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What's New at Work? Lots: Major Recent Court and Agency Actions

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Agenda

- **Review of Recent U.S. Supreme Court Decisions**
  - *Loper Bright, Muldrow*
- **Federal Trade Commission (tried to) Ban Non-Competes**
  - Never mind? What's next?
- **Equal Employment Opportunity Commission Guidance**
  - Harassment and Pregnancy Discrimination
- **Occupational Safety and Health Administration Happenings**
  - Walk-Around Rule and Heat Standard Proposal
- **Department of Labor**
  - Salary Basis Increases Just Behind and Just Around the Corner

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Review of Recent U.S. Supreme Court Cases

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Loper Bright Overrules *Chevron*

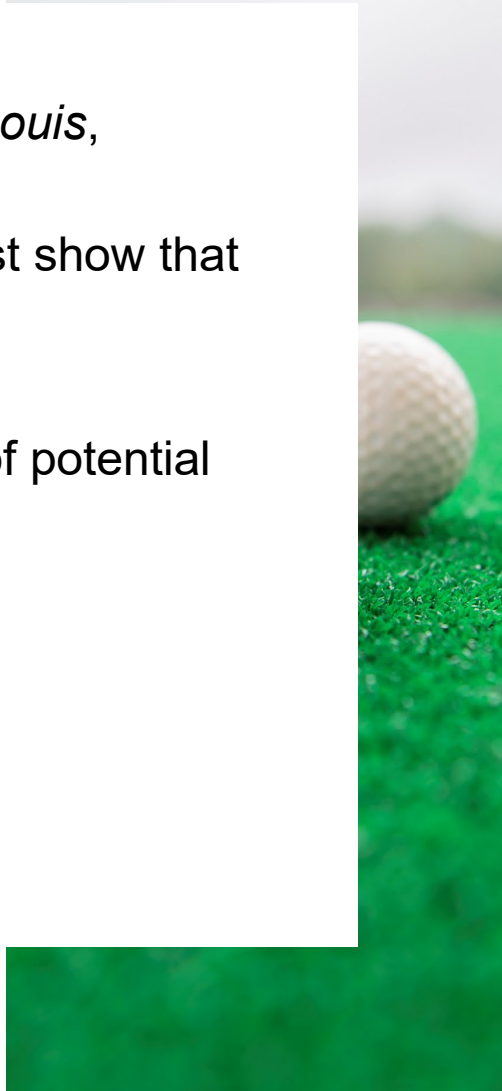
- On June 28, 2024, the U.S. Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo*
  - Held that Administrative Procedure Act requires courts to exercise independent judgment in deciding whether an agency has acted within its statutory authority
  - Courts cannot defer to an agency interpretation just because a statute is ambiguous
  - Agency "expertise" remains "one of the factors" that may make its interpretation persuasive
- Petitioners had argued that *Chevron* deference led to excessive deference to federal agencies, resulting in overregulation, abdication of judicial responsibility to interpret statutes, and unwarranted imposition of regulatory enforcement costs

Loper Bright Overrules *Chevron*

- Implications of *Loper Bright*
  - More legal challenges
    - Many agency interpretations of congressional statutes are vulnerable
    - Prior decisions not affected, but no “thumb on the scale” going forward
  - Agency restraint?
    - Considering strength of interpretation, more cautious rule-making
  - Inconsistent decisions across courts
    - Because *Loper Bright* directs courts to exercise independent judgment rather than defer to agency’s interpretations, courts in different areas of the country may reach differing conclusions regarding agency regulations

Muldrow and "Adverse" Actions

- On April 17, 2024, the U.S. Supreme Court issued its decision in *Muldrow v. City of St. Louis, Missouri, et al.*, No. 22-193
- *Muldrow* held that the plaintiff-employee challenging a job transfer as discriminatory must show that it caused **some** harm with respect to an identifiable term or condition of employment
  - Not material harm, not a significant harm – but *some* harm
- Effectively lowers the standard to show adversity, thus potentially increasing the scope of potential discrimination claims



