

Wage and Hour Division, Labor

§ 778.202

Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(c) *Only the statutory exclusions are authorized.* It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these seven exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is determined.

EXTRA COMPENSATION PAID FOR OVERTIME

§ 778.201 Overtime premiums—general.

(a) Certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days are regarded as overtime premiums. In such case, the extra compensation provided by the premium rates need not be included in the employee's regular rate of pay for the purpose of computing overtime compensation due under section 7(a) of the Act. Moreover, under section 7(h) this extra compensation may be credited toward the overtime payments required by the Act.

(b) The three types of extra premium payments which may thus be treated as overtime premiums for purposes of the Act are outlined in section 7(e) (5), (6), and (7) of the Act as set forth in § 778.200(a). These are discussed in detail in the sections following.

(c) Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. No other types of remuneration for employment may be so credited.

§ 778.202 Premium pay for hours in excess of a daily or weekly standard.

(a) *Hours in excess of 8 per day or statutory weekly standard.* Many employment contracts provide for the payment of overtime compensation for hours worked in excess of 8 per day or

40 per week. Under some contracts such overtime compensation is fixed at one and one-half times the base rate; under others the overtime rate may be greater or less than one and one-half times the base rate. If the payment of such contract overtime compensation is in fact contingent upon the employee's having worked in excess of 8 hours in a day or in excess of the number of hours in the workweek specified in section 7(a) of the Act as the weekly maximum, the extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) and may be credited toward statutory overtime payments pursuant to section 7(h) of the Act. In applying these rules to situations where it is the custom to pay employees for hours during which no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, as these terms are explained in §§ 778.216 to 778.224, it is permissible (but not required) to count these hours as hours worked in determining the amount of overtime premium pay, due for hours in excess of 8 per day or the applicable maximum hours standard, which may be excluded from the regular rate and credited toward the statutory overtime compensation.

(b) *Hours in excess of normal or regular working hours.* Similarly, where the employee's normal or regular daily or weekly working hours are greater or less than 8 hours and 40 hours respectively and his contract provides for the payment of premium rates for work in excess of such normal or regular hours of work for the day or week (such as 7 in a day or 35 in a week) the extra compensation provided by such premium rates, paid for excessive hours, is a true overtime premium to be excluded from the regular rate and it may be credited toward overtime compensation due under the Act.

(c) *Premiums for excessive daily hours.* If an employee whose maximum hours standard is 40 hours is hired at the rate of \$5.75 an hour and receives, as overtime compensation under his contract, \$6.25 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily

working hours), his employer may exclude the premium portion of the overtime rate from the employee's regular rate and credit the total of the extra 50-cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of \$6.75 for hours in excess of 12 per day, the extra \$1 payments could likewise be credited toward overtime compensation due under the Act. To qualify as overtime premiums under section 7(e)(5), the daily overtime premium payments must be made for hours in excess of 8 hours per day or the employee's normal or regular working hours. If the normal workday is artificially divided into a "straight time" period to which one rate is assigned, followed by a so-called "overtime" period for which a higher "rate" is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums will be considered part of the regular rate. For a fuller discussion of this problem, see § 778.501.

(d) *Hours in excess of other statutory standard.* Where payment at premium rates for hours worked in excess of a specified daily or weekly standard is made pursuant to the requirements of another applicable statute, the extra compensation provided by such premium rates will be regarded as a true overtime premium.

(e) *Premium pay for sixth or seventh day worked.* Under section 7(e)(6) and 7(h), extra premium compensation paid pursuant to contract or statute for work on the sixth or seventh day worked in the workweek is regarded in the same light as premiums paid for work in excess of the applicable maximum hours standard or the employee's normal or regular workweek.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7311, Jan. 23, 1981]

§ 778.203 Premium pay for work on Saturdays, Sundays, and other "special days".

Under section 7(e)(6) and 7(h) of the Act, extra compensation provided by a Premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular

days of rest or on the sixth or seventh day of the workweek (hereinafter referred to as "special days") may be treated as an overtime premium for the purposes of the Act. If the premium rate is less than time and one-half, the extra compensation provided by such rate must be included in determining the employee's regular rate of pay and cannot be credited toward statutory overtime due, unless it qualifies as an overtime premium under section 7(e)(5).

(a) "Special days" rate must be at least time and one-half to qualify as overtime premium: The premium rate must be at least "one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days." Where an employee is hired on the basis of a salary for a fixed workweek or at a single hourly rate of pay, the rate paid for work on "special days" must be at least time and one-half his regular hourly rate in order to qualify under section 7(e)(6). If the employee is a pieceworker or if he works at more than one job for which different hourly or piece rates have been established and these are bona fide rates applicable to the work when performed during nonovertime hours, the extra compensation provided by a premium rate of at least one and one-half times either (1) the bona fide rate applicable to the type of job the employee performs on the "special days", or (2) the average hourly earnings in the week in question, will qualify as an overtime premium under this section. (For a fuller discussion of computation on the average rate, see § 778.111; on the rate applicable to the job, see §§ 778.415 through 778.421; on the "established" rate, see § 778.400.)

(b) Bona fide base rate required. The statute authorizes such premiums paid for work on "special days" to be treated as overtime premiums only if they are actually based on a "rate established in good faith for like work performed in nonovertime hours on other days." This phrase is used for the purpose of distinguishing the bona fide employment standards contemplated by section 7(e)(6) from fictitious schemes and artificial or evasive devices as discussed in Subpart F of this