

Welcome

Canadian Termination + Severance Practices:

2018 Termination & Severance Survey Results, and Just Cause Termination: Everything You Need to Know.

This Morning's Topics

Termination & Severance Practices in Canada

 LoganHR

 Peter Saulnier, Partner

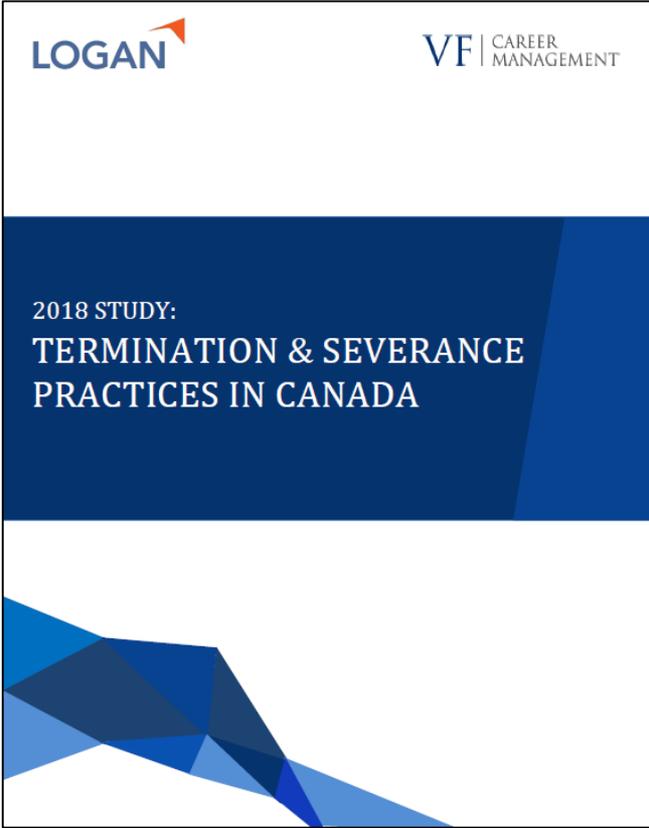
 Liz Grant, Principal Consultant

Just Cause Termination: Everything You Need to Know

 Roper Greyell LLP

 Danny Bernstein, Partner

The 2018 Survey Report



About Us

 The longest standing national Canadian owned career management firm:

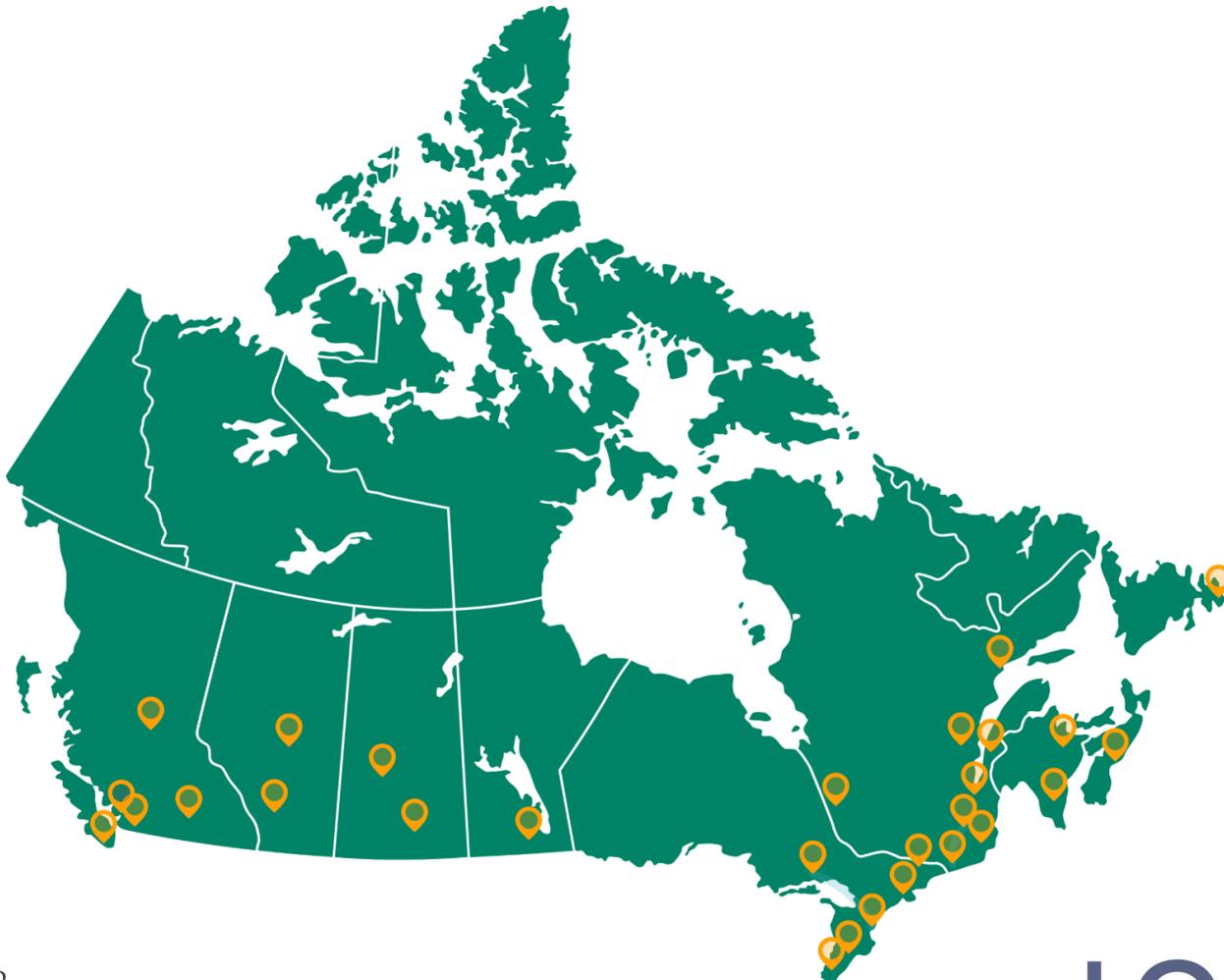
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National coverage from coast to coast



Our Services

 Same caring, competitive, high quality, high touch, coupled with a high tech approach to:



Career Management



Coaching



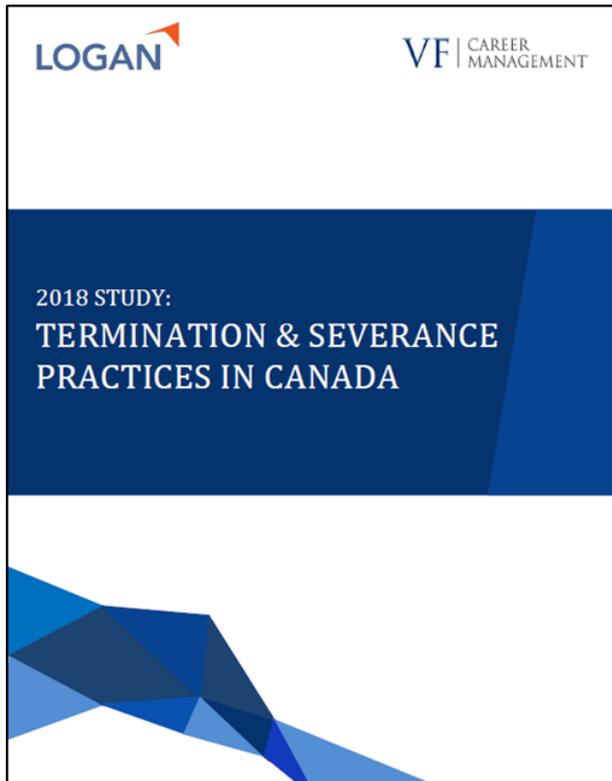
Compensation

Survey Results: Topics for Discussion

1. The Survey

- 👤 The Economy: Workforce Changes
- 👤 Trends in Restructuring
- 👤 Terminations, Severance and Career Transition