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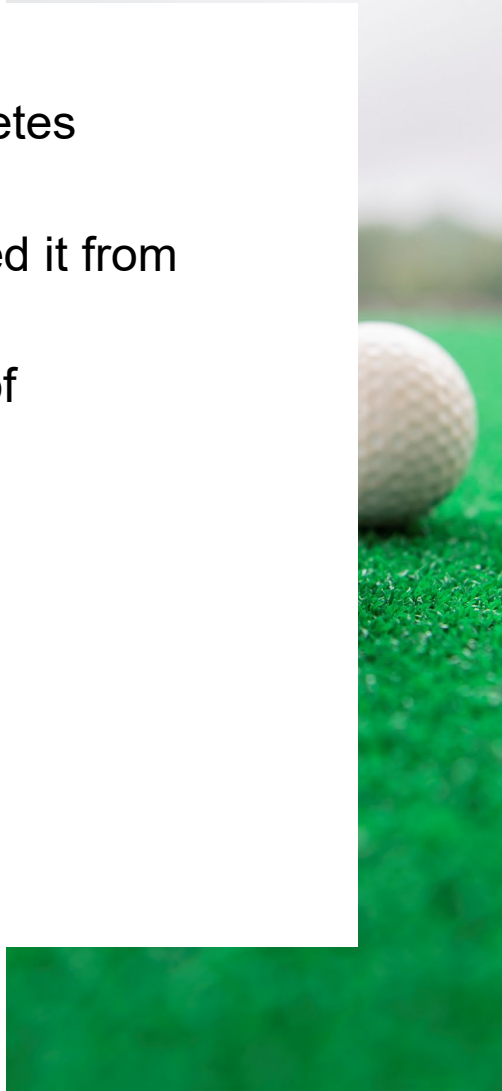
FTC’s Failed Attempt to Ban Most Non-Competes

FTC (tried to) Ban Most Non-Competes

- FTC issued a Final Rule on April 23, 2024 that would have banned almost all non-competes effective of September 4, 2024
- On August 20, 2024, N.D. Texas federal court held the Final Rule was invalid and blocked it from taking nation-wide effect, finding:
  - The FTC did not have authority to create *substantive* rules regarding unfair methods of competition
  - The Rule was arbitrary and capricious
- Where does that leave us?
  - FTC deadline to appeal is October 19, 2024
  - Statewide trends continue
  - Opportunity to recalibrate if needed



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EEOC Guidance on Harassment and Pregnancy Discrimination

