

The Perils of California Employment Law



By Frank E. Melton, Olivia Goodkin and Wendy Lane

It is difficult to keep track of the various laws affecting employers in all 50 states, but California employers that do not focus on the substantial differences between California law and federal law may incur serious liabilities. Prudent companies with California operations simply cannot have uniform national policies or practices without considering the impact of differences in California law in areas such as wage and hour laws, anti-discrimination laws, and rights to terminate or discipline employees.

This article briefly highlights a few of the more significant differences between California and federal employment law, including recent developments.

More Potent Monetary Remedies under FEHA

Companies with California employees should be aware that the remedies under the California Fair Employment & Housing Act ("FEHA") are much more potent than under federal laws such as Title VII, the ADA (Americans with Disabilities Act) and the ADEA (Age Discrimination in Employment Act). Unlike federal law, compensatory damages under FEHA (including back pay, front pay and lost benefits) are not subject to caps limiting recovery. There are also no specific limits on emotional distress damages, punitive damages and attorneys' fees that may be recovered under FEHA. Moreover, under FEHA, individuals may be held personally liable for harassment, including sexual harassment. Under a recent California Supreme Court decision, individual managers or supervisors may no longer be held personally liable for retaliation under FEHA, but retaliation claims remain one of the most dangerous areas of exposure for California employers.

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Adoptions and Estate Planning: Something to Think About



By Terence Nunan

Adoption is a subject that receives insufficient attention in estate planning. When a person, whether a child or adult, is adopted, the adoptee may automatically become a beneficiary to a testator's estate and, therefore, inherit a portion of the estate.

Unlike marriage, adoption is, for most part, irrevocable. For example, if a son of the testator adopts his new wife's child from a prior marriage, the adopted child will become the testator's grandchild and a potential heir even if the son later divorces that wife. In the context of estate planning, the key question is whether the adopted person is, and is intended to be, included in the testator's estate plan.

Often, a person will establish a trust for the benefit of his or her children with eventual distribution to the testator's grandchildren. A critical issue is whether adopted persons should be included in the class of grandchildren of the testator. In the absence of defining provisions in the will or trust, adopted persons may be included, even if adopted as adults. [See *Ehrenclou v. Mac Donald*, 117 Cal. App. 4th 364, 12 Cal. Rptr. 3d 411 (2004) in which Rutter Hobbs & Davidoff was trial counsel to one of the prevailing parties where there were multiple adult adoptions.]

The issue is, of course, the actual intention of the testator. Sometimes a person will adopt for non-paternal motives in order to benefit a friend who the testator would probably not consider as his or her grandchild. Carefully drafted documents may limit the class of intended beneficiaries to persons who are adopted below a specific age (such as age 14 or younger) or who have lived with the adopting parent as a minor.

One aspect of California adoptions that deserves special attention is the estate planning consequence of Family Code Section 8612(b). This provision of California law requires that adopting parent(s) promise in writing that they will treat their adopted child as their lawful child. It provides that the

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Disability Discrimination

Cases decided under the ADA have significantly limited employer obligations. However, California employers cannot rely on federal law under the ADA in determining what reasonable accommodations, if any, to provide to employees with some type of arguable "disability." The disability discrimination provisions of California's FEHA create greater rights for employees than the ADA by more broadly defining what is a protected mental or physical "disability." In addition, California employers have a statutory duty under FEHA to engage in an "interactive process" to determine, in a timely and good faith manner, whether effective reasonable accommodations may be made whenever requested by an employee or job applicant with a known disability. Unlike federal law, the duty to engage in the interactive process is separate and independent from the duty to provide reasonable accommodation for a protected disability. Hence, California employers may be held liable for failure to engage promptly in the interactive process, even if there ultimately is no need to provide a reasonable accommodation.

More Rigorous Tests for Exemptions from Overtime Requirements

There are many differences between California wage and hour laws (governed by the California Labor Code and the state's 17 industry or occupational wage orders) and the Fair Labor Standards Enforcement Act ("FLSA"), the primary federal law regulating wage and hour issues. Where there is an inconsistency, the law most protective of the employee must be followed.

