Employment Law Update April/May 2008

PUBLISHED ON
May 1, 2008

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Preventative Maintenance - The Importance of Training and Educating Your Supervisors

By: Jennifer Craighead Carey

A former employee files a charge with the Equal Employment Opportunity Commission (EEOC), alleging that she was sexually harassed by a coworker and reported the harassment to her immediate supervisor, but the supervisor took no action. In investigating the charge, you learn that the employee did, in fact, verbally notify the supervisor that she believed she was being harassed. The supervisor told her he would not do anything unless she put her complaint in writing. Reluctant to do so, she told the supervisor she only wanted him to know about the harassment, but she did not need him to do anything. No action was ever taken nor did the supervisor ever report the harassment to Human Resources in order to undertake an investigation. An EEOC investigator asks to interview the supervisor. During the interview, the supervisor is asked whether he is familiar with the company's sexual harassment policy and what training he has had on sexual harassment. The supervisor reports that he once read the policy but has had no formal training.

An employee with an attendance problem calls off work to his supervisor and reports that his wife is in the hospital and that he will not be at work that week. When he returns, the supervisor issues him a final warning for attendance and tells the employee that if he is absent again he will be fired. The employee contacts the Department of Labor, Wage and Hour Division, and alleges FMLA retaliation. The supervisor responds that the employee "never asked for FMLA."
An employee with bipolar disorder tells her supervisor that her medication is being adjusted by her health care provider and that until she gets used to the adjustment she needs to start work two hours later than her normal schedule. The supervisor refuses and begins to discipline the employee for tardiness. The employee files a charge of disability discrimination with the EEOC, alleging a failure to accommodate under the Americans with Disabilities Act (ADA).
A supervisor interviews a female for a sales position. The supervisor asks the woman about her child care plans after

she volunteers that she has children. The supervisor does not ask male applicants who volunteer such information about their child care plans. The supervisor decides not to hire the female applicant, although on paper she is the most qualified, citing his concerns about her "reliability.

On Monday morning, employees in the parking lot are seen handing out leaflets encouraging their coworkers to join a union. Later that day, the employees are overheard by their supervisor complaining about their wages and work hours. The supervisor threatens the employees, telling them to stop talking and start working or they will be fired. Several employees ignore the directive and the supervisor suspends them without pay pending investigation. The company receives an unfair labor practice charge from the National Labor Relations Board, alleging the supervisor disciplined the employees for protected concerted activity.

In each of the cases above, would your supervisors and managers understand where they went wrong? In today's challenging work environment, where laws regulate virtually every aspect of the employment relationship, risk management is critical. One of the most effective risk management tools is to educate your supervisors and managers about the law and how to spot issues and get them in front of Human Resources quickly. Indeed, in virtually every employment discrimination matter today, your supervisors can expect to be questioned about training on various employment issues in the workplace and their knowledge of your policies and procedures.

We are all familiar with the old adage that "prevention is the best medicine." Nowhere is this concept more important than in training and educating your supervisors to avoid the landmines that exist in the employment law arena. Your supervisors and managers are often the ones on the front line and the first to become aware of an issue. Failure to train those supervisors and managers to spot the issues and contact Human Resources for intervention can have a costly impact on your business.

Among the critical areas of training are:

• **Proper hiring practices:** Do your managers who participate in interviewing candidates for employment understand what questions can and cannot be asked under state and federal laws? Are they up to date on the latest legal decisions governing drug tests, medical exams, criminal background checks and credit reports? For government contractors covered by Executive Order 11246, are your supervisors and managers informed of any hiring goals necessitated by a shortfall in women or minorities in a given job group and are they trained on your affirmative action obligations?

• **Responding to a union organizing campaign:** Do your supervisors know how to look for signals suggesting that employees are attempting to unionize, and have you provided them with practical advice on how to stay union free? For unionized companies, do your supervisors and managers know how to effectively deal with the union without creating grievance problems or unfair labor practice charges?

