

# Legally Compliant Hiring Practices



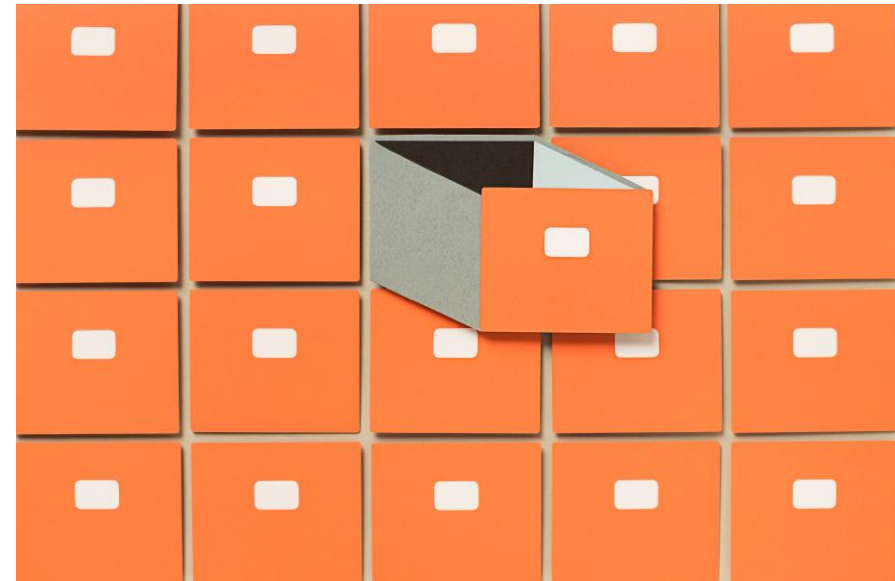
PRESENTED BY:

Beverly A. Ozowara, Partner  
Erica E. Noriega, Associate



# Agenda

- Hiring Process Overview
- Handling Employment Interviews
- Accommodating Candidates with Disabilities
- Conducting Background/Reference Checks



**We're Hiring !**

## **The Hiring Process**

# The Hiring Process

## *Overview*

- The District screens for minimally qualified candidates
  - Eligible candidates are then advanced to an initial interview pool; which in most cases leads to a second interview
  - Superintendent is responsible for making hiring recommendations to the Board
  - Board ultimately approves hires at board meetings
- **Keep in mind:** Collective bargaining agreements might provide requirements for posting vacancies and timelines
- Always refer to applicable collective bargaining agreements and district policies

# Intake Process

- Place Job Ad (“Open Until Filled”) – Promotional Recruitments
- Review Applications
- Review Resumes
- Interviews
- Reference Checks
- Background Check

