

Records Retention for Employers Offering a “Second Chance”

The U.S. DOT, in §40.333(a)(1), sets the minimum requirement for the maintenance of records related to positive drug and alcohol tests and test refusals. The requirement is to keep all records (including testing forms in addition to test results) for at least five years. The FTA maintains a similar requirement in §655.71.

Employers who terminate an employee after a violation may discard all information about the event after five calendar years. However, for employers who choose to return violating employees to safety-sensitive duty, the records-retention requirement often extends beyond five calendar years.



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All records related to the violation – from the original positive or refusal all the way to the final Substance Abuse Professional (SAP)-directed follow-up test – must be maintained in compliance with §40.333. In these second chance cases, it is the final DOT follow-up test that becomes

the anchor point for the five-year retention period. All relevant records must therefore be maintained, along with the last follow-up test, for at least five years from the date of the final test.

Accordingly, in a case in which the SAP has directed five years of follow-up testing, the employer would need to maintain the record of the original violation for 10 years (the five years of follow-up testing, plus the five years of retention required by the regulation). For more information, view U.S. DOT’s guidance in the Employer Handbook and Drug and Alcohol Record Keeping Requirements documents, both available at <http://www.dot.gov/odapc>. ●

New Hires and Old Tests

Employers are reminded they must check the drug and alcohol testing records for all applicants who will be performing a safety-sensitive duty. Employers must obtain written permission to request testing information from each DOT-regulated employer who has employed the applicant in safety-sensitive work within the previous two years, as specified in §40.25(a).

Employers must also ask each applicant whether or not they tested positive,

or refused to test, on any DOT pre-employment drug or alcohol test administered by a covered employer within the previous two years, per §40.25(j).

Note, this record check must also be performed whenever an existing employee transfers into a safety-sensitive role. For more on these requirements, see “Previous Employer Record Requests” in Issue 40 of the FTA Drug and Alcohol Testing Regulation Updates. ●

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Roundups and Random Batch Testing

A serious compliance problem occurs when most or all of the employees selected for random testing in a given period are sent to a collection site as a group. Batch testing of this kind occurs for many reasons, including operational ease or an employer's eagerness to complete random testing in order to remove a task from their to-do list. Sometimes, employers receive misguided advice from a Third Party Administrator (TPA) or collection site, parties who might also enjoy the operational convenience provided when a client happens to send randomly selected employees for testing en masse. FTA has observed, batch testing most frequently occurs when employers primarily use an on-site or mobile collector, and the vendor does not adequately understand random testing requirements.

Regardless of the reason, batch testing has no place in an FTA-regulated program,

“Batch testing is strictly forbidden.”

as the practice makes random testing highly predictable. When selected employees are sent for testing as part of a roundup, this often signals that very few (if any) random tests will occur later in the selection period, greatly reducing the deterrent effect of a random testing program. Per §655.45(g), employers must ensure the dates for random tests are spread reasonably throughout the calendar year and are conducted at all times of the week and day when safety-sensitive functions are performed. The practice of batch testing is strictly forbidden.

For more on random testing, see “Ensuring a Truly Random Testing Program” in Issue 47 of the FTA Drug and Alcohol Testing Regulation Updates. ●

FTA Drug and Alcohol Management Information System (DAMIS) 2014 Annual Reports

REMINDER: FTA Drug and Alcohol Management Information System (DAMIS) 2014 Annual Reports were due March 15th.

If you have not already submitted, please do so at the following link:

<http://damis.dot.gov>.

If you have any questions, email The FTA Drug and Alcohol Project Office at fta.damis@dot.gov or call **(617) 494-6336**.



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Does Airbag Deployment Constitute Disabling Damage?

Federal regulation 49 CFR Part §655.4 associates disabling damage with the vehicle being transported away from the scene by a tow truck or other vehicle. The definition of “disabling damage” clarifies the intent of the rule by stating “disabling damage means damage that precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.” This definition is clarified further by specifying included circumstances and those that are excluded.

A vehicle is considered to have disabling damage if operating the vehicle would result in further damage to the vehicle. However, damage can be remedied temporarily at the scene of the accident without special tools or parts, such as tire



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disablement or headlamp, tail light, turn signal, horn, or windshield wiper damage which makes the vehicle inoperable, is not disabling damage.

