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EMPLOYEE APPEARANCE

Dreaded ultimatum: Cut your hair or get out of here!

by Andrew L. Rodman
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

Employers sometimes have a legitimate desire to implement dress code policies. Depending on the type of business and the corporate culture, showing up to work in flip-flops or jeans may not be appropriate. But how far can employers go?

We know an employer may run afoul of the prohibition against religious discrimination in Title VII of the Civil Rights Act of 1964 by failing to accommodate religious-based dress requirements, such as wearing a yarmulke or a hijab. But what about a policy that conflicts with a grooming practice associated with race, such as a particular hairstyle?

The U.S. Court of Appeals for the 11th Circuit (whose rulings apply to all Florida employers) recently addressed that issue in a case in which an employer refused to hire a black applicant with dreadlocks.

No dreadlocks under company grooming policy

Chastity Jones, who is black, applied for a customer service representative (CSR) position with Catastrophe Management Solutions in Mobile, Alabama. CSRs do not have in-person customer contact; they provide customer service support by telephone.

Jones attended an in-person job interview dressed in a blue business suit and wearing her hair in short dreadlocks. After the interview, HR manager Jeannie Wilson, who is white, offered Jones a job in the presence of other applicants. Jones then met privately with Wilson to discuss a scheduling conflict.

During their private conversation, Wilson asked Jones if her hair was in dreadlocks, and Jones responded, "Yes." Wilson then told her that she couldn't be hired with dreadlocks because "they tend to get messy" and explained that a male applicant had been asked to cut his dreadlocks as a condition of employment. Jones replied that she wouldn't cut her hair, handed her new-hire paperwork back to Wilson, and left the office.

Catastrophe Management maintains a grooming policy that states: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines. . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable."

EEOC alleges dreadlocks ban is race discrimination

The Equal Employment Opportunity Commission (EEOC) filed suit in federal court on Jones' behalf, alleging Catastrophe Management's grooming policy amounted to race discrimination in violation of Title VII. The trial court dismissed the EEOC's case, holding that

Title VII only prohibits discrimination on the basis of *immutable* (unchangeable) characteristics such as race, color, and national origin. The law doesn't protect mutable (changeable) characteristics, even if they are closely associated with a particular ethnic group. The EEOC appealed the trial court's order to the 11th Circuit.

Attempting to link dreadlocks to race, the EEOC argued that dreadlocks originated during the slave trade: "During the forced transportation of Africans across the ocean, their hair became matted with blood, feces, urine, sweat, tears, and dirt. Upon observing them, some slave traders referred to the slaves' hair as 'dreadful.'" In short, the EEOC argued that a "prohibition o[n] dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent."

11th Circuit: Dreadlocks tied to culture, not race

The 11th Circuit rejected the EEOC's arguments and upheld the dismissal of the lawsuit. In support of its ruling, the court of appeals reasoned as follows:

(1) The EEOC sued under a disparate treatment theory of liability, which required it to allege and prove intentional discrimination. The agency didn't sue under a disparate impact theory of liability, which would've required it to prove that a facially neutral policy disproportionately affects members of a protected class in violation of Title VII. As the 11th Circuit noted, "The two theories are not interchangeable." An employer's neutral policy can't trigger disparate treatment liability "merely because it has an unintended adverse effect on members of a protected group." In the end, the 11th Circuit held that the EEOC didn't sufficiently allege intentional discrimination—e.g., that Catastrophe Management intentionally applied its grooming policy differently to white and black applicants and employees.

(2) The term "race" refers to "common physical characteristics shared by a group of people and transmitted by their ancestors over time." Those characteristics "are a matter of birth, and not culture." So, when it comes to "race," Title VII was intended to cover inherited physical characteristics—characteristics that are immutable—not cultural practices. While discrimination on the basis of black hair texture (an immutable characteristic) is prohibited under Title VII, adverse action on the basis of black hairstyles (a mutable choice) is not. According to the court, "That dreadlocks are a 'natural outgrowth' of the texture of black hair does not make them an immutable characteristic of race."

