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PREFACE

We begin our last Newsletter of 2015 by examining the Federal Ministry of Labor and Social Affairs' current draft legislation on temporary employment, which will have far-reaching effects on labor law if it is enacted.

We then turn our attention to "linking clauses" in employment contracts with managing directors, which may indeed be a blessing for companies, but are likely to be a curse for directors. Finally, we consider various current labor court decisions on the minimum wage, on whether works council activities count as working time, on the service of dismissal notices and the reduction of paid annual leave due to parental leave.

Temporary Employment Update. Draft of Legislation Governing the Deployment of Temporary Personnel

of 16 November 2015 from the Federal Ministry of Labor and Social Affairs (Bundesministerium für Arbeit und Soziales – BMAS)

Introduction

The Coalition Agreement adopted by Germany's Grand Coalition had already made provision for the amendment of the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG) and the introduction of criteria to facilitate the distinction between temporary staffing for legitimate reasons and abusive practices *(p. 69 of the Coalition Agreement)*. On 16 November 2015, the Federal Ministry of Labor and Social Affairs submitted a draft of legislation to the Office of the Chancellor that would amend the Temporary Employment Act and other laws (German Civil Code and Works Constitution Act). The content of this draft met with strong criticism from some quarters.

Overview of changes

1.

As called for in the Coalition Agreement, deployment of temporary personnel to the same employer would continue to be limited to 18 consecutive months in the future (proposed § 1(1b) of the Temporary Employment Act). Previous employment by the same employer would not be counted if followed by an interruption of more than six months. However, collective agreements, or company-wide agreements or employment contracts incorporating provisions of such collective agreements, would be allowed to deviate from this maximum period. In keeping with the provisions of the Coalition Agreement, the contemplated amendment proceeds from the assumption of the existence of separate collective agreements for individual sectors and as a result also requires that hirers be party to such collective agreements *(see also the grounds set forth in the draft, p. 19)*. The legislative history shows that – although not reflected in the wording of the draft – such collective agreements must in turn make provision for a limit to the duration of temporary employment *(see grounds set forth in the draft, p. 20)*.

According to the draft, employment in excess of the maximum period would expose the agency to the possibility of losing the right to deploy temporary personnel (proposed § 3(1) no. 1 of the Temporary Employment Act) and constitute an administrative offence (proposed § 16(1) no. 1d of the Temporary Employment Act). Additionally, failure to remain within the maximum limit would also be tantamount to establishment of an employment relationship between the respective temporary employee and his or her hirer (proposed § 10(1) in conjunction with § 9 no. 1b of the Temporary Employment Act). In such cases, employees may contest this change within the month immediately following the maximum period of deployment of 18 months.

2.

In keeping with the provisions of the Coalition Agreement, the draft legislation calls for temporary employees to receive the same treatment in terms of remuneration as comparable employees of the hirer after nine months of employment ('principle of equal treatment'). The duration of any deviation from the principle of equal treatment in the case of collective agreements previously allowed under the Temporary Employment Act would thus be limited (proposed § 8(4) of the Temporary Employment Act.). In the case of employees covered by a collective agreement that calls for a gradual increase in remuneration until the level of that received by comparable employees of the hirer is reached, it would on the other hand be possible to deviate from the principle of equal treatment for up to twelve months. The contemplated legislation would also

count all employment with the same employer for the purposes of determining compliance with the prescribed time limits unless interrupted for a period of more than six months.

Violation of the principle of equal treatment would also result in the establishment of an employment relationship between temporary staff and their respective hirers under the contemplated legislation (proposal for § 10(1) in conjunction with § 9 no. 2 and § 8 of the Temporary Employment Act). It is questionable, however, whether this legal implication is intended. In any case, the grounds contained in the draft make no mention of this. Unlike in the case of the other instances of notional employment relationships with hirers newly included in the draft legislation, the draft makes no provision for objection on the part of temporary employees only in the case of violation of the principle of equal treatment.

3.

A legal definition of what constitutes an employment relationship that, among other things, distinguishes between works contracts and temporary employment would be included in § 611a(1) of the Civil Code to prevent abusive construction of works contracts and facilitate regulatory oversight. Paragraph (2) of the new § 611a of the German Civil Code would also be expanded to include criteria intended to determine whether an employment relationship exists in the context of the required examination of the overall situation. The enumeration can, however, not be considered exhaustive.