YOUR NAME HERE		100 North Avenue • Union, NJ 07083 (908) 123 - 4567 • EMAIL@GMAIL.COM
Profile	A Self-Starter seeking to secure a position in the medical field where I can utilize my knowledge, clinical skill and administrative work through patient care.	
Key Skills	<div>— Phlebotomy Technique</div> <div>— Medical Terminology</div> <div>— Anatomy and Physiology</div> <div>— Patient Education</div> <div>— Data Entry</div> <div>— Records Maintenance</div> <div>— Urinalysis</div> <div>— Injection Administration</div> <div>— Instrument Sterilization</div> <div>— Blood Cholesterol Testing</div> <div>— Vital Sign - EKG</div>	
Experience	<div><b>American Red Cross, Northern NJ</b> <b>Red Cross Volunteer, July 2014 - Present</b><ul style="list-style-type: none"><li>• Attended community events to promote Red Cross Services</li><li>• Assisted in community outreach programs</li><li>• Hosted blood drive for donations</li></ul></div> <div><b>Nursing Home, West Orange Township, NJ</b> <b>Nursing Assistant, September 2013 – October 2013</b><ul style="list-style-type: none"><li>• Provided routine care to residents according to care-plan, such as personal grooming and hygiene</li><li>• Assisted residents with daily living activities, including helping with meals</li><li>• Provided nursing related services to residents, administered medication under the direction of a nurse</li><li>• Performed light housekeeping tasks</li></ul></div> <div><b>Business &amp; Tax Solutions, Newark, NJ</b> <b>Office Assistant, January 2009 - August 2013</b><ul style="list-style-type: none"><li>• Assisted clients as they entered the office and via phone</li><li>• Performed filing and data management tasks, drafted &amp; edited office memos</li><li>• Purchased &amp; managed office supplies</li><li>• Organized &amp; maintained the files system, time &amp; attendance records for staff</li><li>• Performed other administrative office duties.</li></ul></div> <div><b>Health &amp; Beauty Store, New York, NY</b> <b>Sale Associate, April 2011 - August 2013</b><ul style="list-style-type: none"><li>• Greeted customers &amp; assisted with purchases</li><li>• Coordinated inventory control &amp; stocked merchandise</li><li>• Coordinated &amp; planned all product displays</li><li>• Processed customer transactions &amp; maintained cash drawer</li><li>• Provided assistance when necessary</li></ul></div> <div><b>Restaurant, New York, NY</b> <b>Hostess, July 2008 – September 2009</b><ul style="list-style-type: none"><li>• Responsible for coordinating servers in the restaurant</li><li>• Received &amp; recorded dining reservations of guests</li><li>• Assigned guests to tables suitable for their needs</li><li>• Communicated with guests regarding orders, comments &amp; complaints</li></ul></div>	
Education & Credentials	<div>Community College — New York, NY</div> <div>Health Information Technology — Degree Expected: 2018</div> <div>Healthcare Training Institute – Union, NJ</div> <div>Patient Assistant Technician</div>	



# Pre-Employment and Post-Employment

- Pre-employment refers to the process that occurs before an individual is hired by a district
  - Member of interview panel should only be concerned with pre-employment process
- Post-employment refers to onboarding process after an individual has been made an offer of employment
  - Questions not appropriate during a pre-employment interview may be asked after an offer of employment is made: “Provide proof of eligibility to work in the United States.”
  - These questions are left to HR, who relies on guidance, laws, and best practices to ensure only lawful non-discriminatory inquiries are made

# Non-Discrimination In Employment

- State and federal laws prohibit discrimination in employment (including hiring procedures)
- California Fair Employment and Housing Act (FEHA) **prohibits** any non-job-related inquiries of applicants or employees, **either verbally or through the use of an application form**, that expressly, directly or indirectly references a limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or any intent to make such a limitation, specification, or discrimination

## Conduct Job Analysis to Determine Required or Preferred Skills

- Set minimum qualifications
- If using pre-employment tests, utilize examinations that test for the applicant's ability to perform the duties of the position
- All pre-employment tests must be reviewed and validated by HR before use





# Employment Interviews

# Pre-Interview: Look Closely at the Job Application

- ✓ Job Hopping? Gaps in employment?
- ✓ Inflated Position Titles? Puffery?
- ✓ Actual Job Responsibilities
- ✓ Salary History
- ✓ Reporting Relationships
- ✓ Education
- ✓ Actual Experience
- ✓ Writing Ability

# Job Interviews

- Interviews for certain positions may be governed by some sort of agreement between district and union
  - Refer to applicable collective bargaining agreement
  - Does the agreement require job vacancies to be posted internally?
  - Interview panels may be required when filling bargaining unit positions
  - Interview panels may also be common practice when filling administrative positions
- Composition of interview panel generally controlled by agreement
  - For classified and certificated positions, likely at least one bargaining unit member required to be on panel
  - For administrative positions, likely at least one member from each bargaining unit required to be on panel

# Should I Interview Candidates Alone?

- There may be good reason for a manager to interview prospective employees by themselves, but it is not advisable
- Consider possible risks involved
  - A candidate may allege questions were inappropriate or the interviewer was unprofessional
  - A written list of questions is not a solid defense; manager could have gone off script and no other witness to disprove allegations
- Interview panel format can provide some insulation against claims of discriminatory hiring practices

# Interview Panels

- A group of informed and trained individuals who agree to and are trusted to maintain confidentiality about the process, including the identity of candidates, interview questions, responses and the deliberative process
  - Confidentiality agreements are important to have
  - Review these expectations with the panel before each interview
- Understand the need to protect against discrimination in the hiring process
- Are composed of supervisor or manager and other stakeholders with current and relevant knowledge about the position to be filled
- Absent extenuating circumstances, are the same for all applicants for a position