Air bag deployment is not specifically

mentioned in the regulation. From the definition cited above, it is clear the intent of the regulation is to require a post-accident test when the collision impact is significant enough to damage major vehicle components rendering it inoperable, but to exclude minor fender benders, taps, and bumps. Consistent with this interpretation, airbag deployment where the vehicle did not receive disabling damage, would not be considered disabling damage. In other words, airbag deployment in and of itself does not constitute disabling damage. Rather, supervisors should focus on damage to other components of the vehicle associated with the accident to determine if damage renders the vehicle inoperable and, constitutes disabling damage. ●

Officers Serving as BATs — Good Idea or Not?

Even though employers may use Alcohol Screening Devices (ASD) (e.g., breath or saliva) approved by the National Highway Traffic Safety Administration (NHTSA) for the initial alcohol screen test, the reality is the employer still needs to have access to an Evidential Breath Test (EBT) within 30 minutes of an initial screen test result of 0.02 or greater limits the usefulness of the ASD option for many. As a result, proactive employers are looking for alternative sources for DOT alcohol testing services within their local communities. Local police and sheriff's departments are being considered as possible solutions.

“Proactive employers are looking for alternative sources for DOT alcohol testing services within their local communities.”

The regulation (§40.213(h)(2)) allows law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing using NHTSA-approved EBTs or ASDs and to serve as qualified Breath Alcohol Technicians (BATs) for purposes of DOT alcohol testing. In some cases, this alternative may prove to be a viable option, while in others it might be fraught with additional challenges. The following issues are among those which should be taken into consideration when assessing the merits of this alternative.

- Is the equipment utilized by the law enforcement agency on the NHTSA

evidential testing device Conforming Products List (devices listed without an asterisk), and does it have the capability to provide printed results in triplicate; assign a unique number to each test (not a case number); print the device manufacturer's name, serial number, and time of the test; distinguish alcohol from acetone at the 0.02 alcohol concentration level; provide test air blanks; and perform external calibration checks? Most law enforcement equipment is configured for criminal prosecution purposes and, even though accurate, does not print the necessary information required for a DOT test. Most law enforcement agencies are unwilling to change their equipment configuration to conduct DOT tests.

- Law enforcement officers can serve as DOT qualified BATs, as long as they have been certified by state or local governments to conduct breath alcohol testing. In some areas, law enforcement officers who operate breath testing equipment do not have this certification. Many are trained by other officers.
- Local law enforcement officers are usually not familiar with the entirety of the DOT testing program and may not be aware of the testing protocols, record keeping requirements, and testing circumstances (e.g., post-accident) that must be followed.
- Law enforcement may not have the correct Alcohol Testing Forms.
- Law enforcement agencies do not have to adhere to the same standard

of confidentiality and record keeping standards as those required for the FTA program. Their systems are usually set up for criminal case management and thus are kept in case files. Also, law enforcement breath testing devices are usually kept in the police station's intake area of their office. This open area does not usually provide privacy for the test and may be viewed by other personnel or prisoners.

“It is imperative the employer and law enforcement agency representatives have a candid discussion.”

- An officer's first responsibility is to enforce the law. While in their role as the BAT, if they become aware a law has been broken (i.e., DUI), their first responsibility is to address the criminal activity and the BAT role becomes secondary. Employees are then not only subjected to the employer's policy and disciplinary procedures, they are also vulnerable to criminal prosecution for an alcohol positive.

Should an employer choose to pursue this option, it is imperative the employer and law enforcement agency representatives have a candid discussion about the requirements, expectations, and limits of the arrangement. Only after all issues have been satisfactorily addressed should this arrangement be pursued. ●

Documentation Required for Post-Accident Test Delays

Testing for drug and alcohol following an accident must be performed as soon as possible following the accident. The need for the test, however, should not delay necessary medical attention for injured people including transit personnel, compromise the stabilization of the accident scene, or interfere with law enforcement's investigation of the accident. The nature of the accident may dictate the drug and alcohol tests be delayed while these other issues are being addressed.