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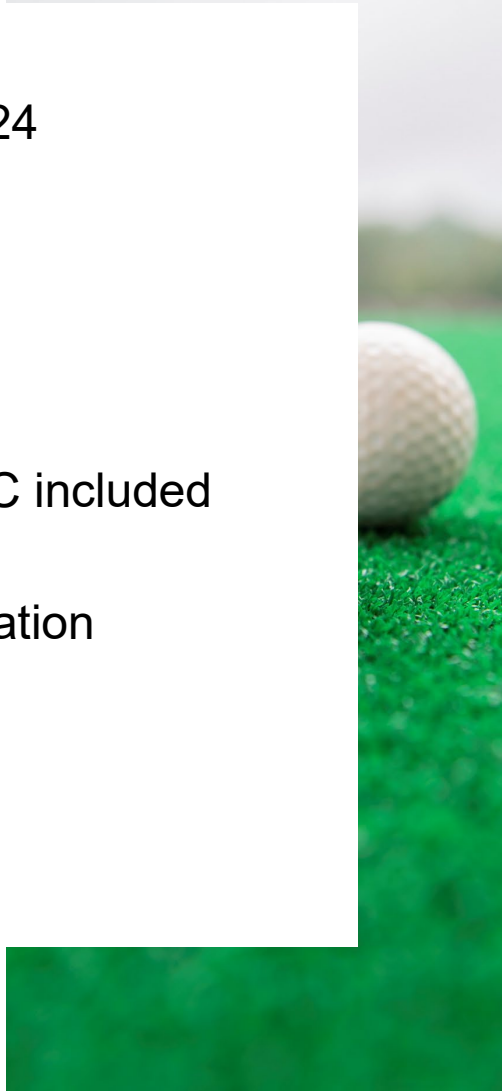
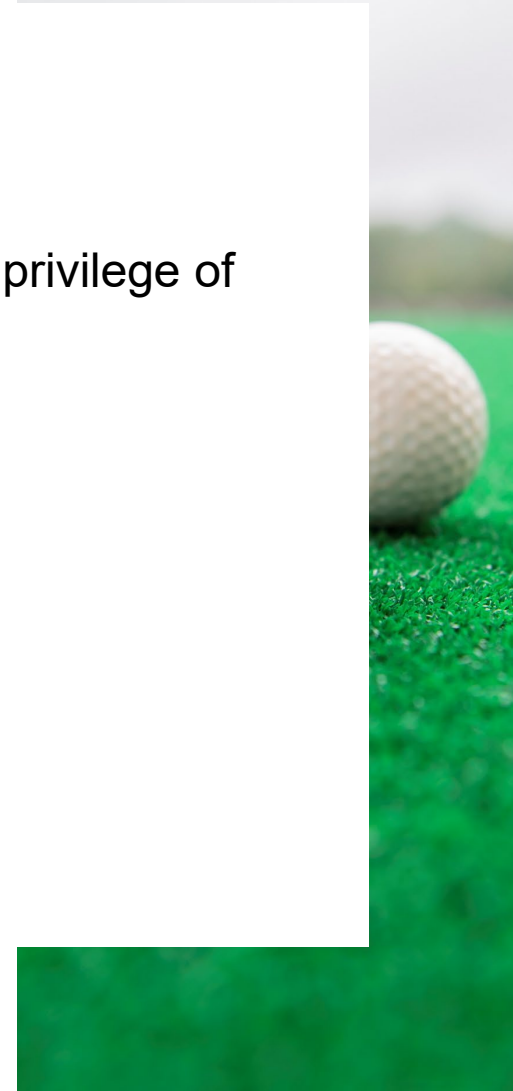
EEOC – Harassment Guidance

- EEOC issued “Enforcement Guidance on Harassment in the Workplace” on April 29, 2024
  - Supersedes prior guidance documents, issued between 1987-1999
  - Was immediately legally challenged by many state AGs
  - Includes 77 scenarios to exemplify what might (or might not) be a Title VII violation
- EEOC noted statistics in updating guidance:
  - Between FY 2016-2023, more than 1/3 of all discrimination charges received by EEOC included harassment allegation
  - 35% of 143 merits lawsuits that the EEOC filed in FY 2023 included harassment allegation



