Myerson Employment

Environmental, Social & Governance (ESG): Considerations for HR

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Welcome

We understand the complexities of modern life and the importance of taking care of your business interests. So it's a deep source of satisfaction that so many businesses choose Myerson as their trusted adviser, from assisting with day to day employment matters via our Myerson HR service to advising on large scale.

Why Myerson?

At Myerson, we are employment experts. Putting our clients and their business at the heart of everything we do means we establish long-term relationships and act as trusted advisers.

We are proud to be ranked as 'Top Tier' in the prestigious international directory The Legal 500 and commended by The Times 'Best Law Firms 2019'. Therefore, you can rest assured you will receive a high-quality and truly bespoke service.

Our employment solicitors are dedicated to assisting and advising on how to achieve your business objectives in the most efficient and practical way. We pride ourselves on providing straightforward and bespoke employment law advice tailored to your business requirements and resources.

You can find out more about our Employment Team by clicking here. Therefore, you can be reassured you will receive a high quality and truly bespoke service.

Environmental, Social and Governance (ESG): Considerations for HR

Introduction

Environmental, social and governance (ESG) issues have become increasingly important for business owners around the world, if they wish to remain competitive. An array of stakeholders – from investors and employees to job candidates and customers – increasingly expect businesses to act responsibly, ethically, and purposefully against their environmental and social responsibilities.

Contents

In this guide, we explain the importance of ESG in the workplace and bring employers up to date on the latest employment-related perspectives on the three pillars of ESG: environmental, social and governance. This includes:

1. ESG in the workplace: What is ESG and why does it matter to HR?

2. Environmental factors: We explore climate change and environmental sustainability in business and consider their impact on HR issues such as recruitment, environmental whistleblowing and discrimination claims.

3. Social factors: We consider the importance of managing relationships and working conditions in the workplace and how the culture of a company influences recruitment, retention and job satisfaction.

4. Governance Factors: We delve into the role of leaders in complying with relevant obligations, setting the company's ESG vision and monitoring progress against ESG targets.

5. How can Myerson help: We set out the many ways Myerson can help you achieve your ESG goals.

ESG in the Workplace

What is ESG?

ESG is an overarching term used to refer to the decisions, conduct, policies and practices of businesses and organisations in relation to environmental, social and governance matters. ESG goals are becoming increasingly important to businesses around the world as their stakeholders become ever more interested in how ethically they are managed.

Environmental

- Climate Change and greenhouse gas emissions
- Emissions to pollution & waste
- Biodiversity, deforestation & land waste
- Energy efficiency
- Resource depletion (including water)

Social

- Human rights, including modern slavery & forced labour
- Health & safety
- Diversity, equity and inclusion
- Conflict zones & conflict minerals
- Community engagement

Governance

- Executive pay & board independence & structure
- Conflicts of interest
- Anti-money laundering, bribery & corruption
- Responsible tax strategy
- Stakeholder engagement

Why does ESG matter to HR?

Now more than ever it is important for employers to recognise how an organisation's ESG performance can impact upon its productivity, employee retention rate, profitability, and overall reputation The better an organisation's ESG performance, the more likely it is to attract investors, drive innovation, retain talent, mitigate risks, and enhance brand value.

HR Consultants, Mercer, recently published research from their *Rise of the relatable organization* report, which showed that employees are demanding more action on ESG initiatives, with 96% of employees agreeing that they expect their company to pursue a sustainability agenda and that one in five employees state that working for a company that is misaligned with their personal values is putting them at risk of burnout.

In addition, insurance provider Marsh & McLennan's *ESG as a workforce strategy*, published in 2020 found that:

