HR Answers

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July 2008

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FEDS INCREASE MINIMUM WAGE AGAIN ON JULY 24TH: BUT REMEMBER THE STATE MINIMUMS!

Organizations should be aware that the federal government will increase the minimum hourly wage to $6.55 per hour effective July 24, 2008. This hourly wage will then increase again in July 2009. Despite this increase, it's important to remember that many states have a higher minimum wage and that when an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage. For example, the minimum hourly wage in Oregon is $7.95; in Washington, it is $8.07; and, in California, the minimum hourly wage is $8.00. This means that an Oregon employer should typically already be paying more than the new federal minimum wage.

For employers with "tipped employees," the federal minimum can remain the same at $2.13 per hour, but the maximum tip credit will rise to $4.42 effective July 24th.

There is one impact that employers in states with higher minimum wages should consider, and that is that employees often gauge their pay by how much over minimum wage they are. So even in states with higher minimum wage levels, be prepared for employees to think that they should get additional money since the federal rate went up. Being prepared for any questions or conversations with employees about this change and why it doesn't affect your organization's pay is a good idea.

BOUNDARIES AT WORK

The ability to carry on a conversation at work is crucial to building relationships with fellow employees, but those conversations must include boundaries that we do not cross. Knowing personal information about your co-workers can distort the line separating professional and personal relationships - a line that isn't easy to patrol, especially at smaller, informal offices. Boundaries reinforce and preserve integrity and individuals' reputations.

We hope the following will be helpful in ensuring that conversations with co-workers, no matter the responsibilities or level of authority, don't distract from a productive, positive workplace.

Some organizations clarify "appropriate" office communication, but most codes of conduct mention only potential legal headaches such as sexual harassment and invasion of privacy. There's often no clear workplace rule about where to draw the line, so a good rule of thumb is to avoid issues that might make someone uncomfortable, including topics of conversation such as romances, physical appearance, health, race, religion and personal finances.

Obviously, employees need to refrain from gossip. Most gossip occurs when employees lack a sense of belonging and/or trust. Gossip often takes place in areas of the workplace where employees feel a false sense of privacy, such as elevators, hallways, and restrooms. It's important for employees to remember that, during work hours, they're not "off duty" in these locations. Making unkind and unsuitable remarks damages how the speaker is perceived by others. The negative effects of being seen as a "gossip" can harm one's reputation and opportunities for future advancement within the organization, and it can be long-term. Equally as important to remember is that those who talk to you about others are also likely to talk *about* you *to* others!

Employees also need to feel comfortable with curbing the amount of gossip to which they are exposed. One strategy is to turn off-topic conversations back to work-related issues as quickly as possible. Simply by smiling and saying, "Let's not go there," you can stick to suitable discussions without being rude. You can also demonstrate your unwillingness to participate in or listen to gossip about a co-worker by turning the conversation to a more positive experience you had with that person, effectively letting others know that you are not interested in talking negatively about another employee. A simple, "That's not been my experience with him/her," can work wonders. Another method is to say something like, "If we're going to talk about Susan then perhaps we should invite her to be part of this conversation."

Non-verbal methods of communication also have the potential to get co-workers into trouble. Email makes it easy to pass around rumors, gossip, and tasteless jokes to multiple people, so employees should treat email as broadcasted messages that can be read and printed. Not only should employees learn to think twice before they speak, but they also need to think twice before hitting the "send" button.

Many employees spend as much or more time at work than they do at home, and are bound to develop friendships with co-workers. Some may become confidants with whom personal information is shared. While it's natural for employees to show interest in each other's lives, an unwillingness to reveal too much personal information, or to listen to another person reveal it, shouldn't be seen by others as unfriendly. It's sometimes necessary to have the courage to cut-off a co-worker's conversation when it becomes too personal or uncomfortable. Sometimes co-worker friendships can fizzle or go awry, and yet the parties often must continue to see each other and perhaps work together daily. There are risks involved with sharing personal details about yourself or your life that you don't want to be made public. This is particularly true for supervisors. The caution is twofold: knowing too much about an employee and making any employment-related business decisions based on that information, and losing objectivity if and when it becomes necessary to have a difficult employment-related conversation with an employee who has shared too much personally and considers you a friend.