# Interview Notes

- Panel members often create interview notes
  - Direct panel members to be professional when taking notes
  - No written comments about applicant's race, color, creed, appearance, politics, or any protected status
  - **KEEP NOTES FOCUSED ON QUALIFICATIONS.**
- EEOC/CRD frequently demand notes in cases of hiring discrimination
  - One seemingly innocent, off-topic written comment on interview notes can provide EEOC/CRD with ammunition to find discrimination exists



# Other Interview Panel Considerations

- Do not place interview notes in personnel files
- If you use some sort of scoring system for picking an applicant, be sure the system can be clearly explained
  - Keep score / ranking sheets with notes
- Be careful of informal “chit chat” with the applicant after an interview has concluded
- Be aware of any conflicts of interest that might exist on the interview panel

# Interview Techniques

- *What will you ask?*

- Develop a list of questions that will be asked of all interviewees for the position
  - Use the job description to help formulate interview questions
- Use open-ended questions
- Start with broad questions; then focus questions on specifics
- Specific questions for particular interviewees?
  - (e.g. explain gaps on resume, discuss previous experience, why left previous employment)

# Conducting the Interview

- *What questions are you prohibited from asking?*
  - Broadly speaking, any question likely to elicit information regarding any protected characteristic
    - Race, color, ancestry, national origin, religion/creed, age (40+), disability (mental and physical), sex or gender (including pregnancy, childbirth, breast feeding, or related medical conditions), sexual orientation, gender identity, gender expression, medical condition, genetic information, marital status, military and veteran status

# Conducting the Interview

- Questions to Avoid

- Questions regarding the applicant's maiden name or preferred/legal name
- Questions regarding applicant's race, color, sexual orientation, complexion, eye color, or hair color
- Questions regarding an applicant's height/weight, physical appearance or asking for a photograph
- Inquires into age, birthdate, date of attendance/completion of school, how much longer do you plan to work, or any other questions that tend to identify applicants over 40 years of age
- Inquiry into applicant's general health, medical condition, or mental/physical disability

# Conducting the Interview

- Questions to Avoid

- Birthplace of the applicant or applicant's parents, spouse or other relatives, or any other questions as to nationality, lineage, ancestry, national origin, descent or parentage
- Questions regarding military service
- Questions regarding an applicant's religion or religious days observed
- General questions regarding organizations, clubs, societies and lodges
- Questions that identify the applicant's sex, gender identity, gender expression, marital status, or number/ages of children or dependents
- Questions relating to pregnancy or birth control
- Questions regarding prior workers' compensation claims/injuries

# Best Practice: Interview Panel Questions

- Interview questions should be prepared by HR in advance
- Interview panelist should not ask question that is not on list of pre-set questions
- Panelist may ask questions to seek clarification of a response, but be careful not to frame it in a way that would invoke suspicion of, or perceived, discrimination
- Collect all copies of questions, notes, and scoring sheets from all panelist before they leave
  - If a panelist must leave early, do not allow them to take any materials
  - Consider whether a late panelist should participate at all, if they do not get to hear from all candidates



# Make the Decision and Document It

- Use objective criteria to make hiring decisions
- Explain why applicant was not selected as objectively & specifically as possible
- Watch out for stereotypes!
  - E.g. “too passive, mousy, quiet, set in their ways...” etc.
  - **Instead:** “Not enough experience,” or “not able to work full-time,” “wanted a minimum of \$25.00 per hour and position pays \$20.00 per hour.”
- HR makes appropriate conditional offer of employment to the selected applicant
- Notify all applicants and record disposition

# Interviewing: Final Thoughts

- Review policies related to interview panels to ensure they reflect sound practices
- Give brief tutorial to each interview panel that is created to ensure sound practices
- Review any paper or electronic job applications that are currently in use to ensure questions are lawful and to ensure obsolete nomenclature is not being used



