

# Employee Retention Credit

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# Presenters



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# Agenda

- What's new with the ERC?
- Who can claim it?
- What are the limitations?
- How do we claim it?
- How does the ERC interact with other credits and PPP loan forgiveness?

# ERC Generally

- What is it?

- ERC is a fully refundable credit for certain wages paid to employees during specified periods of economic hardship
  - Full or partial shutdown related to the pandemic
  - More than 50% decline in gross receipts, regardless of the reason

- When was it enacted?

- March 27, 2020, as part of CARES Act

- Did it change recently? Yes

- December 27, 2020 – Consolidated Appropriations Act, 2021
  - Eliminated ban on ERC if taxpayer also obtained a PPP loan – created retroactive 2020 refund opportunity
  - Extended ERC into first two calendar quarters of 2021, and made it more generous than the 2020 ERC
  - Expanded access to 2020 ERC – raised cap from 100 to 500 employees, *etc.*
- March 1, 2021 – IRS issued [Notice 2021-20](#) (102 pages)
  - Addresses 2020 ERC only, not the 2021 ERC
  - Incorporate the IRS [FAQs](#) and addresses additional issues
- March 11, 2021 – American Rescue Plan Act of 2021 (ARPA)
  - Adds §3134 to the Code (the ARPA ERC)
  - Extends the ERC through December 31, 2021 and adds additional eligibility criteria for Recovery Startup Businesses, among other things
  - Extended statute of limitation on ERC from 3 to 5 years
- April 2, 2021 – IRS issued [Notice 2021-23](#) (17 pages)
  - Addresses changes applicable to 2021 ERC **for the first two calendar quarters only** (later guidance will address Q3 and Q4)
  - Discusses election to use previous quarter, amount of credit, qualified wages, *etc.*

# Overview of ERC

	<b>2020</b> (see Notice 2021-20)	<b>2021</b> (see Notice 2021-23)
<b>Eligibility</b>	Either full or partial suspension of operations (see <a href="#">Q&amp;As #11-22</a> ; <a href="#">FAQs #30-38</a> ) OR Quarterly drop in 2020 gross receipts by more than 50% compared to the same quarter in 2019, and continuing through quarter where gross receipts are at least 80% of the same quarter in 2019 (see <a href="#">Q&amp;As #23-28</a> ; <a href="#">FAQ #39-46</a> )	Either full or partial suspension of operations OR Quarterly drop in 2021 gross receipts by more than 20% Q1 2021 v. Q1 2019 Q2 2021 v. Q2 2019 Q3 2021 v. Q3 2019 Q4 2021 v. Q4 2019 (or elect to use previous quarter, <i>e.g.</i> , Q4 2020 v. Q4 2019) OR Recovery Startup Business in Q3 or Q4 2021
<b>Wage Period</b>	3/13/20 – 12/31/20 (see <a href="#">FAQ #1</a> )	1/1/2021 – 12/31/2021
<b>Qualified Wages</b>	Up to \$10K of wages (including qualified health plan expenses) per employee, for all of 2020 (see <a href="#">Q&amp;As #30-39</a> ; <a href="#">FAQs #48-61</a> )  (includes health plan expenses if no cash wages paid)	Up to \$10K of wages (including qualified health plan expenses) per employee, in each quarter of 2021  (includes health plan expenses even if no cash wages paid)

# Overview of ERC (cont'd)

<b>Credit Amount</b>	50% of Qualified Wages (see <a href="#">Q&amp;A #19</a> ; <a href="#">FAQ #47</a> )  (max \$5K per employee <u>per year</u> )	70% of Qualified Wages  (max \$7K per employee <u>per quarter</u> ; total of \$28K for 2021)  Recovery Startup Businesses are limited to a total credit of \$50K/quarter for all employees
<b>Advance Payments</b>	Employers can request an advance payment after reducing employment tax deposits	Employers with 500 or fewer full-time employees in 2019 can request an advance payment after reducing employment tax deposits