Within these constraints, the employer should work diligently to get the tests conducted as soon as practical. Efforts to obtain the alcohol test should only cease eight hours following the accident and efforts to obtain the drug test should only cease 32 hours following the accident. In the event the alcohol test is not administered within 2 hours following the accident, the employer must also prepare and maintain on file documentation stating the reason(s) for the test delay. This documentation requirement should not be misconstrued to mean employers have 2 hours to get an alcohol test conducted.

Delays in getting the alcohol test performed following an accident may occur if the transit system employee is injured and requires medical attention or is unconscious. Additionally, delays may occur if the transit system employee is detained by law enforcement officers or the circumstances of the accident dictate the transit employee remains at the scene of the accident to safely secure the site and address the needs of passengers or others who are injured. The need for the test should in no



Photo credit: iStockphoto/Achim Prill

way delay necessary medical attention for injured people or prohibit a safety-sensitive employee from leaving the scene of an accident to obtain assistance or necessary emergency medical care.

Delays in testing associated with problems or limitations with testing services (i.e., collection site is closed, collector is not in proximity, collector cannot be reached) should also be documented. However,

employers should take actions to avoid this type of potential delay by proactively establishing procedures for after-hour and remote location testing.

The employer is responsible for collecting all necessary information and ensuring the accident and testing timelines are appropriately documented. The time of the accident should be obtained from the internal accident *(continued next page)*

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Reporting Tips

Report all revenue vehicle operators in the category “Revenue Service Vehicle Operator” regardless of whether they have a Commercial Driver’s License (CDL) or not and regardless of whether they actually collect a fare. Only report operators in the “CDL/Non Revenue Service Vehicles” category if they are required to have a CDL in order to operate the vehicle and they operate a nonrevenue service vehicle (e.g., tow truck, snow plow). Do not report test results for non-transit (FTA-covered) related personnel, such as firefighters, sanitation workers, etc. ●

Daylight Savings Time: Make Sure Clocks were Changed!

Ensure your Breath Alcohol Technicians changed the clock on their Evidentiary Breath Testing device to reflect the beginning of Daylight Savings Time on March 8, 2015. ●

Documentation Required for Post-Accident Test Delays

(continued from previous page) report or police report and the time of the alcohol test should be derived from the corresponding employer’s copy of the Alcohol Test Form (ATF). A comparison of these times will indicate if the 2-hour time frame passed, triggering the need for documentation. In addition, the ATF and CCF should also be compared with the time of the accident to determine whether the 8- and 32-hour time frames for discontinuing efforts to conduct the respective alcohol

“Suitable documentation of the delay may include a statement of the timeline from the investigating employer, police reports, medical reports ...”

and drug tests have passed. For example, it is possible the employee’s medical care may not allow any testing for an extended period of time which may exceed the

8-hour time frame for the alcohol test, but may be permissible within the 32-hour time frame for the drug test. In this case, there would be no alcohol post-accident test, but there would be a drug post-accident test.

Suitable documentation of the delay may include a statement of the timeline from the investigating employer, police reports, medical reports, or statements from collection site personnel describing any delays occurring at the collection site. ●

Drug and Alcohol Training

FTA will be sponsoring upcoming training sessions to provide essential information to facilitate covered employers’ compliance with the drug and alcohol testing regulations (49 CFR Part 655 and Part 40). These free, one-day trainings are available on a first-come, first-served basis and are led by the FTA Drug and Alcohol Program and Audit Team Leaders.

Host	Location	Date
Minnesota DOT	MnDOT Training Center 1900 Country Road I West Shoreview, MN 55126	August 12, 2015
Maine DOT	Maine DOT 16 State House Station Augusta, ME 04333-0016	October 20, 2015

For more information and to register, go to:
<http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training>

If you are interested in hosting a one-day training session, contact the FTA Drug and Alcohol Project Office at fta.damis@dot.gov or **(617) 494-6336** for more information.

