DAY AND NIGHT MINIMUMS

Cond.	A			B			C			D		
	MDA	VIS	HAT	MDA	VIS	HAT	MDA	VIS	HAT	MDA	VIS	HAT
ASR												
S-16	880	1¼	684	880	1½	684	880	1¾	684	880	2	684
	MDA	VIS	HAA	MDA	VIS	HAA	MDA	VIS	HAA	MDA	VIS	HAA
C	880	1¼	684	880	1½	684	880	1¾	684	920	2	724
A	Standard		T 2 eng or less—Standard				T over 2 eng—Standard					

City, Albany; State, Ga.; Airport name, Albany Municipal; Elev., 196'; Fac. Class., NAS Albany Radar; Procedure No. Radar-1, Amdt. Orig.; Eff. date, 17 Feb. 68

These procedures shall become effective on the dates specified therein.

(Secs. 307(c), 313(a), 601, Federal Aviation Act of 1958; 49 U.S.C. 1348(c), 1354(a), 1421; 72 Stat. 749, 752, 775)

Issued in Washington, D.C., on January 11, 1968.

EDWARD C. HODSON,
Acting Director, Flight Standards Service.

[F.R. Doc. 68-681; Filed, Jan. 25, 1968; 8:45 a.m.]

Title 16—COMMERCIAL PRACTICES

Chapter I—Federal Trade Commission

PART 228—TIRE ADVERTISING AND LABELING GUIDES

Tire Description

The Federal Trade Commission has deleted the second sentence of the note under subdivision (ii) of § 228.1(b)(3) of the Tire Advertising and Labeling Guides to read as follows:

§ 228.1 **Tire description.**

* * * * *

(b) * * *

(3) *Other disclosures.* * * *

(ii) *Load-carrying capacity and inflation pressure.* * * *

NOTE: Automobile manufacturers who provide tires as original equipment with new automobiles should incorporate such information in the owner's manual given to new car purchasers.

[Guide 1]

(Secs. 5, 6, 38 Stat. 719, as amended, 721; 15 U.S.C. 45, 46)

Approved: January 16, 1968.

By direction of the Commission.

[SEAL] JOSEPH W. SHEA,
Secretary.

[F.R. Doc. 68-983; Filed, Jan. 25, 1968; 8:45 a.m.]

Title 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education, and Welfare

SUBCHAPTER A—GENERAL

PART 8—COLOR ADDITIVES

Subpart—Provisional Regulations

POSTPONEMENT OF CLOSING DATES OF PROVISIONAL LISTING; CANCELLATION OF CERTIFICATES

The color additive amendments of 1960 (Public Law 86-618; 74 Stat. 404; 21 U.S.C. 376, note) authorize the Secretary of Health, Education, and Welfare to postpone the closing date of a provisional listing of a color additive on his own initiative or upon application of an interested person. Requests have been received to postpone the closing dates of provisional listings of a number of color additives because scientific investigations necessary for listing these color additives under section 706 of the Federal Food, Drug, and Cosmetic Act have not been completed.

The Commissioner of Food and Drugs finds that postponement of the closing dates of the provisionally listed color additives included in this order is consistent with the protection of the public health. These extensions are granted on condition that, where applicable, progress reports be supplied on or before June 30, 1968.

The closing dates of the provisional listing of aluminum benzoate, bone black, cochineal, carminic acid, and charcoal for use in cosmetics are not postponed and the provisional listings are therefore terminated as of December 31, 1967. These color additives had been provisionally listed on the basis that scientific investigations were underway preparatory to submission of petitions for permanent listing. The Food and Drug Administration is unaware of any studies currently being made. To allow for an orderly change in cosmetic formulations containing the color additives being delisted, a grace period of 6 months is allowed for continued use.

Scientific investigations of the safety of D&C Yellow No. 11 have been completed. The Commissioner of Food and Drugs has concluded that the data available to him do not presently permit the establishment of a safe level of ingested use of this color additive. Accordingly, the closing date of the provisional listing of D&C Yellow No. 11 is postponed with the restriction that the color additive be used only in externally applied drugs and cosmetics. Certificates for D&C Yellow No. 11, insofar as ingested use is concerned, are cancelled effective 90 days after publication of this order.