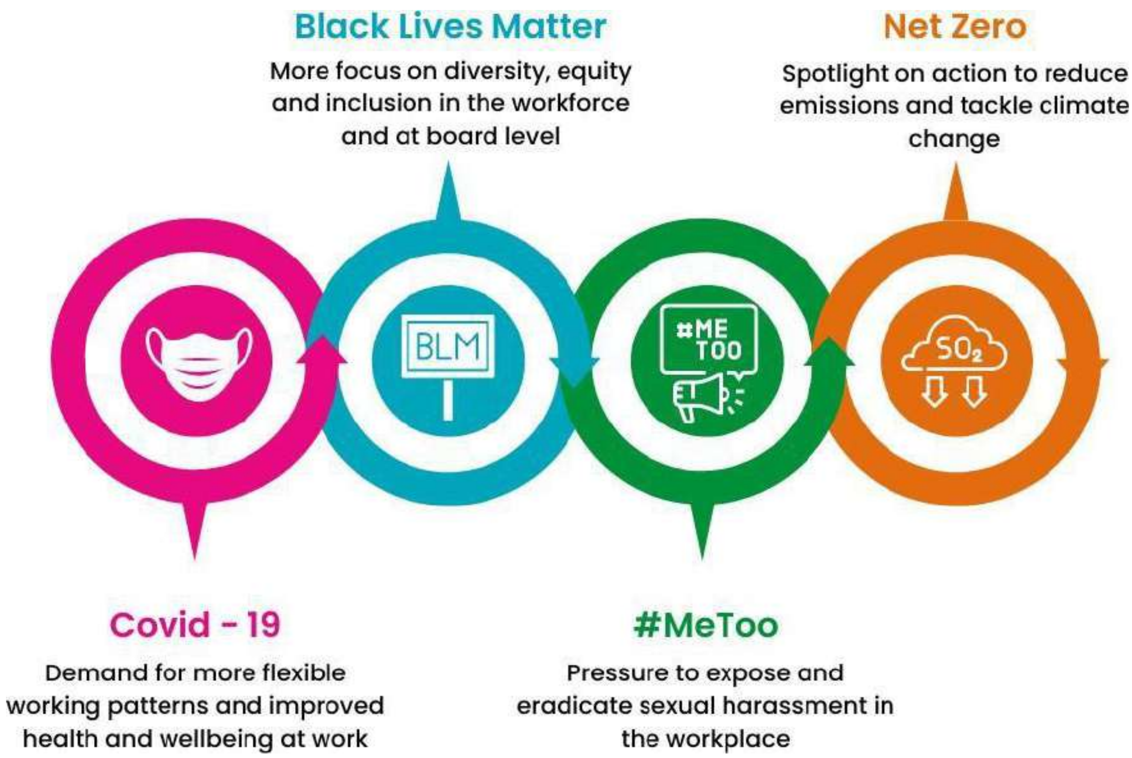
- Employers with highly satisfied employees score 14% higher on ESG performance than global average employers

- Employers with an attractive image among young talent score 25% higher on ESG performance than average employers

- Top employers tend to:

    - Have lower carbon emissions
    - Make a greater effort to understand employee feelings
    - Be more diverse

Various global trends and political movements have helped create a global environment where business stakeholders are far more enquiring and ESG-focused.



Over the next decade, millennials and Gen Z's will make up the vast majority of the workforce and they are heavily influenced by an employers' ethical values and commitment to sustainability. Deloitte's *2023 Gen Z and Millennial Survey* found that over half of Gen Z's and millennials say that they research a brand's environmental impact and policies before accepting a job from them. Having unsustainable and unethical working practices can also negatively impact an organisation's reputation. It is becoming more and more common for customers and clients to abandon brands due to concerns over ethical practices. In 2022, P&O Ferries were widely condemned in the media and suffered significant brand damage when they were found to have abruptly dismissed nearly 800 employees with a video message.

Furthermore, it's not just employees and customers that are interested. Shareholders and investors are also paying attention to ESG. In 2020, fast-fashion retailer Boohoo saw its share price plummet after being found to have used suppliers in Leicester that placed staff in unsafe working conditions with very low wages. Marsh & McLennan also reported that institutional investors such as BlackRock are using ESG to assess investment risks and opportunities.

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Environmental

Climate Change & Nature

The Environmental factor of ESG relates to a company's impact on the natural environment. It considers a company's climate change policies, their carbon footprint, production of waste and pollution, and use of natural resources.

There are currently few laws requiring employers to take account of climate change. Even so, considering the Government's ambitious "net-zero" target by 2050 and the growing concerns of Gen Z's and millennials regarding the climate crisis, many employers are actively working to try and reduce their environmental impact.