The proposal for § 611a(3) of the German Civil Code also goes beyond the requirements contained in the Coalition Agreement by requiring that, subject to presentation of evidence to the contrary, the existence of an employment contract be assumed if the findings of the Deutsche Rentenversicherung Bund, a German retirement insurance scheme, show that an employment relationship exists in the context of classification proceedings pursuant to § 7a of Social Code IV (Sozialgesetzbuch – SGB). This presumption, which has triggered considerable criticism, would apply regardless of whether the classification of the retirement insurance scheme has become final *(see also the grounds contained in the draft, p. 32).*

4.

The draft legislation also contains new provisions governing what falls under covert deployment of temporary employees, which involves designation by the parties of contracts as works or employment contracts when they actually qualify as temporary employment contracts. According to the Coalition Agreement, covert deployment of temporary employees, i. e., deployment without the requisite authorization, is illegal.

Previously, contractors or service providers could avoid having covert deployment of temporary employees declared illegal and escape the associated legal consequences by obtaining 'anticipatory' authorization to deploy temporary employees ('contingency authorization', which according to various courts temporary staffing agencies may not rely upon due to the fact that they represent a breach of good faith; *see, for example, Baden-Württemberg Higher Labor Court, judgment of 3 Dec. 2014 – 4 Sa 41/14*).

The proposed § 1(1) sent. 5 of the Temporary Employment Act stipulates that temporary deployment must be expressly designated as such in agreements between a temporary staffing agency and hirers. Failure to comply

with this formality would establish an employment relationship between a temporary employee and the respective hirer under the contemplated legislation (proposal for § 10(1) in conjunction with § 9 no. 1a of the Temporary Employment Act). Here too, temporary employees would have the right to object within one month after the contemplated date of deployment. In addition, the proposed § 11(2) of the Temporary Employment Act stipulates that temporary personnel must be informed that they will be employed as such.

5.

The legality of arrangements under which hirers assign temporary employees to work for another enterprise was previously the subject of dispute in the scholarly literature. The addition of a clarifying third sentence under § 1(1) of the Temporary Employment Act is proposed to reflect previous practice of the authorities responsible for issuing permits *(see 1.1.2(11) of the Procedural Guidelines of the Federal Employment Agency Regarding the Temporary Employment Act (Geschäftsanweisung der Bundesagentur für Arbeit zum AÜG))*. The purpose of this addition would be to limit the right to deploy personnel exclusively to their actual employers.

Failure to comply with this provision would entail the possibility of regulatory consequences. The proposed § 16(1) no. 1b of the Temporary Employment Act also makes provision for the introduction of a new administrative offense.

6.

In addition, the draft would afford public authorities special rights. A new no. 2b and a new no. 2c would be added to § 1(3) of the Temporary Employment Act:

"(3) This law is, with the exception of § 1b sent. 1, § 16(1) no. 1b and (2) through (5) as well as §§ 17 and 18, not applicable to the deployment of temporary employees
[...]
2b. between employers if duties of an employee are transferred from the previous employer to another employer and on the basis of a public sector collective agreement a) the employment relationship with the previous employer remains in place and b) the work will in the future be performed for the other employer,

2c. between employers if such employers are public law corporations and the respective applicable public sector collective agreements or requirements of public law religious bodies so allow [...]"

According to the draft (see p. 20), the addition of no. 2b to subsection 3 would mean that provisions of the Temporary Employment Act will to a great extent not apply to personnel measures contained in public sector collective agreements (e. g., § 4(3) of the Collective Agreement for Public Service Employees (Tarifvertrag für den öffentlichen Dienst – TVöD)). The provision contained in no. 2c is intended to create a further exemption from the application of the Temporary Employment Act in the case of transfers of personnel between public law corporations if the respective applicable public sector collective agreements or requirements of public law religious bodies stipulate that the Temporary Employment Act is not applicable.

7.