By an order published in the FEDERAL REGISTER of July 26, 1967 (32 F.R. 10930), the provisional listing of carminic acid for use in foods and drugs was terminated effective July 1, 1967. A grace period was allowed until December 31, 1967, to permit orderly withdrawal of the color additive from the market. After publication of the order, the Meer Corporation, New York, N.Y., completed investigations previously underway to establish the safety of a carminic acid solution (cochineal extract) for food and drug use and intends submitting a petition for its listing. In the absence of information that the continued use of a carminic acid solution would adversely affect the public health, carminic acid (cochineal extract) is restored to the list of color additives provisionally listed for food and drug use with a closing date of March 31, 1968.

Therefore, pursuant to the authority of the Federal Food, Drug, and Cosmetic Act (sec. 203(a)(2), Public Law 86-618; 74 Stat. 404; 21 U.S.C. 376, note), delegated by the Secretary to the Commissioner (21 CFR 2.120), Part 8 is amended as follows:

§ 8.501 **[Amended]**

1. Section 8.501 *Provisional lists of color additives* is amended in the following respects:

a. In paragraph (b) *Color additives previously and presently subject to certification and provisionally listed for drug and cosmetic use*, the closing dates for D&C Green No. 5, D&C Green No. 6, D&C Yellow No. 10, D&C Yellow No. 11, D&C Red No. 30, D&C Red No. 33, and D&C Blue No. 6 are changed to "Sept. 30, 1968"; the closing date for D&C Green No. 8 is changed to "June 30, 1968", and there is inserted in the "Restrictions" column for D&C Yellow No. 11 the statement "External use only."

b. In paragraph (c) *Color additives previously and presently subject to certification and provisonally listed for use in externally applied drugs and cosmetics*, the closing dates for External D&C Yellow No. 1 and External D&C Green No. 1 are changed to "Sept. 30, 1968".

c. In paragraph (e) *Color additives provisionally listed for food use on the basis of prior commercial sale but which have not been nor are now subject to certification*, the closing date for carbon black (prepared by the "impingement" or "channel" process) is changed to

"Sept. 30, 1968"; the closing date for iron oxide is changed to "June 30, 1968"; a new item "Carminic acid (cochineal extract)" is alphabetically inserted with a closing date of "March 31, 1968"; and xanthophyll is deleted since it has already been permanently listed as corn endosperm oil (§ 8.322).

d. In paragraph (f) *Color additives provisionally listed for drug use on the basis of prior commercial sale but which have not been nor are now subject to certification*, the closing date for carbon black ("impingement" or "channel" process) is changed to "Sept. 30, 1968"; also a new item "Carminic acid (cochineal extract)" is inserted alphabetically with a closing date of "March 31, 1968".

e. Paragraph (g) is amended: By deleting aluminum benzoate, bone black, carminic acid, charcoal, and cochineal; by deleting ferric hydroxide as a separate item and including it parenthetically in the "iron oxides" item as "(hydrated iron oxides)"; and by changing the closing dates for the remaining items to read as indicated. As amended, paragraph (g) reads as follows:

(g) *Color additives provisionally listed for cosmetic use on the basis of prior commercial sale but which have not been nor are now subject to certification.* The color additives provisonally listed in this paragraph are so listed only for the uses and purposes commercially employed prior to July 12, 1960. Thus, a color additive previously used for coloring cosmetics to be applied to portions of the body other than the eye area (as defined in § 8.1(s)) is not provisionally listed for eye-area use.