One area where there is a particularly significant difference between California and federal law is in the exemptions from overtime requirements. For example, the minimum salary generally required under California law to be an exempt employee is considerably higher than that mandated by federal law (at least two times the California minimum wage, which in 2008 requires a salary of \$33,280 based on the minimum wage of \$8.00 per hour). California law generally requires a rigorous analysis of the employee's actual duties to determine whether more than 50 percent of the duties fall within the executive, administrative, or professional exemptions, in addition to the \$33,280 minimum salary requirement. Federal law, by contrast, frequently leaves more room for employers to find exempt status in permitting non-exempt duties to be performed, so long as they are not "primary" and are "incidental" to the employee's "primary duties." In addition, California employers are required to pay daily overtime whenever a non-exempt employee works more than eight hours in a day (and double time after 12 hours in a day), in contrast with the FLSA, which requires overtime only when non-exempt employees work more than 40 hours in a workweek.

There has been a substantial increase in class action wage and hour litigation nationwide under the FLSA and many state laws during this decade. The proliferation of class action wage and hour lawsuits has been even greater under California law due to the especially rigorous rules regarding determination of exempt status and other unusual requirements upon which many employers have not previously focused, such as meal and rest periods. The wave of class action lawsuits has spread during the past year or so from multi-million dollar settlements and verdicts against large national employers to many medium-sized and small California employers, including non-profits.

Rest and Meal Periods

While the FLSA does not require rest periods, California law requires employers to provide compensated rest periods for non-exempt employees who work at least three and one-half hours per day. Rest periods should be in the middle of each work period and must be at least 10 consecutive minutes for each four hour period worked.

In addition, California law prohibits non-exempt employees from working more than five hours without a meal period of 30 minutes or longer, except in certain limited circumstances. Generally speaking, non-exempt employees must be required to take at least the minimum 30-minute meal period, completely uninterrupted, even if employees voluntarily prefer to do otherwise.

The penalties for violating California meal and rest period requirements are severe. Employers owe one additional hour of pay for each meal or rest period violation. Under recent California court decisions, employers are liable for wage penalties relating to violations for a four year period before the lawsuit was filed (the same statute of limitations as applicable to many other wage and hour violations), which has significantly increased exposure for meal and rest period violations.

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adopted child will "... have the same rights as a natural child born to me, including the right to inherit my estate." This contract may constrain the ability of an adopting parent to later discriminate against the adopted child in favor of natural born children in their estate planning.

As the Ehrenclou decision demonstrates, adoption can create interesting estate planning issues for the adoptive parent(s) as well as their extended family, long after the adoption of the person has occurred. Careful drafting of estate planning documents can make it more certain that wealth will be inherited as the testator actually intended.

Penalties for Non-Payment of Wages upon Termination

All wages and vacation accrued through the last day of employment are due immediately upon termination. Thus, employers must have ready the final paycheck, including all accrued wages and vacation — including any unused paid time off (“PTO”) or floating holidays, which are also generally treated like vacation, but not unused sick time — so that it can be received by the employee on the day of termination. For each calendar day that the final paycheck is delayed, even if it is paid at the normal payroll date, the terminated employee may recover a “waiting time” penalty equal to daily wages, for up to a total of 30 calendar days. The same penalty applies where the employer “willfully” (interpreted broadly) fails to pay the full wages due, including overtime or vacation pay, or takes an unlawful setoff against the final paycheck for monies owed by the employee (most such setoffs being unlawful in California).

Liability Based on Unenforceable Covenants Not to Compete

Covenants not to compete are unenforceable in California except in certain circumstances involving the sale of a business. Companies may be liable for tort damages for wrongful termination in violation of public policy if they fire employees who refuse to sign a non-competition covenant that violates California law. There are also serious questions regarding the extent to which out-of-state employers can succeed in enforcing such covenants against former employees located in (or who relocate to) California based upon choice of law provisions in the covenants purporting to make them enforceable under the law of the employer’s home state. Several California decisions have ruled such choice of law provisions to be unenforceable as to California-based employees because they are contrary to the fundamental public policy of the state permitting employees to pursue a livelihood in the field of their choice. However, employers can enforce in California narrowly-tailored non-solicitation covenants and other provisions necessary to protect trade secret information as defined under California’s version of the Uniform Trade Secrets Act.