• **Managing potential claims under the FMLA, the ADA, and the Pennsylvania Workers' Compensation Law:** Some legal scholars have said that the FMLA is so complex that it is virtually impossible for employers to remain in compliance. When combined with obligations that arise under the ADA and the Pennsylvania Workers' Compensation Law, an employer's efforts to remain in legal compliance become even more nettlesome. It is critical for supervisors and managers to become familiar with the requirements of these three laws, in particular an employee's rights and the supervisor's obligations under each law. Supervisors and managers must understand how to manage leaves of absence within their framework.

• **Harassment in the workplace:** In June of 1999 the EEOC issued guidance stating that employers need to hold periodic harassment training for supervisors and employees. It is critical to defending a sexual or other harassment complaint that employees are educated about your harassment policies, and that supervisors and managers receive training on recognizing and responding to workplace harassment.

• **Wage and hour issues:** The fastest growing segment of class action litigation is wage and hour violations. Many of these claims focus on a supervisor's knowledge or acquiescence in employees working "off the clock" without compensation. When mistakes in this area occur, they can be very expensive. It is important that supervisors understand employees' rights and supervisors' obligations in this arena, particularly since individual supervisors may also be held personally liable for wage and hour violations.

• **Effective Personnel Documentation:** Documenting and communicating performance issues is one of the more difficult aspects of a supervisor's job. The best way to avoid discrimination lawsuits is through sound and thorough recordkeeping practices. Unfortunately, many supervisors are not properly trained in how to generate proper personnel documentation. Supervisors should understand the importance of maintaining good records and how to prepare disciplinary records and performance reviews to minimize liability. One of the most commonly cited reasons for ruling in favor of an employee in a wrongful discharge discrimination lawsuit is that the performance evaluations did not accurately reflect the negative performance relied upon by the employer for the termination. Indeed, the tendency of supervisors is to overrate performance to avoid creating bad feelings.

• **Methods of reducing workers' compensation liability:** Do your supervisors have a full understanding of how to work with an employee who has suffered a work injury? If not, you may not be doing all you should to lower your workers' compensation insurance premium. You can train your supervisors on effective methods of employee interaction from the moment an employee sustains an injury through the leave of absence period and up to and following the employee's return to work.

• **Maintaining professionalism and ethical behavior in your business:** Following the heavy publicity related to corporate scandals in recent years, it is especially important that your employees conduct themselves in a professional manner that promotes your image. Whether you are a Fortune 500 company establishing a program to comply with Sarbanes-Oxley legislation or a smaller employer that wants to make sure your employees do not act in conflict with your company's interests, every business has a vested interest in developing standards of professionalism that provide guidelines for appropriate employee behavior. Supervisors need to understand that this is a concern for your company and conduct themselves in a manner that promotes your policies and procedures in this regard.

• **Discipline and discharge of problem employees:** Whether due to poor performance, bad attitude or excessive absenteeism, disciplinary actions and terminations are an inevitable part of the work environment. However, when management has failed to take proper steps in advance of termination, the result can be an expensive lawsuit alleging discrimination or wrongful discharge. Supervisors need to understand your policies on work rules and discipline and the importance of fair and consistent treatment of employees in matters related to discipline and discharge. Indeed, the law demands consistency in this area. Yet managers, quick to pull the trigger, may overlook this important consideration.

• **Substance abuse issues/violence in the workplace:** Are your supervisors educated on substance abuse issues in the workplace, including recognizing and documenting reasonable suspicion testing determination? Can they recognize the signs and symptoms of alcohol or drug abuse? Are they educated on your workplace violence program and do they know how to recognize the signs of workplace violence and what to do in the event such violence erupts in the workplace? Many employers overlook training on these issues until it is too late.

The above represent vital areas of training for your management team, including your front line supervisors who are often the first to confront these critical issues in the workplace. Members of our Employment Law Group regularly conduct training programs for employers in these areas and can also customize a training program based upon the needs of your business. If you are interested in conducting employment training in the workplace please contact Jennifer Craighead or any member of Barley Snyder's Employment Law Group.

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Regulatory Changes Signal Need for Employee Handbook Checkup

By: Richard L. Hackman

As reported in recent newsletters, there have been significant legal changes that will affect your organization's human resources and employment policies. Recent regulatory revisions to the Family Medical Leave Act, the Occupational Safety and Health Act, and the Age Discrimination in Employment Act, as well as a major National Labor Relations Board decision, will affect the manner in which employers run their businesses.