The Coalition Agreement had already contained an understanding to the effect that the use of temporary personnel as strike breakers was to be prevented. Whereas § 11(5) of the Temporary Employment Act currently affords temporary personnel a right to refuse to work in the case

of a strike, the draft of the legislation intended to implement the requirements contained in the Coalition Agreement would essentially prohibit them from working. According to the proposed § 11(5) of the Temporary Employment Act, companies would not be allowed to hire temporary personnel while involved in a labor dispute. This provision prohibits deployment of 'new' temporary personnel or temporary personnel already working for a hirer at the beginning of the labor dispute regardless of whether such workers are willing to work or not *(see the argumentation contained in the draft, p. 25 and 26)*. The proposed § 16(1) no. 8a and (2) of the Temporary Employment Act calls for fines of up to € 500,000 in the case of violation.

There is some doubt as to the constitutional legitimacy of the contemplated arrangement, which has already been the subject of much criticism, and not only because of its effect as regards the parity of employers in labor disputes; considerable reservations also arise from the 'enforced solidarity' between temporary personnel with the regular workforce of the hirer involved in the labor dispute.

8.

The proposed § 14(2) of the Temporary Employment Act is intended to make it clear that temporary personnel must in the future regularly taken into account by hirers for the purposes of compliance with threshold values called for in works constitutions (with the exception of § 112a of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG)) as well as for the purposes of co-determination. The Coalition Agreement made provision for this only at the level of threshold values under co-determination law and then only if this did not conflict with the purpose of the respective norm. In keeping with recent case law of the Federal Labor Court *(Federal Labor Court,*

order of 4 Nov. 2015 - 7 ABR 42/13), such a provision was also included in the draft as regards thresholds called for in law governing co-determination *(see the grounds advanced in the draft, pp. 26 and 27).*

9.
The new § 80(2) and § 92(1) sent. 1 of the Works Constitution Act are also designed to provide legal clarity as to the scope of the rights of work councils to receive information on the deployment of individuals who are not employees of the enterprise. According to the proposed § 80(2) sent. 2 of the Works Constitution Act, the documentation to be made available to works councils would include the agreements underlying the employment of outside personnel *(see also the previous legal situation: Federal Labor Court, order of 31 Jan. 1989 – 1 ABR 72/87).*

Conclusion

The draft of the legislation makes provision for significant changes in the previous legal situation. In some cases, these changes go significantly beyond what is called for in the Coalition Agreement. If the draft legislation, which calls for implementation with effect as of 1 January 2017, becomes law, this will have a significant effect on current operational practices. It remains to be seen whether and what changes will be made in the draft of the legislation in the context of the impending preliminary negotiations and the subsequent legislative proceedings.

Dr. Piero Sansone

The draft of the legislation makes provision for significant changes in the previous legal situation. In some cases, these changes go significantly beyond what is called for in the Coalition Agreement.

One Man's Blessing, Another Man's Curse: Linking Clauses in Employment Contracts with Managing Directors

Corporate law makes a distinction between a managing director's position as officer of a company and the employment relationship under the employment contract with the managing director. Accordingly, the recall of a managing director will regularly have no effect on the underlying employment contract, i. e., the employment relationship will regularly remain intact if the managing director is recalled, which is possible at any time without providing any reason (except in cases in which articles of association require 'good reason' for recall).

Summary dismissal without notice will come into question only rarely since a 'good reason' for termination will exist only under exceptional circumstances. In particular, recall does not as such constitute good reason for termination of an employment agreement without notice. It will, however, regularly not be in the interest of a company to remain bound to an employment agreement with a managing director that has been recalled, which means that it is advisable to link employment agreements with managing directors with the officership.

This can be achieved through the use of 'linking clauses'. For example, it is possible to stipulate that recall constitutes termination of the employment relationship. It is also conceivable to have termination of the officership operate as a resolutory condition that annuls the employment agreement. Although linking clauses are generally considered permissible, a few pitfalls do exist.

Implications for practice

take into account the fact that according to prevailing opinion the legal periods of notice pursuant to § 622(1) and (2) of the Civil Code (Bürgerliches Gesetzbuch – BGB) must be applied accordingly since a managing director would otherwise 'perceive' termination under a linking clause as summary dismissal. Legal periods of notice must also be respected when a linking clause makes provision for operation of recall as a resolutory condition in respect of an employment relationship.