Mandatory Arbitration of Employment Claims

Agreements to arbitrate California state law claims such as wrongful termination in violation of public policy or state discrimination claims under FEHA: (1) may not limit the employee’s right to seek the full range of remedies provided by statute, such as punitive damages or attorneys’ fees; (2) must permit the employee to conduct discovery sufficient to vindicate statutory rights, including access to essential documents and witnesses; (3) must require the employer to pay all types of costs unique to arbitration, such as arbitrator’s fees; and (4) must ordinarily require both the

employee and employer to arbitrate their claims against each other. In addition, the arbitrator must be neutral and issue a decision at least briefly stating the essential findings and conclusions on which the arbitration award is based. Conditioning continued employment on the execution of an invalid arbitration agreement may support a tort claim for wrongful termination in violation of public policy.

Enhanced Privacy Rights

Private sector employees in California have a right to privacy under the California Constitution, which has been interpreted to impose restrictions on private sector employers somewhat comparable to those imposed on public sector employers by the Fourth Amendment of the United States Constitution. As a result, California courts have significantly limited the rights of employers to engage in random, post-accident and reasonable suspicion drug and alcohol testing. There are also privacy issues raised by company searches or inspections of computers, emails, offices, personal effects and employee vehicles, which make it important for California employers to address these issues in published employee handbooks or policy statements.

Unusual Leave of Absence Requirements

California has a special pregnancy disability law, applicable to businesses with five or more employees (the minimum under FEHA), that requires unpaid leaves for the period of disability certified by a physician up to four months. Larger employers (with 50 or more employees) covered by federal and California family and medical leave laws are required to provide up to 12 workweeks of unpaid “baby-bonding” leave in addition to the up to four months of pregnancy disability leave. California has a unique paid family leave law that technically does not require employers to grant family leave, but leads many California employers to create policies authorizing such leave, even when employees would be ineligible under state/federal family and medical leave laws, because the State pays a portion of the salary for up to six weeks of paid family leave, funded by payroll tax deductions from employee wages.

There is a long list of other special leave of absence and time off requirements under California statutes, including one of the nation’s strictest laws prohibiting retaliation or discrimination against employees who have filed, or made known their intention to file, workers’ compensation claims. This law has been interpreted to require employers to provide leaves of absences and job protection to injured workers, even in cases where the leaves of absence go beyond 12 workweeks of family and medical leave, company policy or the terms of collective bargaining agreements.

Terminating Employees for Use of Medicinal Marijuana

In 1996, Californians passed an initiative, the Compassionate Use Act, which allows patients with a valid doctor's prescription to possess and cultivate marijuana for personal medical use. In a victory for employers, the California Supreme Court recently determined that California employers are not required to accommodate medicinal marijuana use by their employees under this law. The Court held that the Act was only intended to protect medicinal users of marijuana from criminal prosecution and was not meant to affect an employer's right to terminate individuals who use drugs that continue to be illegal under federal law.

Protections for Domestic Partners

Although there is no corresponding right under federal law, as of January 1, 2005, registered domestic partners have the same rights and obligations under California law as spouses. A domestic partnership is established by filing a Declaration of Domestic Partnership form with the California Secretary of State that meets criteria set forth in the California Family Code.

Establishing a domestic partnership affects several different employment-related obligations of businesses. For instance, while California employers (except those in San Francisco) are not required to provide sick leave at all, if they do, they must allow employees to use sick leave to care for "kin care." The "kin care" provisions of California law permit employees to use up to one-half of their annual allotment of sick leave to care for sick children, parents, spouse, domestic partner or the partner's children. Also, insurers of companies that provide health insurance benefits to spouses are required to provide equal benefits to registered domestic partners in California.



There are many other differences between California employment law, and federal employment law and the employment laws of most states. The above provides only a sampling of the surprises out-of-state employers and their counsel may discover regarding their California operations. Employers in California need to be familiar with the state's unique, employee-friendly employment laws in order to run their businesses effectively, with an appropriately limited level of risk of employment law claims.