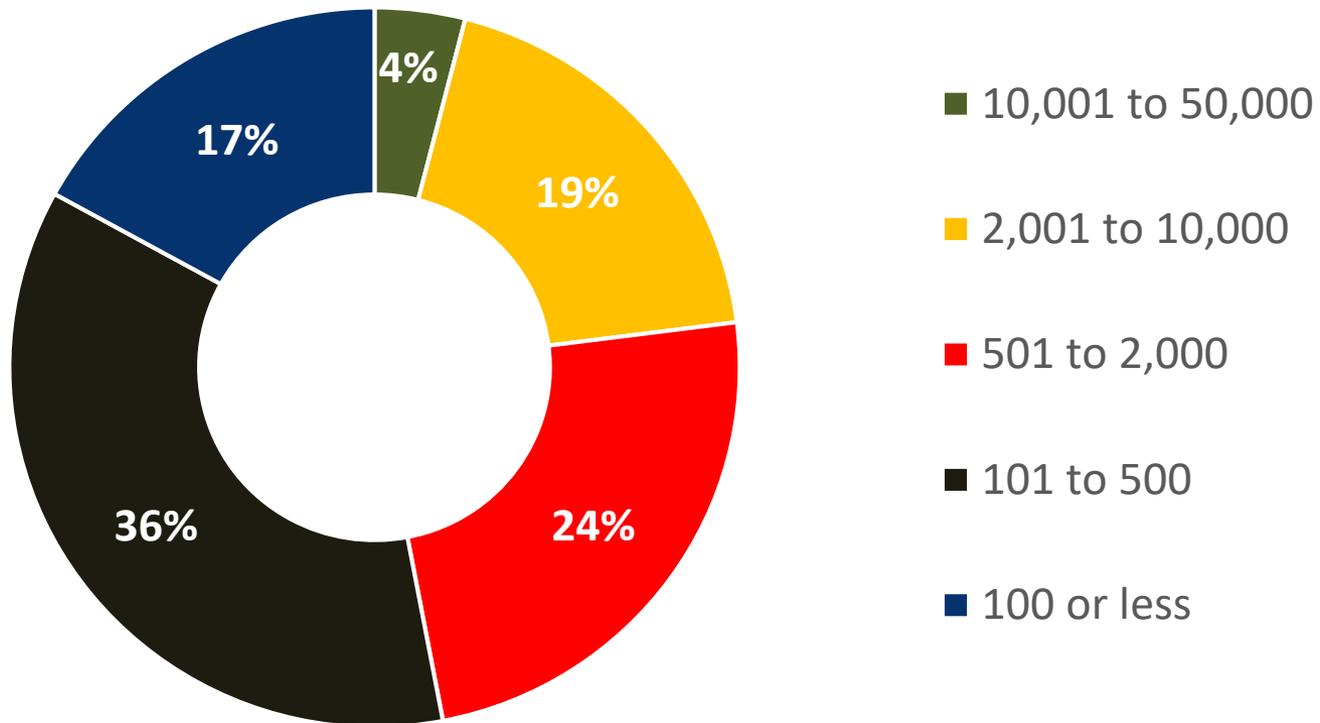
Survey Participants



- 👤 Almost 200 organizations across Canada
- 👤 All industries and regions represented
- 👤 Organizations of all sizes

Organization Size

Number of Employees



Workforce Changes: Past and Future

- 👤 Past – 64% reported the number of employee terminations in the past year to be about the same as the previous year
- 👤 Future – 64% expect employee terminations to be about the same in the coming 12 months
- 👤 Future – 22% expect employee terminations to be lower in the coming 12 months