## **Accommodations for Applicants With Disabilities**

# ADA and FEHA Overview

- Prohibits discrimination against **qualified applicant** with a disability
- Requires employers to engage in a timely, good faith, interactive process with an applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an applicant with a **known** physical or mental disability or **known** medical condition.
- Requires employers to make reasonable accommodation(s) for the disability of any individual applicant if the employer knows of the disability, unless the employer or other covered entity can demonstrate, after engaging in the interactive process, that the accommodation would impose an **undue hardship**

# Not Required to Hire Unqualified Applicants

- An applicant with a disability, like all other applicants, must be able to meet the employer's requirements for the job, such as education, training, employment experience, skills, or licenses
- An applicant with a disability must be able to perform the “essential functions” of the job with or without reasonable accommodation
- (29 C.F.R. § 1630.2; Cal. Code Regs., tit. 2, § 11065.)

# Reasonable Accommodations

ADA and FEHA specifically contemplate reasonable accommodations for applicants:

**ADA**  
*29 C.F.R. § 1630.2*

“The term reasonable accommodation means...[m]odifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires....”

**FEHA**  
*Cal. Code. Regs., tit. 2,  
§ 11065*

“Reasonable accommodation’...modifications or adjustments that are...effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job....”



# Reasonable Accommodations

## *Examples (Non-Exhaustive List)*

- ✓ Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments in the work environment
- ✓ Allowing applicants or employees to bring assistive animals to the work site
- ✓ Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee

# Reasonable Accommodations

## *Examples (Non-Exhaustive List)*

- ✓ Providing written materials in accessible formats, such as large print, braille, or audiotape
- ✓ Ensuring that recruitment, interviews, tests, and other components of the application process are held in accessible locations
- ✓ Providing or modifying equipment or devices
- ✓ Adjusting or modifying application policies and procedures, such as providing extra time for tests

# Reasonable Accommodations

## *Examples from EEOC*

- John is blind and applies for a job as a customer service representative.
- John could perform this job with assistive technology, such as a program that reads information on the screen.
- If the company wishes to have John demonstrate his ability to use the computer, it must provide appropriate assistive technology as a reasonable accommodation.

# Reasonable Accommodations

## *Examples from the EEOC*

- An employer requires job applicants to line up outside its facility to apply for a job, a process that could take several hours.
- Tara has multiple sclerosis that makes her unable to tolerate prolonged exposure to temperatures in the 90's.
- Tara therefore requests that she be allowed to wait indoors where it is air conditioned until the human resources department is ready to take her application.
- The employer would need to modify its hiring procedure to accommodate Tara.

# Reasonable Accommodations

## *Examples from the EEOC*

- Charles is blind and asks that a written test be read to him as a reasonable accommodation.
- The employer proposes to provide Charles with a Braille version of the test, but Charles explains that he cannot read Braille. Thus, a Braille version would not be an effective accommodation.
- The employer then proposes to provide Charles with an audiotope version of the test.
- While Charles preferred to have someone read the questions to him, the audiotope version meets his needs and thus is acceptable as a reasonable accommodation.

# Questions and Medical Exams

Can I ask an applicant whether she is disabled or about the nature or severity of a disability?

No. You may ask about ability to perform job-related functions and can ask them to describe or demonstrate how the job function will be performed with or without reasonable accommodation





# What Don't You Have to Accommodate?

- Physical characteristics
  - Eye or hair color
  - Left-handedness
- Personality traits
  - Quick temper
  - Poor judgment
- Veganism
- Sexual behavior disorders
- Conditions resulting from current unlawful use of controlled substances

# Can You Require a Pre-Employment Physical?

- Only if the employee has an actual job offer for a position where a physical is required
- Physicals must be required of all employees in a particular category or type of work
- Job-related and consistent with business necessity
- Results must be kept confidential
- Must accept rebuttal information

# Questions and Medical Exams

What happens if I don't hire because the pre-employment exam shows a disability?