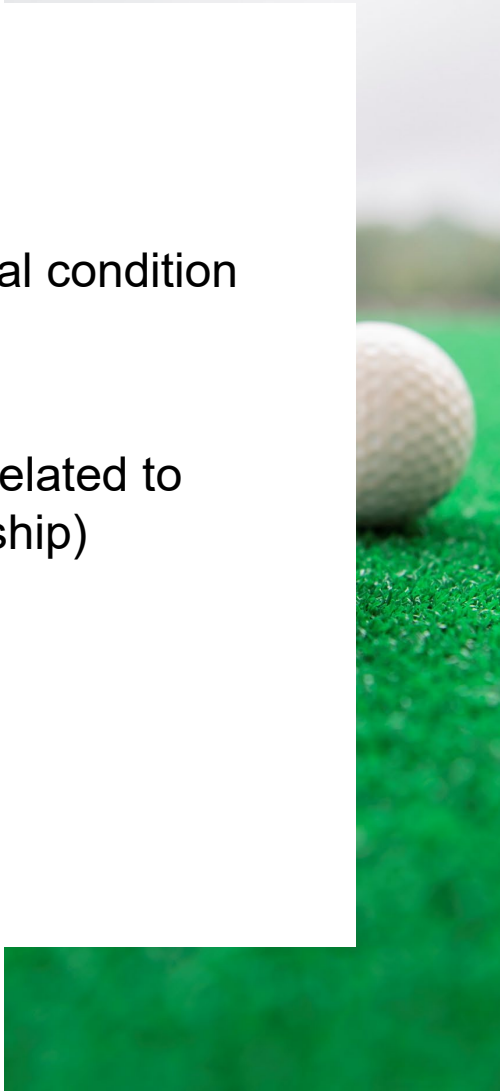
EEOC – Harassment Guidance

- Maintains focus on three components of harassment claims:
  - Conduct based on protected trait (e.g., age, race, sex, etc.)
  - the nature of the harassment resulting in discrimination affecting a term, condition, or privilege of employment; and
  - a basis for holding the employer liable for the conduct
- Addresses emerging workplace issues like:
  - Online, virtual harassment
  - Harassment based on sexual orientation and gender identity
  - Religious expression that could create a hostile work environment
- Opportunity to review and update policies as needed



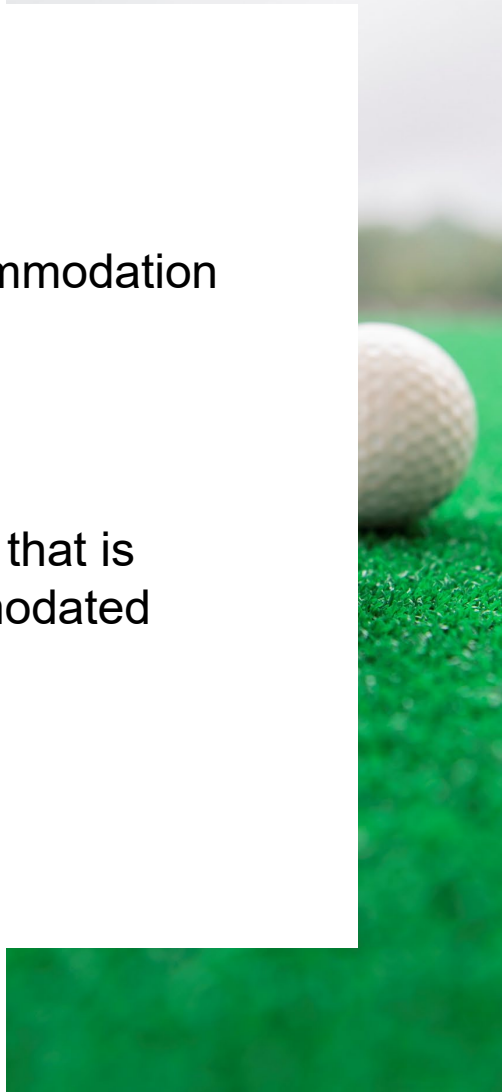
EEOC – Pregnancy Discrimination

- Pregnancy discrimination is a priority for the EEOC
- Title VII (as amended by the Pregnancy Discrimination Act)
  - Prohibits discrimination based on “pregnancy” – current, past, potential; related medical condition (incl. breastfeeding/lactation); having or choosing not to have an abortion; birth control
- Pregnant Workers Fairness Act (PWFA)
  - Requires employers to provide a reasonable accommodation to a known limitation related to pregnancy, childbirth, or related medical condition (unless would cause undue hardship)
- Americans with Disabilities Act (ADA)
  - Prohibits discrimination based on a disability
  - While pregnancy is not a disability, related conditions may be (e.g., diabetes)