(3) Although the EEOC's compliance manual states that "Title VII prohibits employment discrimination against a person because of cultural characteristics linked to race or ethnicity, such as . . . dress and grooming practices," the court of appeals chose not to defer to that published guidance because it conflicts with a legal argument advanced by the EEOC in 2008 that a grooming policy prohibiting dreadlocks falls outside the scope of Title VII even if the hairstyle is associated with a particular race. Also, the position advanced by the EEOC in its compliance manual "runs headlong into a wall of contrary [case law]" upholding facially neutral policies that regulate mutable characteristics.

(4) Expanding the scope of Title VII to encompass cultural characteristics would create a slippery slope because there would be "very thorny issues to confront, such as which cultural characteristics to protect." Similarly, the court wondered how employers would know which cultural practices are associated with a particular race.

(5) If there is any ambiguity about the meaning of "race," that ambiguity should be addressed "through the democratic process"—in other words, by Congress, not the courts.

EEOC v. Catastrophe Management Solutions (11th Cir, 2016).

The long and short of it

Employers, beware: Although the 11th Circuit upheld the lower court's dismissal of the EEOC's lawsuit, it didn't address the potential disparate impact of a "no dreadlocks" policy because the EEOC didn't sufficiently raise that issue. Also, the court didn't hold that the intentional discriminatory application of a no dreadlocks policy—such as refusing to hire black applicants with dreadlocks but hiring white applicants with dreadlocks—would survive scrutiny under Title VII. So you should proceed with caution (and consult with counsel) when you draft, implement, and enforce facially neutral dress or grooming policies.

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SETTLEMENT AGREEMENTS

When is a settlement agreement not a settlement?

by Tom Harper
The Law and Mediation Offices
of G. Thomas Harper, LLC

P.F. Chang's China Bistro received a letter from a Florida employment law firm that represented one of its current employees, a wok cook at the Sawgrass Mills restaurant. The law firm claimed that Kareem Williams, who was still employed at P.F. Chang's, had been the victim of harassment and discrimination. Over two months, the restaurant's lawyer negotiated with Williams' lawyer, eventually reaching a settlement—or so P.F. Chang's thought. When Williams filed suit against the company on April 25, 2016, P.F. Chang's countersued, seeking to enforce the settlement agreement it had reached with his lawyer. Here's what happened.

Changing his mind and changing his claims

Williams began working for P.F. Chang's in the fall of 2014. At the end of January 2016, while he was still working as a wok cook at P.F. Chang's, he contacted a lawyer, complaining that he was being harassed and discriminated against. He hired Jeffrey Del Rio of Spielberger Law Group, who wrote a letter informing P.F. Chang's that Williams had been called "faggot" and the "n" word by two other kitchen employees, and he believed their conduct was based on his sexual orientation. Del Rio stated that Williams had reported his coworkers' conduct to the kitchen manager, who took no action.

During February and March, P.F. Chang's lawyer negotiated a settlement with Del Rio. While the discussions were ongoing, Williams was suspended from his job. On February 29, Del Rio sent an e-mail to P.F. Chang's lawyers in which he stated, "Mr. Williams [has] indicated that if he [could] be paid for the time in which he [had] been suspended, he would be agreeable to a resolution at the $6,500 figure."

The e-mails show that by early March, the lawyers had agreed to settle Williams' complaint for $3,900 plus $632 for the time he lost while he was suspended. In addition, P.F. Chang's agreed to pay Williams' lawyers $2,600. The total settlement was about $7,132. Del Rio agreed to the terms, and P.F. Chang's thought it had reached a settlement.

P.F. Chang's lawyer prepared a written settlement agreement, got it signed by P.F. Chang's officials, and overnighted the signed agreement, along with three settlement checks, to Del Rio. However, Williams refused to sign the agreement and eventually hired another lawyer, who filed a lawsuit in federal court in South Florida in April. With the new lawyer, he sued P.F. Chang's for race discrimination, not gender discrimination or sexual harassment, the claims cited in the January letter.

Williams, who was born in St. Croix and is African-Caribbean by ethnicity and race, noted that the line cooks at the restaurant are predominantly of African descent, while the management team at Sawgrass Mills is predominantly white. He claimed he was treated differently because of his race and denied promotional opportunities regularly given to white employees. He also claimed that his kitchen manager had lost his proficiency test (an assessment required by P.F. Chang's for advancement) and then refused to allow him to retake the test.