You'll need to be able to show reasons for not hiring are job-related and consistent with business necessity, and that no reasonable accommodation could have been made that would have made it possible to perform essential job functions





# Background Checks

# Processing Background Checks: Job Applicants

- After the District has interviewed and selected a candidate, issue a conditional offer of employment contingent upon a successful background check
- Once you get the DOJ report:
  1. Document receipt of report
  2. Review report
    - Review job application – was the candidate truthful?
  3. Clearance of candidate
    - If no prior convictions, candidate may be cleared and issued final offer of employment
    - If prior convictions, consider if candidate is automatically disqualified

# Legal Requirements

- Education Code section 44830.1(a) – Certificated Employees
  - “...no person who has been convicted of a violent or serious felony shall be hired by a school district...”
  - Section 44830.1(d) provides mechanics for initiating criminal background check with DOJ
- Education Code section 45122.1 – Classified Employees
  - Similar prohibitions and processes
- DOJ reports are confidential and must not be shared
- Background check process determines an individual’s eligibility to be employed in a classified or certificated position and requires applicants to submit to fingerprinting and clearance through the DOJ

# Sex Offense or Controlled Substance

- Sex Offense
  - No school district shall employ a person who has been convicted of a sex offense as defined in Education Code Section 44010
- Controlled Substance
  - No school district shall employ a person who has been convicted of any controlled substance as defined in Education Code section 44011
- Certificated Employees
  - Education Code section 44836
- Classified Employees
  - Education Code section 45123

# What happens if You Get a “hit?”

- Both Education Code sections 44830.1 and 45122.1 prohibit school districts from hiring employees with convictions for violent or serious felonies
  - Violent or serious felonies are defined in Penal Code 667.5(c) and Penal Code 1192.7(c), respectively
- Confusion arises when an applicant’s conviction is expunged pursuant to Penal Code section 1203.4
- Education Code section 44009(c) provides that a guilty plea, a finding of guilt, or a conviction following a plea of *nolo contendere* is a conviction, “irrespective of a subsequent order of probation...or an order under section 1203.4 of the Penal Code”



# School District Dilemma

- Applicants who have criminal convictions are, as a general rule, not attractive candidates for school employment
- However, a conviction does not necessarily mean they are legally excluded from employment
- If an applicant has a conviction that is not a violent or serious felony or that is not a sex offense as defined by Education Code section 44010 or a controlled substance offense as defined by Education Code section 44011, school districts must decide whether to hire the applicant
- Each case is fact-specific
- Is this a case where an applicant has a “certificate of rehabilitation” or a pardon?

# Reference Checks

- Are crucial!
- Are protected
  - California law protects employers from tort liability when they provide credible, non-malicious information about a former employee, in response to a request for information from a prospective employer (Civ. Code § 47(c).)
- Employers can be liable for negligent misrepresentation or fraud if they fail to use reasonable care in responding to a reference check
  - *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066
  - Certificated personnel are prohibited from writing or signing any recommendation letter that intentionally omits significant facts or misrepresents facts (5 C.C.R. § 80332(a))

# Reference Checks

- Pay attention to the position held by the references
- Ask the right questions:
  - Would you hire this person again?
  - Was the person dismissed or asked to resign?
- Pay attention to response:
  - Just title and dates of employment provided
  - Tone used when responding
  - Hesitation
  - Scripted response
  - Refusal to respond

# Reference Checks

## *Assembly Bill 2534*

- September 25, 2024, Governor Newsom signed AB 2534 into law
- Will amend Education Code section 44939.5, effective January 1, 2025
- Job applicants required to provide prospective employer with complete list of every educational institution where applicant has been employed
- Applies when applicant is seeking position at school district, county office of education, charter school, or state special school
- LEAs must inquire with each listed entity as to whether the applicant was the subject of credible complaint of, substantiated investigation into, or discipline for, “egregious misconduct,” that required the LEA to report to CTC

# Reference Checks

## *Assembly Bill 2534*

- Senate Committee on Education defines “egregious conduct” as:
  - “Immoral conduct that is the basis for an offense related to sex offenses; child abuse and neglect offenses; and controlled substance offenses, as specified”
- AB 2534 requires employer to release records pertaining to “egregious misconduct” of certificated employees to the new prospective LEA employer
- LEAs must provide inquiring LEA with copy of all relevant records in its possession regarding egregious misconduct when responding to such inquiry

