

for work “outside of the hours established in good faith * * * as the basic, normal, or regular workday” (section 7(e) (7)) and it cannot therefore qualify as an overtime rate. The regular rate of pay of the employee in this situation is \$6.25 per hour and he is owed additional overtime compensation, based on this rate, for all hours in excess of the applicable maximum hours standard. This rule was settled by the Supreme Court in the case of *Walling v. Helmerich & Payne*, 323 U.S. 37, and its validity has been reemphasized by the definition of the term “regular rate” in section 7(e) of the Act as amended.

[46 FR 7318, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

PSEUDO-BONUSES

§ 778.502 Artificially labeling part of the regular wages a “bonus”.

(a) The term “bonus” is properly applied to a sum which is paid as an addition to total wages usually because of extra effort of one kind or another, or as a reward for loyal service or as a gift. The term is improperly applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract.

(b) For example, if an employer has agreed to pay an employee \$300 a week without regard to the number of hours worked, the regular rate of pay of the employee is determined each week by dividing the \$300 salary by the number of hours worked in the week. The situation is not altered if the employer continues to pay the employee, whose applicable maximum hours standard is 40 hours, the same \$300 each week but arbitrarily breaks the sum down into wages for the first 40 hours at an hourly rate of \$4.80 an hour, overtime compensation at \$7.20 per hour and labels the balance a “bonus” (which will vary from week to week, becoming smaller as the hours increase and vanishing entirely in any week in which the employee works 55 hours or more). The situation is in no way bettered if the employer, standing by the logic of his labels, proceeds to compute and pay overtime compensation due on this “bonus” by prorating it back over the hours of the workweek. Overtime com-

pensation has still not been properly computed for this employee at his regular rate.

(c) An illustration of how the plan works over a 3-week period may serve to illustrate this principle more clearly:

(1) In the first week the employee whose applicable maximum hours standard is 40 hours, works 40 hours and receives \$300. The books show he has received \$192 (40 hours×\$4.80 an hour) as wages and \$108 as bonus. No overtime has been worked so no overtime compensation is due.

(2) In the second week he works 45 hours and receives \$300. The books show he has received \$192 for the first 40 hours and \$36 (5 hours×\$7.20 an hour) for the 5 hours over 40, or a total of \$228 as wages, and the balance as a bonus of \$72. Overtime compensation is then computed by the employer by dividing \$72 by 45 hours to discover the average hourly increase resulting from the bonus—\$1.60 per hour—and half this rate is paid for the 5 overtime hours—\$4. This is improper. The employee’s regular rate in this week is \$6.67 per hour. He is owed \$316.85 not \$304.

(3) In the third week the employee works 50 hours and is paid \$300. The books show that the employee received \$192 for the first 40 hours and \$72 (10 hours×\$7.20 per hour) for the 10 hours over 40, for a total of \$264 and the balance as a bonus of \$36. Overtime pay due on the “bonus” is found to be \$3.60. This is improper. The employee’s regular rate in this week is \$6 and he is owed \$330, not \$303.60.

(d) Similar schemes have been devised for piece-rate employees. The method is the same. An employee is assigned an arbitrary hourly rate (usually the minimum) and it is agreed that his straight-time and overtime earnings will be computed on this rate but that if these earnings do not amount to the sum he would have earned had his earnings been computed on a piece-rate basis of “x” cents per piece, he will be paid the difference as a “bonus.” The subterfuge does not serve to conceal the fact that this employee is actually compensated on a piece-rate basis, that there is no bonus and his regular rate is the quotient of piece-rate earnings divided by hours

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worked (*Walling v. Youngerman-Reynolds Hardwood Company*, 325 U.S. 419).

(e) The general rule may be stated that wherever the employee is guaranteed a fixed or determinable sum as his wages each week, no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply.

[33 FR 986, Jan. 26, 1968; 33 FR 3172, Feb. 20, 1968, as amended at 46 FR 7318, Jan. 23, 1981]

§ 778.503 Pseudo “percentage bonuses.”

As explained in § 778.210 of this part, a true bonus based on a percentage of total wages—both straight time and overtime wages—satisfies the Act’s overtime requirements, if it is paid unconditionally. Such a bonus increases both straight time and overtime wages by the same percentage, and thereby includes proper overtime compensation as an arithmetic fact. Some bonuses, however, although expressed as a percentage of both straight time and overtime wages, are in fact a sham. Such bonuses, like the bonuses described in § 778.502 of this part, are generally separated out of a fixed weekly wage and usually decrease in amount in direct proportion to increases in the number of hours worked in a week in excess of 40. The hourly rate purportedly paid under such a scheme is artificially low, and the difference between the wages paid at the hourly rate and the fixed weekly compensation is labeled a percentage of wage “bonus.”

Example: An employer’s wage records show an hourly rate of \$5.62 per hour, and an overtime rate of one and one-half times that amount, or \$8.43 per hour. In addition, the employer pays an alleged percentage of wage bonus on which no additional overtime compensation is paid:

Week 1—40 hours worked:	
40 hours at \$5.62 per hour	\$224.80
Percentage of total earnings bonus at 33.45% of \$224.80	75.20
Total	300.00
Week 2—43 hours worked:	
40 hours at \$5.62 per hour	224.80
3 hours at \$8.43 per hour	25.29
Subtotal	250.09
Percentage of total earnings bonus at 19.96% of \$250.09	49.91

Total	300.00
Week 3—48 hours worked:	
40 hours at \$5.62 per hour	224.80
8 hours at \$8.43 per hour	67.44
Subtotal	292.24
Percentage of total earnings bonus at 2.66% of \$292.24	7.76
Total	300.00

This employee is in fact being paid no overtime compensation at all. The records in fact reveal that the employer pays exactly \$300 per week, no matter how many hours the employee works. The employee’s regular rate is \$300 divided by the number of hours worked in the particular week, and his overtime compensation due must be computed as shown in § 778.114.

[46 FR 7319, Jan. 23, 1981]

Subpart G—Miscellaneous

§ 778.600 Veterans’ subsistence allowances.

Subsistence allowances paid under Public Law 346 (commonly known as the G.I. bill of rights) to a veteran employed in on-the-job training program work may not be used to offset the wages to which he is entitled under the Fair Labor Standards Act. The subsistence allowances provided by Public Law 346 for payment to veterans are not paid as compensation for services rendered to an employer nor are they intended as subsidy payments for such employer. In order to qualify as wages under either section 6 or section 7 of the Act, sums paid to an employee must be paid by or on behalf of the employer. Since veterans’ subsistence allowances are not so paid, they may not be used to make up the minimum wage or overtime pay requirements of the Act nor are they included in the regular rate of pay under section 7.

§ 778.601 Special overtime provisions available for hospital and residential care establishments under section 7(j).

(a) *The statutory provision.* Section 7(j) of the Act provides, for hospital and residential care establishment employment, under prescribed conditions, an exemption from the general requirement of section 7(a) that overtime compensation be computed on a work-week basis. It permits a 14-day period to be established for the purpose of