P.F. Chang's denied Williams' claims and countersued him for enforcement of the settlement agreement it reached with Del Rio in March. The settlement agreement, which Williams had refused to sign, provided that he released P.F. Chang's "from all and any claims arising from [his] previous employment or separation of employment with P.F. Chang's." The company argued that the parties had reached a "meeting of the minds" on the essential terms of the settlement and that Del Rio spoke for Williams, who wrongly refused to sign the agreement.

In its motion, P.F. Chang's asked the court to find that a settlement had been reached and Williams had breached the agreement by suing the company. Although three checks were sent with the agreement, there was no evidence that the checks were ever cashed. In fact, the cover letter enclosed with the checks stated, "Please do not cash the attorney's fee check until you receive confirmation from Williams that he has accepted the settlement payment."

Court won't force settlement

In deciding whether the settlement agreement should be enforced, the court carefully analyzed all the e-mails and communications between the lawyers. The court found that P.F. Chang's had the burden to establish a meeting of the minds, or mutual assent to certain and definite terms. "While uncertainty as to an agreement to nonessential or small items will not preclude a finding of an enforceable settlement, the agreement must be sufficiently specific and mutually agreeable as to every essential element," said the court.

P.F. Chang's argued that the settlement was enforceable despite Williams' failure to sign the agreement because his lawyer had clear and unequivocal authority to enter into the agreement on his behalf. However, the court found hiring a lawyer to represent your interests isn't enough to confer on the lawyer an implied or apparent authority to compromise and settle your claims. The court noted that even when a lawyer believes he has the authority to settle, that belief isn't enough. The court pointed out that Florida courts "have been very stringent in what they find to be a 'clear and unequivocal' grant of authority" to lawyers.

The court found that the lawyers' correspondence about the settlement didn't show that Del Rio had "clear and unequivocal" authority to enter into the settlement agreement. In fact, the court noted that the company had twice asked Del Rio to have Williams sign the agreement. The court concluded that meant the parties thought Williams' signature was necessary to complete the settlement. *Kareem Williams v. P.F. Chang's China Bistro, Inc.*, Case No. 16-cv-60906 (S.D. Fla., August 16, 2016).

Takeaway

Florida courts are hesitant to force a settlement on a party, even when lawyers representing both sides have all agreed on the terms. A few years ago, I had a three-day evidentiary hearing in Tampa in a similar case with facts even more favorable for the employer. In that case, the former employee also refused to sign the final agreement and fired his lawyers. The lesson? Until the former employee signs on the dotted line, you likely don't have a settlement.

You may contact the author at tom@employmentlawflorida.com. ✤

HEALTH BENEFITS

Employers, take note: Earlier ACA filing deadlines coming in 2017

The transitional relief offered to large employers and self-insured small employers that relaxed the filing deadlines for employee health benefits is ending. In 2017, employers will need to be prepared for earlier deadlines for submitting filings to the IRS and meeting their obligation to provide health benefit statements to employees.

Transitional relief

Under the Affordable Care Act (ACA), applicable large employers (those with 50 or more employees) and small employers that self-insure are required to (1) submit to the IRS a filing that records the level of health benefits they offered employees in the previous year and (2) provide their employees with statements regarding the level of health benefits they offer at the beginning of the year. The reporting requirement is designed to allow the IRS to assess "play-or-pay" penalties on employers that offer either a low level of benefits or benefits considered cost-prohibitive for some employees. It also allows employees to demonstrate to the IRS that they have health coverage and avoid a tax penalty. Forms 1094-B or C and 1095-B or C are used in the process.

In an effort to ease employers into the new filing requirements, the IRS issued transitional relief in late 2015 that relaxed the employer filing deadlines for 2016. Under the transitional relief, employers were allowed to send Form 1095 to employees by March 31, 2016, and file Form 1094 with the IRS by May 31, 2016. Very large employers (those with 250 or more employees) are required to file Form 1094 electronically and were allowed to file by June 30, 2016. Further, only employers with 100 or more employees were required to file in 2016, and they needed to insure only 70% of their full-time employees.