# Overview of ERC (cont'd)

<b>Covered Employees</b>	<p>If the average number of full-time employees in 2019 was <math>\leq 100</math>, then the wages of all employees; if <math>&gt; 100</math>, then only the wages of employees <b>not</b> providing services (see <a href="#">FAQ #6</a>)</p>	<p>If the average number of full-time employees in 2019 was <math>\leq 500</math>, then the wages of all employees; if <math>&gt; 500</math>, then only the wages of employees <b>not</b> providing services</p> <p>If severely financially distressed in Q3 or Q4 2021 (gross receipts decline <math>&gt; 90\%</math>), then ERC includes wages of all employees regardless of size</p>
<b>PPP</b>	<p>Available even if obtained a PPP loan (and can be claimed retroactively)</p> <p>Wages used for PPP loan forgiveness cannot also be used to claim the ERC</p>	<p>Available even if obtained a PPP loan</p> <p>Wages used for PPP loan forgiveness cannot also be used to claim the ERC</p>



# 2020 ERC



# 2020 ERC

- Eligibility (2-part test) –
  - Full or partial suspension of operations ([Q&As #11-22](#); [FAQs #30-38](#))), or
  - Quarterly drop in 2020 gross receipts by more than 50% compared to the same quarter in 2019 ([Q&As #23-28](#); [FAQs #39-46](#))
- Other eligibility issues
  - Must carry on a trade or business in 2020
    - If started business in 2019, then special rules apply (see [Q&A #27](#))
      - For example, if started in Q2 2019, then use that quarter as the base for comparison to Q1 2020 and to Q2 2020, and compare Q3 and Q4 2019 to the same quarters in 2020
    - If started mid-quarter, then estimate full quarter gross receipts for that quarter for purposes of comparison to 2020
  - No size limit – applies to large and small employers (though credit amount differs)
  - Includes tax-exempt organizations

# Test #1– Full or Partial Suspension

- 3-part test –
  - (i) government order restricts operations,
  - (ii) the order limits commerce, travel, or group meetings, and
  - (iii) the order affects the typical operations of the business in a non-trivial manner(aggregation rules apply – see [Q&A #21](#))
- Government orders include federal/state/local orders (*e.g.*, closure of nonessential businesses, curfews, shelter-in-place orders, workplace closures), but not statements in press conferences or in interviews with the media, or declarations of a state of emergency unless they limit commerce, travel, or group meetings (see [Q&A #10](#))
- More than a nominal portion of the business must be affected
  - Nominal is < 10% of gross receipts (determined using same calendar quarter in 2019), or < 10% of total hours of service performed by all employees in the business (determined using same calendar quarter in 2019) ([Q&A #11](#))
- Common examples
  - Reduction in seating capacity (*e.g.*, restaurants, movie theaters)
  - Reduction in hours of operation
  - Order prohibits suppliers from making delivery of critical goods to an essential business ([Q&A #12](#))
  - Partial closure of operations (*e.g.*, no elective surgeries)
- Examples that do not meet the test
  - Partial closure but business can run comparably through telework ([Q&As #15-16](#))
    - Factors: employer’s telework capabilities, portability of employee’s work, need for presence in employee’s physical workspace, and transitioning to telework operations
  - Business able to operate but sales were down due to reduced demand or loss of business or customers ([Q&A #13](#)) (but consider 50% declines in gross receipts test)

# Test #2– Decline in Gross Receipts

- Quarterly drop in 2020 gross receipts by more than 50% compared to the same quarter in 2019
  - Can be any single quarter in 2020, and does not need to be related to COVID-19
  - Period continues through and including the first quarter when gross receipts are more than 80% of the same quarter in 2019
    - Thus, if you qualify in one quarter, you get to include the next quarter too
  - Gross receipts for employers other than tax-exempts –
    - [Q&A #24](#) refers to §448(c)
    - Includes total sales (net of returns and allowances), all amounts received for services, any income from investments, and from incidental or outside sources
    - Includes interest, dividends, rents, royalties, and annuities, regardless of whether such amounts are derived in the ordinary course of the taxpayer's trade or business
    - Not reduced by COGS, but reduced by the taxpayer's adjusted basis in capital assets sold
    - Do not include the repayment of a loan, or amounts received with respect to sales tax if the tax is legally imposed on the purchaser of the good or service, and the taxpayer merely collects and remits the sales tax to the taxing authority
  - Gross receipts for tax exempts – [Q&A #25](#) refers to §6033
    - Includes gross receipts from all operations, without reduction for expenses, including unrelated trade or business income, total sales (net of returns and allowances), all amounts received for services (even if unrelated to central mission), investment income (interest, dividends, rents, and royalties), gross amounts received from sales of assets without reduction for basis or expenses of sale, contributions, gifts, grants, and similar amounts, and dues or assessments from members or affiliated organizations
  - Employers should retain proof of the decline in gross receipts for at least 4 years (see [Q&As 70-71](#))
  - Aggregation rules apply (see [Q&A #26](#))