The Transportation Safety Institute Training Schedule

FTA’s strategic training partner, the Transportation Safety Institute (TSI) will offer the following upcoming courses:

- Substance Abuse Management and Program Compliance. This 2½-day course for DAPMs and DERs shows how to evaluate and self-assess an agency’s substance abuse program and its compliance with FTA regulations.
- Reasonable Suspicion Determination for Supervisors. This half-day seminar educates supervisors about the FTA and DOT regulations requiring drug and alcohol testing of safety-sensitive transit workers, and how to determine when to administer reasonable suspicion drug and/or alcohol tests.

There is a small attendance/materials fee. For more information, please call **(405) 954-3682**. To register, go to: <http://www.tsi.dot.gov> or <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Training>.

Online Collector Training— Proceed with Caution

In recent years, collection sites and laboratories have been turning to technology to meet their training requirements. In particular, collection sites are looking to the Internet as a source for their collector qualification training. The regulation (§40.33(b)) stipulates the subjects which must be covered in qualification training, but does not address the format or how the training is to be conducted. Topics to be addressed include:

1. All steps necessary to correctly complete a collection, including the accurate completion of the Chain of Custody and Control Form (CCF).
2. Procedures for problem collections, including temperature out of range, insufficient volume, direct observation, etc.
3. What constitutes a fatal flaw and procedures for correcting correctable flaws.
4. The collector's responsibility for maintaining the integrity of the collection process, ensuring privacy of employees, ensuring the security of the specimen, and avoiding inappropriate/offensive conduct or statements.

Regardless of the format, either online/computer-based or traditional face-to-face collector qualification training, all collectors must be aware that qualifications training is only one of the requirements they must meet to be a collector. All collectors, even those who receive their initial or refresher training online, are required to demonstrate proficiency to be qualified to conduct DOT specimen collections. Even though an online training program may provide a certificate

of completion for completing the training, this should not be misconstrued to mean the collector is now a certified collector. Collectors must also demonstrate their proficiency by conducting five consecutive, error-free mock collections in a real-time setting under the direct observation of a qualified monitor. The proficiency demon-

stration provides the essential hands-on component to the process and tests the knowledge base and skill level of the collector.

Collection site management should use their due diligence to ensure whatever method is used to conduct their qualification training is effective and results in well trained, proficient collectors. ●

2015 DOT Random Testing Rates

The following chart outlines the annual minimum drug and alcohol random testing rates established within DOT agencies and the United States Coast Guard (USCG) for 2015.

DOT Agency	2015 Random Drug Testing Rate	2015 Random Alcohol Testing Rate
Federal Motor Carrier Safety Administration (FMCSA)	50%	10%
Federal Aviation Administration (FAA)	25%	10%
Federal Railroad Administration (FRA)	25%	10%
Federal Transit Administration (FTA)	25%	10%
Pipeline & Hazardous Materials Safety Administration (PHMSA)	25%	N/A
United States Coast Guard (USCG) <i>now with the Dept. of Homeland Security</i>	25%	N/A

Note:

Employers (and C/TPAs) subject to more than one DOT agency drug and alcohol testing rule may continue to combine covered employees into a single random selection pool. However, companies (and C/TPAs) doing so must test at or above the highest minimum annual random testing rates established by the DOT agencies under whose jurisdiction they fall. For example, an employer having both FMCSA- and FRA-covered employees in one pool must test, as a minimum rate, 50 percent for drugs and 10 percent for alcohol. PHMSA- and USCG-regulated employees should not be placed in DOT random alcohol testing pools. Contact the appropriate DOT agency for additional clarification.

Correct DOT Agency on Custody and Control Form

49 CFR Part 40.14 requires the employer or TPA to provide the collector with the DOT agency which regulates the employee's safety-sensitive duties. Despite this requirement, an incorrectly checked DOT agency box is the most common error found on a Federal CCF. For an FTA-covered employee, the box most often checked is "FMCSA." This type of mistake is considered a minor administrative error and would never cause a test to be cancelled. However, whether discovered by the employer, collector, laboratory, Medical Review Officer (MRO) or other individual, it must be corrected. The form may be corrected by checking the correct box (FTA), crossing out the incorrect box, initializing, and dating. ●

New Tools on the Website

FTA has added some new tools and resources to the Drug and Alcohol Program website.