The diversity of the modern workplace means that there will be a number of different boundary levels among the employee population. People with "underdeveloped" boundaries may not notice they're sharing too much information, while people with boundary issues may struggle with exercising their right to protest such communication. Getting along at work is often a matter of being flexible and willing to compromise, and to be tolerant of individual differences. These differences can be widespread and co-workers' boundaries are subjective, creating a challenge concerning office humor. Most people want to laugh, but it's best to avoid jokes that might embarrass, offend, or hurt someone's feelings.

Lastly, if you have a challenge with a co-worker, talk to the offending person directly and privately. If a co-worker says something that offends or upsets you, try to *respond* instead of *react*. Reaction is immediate and emotional. When we react to something, we are more likely to say or do things we might later regret. A response that is planned and controlled will lead to fewer communication issues. HR professionals need to be prepared to help both employees and those in management roles to deal with behavior, boundaries, and appropriate responses. But even more importantly, HR professionals must monitor their own behavior and actions to ensure no one can criticize them for crossing the line.

THE ACTIVE LEGISLATIVE AND LEGAL FRONT

WOW! There has been a great deal of activity recently in the area of legislative and legal compliance for employers. HRA receives many emails, announcements, and alerts on the activity both nationally and state-wide. We sort through the information and select what we feel will be most helpful to our clients and friends. So, please forgive us if this July issue is a little heavy on the "compliance" side of things, but we want you to be aware and prepared. As always, if you have any questions please give us a call and talk with one of our consultants.

Oregon Appeals Court Keeps It Smoky: Medical Marijuana Issue Avoided Through Technicality

Employers were offered no further direction or clarification on how to handle medical marijuana when the Oregon Court of Appeals issued its opinion in Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries. Rather than offering further guidance on whether marijuana must be accommodated by employers, the June 11th decision affirmed a lower court ruling that the employer had failed to raise issues before the Bureau of Labor and Industries (BOLI), so could not preserve those issues for appellate review. This procedural ruling reminds employers that any issues relevant to a civil rights complaint should initially be raised during the BOLI process. But the court avoided addressing how employers should be addressing medical marijuana issues. The good news is that the employer has indicated that it will appeal the appeals court's ruling to the Oregon Supreme Court.

Feds Require Specific Verification System for Federal Contractors

In a June 6th Executive Order, President Bush implemented a requirement that all federal contractors use the Department of Homeland Security (DHS) internet system, in partnership with the Social Security Administration, to verify the employment eligibility of all new hires and existing personnel assigned to work on federal contracts. The Executive Order gave authority to the Secretary of the DHS to designate the system, and E-Verify was designated as such on June 9th. Once the DHS proposed rules become final, this system will required use as a condition of any new federal contract.

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The Executive Order is directed only at future federal contracts, so employers with current federal contracts do not need to make a change. However, federal contractors need to be aware of this change and watch for the DHS to issue proposed rules on how the requirement will be imposed. The DHS is already recommending that federal contractors enroll with the E-Verify system now.

Once the DHS rules go into effect, employers who are federal contractors will be required to use the E-Verify system for all persons hired during the contract term to perform work within the United States, and all persons assigned by the employer to perform work within the United States on the federal contract.

Employers presently using E-Verify are only allowed to verify work eligibility of new hires, not an applicant or current employee. This means that employers must wait until after an offer of employment has been accepted and the I-9 form completed before verifying work authorization status. The employer has no longer than three days after the new hire has started before seeking verification. For those employers who use E-Verify, there is a "rebuttable presumption" that the employer did not knowingly hire a person without work authorization. While this is not a safe harbor protection for that employer, the use of E-Verify provides an initial level of protection.

The E-Verify system will only be in place until November of this year, so changes will have to be made in this requirement.

HR Answers will continue to provide updates on the DHS proposed rules regarding use of E-Verify. Those rules will have at least a 30 day period prior to becoming final. If you have questions about the E-Verify system or other questions related to Affirmative Action Plan obligations under a federal contract, please call us at 503-885-9815.