# Aggregation Rules

- Aggregation rules apply to treat multiple entities as a single employer (see [Q&As #7-9](#); [FAQ #43](#); [FAQ #25](#))
  - Aggregation applies for 4 purposes –
    - (i) Full or partial shutdown rule
    - (ii) Decline in gross receipts rule
    - (iii) 2019 full-time employee calculation
    - (iv) Determining the maximum credit per employee
  - Apply aggregation rules of §52(a) & (b), and §414(m) & (o)
  - Consider parent/sub, brother/sister, combined groups of corps, partnerships, trusts, estates, corporations, and sole proprietorships
    - Generally,  $\geq 50\%$  vote or value test for parent/sub aggregation
    - Common control test for partnerships, trusts, estates, and sole proprietorships
  - ERC must be apportioned among group members based on proportionate share of qualified wages giving rise to the credit for each calendar quarter ([Q&A #8](#); [FAQ #27](#))
  - Note these rules are different from the [affiliation rules](#) that apply to the PPP

# Qualified Wages

- Paid from March 13, 2020 through December 31, 2020
- Includes up to \$10,000 per employee in cash wages and qualified health plan expenses
- No dollar limit or cap on qualified wages like there is with the PPP
- Exclusions –
  - Wages paid to persons related to greater-than-50% shareholder/partner (children, siblings, parents, step-parents, nieces/nephews, aunts/uncles, child/parent/sibling in-laws) ([FAQ #59](#))
    - What about the greater-than-50% shareholder?
  - Severance or other payments paid to former employees after they are terminated ([Q&A #39](#); [FAQ #57](#))
  - Wages that are exempt from Social Security/Medicare taxes (*e.g.*, independent contractors, church employees, *etc.*) ([FAQ #58](#))
- Full or partial suspension test –
  - Qualified wages include only the wages paid during the period of the suspension (and not the whole quarter)
- Decline in gross receipts test –
  - Qualified wages include all the wages paid during the relevant quarters

# Qualified Wages (cont'd)

- Includes qualified group health plan expenses ([Q&As 40-48](#); [FAQs #62-71](#))
  - Includes a proportionate share of healthcare wages even if no cash wages are paid (*i.e.*, furloughed employees)
  - Includes the following –
    - Employer payments for qualified health plan expenses (as defined in IRC § 5000(b)(1)), but only to the extent the amount is excluded from employees' wages
    - Employee contributions with pre-tax dollars (but make sure this is not double counted because already included in gross wages)
    - Employer's cost of health flexible spending arrangements (health FSA) ([Q&A #47](#))
    - Employer contributions to a health reimbursement arrangement (HRA), including an individual coverage HRA ([Q&A #47](#))
  - Excludes the following –
    - Employee contributions made with after-tax dollars ([Q&A #40](#))
    - Employer contributions to an HSA or Archer MSA ([Q&A #46](#))
    - Employer contributions to a qualified small employer health reimbursement arrangement (QSEHRA) ([Q&A #47](#))
    - Employer's matching or nonelective contributions to a 401(k) plan ([Q&A #30](#))
    - Employee pre-tax contributions to a dependent care assistance program or qualified transportation benefit
- Cannot double dip
  - Must exclude wages if reimbursed under PPP, FFCRA qualified sick/family leave reimbursement provisions ([Q&A #48](#)), WOTC under IRC §51, PATH Act R&D payroll tax credits, and paid family medical leave credits under IRC §455