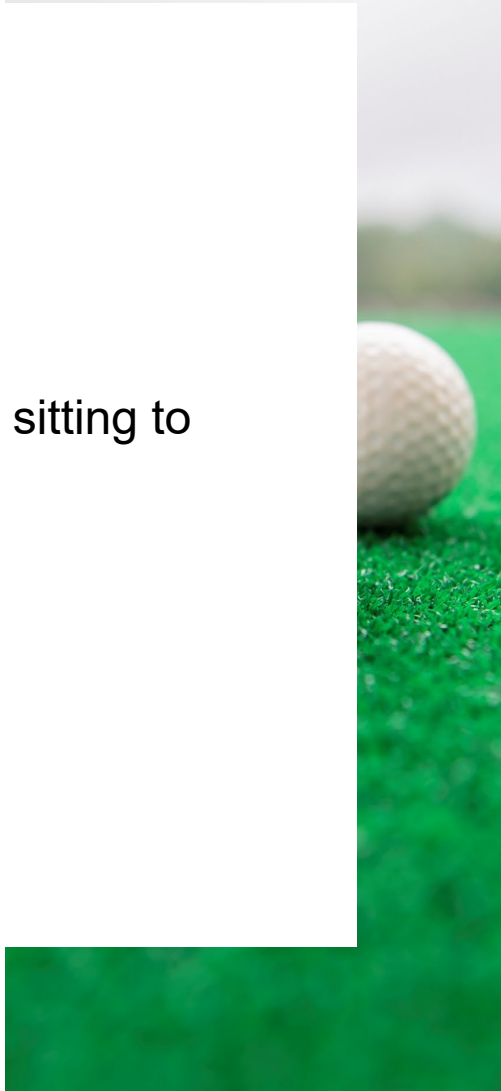
EEOC – Pregnancy Discrimination

- PWFA
  - Prohibits employers from forcing employees to take an accommodation
  - Prohibits employers from requiring that employees take leave if there is another accommodation that will allow them to continue working (and does not cause undue hardship)
  - Similar in some ways but farther reaching than the ADA
    - Pregnancy-related condition need not rise to level of disability
    - Employees may be “qualified” even if they can’t perform one+ essential functions, if that is temporary, they can perform in near future, and inability can be reasonably accommodated
    - Accommodation/undue hardship analysis requires interactive process like ADA
    - Employers only permitted to seek documentation when it is reasonable under the circumstances, and only permitted to seek “reasonable documentation”



EEOC – Pregnancy Discrimination

- EEOC's PWFA regulation became effective June 18 2024
  - Identifies accommodations that EEOC views as reasonable in nearly all cases:
    - allowing an employee to carry or keep water near and drink, as needed
    - allowing an employee to take additional restroom breaks, as needed
    - allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed
    - allowing an employee to take breaks to eat and drink, as needed
- Challenges abound
  - EEOC just brought its first PWFA case on September 10, 2024
  - EEOC currently defending its regulation in appeals court on issue of abortion-related accommodations



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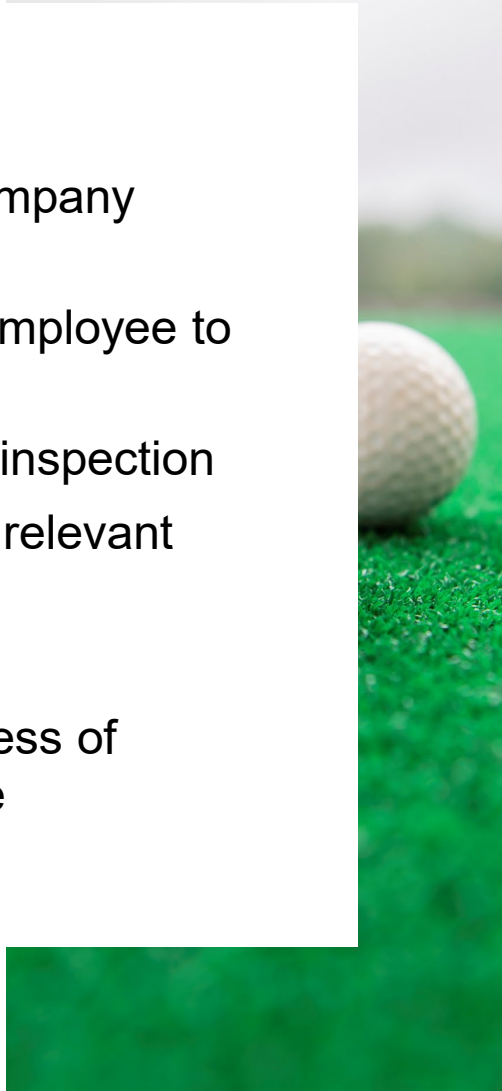
Happenings at OSHA