Increased Employer Burden in Age Discrimination is Affirmed

A ruling by the U.S. Supreme Court has confirmed an increased burden for an employer defending itself against a certain claim of age discrimination. The Supreme Court ruling in Meacham v. Knolls Atomic Power Laboratory, aka KAPL, Inc., requires the employer to now both raise then prove that "reasonable factors other than age" (RFOA) is a valid basis for the employer's actions which caused a disparate impact on workers due to their age. This Supreme Court decision confirms the long-held Ninth Circuit perspective that employers must both raise and prove the RFOA defense

Prior to the Court's decision in KAPL, an employer could raise RFOA as a defense in a claim that its actions violated the Age Discrimination in Employment Act (ADEA) due to the disparate impact of those actions. Disparate impact discrimination occurs when the effect of an employer action has a statistical negative impact on a protected group, such as older workers in the KAPL decision. The intent for that discrimination to occur is not a factor.

In the KAPL situation, the company went through a job and performance evaluation that scored employees to determine which ones would be laid off due to a reduction in force. This evaluation considered valid criteria, such as performance, flexibility, and critical skills. However, the evaluations resulted in 30 out of 31 laid off workers being older than 40 years of age. Those laid off employees then alleged that regardless of its intent, the company's actions had a discriminatory, i.e., disparate, impact on them due to their age.

While age discrimination is prohibited under the ADEA, there are limited exceptions to that prohibition, such as RFOA. This exception to the ADEA includes situations where "the differentiation is based on reasonable factors other than age. When ruling on the KAPL situation, the Court changed its earlier position by concluding that the employer not only had to raise the exception as a defense, but now also has the added burden of proving "reasonableness."

The expected result of the decision in KAPL is that employers challenged with a disparate impact complaint now face a more difficult and expensive burden to defeat that challenge. As pointed out by the Court, a disgruntled employee will have to first identify a specific practice that has this disparate impact. Once that is proven, employers will need to consider how to persuasively prove the reasonableness of whatever RFOA they use in taking the action that has a disparate impact. It won't be sufficient to simply raise the defense.

So, what does the decision really mean? In considering a layoff or other employment action that might have a negative impact on a group of workers due to their age, the employer should assess not only the validity of its reasons for the process it uses, but also consider how the validity of the process can best be proven. That is, determine the proof that will exist before getting into an action or decision that results in discrimination due to a disparate impact. If you're considering a reduction in force, or action that affects a group, don't hesitate to give us a call for assistance in assessing that impact.

ADA Clarification Bill Takes a Step Forward

A number of U.S. Supreme Court interpretations of ADA definitions will be clarified, should a recently passed House bill continue to move forward and become law. Observers and proponents of the bill feel these clarifications would move those ADA applications back towards their original intent. This federal legislation, the "ADA Amendments Act of 2008," H.R. 3195, was passed by an overwhelming majority in the House of Representatives on June 25th. A number of key components of this bill address the Supreme Court decisions that many feel restricted the original application of the ADA. The bill appears to be a mix of expansion and clarification of the ADA; however, the measure compromises on some significant ADA requirements for employers.

The ADA Amendments Act of 2008 currently proposes several key pieces relative to application of the ADA to the workplace:

1) What's a disability? The definition of a "disability" will be modified to specify that an impairment "materially restricts" a major life activity, as opposed to the current requirement that the condition "substantially limits" a major life activity.
2) When is a person regarded as having a disability? The existence of a disability because the person is "regarded as" having such a condition would be expanded and clarified. Under the bill, that term would protect an employee if the employee establishes discrimination because of an actual or perceived physical or mental impairment. At the same time, the bill also precludes the "regarded as" term from being applied to transitory or minor impairments that are expected to last less than six months. The bill also clarifies that an employer is not required to provide a reasonable accommodation to individuals who are "regarded as" disabled.
3) Do mitigating factors impact the disability? The consideration of mitigating measures in determining whether an employee has a disability would be prohibited. The exception to that will be ordinary eyeglasses and contact lenses.
4) Who must prove the person is qualified and able to perform the job? The current requirement that an employee must prove that a person with a disability is qualified and able to perform the job is retained by the legislation.

The ADA Amendments Act will continue to be tracked as it moves forward. Should the legislation get closer to enactment, HR Answers will provide updates, along with immediate steps that organizations should consider in light of the pending changes. Remember, even should the bill restrict certain ADA applications, such as the restriction on transitory or minor impairments, employers will still need to be wary of the state law definitions that more broadly define conditions that can be considered a disability.