Conducting an audit of your organization's human resources/employment policies and procedures is vital to ensuring compliance with the laws governing your business. Undertaking such an audit allows an employer to identify statutory violations in an attempt to prevent unlawful acts before they turn into litigation, and also promotes consistency in the workplace, effectiveness of the human resources function, and improves employee morale. The first step in any such audit is to undertake a review of your employee handbook, the document that acts as your "mouthpiece" in the workplace. As a result of recent regulatory changes, employers should take the opportunity to conduct an audit or "checkup" of their employee handbook to ensure compliance with these revisions. Below is a ten point checklist of issues to keep in mind when auditing your handbook and other employment-related documents:1. **Review All Leave Policies:** Conduct a review of your leave of absence policies, including your Family Medical Leave Act (FMLA) policy. At a minimum, revisions should be made to your FMLA policy to ensure compliance with the most recent regulations regarding leave for family members of those who are serving in the Armed Forces. Employers should also post the new FMLA notice, which may be found on the U.S. Department of Labor's website.

2. **Review Solicitation and Electronic Communications Policies:** In light of the National Labor Relations Board's decision in Guard Publishing Co. that employees do not have the unfettered right to use an employer's e-mail system for activities relating to union organizing or union business, employers should consider revising their non-solicitation policy to include language that makes it clear that employees do not have the right to use employer-owned equipment for purposes unrelated to their work.

3. **Immigration Law Compliance:** Review your immigration compliance documents, policies and procedures

in light of the recent revisions to the I-9 form.

4. **Conduct an Audit of Your EEO Policies:** In the wake of the Supreme Court's decision in Burlington Northern, employers should implement and enforce workplace guidelines that prohibit any form of retaliation. Employers should also:

• Review their EEO statements to confirm inclusion of all applicable federal, state, and locally protected classifications, and scope of protections provided to covered employees;

• Review harassment policies (both sexual and general) and update policies to ensure clear reporting guidelines; and

• Examine the adequacy of complaint and investigation procedures, especially as they apply to supervisors. It is important to provide an alternative reporting channel other than an employee's supervisor for cases where the supervisor may be the source of the harassing or retaliating conduct.

5. **At-Will Language:** Review the adequacy of the "at-will" disclaimers in your handbook to ensure that other language in your handbook does not limit an employee's at-will employment. Your disciplinary policy should not limit your ability to terminate an employee at any time and for any reason. It is well established in Pennsylvania that carefully drafted disclaimer language in a handbook will defeat a claim that an employer's handbook imposes contractual obligations upon an employer. With the case law so clear in this area, there is simply no reason why all employers cannot have carefully drafted language that protects them from claims that an employee is not employed "at will," or that the employer is somehow limited in taking appropriate disciplinary measures.

6. **Dissemination Procedures and Acknowledgment Forms:** Are all employees receiving copies of your policies and/or handbook? Providing electronic access to the employee handbook is acceptable, but consider whether this is adequate if you have employees without access to your intranet or to a computer. Do you have acknowledgment forms from all employees for receipt of the policies or handbook?

7. **Wage and Hour Policies:** Do your stated leave policies (e.g. jury, military, bereavement, personal, vacation) comply with the Fair Labor Standards Act? Does your handbook include a policy setting forth your commitment to compliance with the FLSA?

8. **Company Safety Programs:** Are you adequately informing your employees regarding safety issues in the workplace? Have you made your employees aware of their rights under workers' compensation laws and the Pennsylvania Right to Know Law?

9. **Job Descriptions:** Although job descriptions should not generally be included in an employer's handbook to allow employers the flexibility to update them as business needs change, employers should take the time to review job descriptions to ensure proper identification of "essential functions" and to ensure proper designation of exempt versus non-exempt employees. Job descriptions are perhaps the most underutilized of all "standard" employment-related documentation. This is unfortunate, because an established standard for each position enables the employer to clearly evaluate an employee's job performance and, in the event of litigation, clearly explain why an employee did not meet the requirements of his or her position. Additionally,

job descriptions are invaluable when determining exempt and non-exempt positions, thus ensuring compliance with the Fair Labor Standards Act. Finally, job descriptions are necessary when conducting reasonable accommodation/undue hardship evaluations under the Americans with Disabilities Act.