Reasons for Change

RECENT DRIVERS OF EMPLOYEE TERMINATIONS



64%
Individual
Performance



59%
Organizational
Structure Change



28%
Business Strategy
Change

FORWARD LOOKING DRIVERS OF EMPLOYEE TERMINATIONS



57%
Organizational
Structure Change



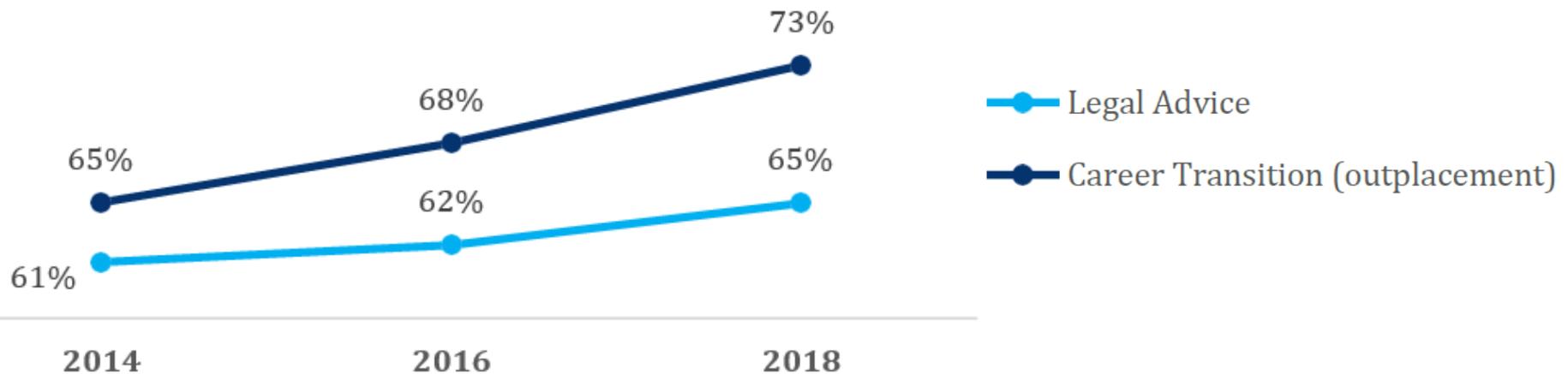
52%
Individual
Performance



29%
Business Strategy
Change

Types of External Support...

Types of external support used by organizations



Termination Planning: Large Downsizings

93% have a detailed plan for large downsizings

👤 Ideal amount of time for planning is more than a month

Common reasons for insufficient project planning

👤 HR told too late

👤 Not enough time

👤 Too many priorities

👤 an aside... 16% cited Inexperienced Management

Termination Planning: Individual Terminations

Most have a detailed plan for individual terminations too

- 👤 Ideal amount of time for planning is a week or more
- 👤 Even a week isn't always possible, so HR needs to be ready with established processes, templates, etc.

Severance Packages Typically Include:

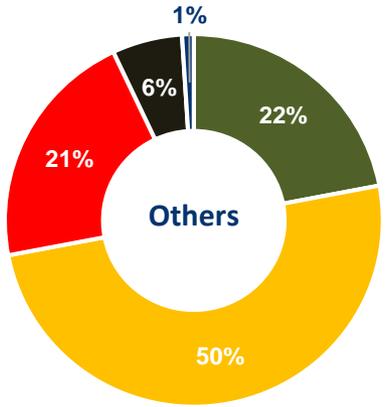
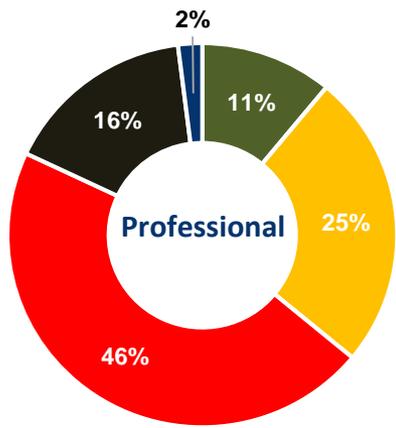
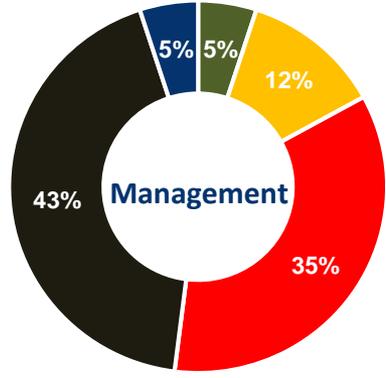
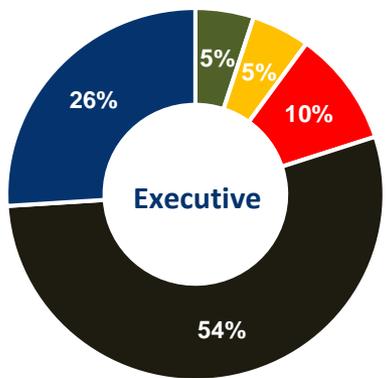
| | Executive | Management | Professional | Others |
|---|-----------|------------|--------------|--------|
| Severance - lump sum | 65% | 66% | 68% | 59% |
| Severance - full salary continuance to end of severance period (no claw back) | 28% | 27% | 20% | 18% |
| Severance - salary continuance with partial payment of outstanding balance upon new position (partial claw back) | 14% | 15% | 16% | 12% |
| Severance - salary continuance stops upon new position (outstanding balance not paid out) | 8% | 6% | 5% | 3% |
| Mix/choice of lump sum and salary continuance | 16% | 14% | 11% | 9% |