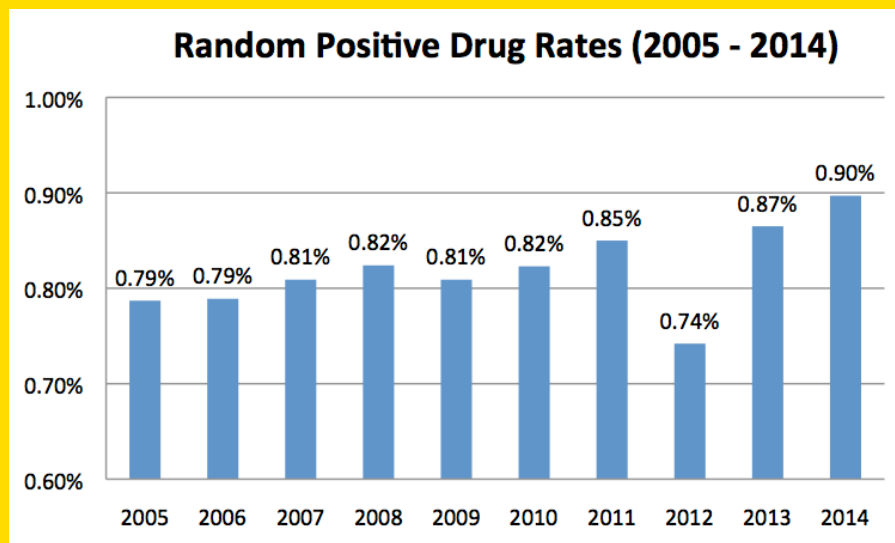
A Policy Builder tool will help employers develop a customized anti-drug and alcohol misuse policy statement that is compliant with FTA regulations. The tool will guide employers through the different elements of a policy, and will then generate an editable Word document to allow the policy to be modified as needed.

FTA has also created some sample forms and new checklists for DAPMs. Check out these new resources at <http://transit-safety.fta.dot.gov/DrugAndAlcohol/Tools>. ●

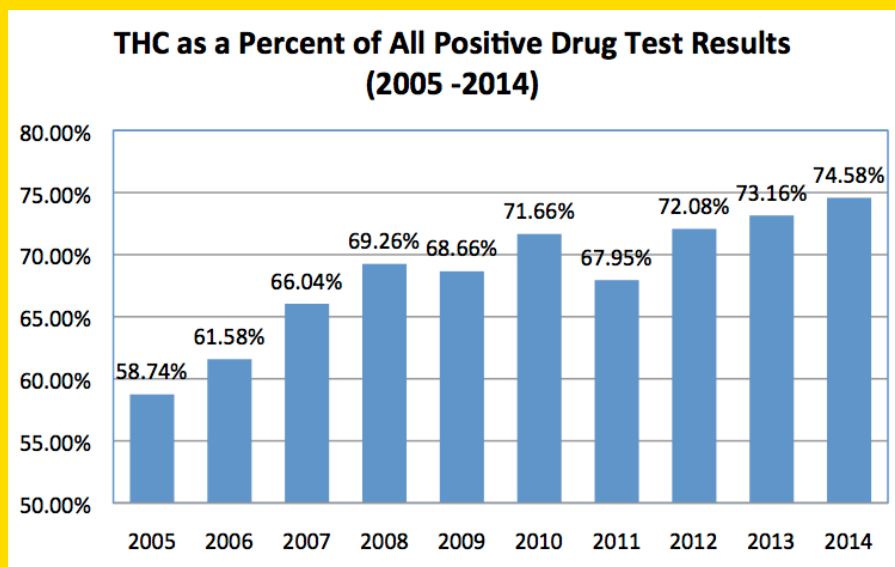
Annual Testing Results for 2014

Annual testing results for calendar year 2014 were due to FTA by March 15, 2015. Although not all data has been submitted or validated, what has been collected to date provides insight into trends of FTA-covered employers.

For the first time in 10 years, the positive rate (Random Drug Testing) has gone above 0.90 percent and continues a slight but steady increase in positive rates.



Possibly driving the increase in the positive rate is the increase in THC-verified positives. The chart below shows the part THC-verified positives play in the total number of positives. The percent of verified positives which include THC has increased steadily for 10 years.