Frank Melton, Olivia Goodkin and Wendy Lane litigate and provide preventive day-to-day advice in connection with a wide range of issues that confront employers, such as those discussed in this article. If you have any questions about labor and employment issues, please call Frank, Olivia or Wendy at (310) 286-1700.

Saving GST Tax



By Terence Nunan

Not all wills and trusts are alike. Buried in the back of many wills and trusts is a paragraph or two which seeks to deal with the possible imposition of generation skipping transfer tax (GST tax) if a child of the settlor of the trust dies prematurely leaving young children to inherit his or her

share of the trust.

The GST tax has been in effect in this current form since 1986 and currently imposes a tax of 45% on transfers of wealth where the settlor on death or during his or her life "skip" a generation and give wealth to grandchildren. For example, a trust which provides benefits to a child of the settlor with eventual distribution to the issue of the child where the child dies is a typical GST transfer. A second (and more common) pattern is a gift in trust to a child with outright distribution of the trust when the child attains age 40. If the child dies before age 40 and his or her share of the trust passes to grandchildren of the settlor, that share of the trust estate may be subject to the 45% GST tax on the child's death. While the law provides an exemption from GST tax of the first two million dollars in trust assets, assets in excess of two million dollars passing to the grandchildren can be subject to the 45% GST tax.

There are ways to avoid the GST tax through careful design of the will or trust. If the document includes a provision which gives the child a general power of appointment on death, then no GST tax will be imposed and instead the assets will be subject to estate tax in the child's estate. If the deceased child has significant unused estate tax exemption, then the assets can pass free of estate and free of GST tax to the grandchildren. For example, if there were a \$1,000,000 trust which is not GST tax exempt, the result of such a general power of appointment provision could save \$450,000 in death taxes.

There are two problems. First, if you grant the child a general power of appointment, he or she might, in fact, exercise the power to redirect the assets in a way the settlor might not want. For example, the child might appoint the trust to his or her current spouse, friends or organizations of any type. Rutter Hobbs & Davidoff developed drafting solutions to this problem so that the child will be deemed to have a general power of appointment so as to eliminate GST tax but cannot unwisely exercise the power of appointment in favor of persons or organizations outside of the family.

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Second, many estate planning documents provide the trustee with the right to grant a general power of appointment to a child if it appears that such a power of appointment will save estate tax. Death, however, is often unexpected, particularly with younger persons, and the trustee may not have time or willingness to grant the child a power of appointment prior to the death of the child. At Rutter Hobbs & Davidoff, we have developed a formula provision which automatically grants a power of appointment to the child to the extent such power of appointment will actually save GST tax.

If you have questions about your estate planning, contact the attorneys at Rutter Hobbs & Davidoff. Not all estate planning attorneys are alike.

Terence Nunan is certified by the State Bar of California in probate, estate planning and trust law. Terry offers practical solutions to the challenges and risks of preserving family wealth. His advice ranges from simple to complex matters, including estate planning, estate and trust administration and post-mortem tax planning. He helps clients create living trusts, irrevocable life insurance trusts, family limited partnerships and defective grantor and reverse defective trusts. Terence can be reached at (310) 286-1700 or tnunan@rutterhobbs.com.

RHD ATTORNEY UPDATE

We are pleased to welcome Emily Nelson to the firm's Trusts & Estates practice. Emily represents clients on tax, business, and fiduciary matters. She is equally experienced in litigation and planning, including preparing wills and trusts, powers of attorney, spousal agreements, family limited partnership agreements, charitable trusts, and state and federal tax forms. Emily joins RHD from Katten Muchin Rosenman LLP, and previously was with the firms Brown, Winfield & Canzoneri and Dechert LLP. She earned her J.D. from the University of Pennsylvania in 1998. Emily can be reached at (310) 286-1700 or enelson@rutterhobbs.com.