Severance Packages Typically Include:

| | Executive | Management | Professional | Others |
|--|-----------|------------|--------------|--------|
| Payment of legal fees | 13% | 9% | 4% | 1% |
| Benefits continuation | 66% | 66% | 60% | 47% |
| Career transition (outplacement) services | 82% | 84% | 72% | 50% |
| Geographic relocation assistance | 5% | 3% | 3% | 1% |
| Non-compete | 45% | 33% | 24% | 13% |
| Non-solicit | 51% | 43% | 34% | 20% |

Typical Severance Per Year of Service

- One Week
- Two Weeks
- Three Weeks
- One Month
- More than One Month



Career Transition Support

THE TOP CRITERIA USED IN DECIDING THE TYPE OR LENGTH OF CAREER TRANSITION SERVICES



WHAT DID SURVEY PARTICIPANTS FIND MOST IMPORTANT IN CHOOSING CAREER TRANSITION PROVIDER?



Career Transition Support

THE TOP REASONS FOR PROVIDING CAREER TRANSITION SERVICES



74%
Right Thing
to Do



59%
For Terminated
Employees to
Receive the
Right Training



48%
Risk Mitigation

Thank-you

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Canadian Termination & Severance Practices:

Just Cause Termination: Everything You Need to Know

September 26, 2018

Danny Bernstein, Partner



Agenda

1. Do you have just cause?
2. Investigating employee misconduct
3. Implementing a termination for cause



1. Do you have just cause for termination?



The legal test for Just Cause

“In general, then, just cause is employee behaviour that, viewed in all the circumstances, is seriously incompatible with the employee’s duties, conduct which goes to the root of the contract and fundamentally strikes at the employment relationship.”

- *Panton v. Everywoman’s Health Centre Society (1988) 2000 BCCA 621*



The Difficult Burden for Employers

- Proving just cause is a heavy burden: “capital punishment of employment law”
- Onus is on the employer to prove necessary facts
- Contextual analysis is required – consider all of the circumstances



The Difficult Burden for Employers

- Balance between the severity of an employee's misconduct and the sanction imposed – focus on proportionality
- Strategic considerations may apply
 - Sending a message
 - Optics



Kerr v Arpac Storage Systems Corp.

- Arpac Storage Systems Corp. (“Arpac”) terminated Mr. Kerr for just cause
- Upon learning that his position was to be eliminated and receiving 12 months working notice, Mr. Kerr committed the following:
 - Altered a company spreadsheet, so that data cells were no long sitting next to the proper employees
 - Deleting thousands of company emails, while forwarding some to his personal email account



Kerr v Arpac Storage Systems Corp

- The Court held that the employer lacked just cause for 4 reasons:
 1. Mr. Kerr's conduct lacked harm to Arpac
 2. Arpac failed to consider Mr. Kerr's medical condition
 3. Arpac failed to consider Mr. Kerr's record of good service
 4. Arpac failed to conduct a proper investigation
- Full citation: *Kerr v Arpac Storage Systems Corp*, 2018 BCSC 704



Best Practices

When faced with a possible just cause situation you need to:

- Act immediately
- Behave consistently (precedent and policy)
- Investigate thoroughly (always!)
- Document and gather evidence
- Clearly warn employee if their employment is in jeopardy



2. Investigating Employee Misconduct



Initial Questions

1. **Who** will investigate?
2. What is the **purpose** of the investigation?
3. What is the **scope** of the investigation?
4. Are **temporary measures** required?