OSHA's New Walk-Around Rule

- Effective May 21, 2024
- OSH Act gives employers and employees the right to authorize a representative to accompany OSHA compliance officers during workplace inspections
- Per OSHA, the new walk-around rule "clarifies" that employees may authorize another employee to serve as their rep, or may select a non-employee.
  - Non-employee reps must be reasonably necessary to conduct effective and thorough inspection
    - Based on knowledge, skills, or experience with workplace hazards or conditions, or relevant language or communication skills, among other things
  - Employers can object to third-party rep, but OSHA compliance officer decides
- New rule could allow union reps (regardless of whether they are employees and regardless of whether it is a union plant) to join OSHA compliance officers as they inspect the worksite



OSHA's New Heat Proposal

- Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings
  - Notice of Proposed Rulemaking published August 30, 2024
  - Comment period expires on Dec. 30, 2024
  - Rule expected in 2025 or 2026
- Programmatic standard that would require employers to create a plan to evaluate and control heat hazards in their workplace (similar to California)
- Proposed elements of a heat standard, among others:
  - Initial heat trigger (80 degrees F) and high heat trigger (90 degrees F)
  - Prevention measures (breaks, water, two-way communication, etc.)
  - Heat illness and emergency response and planning
  - Training

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DOL Salary Basis Increases

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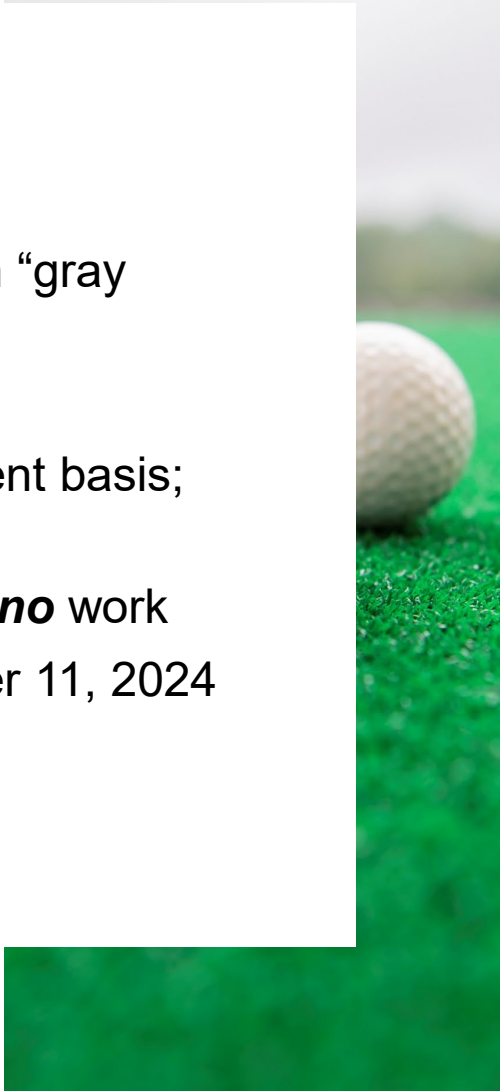
DOL Salary Basis Increases

- Exempt employees must satisfy two-part test
  - Duties (e.g., executive, administrative, professional, computer, outside sales)
    - Significant litigation over whether employees meet these “duties” tests (especially in “gray areas”)
  - Salary basis (for most exemption categories)
    - Predetermined amount of compensation each pay period on a weekly or less frequent basis; cannot be reduced due to variations in quality or quantity of work
    - Exempt employees do not need to be paid for any workweek in which they perform ***no*** work
- Fifth Circuit upheld the DOL’s authority to include a salary basis in this test on September 11, 2024
  - *Mayfield v. U.S. Department of Labor*



DOL Salary Basis Increases

- Just how much salary? According to the DOL's 2024 Final Rule:

Minimum Salary Amount Before July 1, 2024	Minimum Salary Amount Beginning July 1, 2024	Minimum Salary Amount Beginning January 1, 2025
$684 per week (equivalent to a $35,568 annual salary)	$844 per week (equivalent to a $43,888 annual salary)	$1,128 per week (equivalent to a $58,656 annual salary)

- Legal challenges continue, but now is the time to plan

https://www.dol.gov/agencies/whd/overtime/salary-levels

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Questions?

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