

§ 778.205

premium rates for work are made after 5 p.m. only if the employee has not had a meal period or rest period, they are not regarded as overtime premiums; they are premiums paid because of undesirable working conditions.

(c) *Payment in pursuance of agreement.* Premiums of the type which section 7(e)(7) authorizes to be treated as overtime premiums must be paid "in pursuance of an applicable employment contract or collective bargaining agreement," and the rates of pay and the daily and weekly work periods referred to must be established in good faith by such contract or agreement. Although as a general rule a collective bargaining agreement is a formal agreement which has been reduced to writing, an employment contract for purposes of section 7(e)(7) may be either written or oral. Where there is a written employment contract and the practices of the parties differ from its provisions, it must be determined whether the practices of the parties have modified the contract. If the practices of the parties have modified the written provisions of the contract, the provisions of the contract as modified by the practices of the parties will be controlling in determining whether the requirements of section 7(e)(7) are satisfied. The determination as to the existence of the requisite provisions in an applicable oral employment contract will necessarily be based on all the facts, including those showing the terms of the oral contract and the actual employment and pay practices thereunder.

§ 778.205 Premiums for weekend and holiday work—example.

The application of section 7(e)(6) may be illustrated by the following example: Suppose an agreement of employment calls for the payment of \$7.50 an hour for all hours worked on a holiday or on Sunday in the operation of machines by operators whose maximum hours standard is 40 hours and who are paid a bona fide hourly rate of \$5 for like work performed during non-overtime hours on other days. Suppose further that the workweek of such an employee begins at 12:01 a.m. Sunday, and in a particular week he works on a schedule of 8 hours on Sunday and on

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each day from Monday through Saturday, making a total of 56 hours worked in the workweek. Tuesday is a holiday. The payment of \$320 to which the employee is entitled under the employment agreement will satisfy the requirements of the Act since the employer may properly exclude from the regular rate the extra \$20 paid for work on Sunday and the extra \$20 paid for holiday work and credit himself with such amount against the statutory overtime premium required to be paid for the 16 hours worked over 40.

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§ 778.206 Premiums for work outside basic workday or workweek—examples.

The effect of section 7(e)(7) where "clock pattern" premiums are paid may be illustrated by reference to provisions typical of the applicable collective bargaining agreements traditionally in effect between employers and employees in the longshore and stevedoring industries. These agreements specify straight time rates applicable during the hours established in good faith under the agreement as the basic, normal, or regular workday and workweek. Under one such agreement, for example, such workday and workweek are established as the first 6 hours of work, exclusive of mealtime, each day, Monday through Friday, between the hours of 8 a.m. and 5 p.m. Under another typical agreement, such workday and workweek are established as the hours between 8 a.m. and 12 noon and between 1 p.m. and 5 p.m., Monday through Friday. Work outside such workday and workweek is paid for at premium rates not less than one and one-half times the bona fide straight-time rates applicable to like work when performed during the basic, normal, or regular workday or workweek. The extra compensation provided by such premium rates will be excluded in computing the regular rate at which the employees so paid are employed and may be credited toward overtime compensation due under the Act. For example, if an employee is paid \$5 an hour under such an agreement for handling general cargo during the basic, normal, or regular workday and \$7.50 per hour for like work outside of such