2017 filing changes

The IRS has given no indication that it intends to extend transitional relief in 2017. The filing requirement will now apply to all applicable large employers with 50 or more employees, and employers will have to demonstrate that they insured 95% of their employees for each month of the year. Employers will also have to meet earlier filing deadlines. The form sent to employees must be postmarked by January 31, 2017, and the form sent to the IRS must be submitted (by mail or electronically) no later than February 28, 2017.

Plan ahead

The change means employers should start planning to submit their filings by assessing their benefit levels for 2016 to ensure they reach the 95% threshold for each month and working with their insurers and third-party administrators to accurately reflect their benefit offerings. Employers should also prepare to supply the IRS with data supporting payroll and benefits so the agency can determine whether the codes used to complete the forms are accurate.

Finally, employers should make sure they are using the most up-to-date forms. The IRS recently released Forms 1094 and 1095 for 2017 in draft form. Final versions will be available before applicable large employers and self-insured small employers are required to provide Form 1095 to employees. The IRS has proposed only minor changes to the forms, including removing transitional relief. The final versions are expected later this year and are generally made available on the IRS's website. ✤

WAGE AND HOUR LAW

Does the FLSA provide for an exemption you don't know about?

by Jeff Slanker
Sniffen and Spellman, P.A.

The Fair Labor Standards Act (FLSA) has been in the news frequently over the past few months given the drastic changes the U.S. Department of Labor (DOL) has implemented with regard to its overtime provisions. Employers should note that there are many different types of exemptions to the law's requirements that might allow them to avoid paying certain employees overtime. Smart employers will undertake a review of their workforce to make sure employees are not only properly classified as exempt but also assigned the most appropriate exemption under the myriad exemptions available under the FLSA.

FLSA basics

The FLSA, enacted in the 1930s, was the first federal law to broadly regulate minimum wage and overtime in the American workforce. The law has two main requirements. The first requirement is that all employees should be compensated for their work at a specific minimum wage. There is a federal minimum wage, but states may also set a minimum wage at or above the federal rate. Florida's minimum wage statute currently sets the state minimum wage at $8.05 an hour.

The other main component of the FLSA is its overtime provisions, which require employers to compensate all nonexempt employees at a rate 1½ times their normal rate for each hour they work in excess of 40 hours in a workweek.

Only nonexempt employees are subject to the FLSA's minimum wage and overtime provisions. The Act contains a number of different exemptions, and it's important to understand how those exemptions work in light of the DOL's new overtime rules.

Employees must satisfy three requirements to qualify for the most commonly used FLSA exemptions. First, an employee must be paid on a fixed-salary basis, which means that in nearly all circumstances, he will receive a predetermined salary regardless of the number of hours he works. Second, the employee's salary must meet the minimum threshold mandated by the DOL. Third, the employee must perform certain duties.

DOL's new overtime rules

The DOL is the federal agency tasked with administering and interpreting the FLSA. Pursuant to that authority, it is authorized to issue rules employers must follow to remain in compliance with the Act. As we've reported in past issues of *Florida Employment Law Letter,* the DOL recently issued new rules for the "white-collar" exemptions under the FLSA. Those exemptions are also referred to as the executive, administrative, and professional exemptions.

The new rules raise the minimum salary threshold to qualify for the white-collar exemption to roughly $913 per week. The duties test remains unchanged under the new rules. The rules, which are effective December 1, 2016, also contain revised regulations applicable to the "highly compensated" employee exemption as well as an automatic updating mechanism that will raise the salary threshold for the white-collar exemption every three years. The updating mechanism is tied to the census wage levels, which the DOL used to determine the new salary threshold.

There are many things employers must do to ensure compliance with the new overtime regulations prior to their implementation in December. Of course, you need to evaluate your workforce to make sure you're paying your white-collar employees enough to allow them to remain exempt under the new rules. Further, you should take the opportunity to make sure your exempt workers satisfy the duties test for the administrative exemption. Finally, it's important to evaluate whether employees qualify for a lesser known or more advantageous exemption. For more guidance in that regard, we can look to a recent 11th Circuit case.

