

**§ 778.322 Reducing the fixed workweek for which a salary is paid.**

If an employee whose maximum hours standard is 40 hours was hired at a salary of \$200 for a fixed workweek of 40 hours, his regular rate at the time of hiring was \$5 per hour. If his workweek is later reduced to a fixed workweek of 35 hours while his salary remains the same, it is the fact that it now takes him only 35 hours to earn \$200, so that he earns his salary at the average rate of \$5.71 per hour. His regular rate thus becomes \$5.71 per hour; it is no longer \$5 an hour. Overtime pay is due under the Act only for hours worked in excess of 40, not 35, but if the understanding of the parties is that the salary of \$200 now covers 35 hours of work and no more, the employee would be owed \$5.71 per hour under his employment contract for each hour worked between 35 and 40. He would be owed not less than one and one-half times \$5.71 (\$8.57) per hour, under the statute, for each hour worked in excess of 40 in the workweek. In weeks in which no overtime is worked only the provisions of section 6 of the Act, requiring the payment of not less than the applicable minimum wage for each hour worked, apply so that the employee's right to receive \$5.71 per hour is enforceable only under his contract. However, in overtime weeks the Administrator has the duty to insure the payment of at least one and one-half times the employee's regular rate of pay for hours worked in excess of 40 and this overtime compensation cannot be said to have been paid until all straight time compensation due the employee under the statute or his employment contract has been paid. Thus if the employee works 41 hours in a particular week, he is owed his salary for 35 hours—\$200, 5 hours' pay at \$5.71 per hour for the 5 hours between 35 and 40—\$28.55, and 1 hour's pay at \$8.57 for the 1 hour in excess of 40—\$8.57, or a total of \$237.12 for the week.

[46 FR 7316, Jan. 23, 1981]

**§ 778.323 Effect if salary is for variable workweek.**

The discussion in the prior section sets forth one result of reducing the workweek from 40 to 35 hours. It is not

either the necessary result or the only possible result. As in all cases of employees hired on a salary basis, the regular rate depends in part on the agreement of the parties as to what the salary is intended to compensate. In reducing the customary workweek schedule to 35 hours the parties may agree to change the basis of the employment arrangement by providing that the salary which formerly covered a fixed workweek of 40 hours now covers a variable workweek up to 40 hours. If this is the new agreement, the employee receives \$200 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. His rate thus varies from week to week, but in weeks of 40 hours or over, it is \$5 per hour (since the agreement of the parties is that the salary covers up to 40 hours and no more) and his overtime rate, for hours in excess of 40, thus remains \$7.50 per hour. Such a salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his full salary if he worked only 25 or 30 hours. No deductions for hours not worked in short workweeks would be made. (For a discussion of the effect of deductions on the regular rate, see §§ 778.304 to 778.307.)

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**§ 778.324 Effect on hourly rate employees.**

A similar situation is presented where employees have been hired at an hourly rate of pay and have customarily worked a fixed workweek. If the workweek is reduced from 40 to 35 hours without reduction in total pay, the average hourly rate is thereby increased as in § 778.322. If the reduction in work schedule is accompanied by a new agreement altering the mode of compensation from an hourly rate basis to a fixed salary for a variable workweek up to 40 hours, the results described in § 778.323 follow.

**§ 778.325 Effect on salary covering more than 40 hours' pay.**

The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was