The Importance of Planning: Mitigate the Risk of Director and Officer Liability in Bankruptcy



By Eric C. Peterson

For numerous reasons, bankruptcy can promise significant relief, and even new opportunities, for companies beset by financial hardship. With news of tightening credit markets, soft employment numbers, and decreases in capital expenditures, an increase in commercial bankruptcy filings may be on the horizon. As a corollary, litigation personally targeting the directors and officers of debtor firms may also increase.

When a bankruptcy is filed and litigation starts, some of the primary protections against personal director and officer liability can be called into question, and potentially undermined. Before finding oneself on the receiving end of unpleasant surprises, directors and officers should carefully consider the facts leading to the need for bankruptcy protection, assess the likelihood that they may be personally subjected to litigation, and achieve clarity on the nature and extent of any insurance they should have in place in the event that the worst case scenario materializes.

The Attorney Client Privilege

Bankruptcy is expensive, and creditors frequently become uncooperative in the process. The longer a company remains under bankruptcy court supervision, the more likely it becomes that the company may be forced to liquidate, or that creditors will demand a change in management — whether through the appointment of a trustee or some other officer responsible to turn around the ailing firm. No matter which course the change in control takes, the effect can be troubling.

Outside of bankruptcy, the power to control and to waive the attorney-client privilege rests with company management. The filing of a bankruptcy petition creates an entity, a bankruptcy estate, which controls virtually all claims and rights of the pre-bankruptcy debtor. Included among the rights the estate enjoys is the right to assert or waive the attorney-client privilege.

Just as the pre-petition debtor could have demanded that all files, emails, correspondences, memos, and other documents in the possession of their counsel be turned

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over to them, a bankruptcy trustee also can make such a demand. Because the trustee controls the privilege, he or she can and may assert or waive the privilege if doing so may ultimately result in additional funds coming into the bankruptcy estate for the benefit of creditors. This includes the potential waiver of the privilege if doing so would bolster claims that former directors and officers breached duties they owed to the company or, as discussed below, its creditors. In other words, emails, memos, and other items that may have been generated in the normal course of seeking legal counsel before the commencement of a bankruptcy case, including strategy discussions as to how to thwart or mollify one creditor or another, or detailed information concerning various decisions that were made pre-petition, can be made available for examination by a trustee and possibly others desirous of identifying new assets to be liquidated for the benefit of creditors. Included among the potential assets are claims against former management for breach of duty and, by extension, the personal assets of directors and officers.

Fiduciary duties owed to creditors

Once a company actually becomes insolvent, duties owed by the directors and officers begin to run in favor of the company's creditors. Directors and officers of insolvent companies must therefore maintain acute awareness of, and sensitivity to, creditor needs. Prudent managers will assess, from the creditor's perspective, whether decisions they make and options they reject serve the general interest creditors share, i.e., that their claims will be paid. Riskier strategies promising the potential of higher payouts may appear to serve the interests of the ownership hoping for a return on investment as well. Such strategies may, however, also fail, in which event creditors may predictably complain that had a safer path been chosen, they would have been made whole, or more nearly so. One can also predict that a trustee may seek to rectify any resulting shortfall by seeking necessary recoveries from directors and officers, or the insurance policies that cover them.

Denial of insurance coverage

Compounding the foregoing concerns is the prospect that director and officer insurance carriers may take the position that D&O insurance policies exclude coverage in the context of litigation brought on behalf of a bankruptcy estate. If they provide a defense, they almost always do so under a reservation of rights pursuant to which they may determine at a later date that coverage should not have been made available. In this event, carriers may later add to a defendant director's or officer's troubles by seeking to recoup from them amounts spent on their behalf during litigation.

A basis frequently cited for the denial of coverage is the "insured vs. insured" coverage exclusion, which most director and officer liability policies contain. The language describing the exclusion varies from policy to policy, but the general thrust of the exclusion is by and large the same. The insured vs. insured exclusion provides, in one form or another, that an insurer is not required to provide coverage where one insured sues another. The reason for the exclusion is a valid one. It protects carriers from being forced to cover collusive suits brought by company insiders. The rationale for denying coverage in the bankruptcy context is based on a variation on this theme.