A note from the 11th Circuit

The 11th Circuit recently affirmed the dismissal of a lawsuit filed by a lawyer against her former employer for unpaid overtime. In its ruling, the court noted that not all exemptions require the employee to satisfy the minimum salary threshold. The case is important because it's a reminder that some positions subject to the

FLSA exemptions, including attorneys, don't require the employee to be paid a minimum salary.

Indeed, other positions that are exempt but not subject to a minimum salary requirement include teachers and doctors. Academic administrative personnel at schools, colleges, and universities are subject to a modified minimum salary requirement, and some professions provide employers different options for meeting the minimum salary requirement. For example, computer professionals may be paid either on a minimum salary basis or at a specific hourly rate.

The point is, there are many different exemptions under the FLSA, and depending on the classification, some exemptions can be more advantageous, and cost the employer less to maintain, than others. *Antonia N. Okonkwo v. The Callins Law Firm, LLC,* No. 16-10192, 2016 WL 4916850 (11th Cir., Sept. 15, 2016).

Employer takeaway

Although several lawsuits challenging the DOL's new overtime rules are pending in federal courts, employers need to be prepared to comply with the new rules by December 1, 2016. Not only should you review whether you are compensating your exempt employees enough to qualify them as exempt under the new rules, but you should also make sure you've assigned them the most appropriate exemption for their position.

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TRADE SECRETS

DTSA provides additional intellectual property protection

The recently enacted federal Defend Trade Secrets Act (DTSA) was intended to provide some uniformity and predictability to businesses' protection of their valuable trade secrets. However, before taking full advantage of the law's new protections, companies have some policy actions to take.

Is it secret? Is it safe?

Trade secrets consist of any number of things—formulas, recipes, patterns, programs, manufacturing processes, sales methods, advertising techniques, client lists—that keep your business unique and competitive. Essentially, any valuable business information that isn't generally known and your company makes reasonable efforts to keep confidential could be a protectable trade secret.

Trade secrets differ from other forms of intellectual property in that there is no time-based limit on how long a trade secret is protected. Prudent businesses will combine the best efforts of security, need-to-know exposure, and contractual protection (nondisclosure agreements, for example) to preserve the confidentiality of any trade secrets.

If a trade secret is acquired through improper means or disclosure, then the business may have a legal claim against both the party who acquired the secret and, if applicable, the party who wrongly disclosed the secret. Even if the trade secret itself can no longer be protected, the business may be able to recover damages, profits, and royalties.

UTSA: Uniform in theory but not in practice

These claims have traditionally risen under the Uniform Trade Secrets Act (UTSA), which has been adopted by (and remains effective in) nearly all of the states. Yet despite the UTSA's very goal of providing a *uniform* system of trade secret protection through its common definitions, standards, and remedies, the intricacies and interplay of state laws and judicial interpretation led to an inconsistent patchwork of trade secret protection. This is where the DTSA comes in.

Most simply, the DTSA now creates a *federal* claim for misappropriation of trade secrets. Thus, businesses will now have an alternative and, arguably, more consistent path to recover damages for trade secret violations. This will be particularly valuable to multistate organizations.

Meanwhile, note that the DTSA doesn't preempt or overturn existing state laws or the UTSA, so businesses also will still have access to those remedies in the event they are more favorable.

Whistleblower immunity and notice requirement

To take full advantage of the DTSA's remedies, there is one notice requirement to which businesses must pay attention. While protection of trade secrets is of significant importance, so is protection of whistleblowers. Therefore, the DTSA provides immunity to employees and individual contractors who disclose trade secret information as part of whistleblowing activity.

Specifically, the DTSA protects disclosures made "in confidence to a federal, state, or local government official or . . . attorney" when made "solely for the purpose of reporting or investigating a suspected violation of law." The Act also protects sealed disclosures made in a complaint or other document filed in a lawsuit or other proceeding.

Going forward, employees and individual contractors must be given notice of this whistleblower protection in any contracts or policy documents related to trade secret protection. Businesses that fail to provide this notice will not be actively penalized and will still be able to file claims under the DTSA. However, those businesses' recovery under the Act will be limited in that it won't include attorneys' fees or punitive (up to double) damages from any employee or contractor to whom the notice wasn't provided.