It is becoming common place for employers to implement practices and policies relating to climate change, such as:

- Schemes to encourage employees to walk or cycle to work or take public transport
- Paperless working
- Raise awareness of climate change issues via training or sustainability programmes
- Include environmental misconduct matters in the disciplinary policy (i.e. for a company with a net-zero commitment or strong environmental ethos)
- Special paid leave to allow volunteering with environmental organisations
- Requiring prior approval of expense claims where travel is required or offering staff an extra day's holiday when they choose not to fly
- An electric vehicle salary sacrifice scheme and workplace charging points
- Vegan and vegetarian meals and snack options

Other employers are using climate-aligned legal drafting for their employment contracts, and corporate documents. For HR, this could include aspirational pro-climate provisions, such as:

- A garden leave clause permitting the employee to undertake climate-related volunteering activities
- A sustainable commuting policy
- A flexible working policy that supports the achievement of net-zero targets

Environmental Whistleblowing

Climate-related whistleblowing is another environmental factor that employers should have in their ESG planning. Whilst there are few laws that place specific climate-related obligations on employers, the Employment Rights Act 1996 does protect a qualifying whistleblower from detriment or dismissal for filing a complaint about an organisation's environmental practices.

To qualify as a whistleblower, an employee needs to have made a "protected disclosure" about a specified type of wrongdoing within the business, which they reasonably believe is a disclosure in the public interest. For example, this might involve disclosing information about damage to the environment, such as where an employer has been polluting local rivers or dumping waste illegally.

There is no statutory threshold for environmental damage and any adverse impact on the environment could potentially fall within the definition of "environmental damage" for the purpose of a whistleblowing claim. Therefore, this opens up the possibility that an employee's concerns about an organisation's environmental practices could constitute a protected disclosure on a wide basis.

If an employee "'blows the whistle"' due to environmental concerns, employers need to ensure that no one in their organisation punishes or dismisses the employee for having raised these concerns, otherwise the individual will have strong whistleblowing claims for unlawful detriment or automatic unfair dismissal.

Successful claims can be financially damaging for an employer. Automatic unfair dismissal claims carry a potentially unlimited award of compensation, whilst claims of unlawful detriment also include the potential for non-financial losses to be awarded (e.g. compensation for injury to feelings).

Having an effective whistleblowing policy encourages an open office culture, where complaints are taken seriously and employers are able to resolve employee concerns at an early stage, rather than leaving them to fester, turn into whistleblowing claims that could be exposed to the public, the employment tribunal, and/or regulators.

Discrimination

An individual's belief in climate-change-related causes can also potentially qualify for protection from discrimination under the Equality Act 2010.

Certain individuals, including job applicants, employees, and workers, are protected against discrimination, harassment and victimisation relating to a "protected characteristic". Some protected characteristics are an individual's age, sex and race, but they also include philosophical beliefs (such as political and environmental beliefs). For example, ethical veganism has been found to qualify as a protected philosophical belief.

To qualify as a philosophical belief, the individual's environmental beliefs must be strong enough. In the leading case of *Grainger plc and Others v Nicholson*, the Claimant successfully argued that his belief that mankind is under a moral duty to prevent climate change was a philosophical belief and he was therefore protected under discrimination laws. The case established the conditions that must be met for environmental concerns to qualify as a protected philosophical belief:

- The belief must be genuinely held
- It must be a belief, not merely an opinion or a viewpoint
- It must be a belief as to a weighty and substantial aspect of human life and behaviour

- It must attain a certain level of cogency, seriousness, cohesion and importance

- It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others

To protect the company and mitigate the legal risks, employers should be aware of any employees who may have strong beliefs in relation to climate change. HR might also consider rolling out training for staff on the Equality Act 2010 and/or implementing climate-conscious policies and practices, together with robust grievance and disciplinary processes to address any complaints of discrimination.

Social Factors

The "S" part of ESG is probably the most important factor for HR and employers and is the factor that most clearly synchronises with employment law. The social element centres around how an employer manages its employees and its interactions with clients, customers, and the wider community. It considers how effectively an employer has implemented workplace practices concerning diversity, equality and inclusion, health initiatives and employee wellbeing.

Diversity, Equity, & Inclusion ("DEI")

Diversity: relates to particular characteristics that differentiate one individual from another such as a person's race, gender or ethnicity.

