certain adjustments to cope with the reality of a developing country. Secondly, the breastfeeding right defined in Vietnam law is similar to Germany since both countries upheld the common standards, and thus the female workers in these countries can exercise their motherhood in the workplace better than Thai women. Hence, the law of Vietnam in protecting the right to breastfeeding of female workers and their motherhood in general is innovative, confirming the positive shift of Vietnamese domestic laws toward the international standards. With this woman right advancement, Vietnam labour law also reflect certain extent of characterizing of feminist legal theory, through the breastfeeding right stipulation.

DISCUSSION OVER THE FEMINIST LEGAL THEORY IN VIETNAM LABOUR LAW

The manifestation of feminist legal theory

The result of previous legal reviews stated that respecting feminist legal theory is available in Vietnam labour law as can be seen in the rights of breastfeeding, and generally the right of female workers. This identification can be additionally proved by demonstrating the engagement between Vietnam labour laws and schools of feminist legal theories:

Firstly, the right of breastfeeding is the right exclusively enjoyed by women, which upholds and respects their motherhood status at the workplace. Despite the labour laws being updated and changing to keep up with the social economic development, this right has been secured well without notable changes. The labour laws of Vietnam have long been stipulated and constantly keep this term with certain updates in terms of breastfeeding facility requirements. In this line, female workers are adequately favourable in exercising their motherhood in the workplace. Reflecting to the legal schools of modern feminist legal theories as presented, it can be seen that Vietnam labour law has enshrined cultural feminists theory, dominance theory and anti-essentialism theory. Since all these theories believe that the feminist rights in law should be developed on the basis of the feminist differences, unique rights of female workers must be considered in laws and only female workers are entitled to enjoy. Additionally, since this right has long been upheld in Vietnam labour law, we can conclude that the embedment of the legal feminist theory in to

the Vietnam law is not new but has already been existed.

Secondly and from a broader perspective, we can see that the school of formal equity theory is also strongly depicted. The common theme of women should be treated the same as men has been found in Vietnam labour laws as well as guiding documents. Significantly, this gender equality is even more enhanced in the latest legal documents. Apart from the definition of the breastfeeding right, an example toward this can be seen in the name of the chapter X of the labour code 2020. Accordingly, the name of this chapter emphasizes that this chapter is worded as “Specific rules for female workers and ensuring sexual equality”¹⁵. This is a developing step compared to the previous version which only defines the same chapter with the name as “Specific rules for female workers”¹⁷. In line with this change, the provisions set in this chapter have also been updated by ways of remaining and developing exclusive rights of female workers as seen in the case of breastfeeding right on one hand, and on the other hand is to constantly uphold the balance between male and female workers. This change showed that the lawmakers acknowledged formal equity theory into their legislative techniques: securing the rights that only women have while creating the sense of being treated equally to their male counterparts.

As described in the previous part of the research, feminist legal theory additionally serves to protect the right of women while harmonize the difference of right enjoyments between men and women. What can be seen in breastfeeding right of Vietnamese female workers as well as other feminist rights defined in latest labour laws of Vietnam provide convincible evidences about the approach to feminist legal theory from Vietnamese law makers. Arguably, the embedment of this theory in law can reveal evidence that the right to motherhood will be ensured in the workplace, as well as the domestic laws of Vietnam will be developed in line with or even, higher than the international standards of protecting women rights. The legislative technique in the labour laws of Vietnam can thus be regarded as a prototype for other countries with disadvantaged developing conditions to enhance the rights and values of women, further to secure their right to motherhood.

Proposal to enhance the right to motherhood

In a report released in March 2021, ILO indicated that the ratio of Vietnamese female workers of legal working age participating in the labour market society is

70,9%²⁸. This figure is considerably high and even much higher than the global average of 47.2%²⁸. The percentage of Vietnamese female workers in agriculture reduced and gradually shifted to other sectors of the economy (industrial, service and non-service), which occupied 68% of the total female worker participating in the national labour force²⁸. ILO identified this is the result of free market movement and this will be the trend in the context of Vietnam in the upcoming years²⁸. This movement signifies that the female workers who work in factories, firms and other industrial facilities will doubtlessly be increased. Noticeably, this situation alarms the fact that to what extent the employers will secure the motherhood right of female workers and if the available laws are enough to adhere to their strict compliance.

According to the official report of Vietnam General Confederation of Labour conducted under coalition with Alive & Thrive organisation, there have been only 826 breastfeeding facilities installed in 515 institutions until May 2020²⁹. Hanoi's firms occupy for 182 while the remaining number are allocated sparsely in other provinces. Despite the fact that this number sharply increased from 70 in 2014, it is relatively low when there is only 1 breastfeeding facility to serve 1.200 female workers on average. In addition to this, the report said that 25% of surveyed enterprises expressed their concerns over the inefficiency of the breastfeeding facility in their firm. Reasoning for this concentrated on the far proximity of the breastfeeding facility to the workplace and the small number of female workers feeding their child by breast milk. On the other hand, the surveyed results in the 10 specialised manufacturing areas specified the need of equipping breastfeeding facilities. 97% respondents expressed their opinions that every company should have at least one breastfeeding facility and moreover, 99% confirmed their loyalty to the firms if employers can provide appropriate policies promoting the breastfeeding right. In terms of the length of breastfeeding break, 77% workers agreed that 60 minutes is not enough for them to breastfeed their child while the private place to breastfeeding is absent in most companies.