10. **Review Company Security/Confidentiality Policies:** Have the penalties for disclosure of confidential company information been made clear to employees? Have you set forth clear guidelines on how confidential information should be maintained and protected, even after an employee leaves the company?

A well-written handbook is an important first step to promoting a stable work environment and in defending against a myriad of employment-related legal claims. Employers who adopt written employment policies should ensure that all managerial and supervisory employees are fully familiar with those policies so that the practice of the workplace mirrors as closely as possible the policies of the workplace.

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Remember WARN Act Notice Requirements in a Reduction in Force

By: Jill Sebest Welch

When companies consider trimming their workforce to a significant degree, or plant closings to deal with tough economic realities, they often must also forewarn employees of these decisions. Aptly named the WARN Act, the federal Worker Adjustment Retraining and Notification Act, in effect since 1989, requires certain employers to provide sixty-days' advance notice of such a "mass layoff" or "plant closing." The purpose of the WARN Act is to give affected employees sufficient advance notice to adjust to, and hopefully emerge from, the impending job loss. This article is a reminder to employers going through the myriad details of a significant reduction in force, plant closing, or even a sale of the business that they need to plan ahead in the event that they are covered by the WARN Act's requirements.

Scope of the Federal WARN Act: 100 and 50

The WARN Act applies to companies of 100 or more employees, excluding part-time employees working less than 20 hours per week (or short term employees of less than 6 months). It also applies to employers of 100 or more employees (including part-time workers) who, in the aggregate, work at least 4,000 hours per week.

What kinds of events or transactions are triggered under the WARN Act?

Plant closings -- a permanent or temporary shut down (6 months or more) of a single site or facility or operating unit where the shut down results in an employment loss of 50 or more full-time employees during any 30-day period.

Mass layoffs -- either (1) a reduction in force of at least one-third of the full-time employees, provided the number of full-time affected employees is at least 50, at a single facility during any 30-day period; or (2) employment loss of at least 500 full-time employees at a single facility during any 30-day period, regardless of the percentage affected.

Where the layoffs or plant closings occur in two or more phases and the aggregate number of affected employees exceeds these thresholds within any 90-day period, the employer must provide notice under the Act unless it is able to prove that the employment losses were truly the result of separate causes and not an attempt to avoid the requirements of the Act.

The WARN Act's Notice Requirements

Under these triggering circumstances, the WARN Act requires employers to provide all affected employees, full time and part time, or the employees' representative, written notice at least 60 days in advance. The company must also notify the state's dislocated workers unit and the highest elected official of the locality in which the closing or layoff is to occur. The notice must be in writing and must provide the predicted date of separation.

Generally, affected employees are entitled to notice 60 day in advance of the plant closing or layoff, or to 60 days' pay and benefits in lieu of notice. If the employer fails to provide such notice, then the employee can file a civil lawsuit under the WARN Act for money damages and seek attorneys fees. The employer that fails to notify the local taxing authority and fails to pay employees money due under the WARN Act within three weeks of the shutdown or layoff may also be subject to a civil penalty of up to $500 per day.

Depending upon the timing, the sale of all or part of a company's business can also trigger WARN Act obligations. The Act makes the seller responsible for providing the 60-days' notice up to and including the effective date of the sale, after which the purchaser is responsible for providing notice. To avoid the sale being deemed an "employment loss" to employees under the Act, the parties to the transaction need to design the sale to be as seamless as possible for the affected employees. Where significant reductions in the workforce are unavoidable, the parties should spell out which of them will assume the liability for any WARN Act obligations.

Be Aware That Some States and Localities Have "Baby" WARN Acts

Recently, New Jersey joined the ranks of states that have adopted their own form of plant closing and mass layoff statutes to supplement the federal WARN Act provisions. These states include California, Connecticut, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, Rhode Island, South Carolina, Tennessee, and Wisconsin. Although Pennsylvania is not among them, Philadelphia does have local regulations that address plant closures and layoffs.

In these tough economic times, companies are facing difficult decisions about downsizing, rightsizing, and plant closings. It is important that they keep in mind those federal and local WARN Act requirements as part of those decisions. The attorneys in the Employment Law Group at Barley Snyder can assist you in working through the WARN Act notice requirements.

