

**Wage and Hour Division, Labor**

**§ 778.312**

Congressional purpose to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work would thus be defeated. For this reason, where extra compensation is paid in the form of a lump sum for work performed in overtime hours, it must be included in the regular rate and may not be credited against statutory overtime compensation due.

[46 FR 7314, Jan. 23, 1981]

**§ 778.311 Flat rate for special job performed in overtime hours.**

(a) *Flat rate is not an overtime premium.* The same reasoning applies where employees are paid a flat rate for a special job performed during overtime hours, without regard to the time actually consumed in performance. (This situation should be distinguished from “show-up” and “call-back” pay situations discussed in §§ 778.220 through 778.222 and from payment at a rate not less than one and one-half times the applicable rate to pieceworkers for work performed during overtime hours, as discussed in §§ 778.415 through 778.421). The total amount paid must be included in the regular rate; no part of the amount may be credited toward statutory overtime compensation due.

(b) *Application of rule illustrated.* It may be helpful to give a specific example illustrating the result of paying an employee on the basis under discussion.

(1) An employment agreement calls for the payment of \$5 per hour for work during the hours established in good faith as the basic workday or workweek; it provides for the payment of \$7.50 per hour for work during hours outside the basic workday or workweek. It further provides that employees doing a special task outside the basic workday or workweek shall receive 6 hours’ pay at the rate of \$7.50 per hour (a total payment of \$45) regardless of the time actually consumed in performance. The applicable maximum hours standard is 40 hours in a workweek.

(2) Suppose an employee under such an agreement works the following schedule:

	M	T	W	T	F	S	S
Hours within basic workday	8	8	7	8	8	0	0
Pay under contract .....	\$40	\$40	\$35	\$40	\$40	0	0
Hours outside basic workday	2	2 <sup>1</sup>	1	0	0	4	0
Pay under contract .....	\$15	\$45	\$7.50	0	0	\$30	0

<sup>1</sup>Hours spent in the performance of special work.

(3) To determine the regular rate, the total compensation (except statutory exclusions) must be divided by the total number of hours worked. The only sums to be excluded in this situation are the extra premiums provided by a premium rate (a rate per hour) for work outside the basic workday and workweek, which qualify for exclusion under section 7(e)(7) of the Act, as discussed in § 778.204. The \$15 paid on Monday, the \$7.50 paid on Wednesday and the \$30 paid on Saturday are paid pursuant to rates which qualify as premium rates under section 7(e)(7) of the Act. The total extra compensation (over the straight time pay for these hours) provided by these premium rates is \$17.50. The sum of \$17.50 should be subtracted from the total of \$292.50 due the employee under the employment agreement. No part of the \$45 payment for the special work performed on Tuesday qualifies for exclusion. The remaining \$275 must thus be divided by 48 hours to determine the regular rate—\$5.73 per hour. The employee is owed an additional one-half this rate under the Act for each of 8 overtime hours worked—\$22.92. The extra compensation in the amount of \$17.50 payable pursuant to contract premium rates which qualify as overtime premiums may be credited toward the \$22.92 owed as statutory overtime premiums. No part of the \$45 payment may be so credited. The employer must pay the employee an additional \$5.42 as statutory overtime pay—a total of \$297.92 for the week.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7315, Jan. 23, 1981]

“TASK” BASIS OF PAYMENT

**§ 778.312 Pay for task without regard to actual hours.**

(a) Under some employment agreements employees are paid according to