# Limitation on Qualified Wages

- **More than 100 average full-time employees in 2019 –**
  - Include only the wages of employees NOT providing services (*i.e.*, for paid time off) ([Q&A #34](#))
  - Includes hourly wages and wages of salaried employees ([Q&As #36-37](#); [FAQs #54-55](#))
  - Cannot increase wages to claim additional credit – lookback rule to 30 days immediately preceding the period of economic hardship ([Q&A #35](#); [FAQ #53](#))
    - Note this rule does not apply to the 2021 ERC
  - Do not include wages for vacation, holidays, sick days, or other days off (because accrued during previous periods) ([Q&A #38](#); [FAQ #56](#))
- **100 or fewer average full-time employees in 2019 –**
  - Include wages of ALL employees (*i.e.*, for time worked and for paid time off) ([Q&A #33](#); [FAQ #6](#))
  - Includes wages for pre-existing vacation, holidays, sick days, or other days off ([Q&A #38](#); [FAQ #56](#))
- **If self employed, qualified wages do not include self-employment earnings, but they do include the wages of employees ([Q&A #5](#); [FAQ #2](#))**
- **Household employers are not eligible to claim the ERC unless they operate a t/b and pay employment taxes ([Q&A #6](#))**

# Full-Time Employee Calculation

- Calculation of average number of full-time employees in 2019 is based on IRC §4980H ([Q&A #31](#); [FAQ #49](#))
  - Note: this is not a full-time equivalent calculation like with the PPP
  - Take the sum of the monthly averages of full-time employees during 2019 and divide by 12
    - Can use 2020 averages if not in business in 2019
  - Full-time employee means an employee who worked on average at least 30 hours a week or 130 hours a month
  - Rule likely excludes part-time employees, despite statements in [JCT Bluebook](#) for CARES Act
  - Must take into account the aggregation rules discussed earlier ([Q&A #32](#))

# How is the 2020 ERC Calculated?

- **Credit Amount**
  - 50% of qualified wages, up to \$5,000 per employee for the year ([Q&A #29](#); [FAQ #47](#))
  - If an employee gets paid by 2 or more entities that are aggregated, then the max qualified wages is \$10K in the aggregate (see [Q&A #29](#))
- **Interaction with PPP, Qualified Sick/Family Leave Credits, and Work Opportunity Tax Credits (WOTCs) under IRC §51**
  - Can claim ERC even if obtained a PPP loan
  - No double dipping with PPP – wages used for PPP loan forgiveness cannot be used for ERC
  - No double dipping with FFCRA – qualified sick/family leave wages reimbursed with credits cannot be used for ERC ([FAQ #14](#))
    - Also cannot double dip with paid family medical leave credits under IRC §45S
  - No double dipping with WOTCs (§51), PATH Act R&D payroll tax credits, and paid family medical leave credits (§45S)
- **What if I took advantage of the employer payroll tax deferral provision in the CARES Act?**
  - No effect on ability to claim ERC
  - Deferral may affect the amount that an employer may request as an advance credit

# How to Claim the 2020 ERC (Q&As #50-58)

- Employers can retroactively claim the 2020 ERC on Form 941-X for the relevant quarters in 2020, starting with Q2 2020 (Q&A #57)
  - Form 941, starting in Q2 2020 (see Instructions to Form 941)
  - Each member of an aggregated group claims the ERC separately (Q&A #55)
- Form 7200 for advance payments (see Instructions to Form 7200)
- Can be claimed retroactively on Form 941-X (see Instructions to Form 941-X) for each quarter that the taxpayer is entitled to the ERC (Q&As #57-58)

Part 3: Enter the corrections for this quarter. If any line doesn't apply, leave it blank. (continued)				
	Column 1 Total corrected amount (for ALL employees)	Column 2 Amount originally reported or as previously corrected (for ALL employees)	Column 3 Difference (If this amount is a negative number, use a minus sign.)	Column 4 Tax correction
26. Refundable portion of employee retention credit (Form 941 or 941-SS, line 13d)	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