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Sponsors and Administrators of 401(k) Plans Now Face Elevated Risk of Liability for Individual Account Losses

By: Mark A. Smith

In a decision released on February 20, 2008, the U.S. Supreme Court, in LaRue v. DeWolff, Boberg & Associates, Inc., concluded that an individual participant in a 401(k) plan or other individual account, can sue the plan's fiduciaries alleging a breach of fiduciary duty to recover investment losses suffered by that participant's individual account.

LaRue was a participant in his employer's 401(k) plan, which allowed participants to self-direct their investments in the plan. He filed suit, alleging that the plan fiduciaries failed to follow his investment directions and, as a result, his 401(k) account had lost approximately $150,000. The federal district court and the Fourth Circuit Court of Appeals dismissed his lawsuit, holding that money damages were not available under ERISA Section 502(a)(3), and that he could not bring a claim for individual account losses, under ERISA Section 502(a)(2).

Before this decision it was generally understood, based on prior Supreme Court cases, that actions brought under ERISA Section 502(a)(2) to recover monetary losses on a breach of fiduciary duty theory could only prevail if the plan as a whole had suffered the loss. In other words, a plan participant in a 401(k) plan, a profit sharing plan, or an employee stock ownership plan could not bring a suit based on his or her losses in an individual account in the plan. In LaRue, the Supreme Court distinguished its prior decisions and concluded that a participant in a defined contribution retirement plan like a 401(k) plan, where the individual account and not the plan as a whole is the source of the participant's benefit, can sue under ERISA Section 502(a)(2) to protect the individual account against losses caused by a fiduciary, even if the plan as a whole was not similarly damaged. The Court reasoned that, in a defined contribution plan context, any loss to any account was a loss "to the plan."

It is difficult to project whether the LaRue decision will, in fact, "open the floodgates" to a deluge of individual ERISA lawsuits, as some legal commentators are suggesting. On the one hand, because of the LaRue decision, plan fiduciaries will no longer be able to hide behind the argument that they are only liable for mistakes that injure the plan as a whole. But on the other hand, the LaRue decision does not make plan fiduciaries per se liable for an individual's account losses. Plaintiffs relying on the LaRue decision to sue a fiduciary to recover individual account losses must still do more than prove that a loss occurred; they must also prove that those losses resulted from mistakes made by the plan fiduciary in performing plan duties.

If nothing else, however, the LaRue decision should serve as a sobering reminder to retirement plan fiduciaries that they have a daunting array of statutory duties imposed upon them by ERISA, and a now-elevated risk of personal liability for resultant financial losses if they fall short in performing those duties. Steps employers that sponsor plans can take to manage or limit this potential fiduciary liability include the following:

• First, be aware of who has the status of "ERISA fiduciary," and thus the potential personal liability that comes with that role. At a minimum this includes the plan administrator, which is usually the employer itself but is sometimes an individual working for the employer who is named as plan administrator, or a committee of such individuals. It also includes any trustee holding the plan assets and any investment advisor paid a fee to make decisions about the investment of plan assets.

• It may surprise most plan sponsors that ERISA fiduciary status does not usually attach to third party administrators/recordkeepers (TPAs) hired to maintain plan accounts, take participant investment directions, send out statements and the like. These TPAs typically take great care to disclaim fiduciary status in the service agreements they enter into with the employer or plan administrator. Those service agreements often go further, not only distancing the TPA from fiduciary status but also limiting the TPA's liability for their mistakes to losses that result from willful misconduct or gross negligence. When such a limitation on liability is in place and a TPA mistake does not rise to the level of willful misconduct or gross negligence (that is, the mistake constitutes mere ordinary negligence), the consequences of that mistake fall back on the shoulders of the plan administrator who hired the TPA, not on the TPA. Renegotiation of TPA service agreements to pressure TPAs into accepting fiduciary status in light of the LaRue case is not a realistic objective, but renegotiations to get TPAs to agree contractually to being liable for their ordinary negligence is a course plan administrators and employers should consider.