Who will investigate?

- Investigator Considerations:
 - **Neutrality** – must be perceived as fair and unbiased by all parties, and have no prior work history with either party
 - **Expertise** – should have requisite skills and experience to conduct an investigation
 - **Credibility** – should have necessary authority to make findings and recommendations
 - **Availability** – prompt investigation



What is the **purpose** of the investigation?

- To find out what happened
 - To test the integrity of witness and to get him/her to commit to a version of events
 - To obtain insight on explanations, excuses, and defenses
 - To determine the motive behind the events
 - To assess culpability
 - To prevent recurrence in the future



What is the **scope** of the investigation?

- The Terms of Reference are important
 - How you paper the file at the outset as important as substantive content of the investigation itself
 - Courts and Tribunals carefully review initial communications and documents created at outset of investigation to determine true purpose and intent of investigation



Are **temporary measures** required?

- Paid or unpaid leave (suspension) or reassignment pending review / investigation
- Referral to an Employment Assistance Program (“EAP”)



Investigation Preparation

- 1. Be mindful of legislative context or applicable company policies**
 - Employee's rights and obligations?
 - Employer's rights and obligations?
- 2. Logistics**
 - Location, method (Skype, telephone, etc.), time allotted and scheduling constraints
- 3. Pre-investigation communication**
- 4. Gather documents and other physical evidence**
- 5. Interview outline or script**



The Investigation Report

- Useful to divide investigation report into sections, such as
 - Process and methodology
 - Summary of the complaint
 - Summary of the response
 - Facts and evidence gathered
 - Factual conclusions
 - Legal advice and recommendations



Post-Investigation

- Make findings of fact
 - Is there a violation of law or policy?
 - If so, what is appropriate disciplinary response?
 - Consider disciplinary history and other potentially mitigating factors



Post-Investigation

- Communicate conclusion to the Complainant
 - Findings regarding allegations
 - Be mindful of Respondent's privacy - which extends to any disciplinary response
 - Complainant generally not entitled to copy of report



Post-Investigation

- Communicate conclusion to the Respondent
 - If discipline imposed:
 - Articulate reasons for decision
 - Include grounds for decision
 - Letter of discipline is often key piece of evidence / exhibit in investigation report



3. Implementing the termination



The Termination Letter

- Clearly state the grounds you are relying on
- Reference any applicable policies / contracts / job descriptions
- Leave enough room to maneuver
- Write it for the court



The Termination Meeting

- Two people from management (generally direct manager and HR)
- One note-taker and one talker
- Present termination letter
- Short and to-the-point – do not invite argument



The Termination Meeting

- Terminating with cause so no notice, severance, etc.*
- Explain next steps
 - Benefit termination
 - ROE
 - Pension
 - Etc.

*absent something unusual in the contract



The hybrid strategy

- You may have just cause but you also want to avoid a protracted dispute
- Offer the employee a discounted severance package in exchange for a release
- Particularly useful where the facts are potentially embarrassing for the company



The hybrid strategy

- The severance offer goes in a separate letter from termination notice
- Clearly marked “without prejudice”
- In the event there is no settlement, the company will rely on just cause termination. Employee should be aware that this is their chance for a settlement.



Release of Claims

- A release is invaluable and should be requested any time you make a payment that is not contractually or statutorily required
- Releases should be prepared by counsel to ensure all claims are covered and it is enforceable



Getting it wrong

- If you dismiss an employee for just cause which is found to be improper by a court or tribunal, you will owe the employee damages:
 - At least payment in lieu of notice
 - Possibly other forms of compensation
 - Aggravated damages
 - Punitive damages
 - *Bailey v Service Corporation International (Canada) ULC*: \$110K punitive damages award - employer leveled false allegations against employee including that employee abandoned position.



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