A WORD FROM THE WISE™
TELL IT LIKE IT IS

Not many of us like to deliver a hard message, especially when that message tends to have overtones personal to the person hearing it. It's difficult to convey a message that not only carries impact on personal measurement or value but also directly or indirectly has an impact on something else significant, like the person's job. Unfortunately, because we recognize the impact and feel the discomfort that goes along with that impact, there is a tendency to soften the message or use wording that we feel will sting less. Even though taking that approach might initially feel better, the reality is that the softer message usually isn't fair to the hearer, doesn't get our point across, and can even create liability for us. We need to get better at telling it like it is!

Here are three common examples of where softening the message usually ends with negative results for both the person hearing and the person delivering the message:

1. **Concluding someone's job performance is "Average" when it's not.** Nobody likes to be told their performance or work is "sub par" or "below average'; however, softening the message to characterize the person's performance as "average" indicates their work is on par with co-workers. How would you then later discipline or terminate an employee for "average" work? Especially where the employee hears "average' and concludes that he or she is as good as any co-worker. Rather than create that issue, why not tell the employee where their job performance needs to specifically improve, then give them the opportunity to make that improvement?
2. **Not telling someone that a corrective action is also a disciplinary "Warning."** If a manager or supervisor intends to take a step of corrective action that is actually discipline, it is very important that the message is conveyed that way. Failing to do so not only doesn't fully deliver the message that disciplinary action is actually taking place, but also conveys that the corrective action is just a suggestion and the performance isn't that bad. Will that softer message really motivate the employee to change his or her behavior?
3. **Designating a loss of job as a "layoff' rather than a "termination."** A layoff implies the potential for a recall, which can create a false expectation for the affected employee and also create a potential, implied obligation for the organization. Rather than create either of those possibilities, if the separation from employment is indefinite or long term, consideration should be given to using "termination." Termination doesn't have to be tied to job performance or misconduct, but can be tied to business related reasons, e.g., a reduction in force or the business environment. Tying it to outside factors lessens the personal sting.

In each of these instances, the person delivering the message might feel that easing the wording softens the blow; however, changing the wording, or omitting what the action is, really changes the message. So, how do we get better at telling it like it is? Try a few considerations when delivering a tough or hard message:

1. Decide on the purpose of your message BEFORE starting delivery. What do you want your communication to accomplish?
2. Pick the words that best achieve your purpose. Identify the key terms or wording, then stick to what you select!
3. Avoid personal words—either in the message or in how you couch the message.
4. Be brief and to the point. Stick to the message!

Will you still get a negative reaction to some tough messages? Yes, but you can reduce the chances of that happening and accomplish your objective if you take a few steps prior to telling it like it is.

THOUGHTS TO THINK ABOUT

The test of a leader is that he leaves behind him in others the conviction and the will to carry on.

- *Walter Lippmann*

The most important thing in communication is to hear what isn't being said.

- *Peter F. Drucker*

There is something that is much more scarce, something finer far, something rarer than ability. It is the ability to recognize ability.

- *Elbert Hubbard*

Too often we . . . enjoy the comfort of opinion without the discomfort of thought.

- *John F. Kennedy*

GOOD MANAGEMENT VALUE INCREASES: DOORS MAY OPEN TO UNIONS

Pursuing proactive, positive employee relations is always beneficial to an organization. Developing and then implementing good management practices and policies goes a long way toward enhancing employee attraction and retention. Plus, the benefits of positive management on the culture and production can't be underestimated. However, based on some pending federal legislation, employers may soon have another motivating reason to encourage positive management—the risk of unionization.

The proposed Employee Free Choice Act (EFCA) is currently under consideration by federal legislators and is supported by Senator Barack Obama. As currently proposed, this new law would have substantial impact on nonunion employers who face attempted union organizing. This impact would not only make it easier for unions, which have experienced a decline for 25 years, to organize, but it would also impose financial penalties on employers who willfully fail to comply with the bill's requirements.