Executive employment agreements with limited terms, which are often encountered in practice, call for special attention. In order to ensure that a linking clause included in an employment agreement with a limited term is valid, the employment agreement should make provision for termination with notice (which of course defeats the purpose of the fixed term of the employment from the perspective of the managing director). According to overriding opinion, linking clauses would otherwise regularly be meaningless in the case of agreements with limited terms due to the absence of the possibility of termination with notice.

Another typical constellation of problems also arises when contractual periods of notice are shortened by a linking clause. It is not unusual to make provision for periods of notice in employment contracts with unlimited terms with managing directors that are longer than the legally prescribed periods in order to give managing directors longer-term prospects. In such cases, a linking clause would mean that a significantly shorter period of notice could apply for the company due to analogous application of legal periods of notice under the linking

clause (possibly only one month's notice) than for the managing director. This result could constitute a violation of § 622(6) of the German Civil Code. The period of notice for an employee may not be longer than that agreed for the employer. However, the analogous application of this provision to executive employment agreements has not yet been conclusively clarified.

Linking clauses must also comply with the provisions of law governing general terms & conditions since managing director usually qualify for treatment as consumers For example, linking clauses may under certain circumstances be considered unusual (§ 305c of the Civil Code) or unreasonably disadvantageous (§ 307(1) of the Civil Code) and accordingly invalid. The standards to be met in this regard by linking clauses contained in agreements with limited terms are especially stringent.

Conclusions

From the point of view of companies, the use of linking clauses is advisable since it is not in the interest of a company to continue to employ a managing director who has been recalled; from the point of view of managing directors, such clauses can on the other hand be extremely disadvantageous. However, linking clauses should be formulated with extreme care and tailored to the specific circumstances. This will regularly apply in the case of executive employment agreements with limited terms.

Pia Pracht

New Developments Regarding the Minimum Wage

A uniform minimum wage of € 8.50 per hour has been in effect throughout Germany since 1 January 2015. Valuation of different components of compensation represents one of the central problems involved in connection with the minimum wage. In principle, it can be assumed that compensation components can be offset against one another only if they are functionally equivalent, i. e., if they relate directly to the work covered by the minimum wage. This may apply in the case of fringe benefits and bonuses, etc., but not, for example, to capital-forming benefits. Two decisions are presented below that address other basic issues related to the minimum wage.

Decision

The judgment of the Berlin-Brandenburg Higher Labor Court of 2 October 2015 (9 Sa 570/15 and elsewhere) dealt with a case involving dismissal with an offer of reengagement in which an employer wanted to cease paying vacation money and Christmas bonuses due to the increase in hourly wages called for by the Minimum Wage Act (Mindestlohngesetz – MiLoG).

In its decision, which has up to now been issued only in the form of a press release, the Berlin-Brandenburg Higher Labor Court, ruled that dismissal with an offer of reengagement was invalid in this case. The court proceeded from the assumption that neither vacation money nor special payments, which in the present case were based upon the length of service of the employee affected, was intended as payment for the performance of work in the narrower sense, but were both additional benefits that were independent of the wages paid. In such cases, the court ruled, the general conditions for a dismissal accompanied by an offer of reengagement for the purposes of reducing compensation would have to apply but were most likely not fulfilled in the present case.

Implications for practice

Employers are advised to exercise caution in the case of any dismissal coupled with an offer of reengagement for the purposes of adjusting compensation due to the introduction of the minimum wage. Dismissal with an offer

of reengagement for the purposes of achieving a reduction in remuneration is possible only under very stringent conditions that are in practice virtually never fulfilled. Since the grounds for the decision are not available, it is not yet possible to determine conclusively whether the opposite conclusion can be drawn from the present judgment of the Berlin-Brandenburg Higher Labor Court, i. e., that dismissal with an offer of reengagement is possible under less stringent conditions in exceptional cases if the only components of compensation that are eliminated are components that directly related to the minimum wage.

Decision

In its judgment of 24 June 2015 (2 Sa 56/15), the Saxony Higher Labor Court found that dismissal on the basis of refusal to accept a change in an employment contract is in violation of the prohibition of retaliation contained in § 612a of the German Civil Code and therefore invalid. The court reasoned that the offer of a new contract was in violation of the Minimum Wage Act.