Bottom line

Whether the DTSA requires action in your company will depend on how heavily your business relies on trade secrets (and their protection), your states of operation, and whether the legal precedent in those states provides stable, consistent protection of and remedies for trade secret misappropriation.

For many businesses, it may be simpler to add the above-referenced notice to any newly drafted or revised employee agreements or policies related to trade secret protection since that at least offers the chance for full recovery, including attorneys' fees and punitive damages, under either the federal or state laws.

Regardless of which law provides the best remedy, businesses must still maintain diligent efforts to protect their trade secrets from breach, discovery, or disclosure. ✤

BONUSES

Bonuses and the new FLSA overtime regulations

Under the final overtime regulations released by the U.S. Department of Labor (DOL), employers will now be able to count nondiscretionary bonuses, incentive payments, and commissions toward as much as 10% of employees' salary to determine whether they have reached the salary threshold for exemption from overtime. For these payments to count, they must be paid on a quarterly or more frequent basis. The new rules also permit employers to make a catch-up payment.

A highly compensated employee's (HCE) annual compensation may continue to include commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned, as it has in the past. The DOL set the total annual compensation level for HCEs at $134,004 per year, up from a threshold of $100,000. An HCE must receive at least the new standard salary amount of $913 per week on a salary or fee basis. In addition, an HCE must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee and have the primary duty of performing office or nonmanual work.

Nondiscretionary vs. discretionary

Under the federal Fair Labor Standards Act (FLSA), bonus payments are divided into discretionary and nondiscretionary types. Only nondiscretionary bonuses, incentive payments, and commissions may count toward as much as 10% of the salary threshold beginning in December 2016.

Bonuses are discretionary if:

- Both the fact that the payment is to be made and the amount of the payment are determined at the sole discretion of the employer; and
- The bonuses are not paid under any prior contract, agreement, or promise that causes the employee to expect the payments regularly.

Bonuses are nondiscretionary if the employer promises, contracts, or agrees to pay a bonus to employees. Nondiscretionary bonuses include:

- Bonuses that are promised to employees upon hiring;
- Bonuses that are the result of collective bargaining;
- Bonuses that are announced to employees to induce them to work more steadily, more rapidly, or more efficiently;
- Attendance bonuses;
- Individual or group production bonuses;
- Bonuses for quality and accuracy of work;
- Bonuses that are announced to employees to induce them to remain with the company; and
- Bonuses that are contingent on employees continuing in employment until the payment is made.

Bonuses included in regular rate of pay

Employers need to recognize the distinction between bonuses that may count toward as much as 10% of the salary threshold and bonuses that are included in an employee's regular rate of pay for the purpose of determining weekly overtime.

Nondiscretionary bonuses may be included in an employee's regular rate of pay for the purpose of determining the weekly overtime amount owed, while discretionary bonuses may not be included. There is not a

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10% limit on including nondiscretionary bonuses in an employee's regular rate of pay for the purpose of determining overtime.

Exceptions

The FLSA provides several narrow exemptions from the requirement that bonuses be included in an employee's regular rate of pay for the purpose of determining the amount of weekly overtime owed. The responsibility is on the employer to prove that a payment meets one of the exemption requirements. The exemptions include:

- Gifts (or payments in the nature of gifts) made on special occasions as a reward for service that aren't measured by or dependent on hours worked, production, or efficiency;
- Vacation, holiday, or sick leave pay; payment for the employer's failure to provide sufficient work; reasonable payments for traveling expenses; and other similar payments to an employee that aren't made as compensation for hours of employment;
- Sums paid in recognition of services performed during a given period if either:
  - Both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and aren't made under a contract, agreement, or promise that causes the employee to expect such payments regularly;
  - The payments are made under a bona fide profit-sharing plan or trust or a bona fide thrift or savings plan if the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or
  - The payments are talent fees paid to performers, including announcers, on radio and television programs;
- Contributions to a trustee for life, accident, or health insurance, retirement, or similar benefits for employees;
- Premium overtime pay;
- Premium pay for working holidays or weekends;
- Extra compensation provided by a premium rate paid to an employee under an employment contract or collective bargaining agreement; and
- Certain stock option compensation. ✤

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