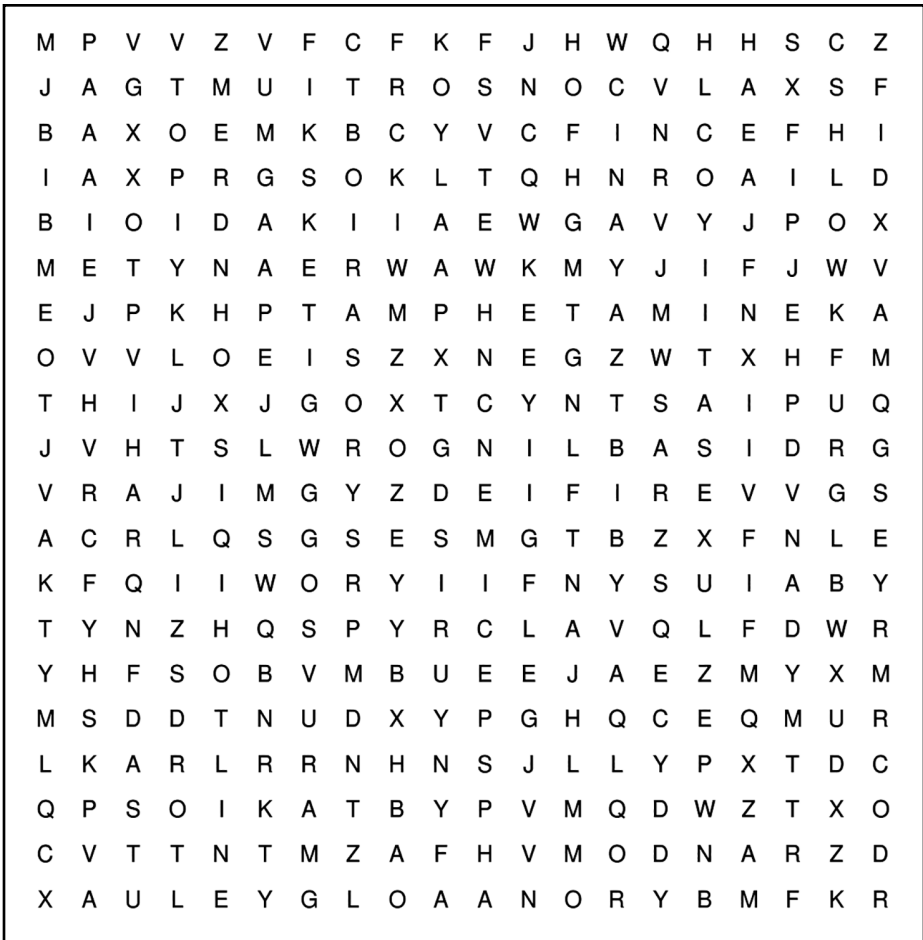


*Note: 2014 data has not been finalized.

FTA Drug and Alcohol Word Search

Find the Drug and Alcohol terms, forward, backward, up, down and diagonal.

- AMPHETAMINE
- CONSORTIUM
- DER
- DISABLING
- HOTLINE
- ODAPC
- POSITIVE
- RANDOM
- ROSARIO
- SACRAMENTO
- SHY
- SPECIMEN
- VERIFIED



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Tourist Trolley or Road Trolley?

49 CFR Part 655.4 references “trolley car” and “trolley bus” in its definition of “Accident.” There has been some confusion from FTA-covered employees as to the type of vehicle referred to in the definition. A trolleybus (or trolley bus) is defined as a rubber-tired, electrically powered vehicle operated on city streets drawing power from overhead lines. A trolley car (or trolley car) is similar except it runs on rails and may draw its power from underneath.

The vehicle causing the confusion is a “tourist trolley” also called a “road trolley” which is a rubber-tired bus (usually diesel or propane fueled, sometimes compressed natural gas), which is made to resemble an old-style streetcar or tram, but is essentially a bus with a trolley-like body. This type of vehicle is considered a bus for the purpose of the FTA definition of Accident. In post-accident testing, the tourist trolley would fall under the same requirements as a motorbus. ●



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