The new offer made by the defendant called for payment of wages based on the minimum legal wage, but at the same time contained a clause stipulating that the basic salary covered a flat ten hours of overtime per month. The Saxony Higher Labor Court was of the opinion that the clause calling for a flat amount of overtime undercut the minimum wage and that the offer of a new contract was therefore in violation of the Minimum Wage Act.

Implications for practice

The implications of the decision of the Saxony Higher Labor Court could be explosive. Clauses that call for flat remuneration for overtime may – in compliance with the principles developed in the case law – be validly agreed and are common practice.

However, employers are advised, especially in the case of employment relationships based on wages that do not or barely exceed the minimum wage, to carefully determine whether the amount of overtime required on a flat rate basis causes wages to drop below the legal minimum wage. If this should be the case, the employer could be confronted with claims for retrospective payment by the employee.

Dr. Heiko Reiter

Dismissal with an offer of reengagement for the purposes of achieving a reduction in remuneration is possible only under very stringent conditions...

Works Council Activities Do Not Count As Working Time within the Meaning of the Working Hours Act (Arbeitszeitgesetz – ArbZG)

Decision

A decision of the Lower Saxony Higher Labor Court of 20 April 2015 (12 TaBV 76/14) involved a case in which an employer required a worker assigned to the late shift to complete his shift, which ended at 8:15 p.m., after attending a works council meeting lasting from 8:00 a.m. to 3:00 p.m. The works council considered this a violation of the provisions of the Working Hours Act (Arbeitszeitgesetz – ArbZG) that limit the number of hours an employee may work per day.

After the action brought by the works council's was dismissed by the court of first instance, the Lower Saxony Higher Labor Court also ruled that the appeal of the works council was unfounded. The Lower Saxony Higher Labor Court expressly stated that time devoted to work for a works council does not qualify as working time within the meaning of the Working Hours Act. The court grounded its opinion in the fact that employers are the only ones who can be taken to account by regulatory authorities for failure to observe the provisions of the Working Hours Act.

The provisions of the Working Hours Act governing fines and sanctions apply exclusively to employers, who cannot, however, in any way interfere with the right of works councils to organize their work as they see fit. It is also possible to argue that employers could ultimately find themselves held responsible for violations of the Working Hours Act that they could never have prevented due to the independence of works councils. However, § 37(2) of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) does entitle members of works councils to paid time off if they cannot or it is unreasonable to expect them to work before or after a works council meeting. It will regularly be considered unreasonable to expect employees to work before or after a works council meeting if the total time taken up by the works council activities and actual working hours would exceed the maximum working time pursuant to § 3 of the Working Hours Act (8 or, under exceptional circumstances, 10 hours).

Implications for practice

Despite the fact that the decision of the Lower Saxony Higher Labor Court makes it explicitly clear that time devoted to works council activities does not count as working hours within the meaning of the Working Hours Act, the Working Hours Act applies indirectly, in particular in the case of shift work. For example, employees are entitled to paid time off under § 37(2) of the Works Constitution Act if prevented from working or if it would be unreasonable to expect them to work. According to the decision of the Lower Saxony Higher Labor Court, this will regularly be the case, in particular if the total time devoted to works council activities and actual work on the same day exceeds 8 or, under exceptional circumstances, 10 hours. Employees cannot then be forced to work. For the avoidance of doubt, it must be mentioned that the matter addressed by the Lower Saxony Higher Labor Court concerns only the Working Hours Act, i. e., issues related to occupational safety and health. The question as to payment for 'works council overtime' is already resolved in § 37(3) of the Works Constitution Act.

The decision of the Lower Saxony Higher Labor Court is now under appeal, and clarification of the issue by the highest courts is pending.

Lena Jordan

Proper Dismissal is Important!

Decision

The Schleswig-Holstein Higher Labor Court ruled in a recent judgment (13 Oct. 2015, 2 Sa 149/15) that notice of dismissal cannot be served by simply depositing the notice in a residential mailbox on a Sunday. The Higher Labor Court was of the opinion that it cannot be assumed that the intended recipient will take cognizance of a notice of dismissal delivered on a Sunday. Since no mail is delivered on Sundays or holidays, employees cannot be expected to check their mailboxes on those days. Notice of dismissal deposited in a mailbox on a Sunday must therefore regularly be considered to have been delivered on the next working day. The Schleswig-Holstein Higher Labor Court expressly made it clear that this also applies if a probationary period ends on a Sunday.