# Reference Checks

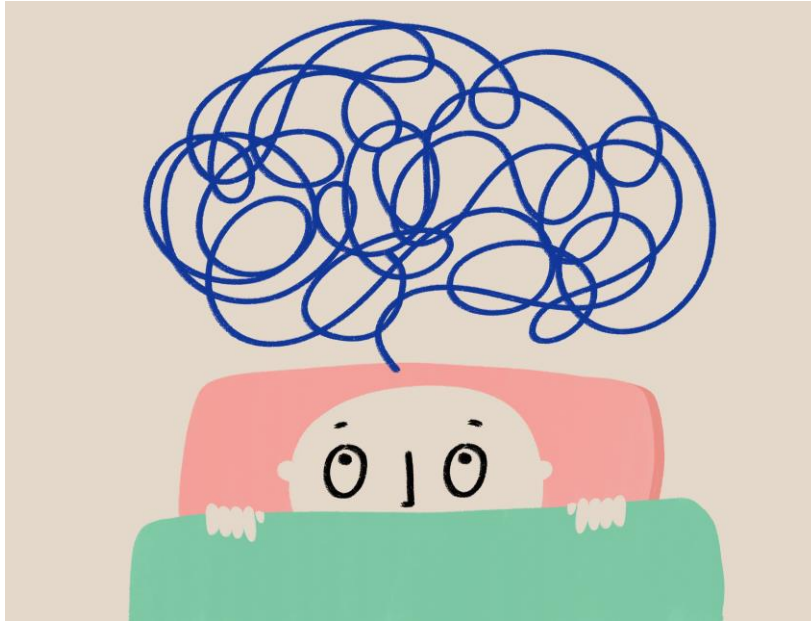
## *Assembly Bill 2534*

- Notes from Senate Committee on Education (June 2024):
  - AB 2534 seeks to bolster existing protections for students by ensuring that schools have access to comprehensive information about a teacher's professional history, particularly any instances of serious misconduct
  - By preventing educators with a history of egregious behavior from being hired without full disclosure, the measure aims to enhance the safety and integrity of educational environments

# Reference Checks

## *Assembly Bill 2534*

- Senate Committee staff notes on impacts (June 2024):
  - Implementation
    - LEAs will need to establish procedures for collecting and verifying employment histories and for handling inquiries with previous employers
    - This may require additional administrative resources and training to ensure that the process is thorough and compliant with legal standards
  - Potential impact on hiring practices
    - New law could influence hiring practices by making it more difficult for individuals with past allegations of misconduct to secure school positions
    - While this enhances student safety, it may also result in longer hiring processes and potential challenges in filling teaching vacancies, as schools navigate the complexities of thoroughly vetting candidates



## Final Thoughts

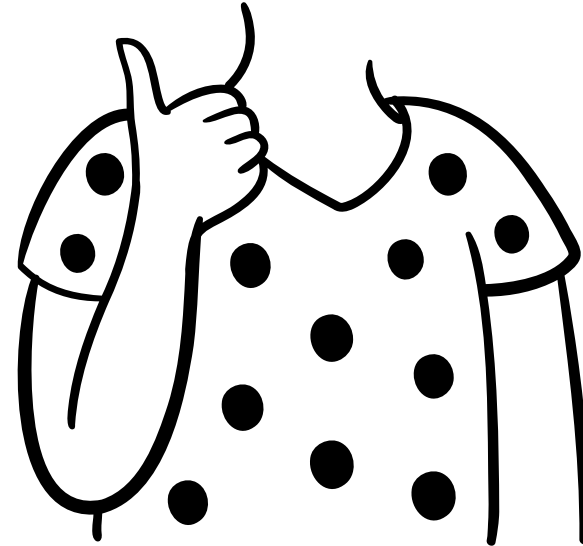


## NEGLIGENT HIRING

- Employer has a duty to exercise reasonable care in hiring (and retaining) employees and to avoid exposing third parties to an unreasonable risk of injury
- Employer must take reasonable steps during the hiring process to satisfy this duty
- Thoroughly complete all steps of hiring process (background, criminal, pre-employment tests, references, driving (if appropriate) to determine fitness for duty and whether prone to violence)

# Certification

**Include a statement on the application wherein the applicant certifies the information provided is true and correct and that no material information has been omitted**



# Question & Answer Session

# Thank You

For questions or comments, please  
contact:

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