• It is somewhat obvious and simplistic to say, but the main lesson for a fiduciary to take from the LaRue decision is to avoid conduct that can lead to fiduciary liability. Take care to minimize plan administration errors. Make certain that fiduciary decisions are made for sound and considered reasons that are documented in your records. Periodically review past fiduciary decisions that have ongoing impact, like the selection of investment funds offered and investment advisors, to make sure they are still defensible, and document that review. Administer all ERISA plans uniformly and in accordance with their terms. Develop a well thought out plan investment policy statement, and then follow it, doing periodic reviews to reconfirm the appropriateness of plan investments.

• Plan sponsor employers should conduct a critical review of the fiduciary liability protection they have in place under their business general liability coverage, checking limits of liability, whom the coverage protects (especially if an individual or a committee holds an ERISA fiduciary role), whether all ERISA plans are listed, and what specific exclusions apply. And of course, if there is no such coverage, and the employer, or an individual the employer will indemnify, is an ERISA fiduciary, the employer should investigate the availability and costs of adding such coverage. Note, the fiduciary liability coverage referred to here is not the ERISA-required fidelity bond that employers have to maintain by law to protect their ERISA plans against fiduciary dishonesty. Rather, it is coverage that protects the insured fiduciary against personal liability for losses that result from the fiduciary's mistakes, oversights, or errors in judgment.

• ERISA Section 404(c) provides that if a plan allows participants to exercise control over the investment of their accounts, and does so in accordance with an extensive set of U.S. Department of Labor regulations that specify the minimum array of choices to be available, the required availability of information about those choices, and the frequency with which investmentchanges can be made, then the plan fiduciaries will not be liable for losses a participant experiences as a result of that exercise of investment control. If employers believe they have set up a 404(c)-compliant plan and are thus shielded from liability for investment losses, they are advised to revisit their 404(c) design to make certain it is as compliant with the 404(c) regulations as possible, addressing areas of non-compliance where possible.

• Finally, there is considerable recent ERISA fiduciary litigation focusing on 401(k) plan fees, alleging the plan fiduciaries do not know what fees are being deducted from participant accounts or for what purpose, and are not properly assessing the necessity for or appropriateness of those fees. Although these fee-related cases are not an outgrowth of the recent LaRue decision, any review of fiduciary practices and risks, whether undertaken as a result of LaRue or otherwise, should be expanded to include taking a critical look at the plan's mutual fund operating expense ratios, determining who gets paid what amounts out of those expense deductions, assessing the reasonableness and necessity of those payments, and reacting accordingly.

Plan sponsors or administrators who have questions about any of these recommendations or would like assistance are encouraged to contact Mark Smith or Harry Booker.

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New Employee Verification Act Introduced in the U.S. House of Representatives

By: Silas M. Ruiz-Steele

On February 28, 2008, the New Employee Verification Act (NEVA, HR 5515) was introduced in Congress by Rep. Sam Johnson (R-TX) and three other Republican representatives. The bill proposes a mandatory national electronic employment verification system that would replace the current method of verifying employment eligibility through the federal government's Form I-9 and E-Verify program. Authorization for E-Verify is scheduled to expire at the end of 2008.

NEVA would introduce a paperless Electronic Employment Verification System (EEVS) that would require employers to check worker eligibility by entering employee identification data through their state's Directory of New Hires, an electronic government portal currently in use for child support enforcement. The new system would allow employers to confirm work authorization for U.S. citizens through the Social Security Administration database and that of non-citizens through the Department of Homeland Security database. Other key features of the bill include:

- Providing that federal immigration law preempts any state law in regard to employer fines or sanctions on immigration-related issues or in requiring employers to verify work status or identity for purposes of work authorization;
- Requiring employers to be responsible only for the hiring decisions of their own employees and not those of their subcontractors; and
- Applies only to an employer's newly hired employees.

Finally, as an added layer of security, the bill would create a voluntary Secure Electronic Employment Verification System (SEEVS) that employers could choose to use in the verification process. This system would include a standard background check and the collection of a "biometric" characteristic - such as a thumbprint - to secure an employee's identity and prevent the fraudulent use of a Social Security number, altered identification documents, and stolen or fraudulently obtained drivers' license for the purpose of unlawful employment.

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