Implications for practice

This decision provides an occasion for addressing the provisions of law regarding the delivery of termination notices. Late delivery of a notice of dismissal can expose an employer to serious legal repercussions. This would apply, for example, if – as is the case here – a probationary period ends and protection under the Employment Protection Act (Kündigungsschutzgesetz – KSchG) is triggered. Another possibility is that the period of notice could be effectively extended (e. g., in the case of termination with effect as of the end of a specific quarter). In such cases, it is necessary to ensure in advance that a notice of dismissal is served in a timely manner.

The best alternative is always to have the notice hand delivered by a messenger on the company's premises in the presence of witnesses or at the recipient's home (ideally with confirmation of receipt). It is also possible – but may be risky – to give the notice to a (adult) member of the employee's family living in the same household. It is important that the messenger be aware of the content of the notice of dismissal. Ideally, the messenger should be the one to put the letter in the envelope. If hand delivery is not possible, a notice of dismissal may be deposited in the employee's mailbox at the place of residence. In this case, it is necessary to make sure this takes place on a working day and by about 2:00 p.m. since mail delivery will regularly no longer be expected after that time.

Registered mail with confirmation of receipt is not advisable for the purposes of compliance with deadlines since receipt effectively takes place not upon notification, but upon actual delivery. As a result, registered mail without confirmation is to be preferred. It is also important here to make sure that the registration number is recorded by the individual who puts the notice in the envelope.

Jens Völksen

Retroactive Reduction of Paid Annual Leave due to Parental Leave?

Decision

§ 17(1) sent. 1 of the Federal Parent Allowance and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz – BEEG) allows employers to reduce paid annual leave by one-twelfth for each full calendar month of parental leave taken in the same year. The Federal Labor Court's decision of 19 May 2015 (Ref.: 9 AZR 725/13) addressed the question as to whether this also applies retroactively, i. e., after termination of the employment relationship, which is the subject of dispute in the case law and the scholarly literature.

The plaintiff had been employed by the defendant since 2007. The plaintiff went on parental leave in 2010, and the parties terminated the employment relationship in the year 2012 prior to the planned end of the period of parental leave. The plaintiff's initial attempt to claim outstanding annual leave without resorting to the courts was unsuccessful. When the plaintiff finally filed an action, the defendant announced his intention to reduce the paid annual leave due the plaintiff by one-twelfth for each full calendar month of parental leave taken.

The Hamm Higher Labor Court (27 June 2013, Ref.: 16 Sa 51/13) granted the plaintiff's claim after the Labor Court Hamm had denied it. The Federal Labor Court confirmed the judgment of the court of appeal. The Senate was of the opinion that an employer must announce his intention to reduce paid annual leave due to parental leave while the employment relationship is still intact, arguing that compensation due upon termination of an employment relationship is not the equivalent of paid leave, but an independent pecuniary right. As soon as such a right comes into being, there can no longer be any right to paid leave, which means it cannot be reduced.

Implications for practice

This decision is a logical extension of the case law of the Federal Labor Court after it explicitly completely abandoned what was referred to as the surrogate theory in its judgment of 19 June 2012 (Ref. 9 AZR 652/10). Previously, compensation due pursuant to § 7(4) of the Federal Holiday Act (Bundesurlaubsgesetz – BUrIG) was subject to the same provisions as the underlying annual leave, in particular as regards time bars.

An employer who wants to reduce an employee's paid annual leave on the basis of parental leave taken must therefore make sure he exercises this right to make such a reduction at the very latest during the period of notice or prior to entry into force and effect of a termination agreement.

Since the Federal Labor Court disallowed any such reduction in the case of the decision at issue here, the Court did not have to address the question as to whether the employer's right to make the reduction pursuant to § 17(1) sent. 1 of the Federal Parent Allowance and Parental Leave Act is compatible with EU law. This question – which the court of first instance answered in the positive – therefore remains to be clarified by the higher courts. As a result, employers are faced with a not insignificant degree of legal uncertainty in this regard.

Hagen Strippelmann

Content

Note

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