The EFCA imposes two major impacts on an employer who is faced with union organizing. First, the union can be certified as the employees' bargaining representative without even having an election, should the union get 50% or more of the affected employees to sign an authorization card. Under the National Labor Relations Act (NLRA) currently in effect, if 50% or more of the affected employees sign an authorization card, the union can demand recognition. However, the employer then has a choice to accept that demand or refer the situation to the National Labor Relations Board for an election. Under current law, it takes at least 30% of the employees' signing cards to even seek an election. Should the EFCA pass, the whole election process could be eliminated in certain situations. This would automatically lock the affected employees into that union representation and impose a bargaining obligation on the employer.

The second significant impact of the proposed legislation is on the bargaining process. If an agreement between the union and the employer on a first contract is not reached within 90 days, an arbitrator will be assigned. This arbitrator will have the power to require a first contact between the parties that can last for two years. Collective bargaining on initial contracts is usually a long process that can result in no agreement being reached, effectively disbanding the proposed union. Under the EFCA, the parties are required to begin bargaining within 10 days following the union's being certified to represent the parties and an agreement needs to be reached within 90 days.

As mentioned above, the EFCA also imposed a financial penalty for a willful violation of its requirements. Current federal labor law has no such punitive step.

The potential passing of the EFCA increases the need for employers to improve their proactive, positive management skills and culture. Consideration should be given to what policies, practices, and other steps should be addressed. Management and employees should be educated on the organization's perspective on unions and their impact on the local workplace. Management can then outline an educational and operational plan to prevent the attraction for the employees to involve an outside party in their workplace.

HR Answers has several training programs that teach management how to effectively, proactively, and practically promote and maintain a positive work environment. We can also meet with management to discuss the signs of union activity and what responses are legal and effective in these situations. If you would like to discuss these training programs, or consulting support, please give us a call at 503-885-9815.

MENTORING MANAGERS MOMENT

Praise is welcome anytime and anywhere, right? With all the praise and recognition employees seem to crave, you'd think it wouldn't matter where or how you give it. But it does matters - a *lot!* Managers who don't bother to get to know their direct reports on a personal level will not be successful at this activity. A shy individual may cringe if recognized in a public event; the same goes for individuals from certain cultures. Managers must also avoid the appearance of favoritism by considering how much public praise they give the same people time and again.

So should you go easy on the praise to avoid offending someone? No, you should instead learn enough about your employees to be able to tailor your praise to their situations. It's simple: just ask them how they like to receive praise for a job well done. You can ask this question once they are employed, but there is nothing stopping you from asking this question as part of your interviewing process too.

Collect employees' insights. Rush projects and last-second demands often inspire employees to come up with great ideas. Yet typically in the midst of the frenzy, there's no time to document them. You, yourself, may not have the time to pause either. However, do debrief yourself and your group at the end of even the busiest day. Use a phone call or e-mail to remind employees who came up with good ideas to jot them down. Or create a special "great ideas" poster and hang it on the wall. This becomes the place for all ideas. The positives of this are that everyone (those on the team and those who pass by) can see the ideas, and it also becomes the list to see how many of the great ideas have been completed/implemented. The concept of capturing the ideas will have great payoff in improving your group's work and its morale.

WORST AFFRONTS TO WORKPLACE ETIQUETTE

Employees say stealing someone else's food from the fridge is the worst affront to workplace etiquette, according to a survey by TheLadders.com. Nearly 98% of respondents said taking a colleague's food from the office refrigerator is unacceptable, making it the most-cited example of a breach of workplace etiquette.

The survey found that employees identify the following other behaviors that cross the workplace-etiquette line:

- Bad hygiene (96%)
- Bad habits (88%)
- Drinking on the job (86%)
- Wastefulness with paper (82%)
- Swearing (81%)
- Cooking smelly food in the office microwave (74%)
- Sneaking peaks at the BlackBerry® in meetings (64%)

"Some argue that in the 21st century, employers should move with the times and accept a more casual work environment," says Marc Cenedella, CEO and founder of TheLadders.com. "But employees beware: in every office there exists an invisible line between professional and unprofessional and it is very clear from our survey results that some common behaviors definitely cross the line."

We are interested in your thoughts and observations. Do you agree with employees about the worst affronts to workplace etiquette? Share your top concerns with us at djeffries@hranswers.com.