# Suggested Approach

- Determine the minimum payroll amount listed on the PPP loan forgiveness application that is required to obtain the amount of forgiveness requested – may be 7 weeks or more depending on amount of nonpayroll costs used (see Q&A #49)
  - For example, if PPP loan was for \$300K, and the loan forgiveness application included \$300K of payroll, but no nonpayroll expenses, then none of the wages can be used for the ERC, even though borrower could have included up to \$120K of nonpayroll expenses on the loan forgiveness application
    - However, if the application included \$100K of nonpayroll expenses and \$300K of payroll, then the extra \$100K of payroll expenses on the application can be used for the ERC, and nothing limits the taxpayer's choice on which \$100K of payroll to use (see Q&A #49, Exs. 4 & 6)
- Map those wages to the PPP and any excess wages can be used to claim the ERC
  - Recall PPP wages were limited to \$100,000; no such limitation exists for the ERC
  - Recall there were owner wage limitations for the PPP, *i.e.*, C or S corp shareholders of 5% or more, general partners, and owner compensation replacement amount for Sch. C filers
  - Consider allocating PPP wages to highly-paid employees first to preserve the wages of lower-paid employees for the ERC so they have a greater chance of reaching \$10,000

# Mergers & Acquisitions

- What if I acquired a business in 2020?
  - Including the gross receipts in 2020, but not in 2019, makes it harder to meet the decline in gross receipts test
  - Businesses must include the target's gross receipts for each quarter owned (regardless if acquired in a stock or asset deal)
  - IRS safe harbor for 2020 calendar-year acquisitions ([Q&A #28](#); [FAQ #45](#))
    - Business may, to the extent information is available, include the gross receipts of the acquired business in its gross receipts for the relevant 2019 calendar quarter, even though not owned at that time
    - If target was acquired mid-quarter and business uses the safe harbor, then it must estimate and use the target's full-quarter 2020 gross receipts in the calculation
      - Not necessary to do if the safe harbor approach is not used



# Taxation of the ERC

- Is the amount of the ERC includible in taxable income?
  - No, the ERC is not included in gross income ([Q&As #60-61](#); [FAQ #86](#)), BUT . . .
- Does expense disallowance apply?
  - Yes – the employer’s aggregate deductions are reduced by the amount of the ERC ([Q&As #60-61](#); [FAQ #85](#))
  - This means the ERC is taxable, and this applies both to the 2020 ERC and the 2021 ERC
  - For the 2020 ERC, in which tax year does expense disallowance apply – 2020 or 2021?
    - Consider §280C and Rev. Rul. 2020-27 (relating to the PPP)

# 2021 ERC

# Eligibility

- Test similar but different –
  - Full or partial suspension of operations, or
  - Quarterly drop in 2021 gross receipts by more than **20%** compared to the same quarter in 2019
    - Q1 2021 v. Q1 2019
    - Q2 2021 v. Q2 2019
    - Election to use prior quarter
      - For Q1 2021, taxpayers can use Q4 2020 v. Q4 2019
        - If business not in existence in 2019, then the election cannot be made (Notice 2021-23)
      - For Q2 2021, taxpayers can use Q1 2021 v. Q1 2019
        - If business not in existence on 1/1/2019, then compare Q1 2021 v. Q1 2020
      - If a business was not in existence at the beginning of any calendar quarter in 2019, then the comparison is to the same quarter in 2020
      - Election can be separately for each quarter, and need not be made for all quarters
        - Thus, if more than 20% drop in Q1 2021, then automatically qualify for Q2 2021 too because can elect to use Q1
  - Recovery Startup Businesses – (see IRC [§3134\(c\)\(5\)](#))
    - Not eligible under prior two tests
    - Commenced trade or business after 2/15/2020, and
    - Average annual gross receipts ≤ \$1 million
    - Max total credit of \$50,000 per quarter for all employees
- No size limit – applies to large and small employers (though credit amount differs)

# Eligibility Differences

## 2020 ERC

- Full or partial suspension
- > 50% reduction in gross receipts

## 2021 ERC

- Full or partial suspension
- > 20% reduction in gross receipts
- Recovery Startup Businesses in Q3 or Q4 2021
- Includes certain public instrumentalities, such as public universities, hospitals, and medical-care providers
- Includes employers not in existence in 2019

# Qualified Wages

- Paid from 1/1/2021 through 12/31/2021
- No dollar limit or cap on qualified wages like there is for the PPP
  - Includes bonuses paid during the quarter; thus, does not limit wages to comparable wages during previous 30 days (like the 2020 ERC)
  - **Tip:** if not scheduled to pay \$10K in Q1 or Q2, consider bunching wages to maximize the ERC
- Up to \$10,000 per quarter, including allocable qualified health plan expenses
  - Includes a proportionate share of healthcare wages even if cash wages are not paid
- Full or partial suspension test –
  - Qualified wages include only the wages paid during the period of the suspension (and not the whole quarter)
- Decline in gross receipts test and Recovery Startup Businesses in Q3 & Q4 –
  - Qualified wages include all the wages paid during the quarter