Against this backdrop, the author suggests two solutions to secure the breastfeeding right of female workers, and thus enhance the responsibility of employers to the female worker's motherhood. Firstly, the labour law must compulsorily require firms to install the facility for breastfeeding regardless of its size. Currently, the labour law of Vietnam only uses the word "recommend" instead of "require" or "must" in its current provision and this should be changed¹⁶. Rea-

sonings for this suggestion come from the inexpensive source to arrange for a breastfeeding facility in a firm. Accordingly, the aforementioned report calculated that employer only spends VND 15 million (USD 600) for installing a breastfeeding facility. This amount will be nothing if this facility is merged with the medical room of the enterprise²⁹. In all cases, this facility must meet adequate hygienic conditions and is located at or near the workplace but preferably outside the undertakings where the women are working³⁰. Moreover, this regulation is expected to support female workers in nursing their child by their own breast milk instead of dairy products as recommended by WHO. It is worth noticing that over VND 2 trillion per year are for dairy products in Vietnam, and thus the suggestion of stricter requirements breastfeeding in law is appropriate when it can help saving 12% of money spent³¹.

Secondly, an additional option about the break time for breastfeeding should be added to contemplate the situation where the distance between breastfeeding facility and the undertaking is far. Vietnam laws can be adjusted in the same way as German law did, which allows 90 minutes for breastfeeding break if the breastfeeding facility is separately located from the working place. This regulation can respond to the actual need of female workers in Vietnam as shown in the survey and adhere their loyalty to the firm they work. Besides, adopting this solution further confirms the innovative movement of Vietnam labour law, which allows Vietnamese women to enjoy the feminist right at the same level with developed countries as well as international standards.

CONCLUSION

While comparing to the other countries as well as international standard in terms of the breastfeeding right, this research showed that the labour law of Vietnam has been innovated with certain rights of female workers being promoted. Particularly, such improvement showed the penetration of feminist legal theory into the new labour law of Vietnam. Such embedment has been enshrined and guided the Vietnam legislation toward the international standards in the breastfeeding right or in the broad sense, the right to motherhood. Solutions upon amending the breastfeeding right in labour law, in terms of provide more options for female workers about the length of the break and mandatory instalment of the breastfeeding facility, were provided with a hope that not only the right to breastfeeding of female workers in Vietnam is protected, but their right to motherhood in the course of employment is further secured. This

research also provides rooms for future studies to be conducted on, namely the impact of the feminist legal theory on Vietnam labour legislation should be revisited in a broader scale, rather than the breastfeeding right only. This could help us to have more in depth understanding about the values of this theory in promoting the right to motherhood of Vietnamese female workers comprehensively.

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COMPETING INTEREST

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All content of the article is done by the author only.

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TÓM TẮT

Bổn phận làm mẹ là một trong những nghĩa vụ thiêng liêng và quan trọng nhất của người phụ nữ dù trong bất kỳ xã hội nào. Đảm bảo người phụ nữ có những điều kiện cần thiết để thực hiện quyền làm mẹ của mình được xem là một dấu hiệu thể hiện trình độ phát triển cao của xã hội. Trong lĩnh vực lao động, pháp luật Việt Nam thiết kế những quy định bảo vệ quyền làm mẹ của lao động nữ bằng cách dành cho họ những ưu tiên đặc biệt. Vì quyền làm mẹ là một khái niệm rất rộng với nhiều quyền khác nhau của người phụ nữ nói chung và lao động nữ nói riêng, nghiên cứu tập trung phân tích những điểm tiến bộ trong quy định của pháp luật lao động Việt Nam về quyền của lao động nữ trong việc nuôi con bằng sữa mẹ, một quyền cho phép lao động nữ có thể thực hiện bổn phận làm mẹ của họ trong môi trường làm việc. Thông qua cách tiếp cận học thuyết về nữ quyền, quyền làm mẹ, so sánh pháp luật của một số quốc gia và các tiêu chuẩn về lao động quốc tế, cùng những phương pháp như phân tích pháp luật, diễn dịch và quy nạp, kết quả nghiên cứu cho thấy luật lao động Việt Nam đảm bảo tốt quyền này và đồng thời, tinh thần của học thuyết pháp lý nữ quyền qua đó cũng được thể hiện trong luật lao động với những giá trị nhất định. Những kiến nghị về đảm bảo công cụ, phương tiện và địa điểm để lao động nữ có thể thực hiện quyền nuôi con bằng sữa mẹ tại nơi làm việc từ đó cũng được đề xuất dựa trên trong bối cảnh kinh tế, xã hội hiện tại của Việt Nam.

Từ khoá: Học thuyết pháp lý nữ quyền, luật lao động Việt Nam, Nuôi con bằng sữa mẹ, bổn phận làm mẹ, bình đẳng giới

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