FOR YOUR CALENDAR

Open up your Daytimers, computer calendars, Palm Pilots, and of course those Blackberries. The following is a look at upcoming events, special days and other diverse and fun activities you will want to be aware of and get scheduled. To register for our workshops, please call any of our offices, send an e-mail to Melissa Sambuceto at MSambuceto@hranswers.com, or simply register online at www.hranswers.com and click on the "Workshop Registration" tab at the top of the homepage.

JULY

Diversity Awareness, Make a Difference to Children, National Blueberries, National Hot Dog, Recreation and Parks, and Sandwich Generation Month.

July 14 Pick Blueberries Day

July 20–26 Everybody Deserves a Massage Week

July 28 Accountants Day

July 29 HRA Workshop (Tualatin)
Managing the Protected Employee: Discrimination Avoidance
8:30am – 12:00 noon

AUGUST

To help you plan ahead, here's a look at what we have planned so far for August.

Aug. 7 HRA Workshop (Tualatin)
Conducting Internal Investigations – What You Absolutely Must Know!
8:30am – 12:00 noon

Information and advice offered through Advantage should not be construed as legal opinion. The material contained herein will not apply to all circumstances or to all organizations. Use it as a resource and reference. Should you feel legal advice is required, please consult with your corporate counsel.

ON MY SOAPBOX

We have all seen the signs on office windows – bold, black-lettered words with a red circle and slash indicating that we have walked into a "No Whining" zone. I suspect that, at least under our breath, we have said "Yes," expressing our agreement with the sentiment. After all, who wants to be some place where most of the words or comments are complaints, criticisms, and moans about picayune matters that are just part of life?

But maybe there is another way to look at this – another perspective, and a valid one at that. What if encouraging concerns, criticisms, and yes, even a little whining, is a good thing? What if this is a necessary practice to really ensure a positive workplace? What if the organizations that say "tell us whatever is bothering you, no matter how small" actually have the secret to building a collaborative and productive work environment?

So, here's the premise – complaining means being able to comment on any obstacle that is getting in the way of productive work, even if that is a policy or the way we have always done it. Listening to the complaint, asking for recommended solutions, and then working to remedy the issue means that employees were heard; that the system worked to remove a barrier that was stymieing employees' best efforts. This could make "whining" one of the most valuable communications between employees and employer.

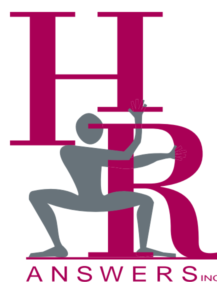
We all know how we got to the point of the "No Whining" signs. It is exhausting to have employees gripe about everything. We don't want to hear the adult rendition of every child's remark, "He touched me…she took my toy…he pulled my hair." We believe that by the time someone is able to work for a living, they should also be able to put these petty things behind them, pull up their socks, and go to work. And for the most part employees do just that.

But it must be confusing sometimes when we espouse the "open door" and then tell them that the concern they brought to us isn't what we had in mind, or when they raise an issue and we tell them that we are doing what is best for the business with no explanation about why their concern or idea isn't worth discussing.

Maybe if our posture was built on a candid desire to know what bugs employees, what ideas they have for change, what kind of remarks they make when they go home at night, we would be living a better model of open communication and respect. Maybe if we explicitly said no issue was too small and then acted on whatever they brought forward, we would build greater credibility and stronger relationships. Maybe if we said, "You can't complain about other employees, but you can complain about anything the organization is doing." If we said, "Don't just come to us with a problem; bring a suggested solution as well." If we said, "Don't talk behind your hands into the ears of others. Talk to me out in the open where we can tackle what is bothering you," we could construct a stronger culture of togetherness and problems solving. It might sound a bit Pollyanna-ish, (is that a real word?), but it also just might work.

According to a recent article in *Talent Management* magazine, a candid culture embraces employee complaints. Maybe it is time to leave behind the cute signs that we are all familiar with. Maybe it is time to create a Whining Zone (although we don't have to call it that) in every manager's office, because it will help surface concerns and give management a chance to better understand the employees. Maybe it will give us a chance to work together to resolve issues, and develop that positive workplace we all so desire. Maybe we have had it all wrong…whining, or at least some positive variation of letting others know there is a problem, any problem, is actually a good thing.

- Judy Clark, President



"Whatever the Question"

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