

specifies a rate of \$5 per hour and guarantees \$200 per week, but he will continue to receive his cost-of-living bonus and commissions in addition to the guaranteed pay. Bonuses and commissions of this type are, of course, included in the "regular rate" as defined in section 7(e). It is also apparent that the \$5 rate specified in the contract is not a "regular rate" under the requirements of section 7(f) since it never controls or determines the total compensation he receives. For this reason, it is not possible to enter into a guaranteed pay agreement of the type permitted under section 7(f) with an employee whose regular weekly earnings are made up in part by the payment of regular bonuses and commissions of this type. This is so because even in weeks in which the employee works sufficient hours to exceed, at his hourly rate, the sum guaranteed, his total compensation is controlled by the bonus and the amount of commissions earned as well as by the hourly rate.

(d) In order to qualify as a "regular rate" under section 7(f) the rate specified in the contract together with the guarantee must be the actual measure of the regular wages which the employee receives. However, the payment of extra compensation, over and above the guaranteed amount, by way of extra premiums for work on holidays, or for extraordinarily excessive work (such as for work in excess of 16 consecutive hours in a day, or for work in excess of 6 consecutive days of work), year-end bonuses and similar payments which are not regularly paid as part of the employee's usual wages, will not invalidate a contract which otherwise qualifies under section 7(f).

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7317, Jan. 23, 1981]

**§ 778.409 Provision for overtime pay.**

The section 7(f) contract must provide for compensation at not less than one and one-half times the specified regular rate for all hours worked in excess of the applicable maximum hours standard for the particular workweek. All excessive hours, not merely those covered by the guarantee, must be compensated at one and one-half times (or a higher multiple) of the specified regular rate. A contract which guaran-

teed a weekly salary of \$169, specified a rate of \$3.60 per hour, and provided that not less than one and one-half times such rate would be paid only for all hours up to and including 46 $\frac{2}{3}$  hours would not qualify under this section. The contract must provide for payment at time and one-half (or more) for all hours in excess of the applicable maximum hours standard in any workweek. A contract may provide a specific overtime rate greater than one and one-half times the specified rate, for example, double time. If it does provide a specific overtime rate it must provide that such rate will be paid for all hours worked in excess of the applicable maximum hours standard.

[46 FR 7317, Jan. 23, 1981]

**§ 778.410 The guaranty under section 7(f).**

(a) The statute provides that the guaranty must be a weekly guaranty. A guaranty of monthly, semimonthly, or biweekly pay (which would allow averaging wages over more than one workweek) does not qualify under this paragraph. Obviously guarantees for periods less than a workweek do not qualify. Whatever sum is guaranteed must be paid in full in all workweeks, however short in which the employee performs any amount of work for the employer. The amount of the guaranty may not be subject to proration or deduction in short weeks.

(b) The contract must provide a guaranty of pay. The amount must be specified. A mere guaranty to provide work for a particular number of hours does not qualify under this section.

(c) The pay guaranteed must be "for not more than 60 hours based on the rate so specified."

**§ 778.411 Sixty-hour limit on pay guaranteed by contract.**

The amount of weekly pay guaranteed may not exceed compensation due at the specified regular rate for the applicable maximum hours standard and at the specified overtime rate for the additional hours, not to exceed a total of 60 hours. Thus, if the maximum hours standard is 40 hours and the specified regular rate is \$5 an hour the weekly guaranty cannot be greater than \$350. This does not mean that an

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employee employed pursuant to a guaranteed pay contract under this section may not work more than 60 hours in any week; it means merely that pay in an amount sufficient to compensate for a greater number of hours cannot be covered by the guaranteed pay. If he works in excess of 60 hours he must be paid, for each hour worked in excess of 60, overtime compensation as provided in the contract, in addition to the guaranteed amount.

[46 FR 7317, Jan. 23, 1981]

### **§ 778.412 Relationship between amount guaranteed and range of hours employee may be expected to work.**

While the guaranteed pay may not cover more than 60 hours, the contract may guarantee pay for a lesser number of hours. In order for a contract to qualify as a bona fide contract for an employee whose duties necessitate irregular hours of work, the number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours the employee may be expected to work. A guaranty of pay for 60 hours to an employee whose duties necessitate irregular hours of work which can reasonably be expected to range no higher than 50 hours would not qualify as a bona fide contract under this section. The rate specified in such a contract would be wholly fictitious and therefore would not be a "regular rate" as discussed above. When the parties enter into a guaranteed pay contract, therefore, they should determine, as far as possible, the range of hours the employee is likely to work. In deciding the amount of the guaranty they should not choose a guaranty of pay to cover the maximum number of hours which the employee will be likely to work at any time but should rather select a figure low enough so that it may reasonably be expected that the rate will be operative in a significant number of workweeks. In both *Walling v. A. H. Belo Co.*, 316 U.S. 624 and *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17 the court found that the employees did actually exceed the number of hours (60 and 84 respectively) for which pay was guaranteed on fairly frequent occasions so that the hourly rate stipulated in

the contract in each case was often operative and did actually control the compensation received by the employees. In cases where the guaranteed number of hours has not been exceeded in a significant number of workweeks, this fact will be weighed in the light of all the other facts and circumstances pertinent to the agreement before reaching a conclusion as to its effect on the validity of the pay arrangement. By a periodic review of the actual operation of the contract the employer can determine whether a stipulated contract rate reasonably expected by the parties to be operative in a significant number of workweeks is actually so operative or whether adjustments in the contract are necessary to ensure such an operative rate.

### **§ 778.413 Guaranty must be based on rates specified in contract.**

The guaranty of pay must be "based on the rate so specified," in the contract. If the contract specifies a regular rate of \$5 and an overtime rate of \$7.50 and guarantees pay for 50 hours and the maximum hours standard is 40 hours, the amount of the guaranty must be \$275, if it is to be based on the rates so specified. A guaranty of \$290 in such a situation would not, obviously, be based on the rates specified in the contract. Moreover, a contract which provides a variety of different rates for shift differentials, arduous or hazardous work, stand-by time, piece-rate incentive bonuses, commissions or the like in addition to a specified regular rate and a specified overtime rate with a guaranty of pay of, say, \$290 from all sources would not qualify under this section, since the guaranty of pay in such a case is not based on the regular and overtime rates specified in the contract.

[46 FR 7318, Jan. 23, 1981]

### **§ 778.414 "Approval" of contracts under section 7(f).**

(a) There is no requirement that a contract, to qualify under section 7(f), must be approved by the Secretary of Labor or the Administrator. The question of whether a contract which purports to qualify an employee for exemption under section 7(f) meets the