Equity: often confused incorrectly with "equality", it relates to the way in which individuals are treated fairly based on their specific individual needs and the fact that certain employees may need different resources to enable them to flourish in their role.

Inclusion: refers to employees feeling a sense of belonging in the workplace and feeling as though they can speak freely and openly and feel respected.

In light of the COVID-19 pandemic and movements such as #MeToo and Black Lives Matter, now more than ever it is important for employers to consider their DEI performance. Statistics published in Deloitte's *Global 2023 Gen Z and Millennial Survey* revealed that younger employees are more likely to want to work for their employer for longer than five years if their employer tries to create a diverse and inclusive working environment.

Fostering DEI in the workplace culture is proven to have positive impacts upon employee recruitment, retention and satisfaction, which, in turn, leads to increased levels of motivation and productivity. Having a diverse workforce can also avoid "group think" and encourage creativity and smarter decision making as employers can draw upon a wider variety of ideas and perspectives.

Equally, there are risks to ignoring DEI. Instances of discrimination, such as sexual or racial harassment, can disrupt staff performance, productivity, and profitability, as well as potentially resulting in time-consuming and costly discrimination claims in the employment tribunal.

Actions for improving DEI in the Workplace

Employers should consider taking the following ongoing actions to improve diversity, equity, and inclusion in the workplace:

01 POLICIES

Implement, and keep under review, DEI and bullying and harassment policies to ensure they match best practice

02 TRAINING

Staff training on relevant policies or, for example, on unconscious bias or inclusive leadership training

03 REPRESENTATION

Improve representation of minority groups, particularly at a senior level

04 RECRUITMENT

Review recruitment and promotion practices. This should include stating their commitment to DEI principles in job advertisements and considering using positive action, where appropriate

05 REVIEW PAY

Conduct pay equity audits to understand where there are pay discrepancies in the workforce

06 MENTOR

Mentor junior employees and potential employees, particularly any identified as being under-represented or potentially disadvantaged in the company

07 COMMUNITY

Establish relationships with charities and local community groups that align with your company's core values

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Health & Wellbeing in the Workplace

How well does your company support your staff when it comes to their mental and physical health?

In addition to an employer's legal duties to take reasonable care of the health and wellbeing of their employees, following the COVID-19 pandemic, it has become clear that taking the time to invest in your employees' mental health can be beneficial from a financial perspective.

Deloitte's *Mental health and employers: The case for investment – pandemic and beyond* report highlighted that the cost to businesses of poor mental health in 2020- 21 was £53 – £56 billion. In contrast, the average return on investment of mental health initiatives in the workplace in the same period was £5.30 for every £1 invested. This was primarily a result of reducing the costs associated with absenteeism, presenteeism and staff turnover.

Many organisations now recognise the importance of mental health in the workplace and, as such, have introduced measures to support employees who suffer from common mental health issues, such as stress and anxiety. Demonstrating a genuine desire to support the physical and mental health of employees can lead to increased productivity and higher staff retention rates.

Hybrid working has also become commonplace following the pandemic, as a means for employees to achieve a greater work/life balance. Some companies are offering employees the option to work entirely remotely, whilst others take a hybrid approach with employees splitting their week between home and office.

The right to request flexible working is also available to all employees from day one as of 6th April 2024. Other employers have trialled a four-day working week, where employees receive 100% of their pay for 80% of their time, provided they commit to offering 100% productivity. Deloitte's *Global 2023 Gen Z and Millennial Survey* reported that a positive work/life balance was the top trait younger staff admired in their peers and their key factor when choosing a new employer.

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Whilst hybrid working can certainly have a positive impact on an employee's mental health, it needs careful planning before implementing. An unwanted side effect can be that employees may feel isolated in an "always on" culture where work life and home life become blurred.