Color additive	*Closing date*
Aluminum hydroxide	Dec. 31, 1968
Aluminum powder	Do.
Aluminum silicate (including hydrated aluminum silicate).	Do.
Aluminum stearate	June 30, 1968
Annato	Dec. 31, 1968
Azulene	June 30, 1968
Barium sulfate (blanc fixe)	Dec. 31, 1968
Bentonite	June 30, 1968
Bismuth oxychloride	Dec. 31, 1968
Bronze powder	June 30, 1968
Calcium carbonate	Dec. 31, 1968
Calcium silicate	June 30, 1968
Calcium stearate	Do.
Calcium sulfate	Dec. 31, 1968
Caramel	Do.
Carbon black (prepared by the "impingement" or "channel" process).	Sept. 30, 1968
Carmine	Dec. 31, 1968
Carotene	Do.
Chlorophyll copper complex and chlorophyllin copper complex.	Mar. 31, 1968
Chromium hydroxide green	June 30, 1968
Chromium oxide greens	Do.
Copper, metallic powder	Dec. 31, 1968
Copper versenate	June 30, 1968
Cornstarch	Dec. 31, 1968
Dihydroxyacetone	June 30, 1968
Ferric ferrocyanide (iron blue).	Do.
Gold	Dec. 31, 1968
Graphite	June 30, 1968
Guanine (pearl essence)	Do.
Iron oxides (including hydrated iron oxides).	Dec. 31, 1968
Kaolin	June 30, 1968
Lithium stearate	Do.
Magnesium aluminum silicate.	Dec. 31, 1968
Magnesium carbonate	Do.
Magnesium oxide	Do.
Magnesium stearate	June 30, 1968
Magnesium trisilicate	Dec. 31, 1968
Manganese violet (probably $2(NH_4)_2Mn_2(P_2O_7)_2$).	June 30, 1968
Mica	Do.
Silicic acid	Dec. 31, 1968
Silicon dioxide (silica)	Do.
Silk, powdered	Mar. 31, 1968
Talc	Dec. 31, 1968
Tin oxide	Do.
Titanium dioxide	Dec. 31, 1968
Ultramarine blue	June 30, 1968
Ultramarine green	Do.
Ultramarine pink	Do.
Ultramarine red	Do.
Ultramarine violet	Do.
Zinc carbonate	Dec. 31, 1968
Zinc oxide	Do.
Zinc stearate	June 30, 1968

2. Section 8.510 is amended by adding thereto a new paragraph as follows:

§ 8.510 **Cancellation of certificates.**

* * * * *

(f) Certificates issued for D&C Yellow No. 11 and all mixtures containing this color additive are cancelled and have no effect after April 30, 1968, insofar as ingested use is concerned. Use of this color additive in the manufacture of ingested drugs or cosmetics subject to ingestion after that date will result in adulteration.

In order to allow orderly withdrawal from the market of aluminum benzoate, bone black, carminic acid, charcoal, and cochineal for use in cosmetics and in the absence of information that the continued use of these color additives will adversely affect the public health, the Food and Drug Administration will not institute regulatory action against these color additives, or the articles in which they have been permitted to be used, solely for the reason that they are not provisionally or permanently listed as color additives for the period ending June 30, 1968.

Notice and public procedure and delayed effective date are unnecessary prerequisites to the promulgation of this order, and I so find, since section 203(a)(2) of Public Law 86-618 provides for this issuance.

Effective date. This order is effective as of January 1, 1968.

(Sec. 203(a)(2), Public Law 86-618; 74 Stat. 404; 21 U.S.C. 376, note)

Dated: January 18, 1968.

JAMES L. GODDARD,
Commissioner of Food and Drugs.

[F.R. Doc. 68-996; Filed, Jan. 25, 1968; 8:47 a.m.]

Title 27—INTOXICATING LIQUORS

Chapter I—Internal Revenue Service, Department of the Treasury

[T.D. 6945]

PART 5—LABELING AND ADVERTISING OF DISTILLED SPIRITS

Standards of Identity for Neutral Spirits and Domestic Whiskies

Notice of public hearing to be held in Washington, D.C., beginning on September 18, 1967, with respect to certain petitions to amend 27 CFR Part 5, Labeling and Advertising of Distilled Spirits, was published in the FEDERAL REGISTER on July 11, 1967 (32 F.R. 10208). At the conclusion of the hearing and after a thorough study of matters relevant to the issues, including evidence submitted by interested parties at this hearing and the hearing held in April 1966, the following conclusions have been reached:

1. *Proposals.* A group of proposals (subjects 2 through 6 in the notice) considered at the hearing were aimed at eliminating the present restrictions relating to proof of distillation, entry proof, and cooperage required with respect to bourbon, rye, and other traditional American type whiskies, including "straight" whiskies.