Specifically, in bankruptcy, there is a generally well-known concept that the bankruptcy estate "steps into the shoes" of the pre-petition entity. A bankruptcy estate is said to have no greater rights than did the pre-petition entity. Consequently, carriers contend that the bankruptcy estate is subject to the same coverage limitations and defenses to coverage that were applicable to the pre-petition entity. Carriers therefore have been known to argue that, because the "insured vs. insured" coverage exclusion would have applied outside of bankruptcy, i.e., in the context of a claim brought by the company against directors and officers, that it should apply in bankruptcy as well — including when the bankruptcy trustee or estate representative is seeking recoveries from directors and officers personally.

The rationale forwarded by carriers has some support in case law, although recent decisional law makes it less clear. Ultimately, the analysis will bear on the verbiage contained in the insurance policy(ies), and how such language has been construed under state law. In advance of a bankruptcy filing, directors and officers should therefore review their policies and, if appropriate, negotiate for policy language that makes clear that a bankruptcy trustee or other court-appointed officer is not an "insured" for purposes of triggering the coverage exclusion.

Conclusion

Although bankruptcy promises significant relief, helping a troubled company maximize the return creditors realize on their claims, directors and officers are wise to engage separate counsel for advice while under the increased pressures of running a company approaching insolvency, and potentially a voluntary or involuntary bankruptcy filing. Company counsel should not be the primary source for directors and officers seeking advice on enhancing the value of their personal interests, or diminishing their exposure to liabilities. Directors and officers should employ extra care in making decisions, remaining mindful of creditor interests

and potential creditor claims that may arise against them as they navigate the choppy waters of financial strain.

At a minimum, before one is surprised by claims or unintended consequences of decisions made at perhaps the most troubled period of a company's life, they should seek input and achieve clarity on the nature and extent of any claims that may accrue against them, and take care to maximize their immunity from personal claims.

Eric Peterson is a partner practicing in the bankruptcy litigation group. In 2005, 2006 and 2007, Eric was named by Law & Politics Magazine and the publishers of Los Angeles Magazine as one of the top young attorneys in Southern California. Eric can be reached at (310) 286-1700 or epeterson@rutterhobbs.com.

Super Lawyers

RHD congratulates our Super Lawyers, named by *Los Angeles Magazine and Law & Politics Magazine*:

- Andrew Apfelberg (Business / Corporate)
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- Frank Hobbs (Business Litigation)
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- Obtained court approval for unitrust conversion of a set of trusts valued over \$50 million.
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- Obtained judicial reformation of the Jemison Trust, which provides awards to employees of the Los Angeles County District Attorney's office.
- Obtained trustee's resignation for failing to administer trust properly.
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- Defeated will contest of a local celebrity's holographic will.

BANKRUPTCY AND CORPORATE REORGANIZATION

- Represented a large technology company in an action to deny a discharge to a debtor who had hacked into and compromised the company's global computer system.
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- Represented directors and officers of a publicly traded, multinational media company in connection with bankruptcy trustee claims for breach of fiduciary duties.
- Represented two creditors in different preference defense cases.

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May 4, 2008

RHD is a proud sponsor of the **10th Annual Big Sunday Event**.

March 18, 2008

Eric Peterson presented "Directors and Officers Litigation in Bankruptcy" as a panelist at a **Beverly Hills Bar Association** seminar.

March 16, 2008

Fred Fenster was quoted in **The Observer's** article, "The Surreal Tale of OJ: the Sequel."

March 13, 2008

Olivia Goodkin's article, "Reimbursement of Employees' Expenses," was posted on **www.legalcatch.wordpress.com**.

March 1, 2008

Andrew Apfelberg was quoted in **Package Printing's** article, "When It's Time to Sell...Lining Up a Team of Experts is Essential."

January 31, 2008

San Diego Daily Transcript published Greg Sater's article, "Name and Trademark Your Product Without Spending a Fortune in Legal Fees."

January 28, 2008

Beth Hummer was quoted in **Lawyers USA's** article, "Internet Anonymity: What Happens When a Case Includes a "Doe" Defendant?"

January 14, 2008

Natasha Shabani's article, "Keeping Online Contests on the Right Side of the Law," was published in the **Century City News**.

Practice Areas

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