Some of the ways in which employers can improve employee health and wellbeing include:

- Employee engagement surveys and software
- Subsidised gym memberships
- Healthy food and snack options
- Mental health training sessions for all employees
- Flexible/hybrid working arrangements
- Private health insurance
- A "wellbeing day", where staff are given an additional day of paid leave to do something that will aid their health and wellbring
- Training to managers on how to spot employees suffering from stress or burnout

Workforce Engagement

Engaging with the workforce is vital if a business wishes to make progress with its social goals, as it will help them understand their employees' wants and needs, foster an inclusive culture and improve retention rates. In considering how effectively you are engaging with your workforce, a company should think about:

- How effective are your whistleblowing and reporting processes?
- Is your grievance procedure working well and achieving the right outcomes?
- How effectively have you dealt with recent instances of discrimination, bullying or harassment?

- Do you use non-disclosure agreements appropriately?
- What are the levels of employee satisfaction and how do you rate your organisational health?
- How do you gather feedback from employees and how can you use this to improve?

Governance Factors

Governance refers to the way in which a company is structured and how it manages its internal systems, audits, executive pay, shareholder rights and business ethics. It reflects how, at board level, environmental and social factors are managed and how transparent the company is in its ESG performance.

Good governance practices are essential for a successful ESG strategy. Those practices might be legal obligations that the company must action or voluntary measures that the company has decided to take. Examples of some positive governance actions include accurate reporting on finances and business strategy, transparent and fair pay and promotion structures, and the effective identification and avoidance of conflicts of interest.

Regulatory Obligations

Whilst there are limited legal obligations compelling an employer to take positive steps towards the governance aspects of ESG, regulators and laws do hold companies to account in certain ways.

For example, the Competition and Markets Authority ("CMA") are paying closer attention to "greenwashing" – when a company falsely advertises its product or service as being as being "green", sustainable, or environmentally friendly. On 20th September 2021, the CMA published its "Green Claims Code", which companies are required to adhere to so that they do not mislead consumers. In 2022, the CMA launched an investigation into fashion brands ASOS, Boohoo and George at Asda to scrutinise their "green" claims.

In addition, there are also regulations that compel companies with more than 250 or more employees to report on their gender pay gap each year, including the publication of data such as the percentage of men and women receiving bonuses, the percentage of men and women in each pay band, and the average gender pay gaps for hourly pay and bonuses. Quoted companies with more than 250 employees are also required to report on the ratio between their CEO's pay and the average pay of the workforce. It is not currently mandatory for companies to report on their ethnicity and disability pay gaps, however, more and more companies are choosing to do so voluntarily.

Other companies are legally obligated to publish modern slavery and human trafficking statements, which must set out the potential modern slavery risks related to its business and the steps it has taken during the financial year to ensure that slavery and human trafficking is not taking place in its business or supply chains.

Governance Considerations for Employers

Senior executives and managers are fundamental in setting the ESG agenda and achieving its goals. Under section 172(1) of the Companies Act 2006, directors are under a duty to act in good faith in promoting the success of the company and, in doing so, amongst other things, they must have regard to:

Considering the factors we have explored in this guide, it is easy to see how this legal duty on company directors lines up with taking positive measures to progress an ESG agenda, where that agenda aligns with the best interests and success of the company. The board will be responsible for the performance and actions of a company and it is important, for the sake of good governance and compliance with their duties, that environmental, sustainability and social aims and measures are at least considered as part of the planning of the business. Notwithstanding the role of directors, the HR department will also play an influential role in furthering a company's ESG progress.

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HR can play a vital role in ensuring board ESG decisions are effectively implemented throughout the business (e.g. new policies, practices, training and communications). Further, whilst an ESG strategy is normally set by the board, HR are increasingly shaping the approach to ESG. Many companies now have HR representation at boardroom level, which is particularly helpful in devising and implementing "social" measures. HR representatives can ensure that executive decisions reflect company culture and ESG principles.

Just as the planning of ESG targets and implementation of effective measures is crucial, so is the need for a company to track its ESG performance. This can be done by collecting data and reporting on that data. In some instances, an employer will be obligated to collate and publish certain data (such as the gender pay gap reporting obligations mentioned above).

In other areas, employers would do well to voluntarily measure and reflect on their performance against ESG targets each year. For example, a company that introduces new policies (such as whistleblowing or anti-discrimination) could review how effectively they have been enforced and complied with by staff and consider staff training where required. Alternatively, employee engagement surveys could be used to determine how well new policies and benefits (e.g. hybrid working, new pay review structures) have been received by staff, allowing decision makers to make changes where there is dissatisfaction.