# Relaxed Limitation on Qualified Wages

- The full-time employee limitation was increased from 100 full-time employees to 500 full-time-employees, substantially broadening the 2021 ERC
  - Same calculation of average number of full-time employees based on IRC [§4980H](#) (see earlier slide)
  - Remember that (i) the calculation likely excludes part-time employees, (ii) this is not a full-time equivalent calculation like with the PPP, and (iii) the aggregation rules apply to this calculation
- > 500 average full-time employees in 2019 (and not severely financially distressed in Q3 or Q4) –
  - Include only the wages of employees NOT providing services (*i.e.*, for paid time off)
- ≤ 500 average full-time employees in 2019 –
  - Include wages of ALL employees (*i.e.*, for time worked and for paid time off)
- If “severely financially distressed” in Q3 or Q4 2021 (*i.e.*, gross receipts decline > 90%), then includes wages of ALL employees regardless of size



# How is the 2021 ERC Calculated?

- **Credit Amount**
  - 70% of qualified wages, up to \$7,000 per employee per quarter (\$28,000 max per employee for 2021)
  - Recovery Startup Businesses in Q3 and Q4 are limited to a total credit of \$50K/quarter for all employees
- **Interaction with PPP and Qualified Sick/Family Leave Credits**
  - Can claim ERC even if obtained a PPP loan
  - No double dipping with PPP – wages used for PPP loan forgiveness cannot be used for ERC
    - Can claim the ERC on ANY qualified wages that are not counted as payroll costs in obtaining PPP loan forgiveness
    - **Tip:** maximize nonpayroll costs on the PPP loan forgiveness application, and then map the payroll costs between these two programs to prevent double dipping
  - No double dipping with FFCRA – qualified sick/family leave wages reimbursed with credits cannot be used for ERC
  - Wages used to support the 2021 ERC may not be used to claim credits under §§45S, 41, 45A, 45P, 51, and 1396; however, an employer can use the same wages to claim the 2021 ERC and the work opportunity credit under §51

# How to Claim the 2021 ERC

- Employers may reduce their employment tax and income tax deposits for the amount of anticipated credits without penalty
  - New IRS [Form 941 \(Rev. 3-2021\)](#), starting in Q1 2021
- Employers with 500 or fewer average full-time employees in 2019 can request and advance payment on Form 7200 after reducing their deposits
- Can use same mapping procedure as 2020 ERC to ensure no overlap between ERC and PPP/FFCRA/WOTCs (§51)/PATH Act R&D payroll tax credits/paid family medical leave credits (§45S)
- Plan for a future audit and document everything because statute of limitation extended from 3 to 5 years

# Sample Document Request List for ERC

- List any subsidiaries or commonly-controlled businesses
- List any acquisitions or business combinations in 2020
- Payroll register report from 3/13/2020 – 12/31/2020 (per employee and pay period), and for all of 2021 when available
- Qualified health plan expenses for 2020 (per employee and pay period), and for all of 2021 when available
- Exact dates in 2020 or 2021 that you experienced a full or partial shutdown due to a government order relating to COVID
- Gross receipts by quarter for 2019, 2020, and 2021
- Completed PPP loan forgiveness application (or draft if not submitted yet)
- Copies of 941s for all quarters of 2020 and 2021
- List of any greater-than-50% owners that work for the business as an employee, and any other employees that are related to such owners
- Monthly average number of full-time employees in 2019

# Helpful Links & Resources

- Where can I get more information?
  - IRS [Notice 2021-23](#) (April 2, 2021)
  - IRS [Notice 2021-20](#) (March 1, 2021)
  - IRS [FAQs](#) (updated regularly)
  - CARES Act [JCT Bluebook](#)
  - U.S. Senate Finance Committee [FAQs](#) address nonprofits
  - [IRS Form 941 \(Rev. 3-2021\)](#) & [Instructions to Form 941](#)
  - [IRS Form 7200](#) & [Instructions to Form 7200](#)
  - IRS press release January 26, 2021 ([IR-2021-21](#))

# Questions?



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