In terms of pay, executives can aim to make sure all employees are paid fairly and incentivised. ESG targets are increasingly being used by companies to measure success and reward employees. Research by accounting firm PwC revealed that companies are increasingly basing staff remuneration and incentives on performance against ESG targets:

- 60% of the FTSE 100 companies use an ESG performance target in their executive incentive arrangements
- 46% of companies included an ESG measure in their annual bonus plans
- 32% of companies incorporated an ESG performance target in their long-term incentive plans

Senior executives and managers who govern companies can greatly enhance their company's reputation with internal and external stakeholders, and help futureproof their company's image with younger generations, by implementing policies that enhance their ESG framework and by holding the company to account on its performance against ESG targets.

How Can Myerson Help?

As a full-service law firm operating across a wide range of sectors and disciplines, our expert lawyers can advise on a variety of matters relating to ESG and can help you to mitigate legal, operational and reputational risks associated with poor ESG practices and procedures. Examples of how we may be able to assist include:

ENVIRONMENTAL

- Advising around extreme weather patterns impeding the performance of contractual obligations and related disputes
- Reviewing and drafting environmentally friendly staff policies e.g. travel, expenses and remuneration, sustainability policies
- Drafting climate-change and sustainability obligations for contracts of employment
- Reviewing whistleblowing policies and advising on any claims brought by employees relating to environmental issues
- Advising in relation to employees and time off for protests
- Defending discrimination and/or unfair dismissal claims relating to environmental complaints
- Advising on green lease issues including sustainability obligations in new and renewal leases and dilapidations issues
- Advising on leases of land and agreements relating to EV charging points, solar panels/farms and Biodiversity Net Gain (BNG) offsetting
- Advising on section 106 obligations and conservation covenants relating to BNG on developments
- Advising on breaches of commercial contracts and/or misrepresentation claims where a party has not adhered to environmental and sustainability obligations
- Advising on greenwashing claims and reputational issues, such as defamation and misrepresentation claims

SOCIAL

- Drafting diversity and inclusion, harassment, grievance and disciplinary policies and providing related training
- Advising on employee beliefs, activism and reviewing CSR policies to reflect the employer's cultural vision
- Drafting policies relating to matters such as the menopause, maternity and parental leave, or fertility leave
- Helping to prepare and implement policies aimed at enhancing recruitment and retention, such as hybrid and flexible working policies, bonus schemes, share incentives, training and development processes and apprenticeship schemes
- Defending discrimination and/or an unfair dismissal claims brought by an employee
- Advising on gender or ethnicity pay gap reporting and compliance with National Minimum Wage and Living Wage regulations
- Political and social issues that impact supply chains and contractual performance issues
- Post-completion disputes in corporate transactions relating to breaches of warranties and indemnities around employment issues and compliance with social standards

GOVERNANCE

- Assisting with corporate constitutional changes following the grant of B Corp status
- Advising on and providing project management, as well as drafting the necessary legal documentation, in facilitating the transition of ownership to an employee ownership trust.
- Advising on corporate governance structures, constitutions and the prearation of corporate policies
- Providing assistance during corporate due diligence exercises, with a focus on key governance issues such as modern slavery, corruption and anti-bribery, in particular as part of private-equity-led investments and banking transactions
- Preparing supplier codes of conduct and modern slavery statements
- Advising on whistleblowing complaints and disciplinary and grievance situations relating to senior and executive staff
- Drafting ethics policies, such as anti-bribery, corruption an anti-facilitation of tax evasion and contractual provisions
- Advising on data protection compliance in the processing of employee and customer data
- Privacy and data protection policies, processes and documentation including privacy notices, data mapping and data transfers and Data Protection Impact Assessments to support privacy by design
- Advice on commercial matters elating to breach of contract claims and misrepresentation claims relating to breaches of supplier codes of conduct, and anti-bribery, corruption and human rights standards and policies
- Advice on the legal issues involved in terminating commercial contracts where a party is involved in breaches of laws and standards relating to health safety, human rights, modern slavery and other matters

You're in safe hands!

If you would like further information about how we can help you with your ESG, or if you have any questions, please don't hesitate to contact a member of our Employment Team today.

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