Findings. The relative presence of flavoring materials which characterize whisky is normally determined by the proof of distillation of the spirits. As distillation proof rises, flavoring materials decrease until a point is reached at which the spirits no longer possess whisky characteristics (190° proof). The typical American whiskies, bourbon, rye, etc., and the "straight" possess characteristics which distinguish them from other type whiskies. Two principal factors contribute to the development of such characteristics: (a) The distillation of the whisky at lower proofs (not exceeding 160°) resulting in pronounced natural flavoring components in the raw distillate; and (b) the maturing, except in the case of corn whiskies, of such distillates in charred new oak containers so as to cure the whiskies and enhance their palatability.

No evidence was submitted that other proofs of distillation than 190° and 160° would more accurately distinguish whiskies from neutral spirits or American type whiskies from other whiskies even were it conceded that those distinctions are not infallible under sophisticated distilling processes.

No significant evidence was submitted to establish that a change should be made with respect to the American type whiskies in the present limitation on entry proof prescribed in 1962 after experimentation, research, and public hearing. At that time it was concluded that entry at higher proofs would substantially affect the character of the

whisky. These types of whiskies are generally being produced well within the present regulatory limits for distillation and entry proofs.

Storage in charred new oak wood is necessary in order (a) to supply some of the raw materials for the chemical reactions needed to develop the distinguishing characteristics of the whiskies and (b) to act as a catalyst in speeding up chemical reactions vital to the maturing process. The additional materials in the char aid in the removal or alteration of the undesirable flavoring components which result from the low distillation proof and assist in the development of desirable characteristics.

Since charred new oak wood is necessary to properly mature these types of whiskies distilled not in excess of 160° proof, the consumer should be advised if such whiskies (other than the corn whiskies) are not so stored. Reused cooperage does not provide the char and proper balance of wood extractives to mature and develop such whiskies in the traditional manner. The present regulatory requirements provide the consumer with this information by requiring that if such whiskies are stored in reused cooperage they bear, as a part of their designation, "Distilled from rye (or bourbon, wheat, etc.) mash," if distilled from a predominant mash, and the statement, "stored _____ (years and/or months) in reused cooperage", in lieu of the statement "* * * is _____ (years and/or months) old."

The removal of the present regulatory restrictions referred to would facilitate the production of whiskies to be marketed as bourbon, rye, etc., or "straight" whisky which generally lack the distinguishing characteristics of such whiskies, and this would not be in the interests of the consumer. Further, the Congress has recognized the distinctive character of bourbon whisky as unlike other types of beverages, whether foreign or domestic.

Conclusion. All proposals for amendments in the regulations with respect to domestic whiskies distilled at 160° proof of the statement "* * * is _____ (years or less are rejected. The evidence presented did not establish that the requested changes in the standards for distinctive American types of whiskies are in the public interest within the legislative standards for these regulations.

Any claim that the present regulations favor imported products is inapplicable to these types of whiskies. Bourbon whisky can only be produced in the United States and the other types of whiskies distinctive of this country, i.e., rye, corn, "straight," if produced abroad and imported must be labeled so as to show their foreign origin and must comply with the American standards.

2. *Proposal.* One of the petitions considered at the hearing proposed (subject 1 in the notice) to add a new standard of identity for a whisky which has been distilled at more than 160° proof but at less than 190° proof, aged in oak barrels seasoned by prior use, and to permit such whisky to bear a conventional age statement.

Findings. Several studies proved conclusively that whiskies distilled at more than 160° proof mature satisfactorily in used cooperage. Canadian, Scotch, and Irish whiskies are composed primarily of whisky so matured. The storage of whisky in charred new oak containers is peculiar to American types of whiskies which must be distilled at not more than 160° proof. Whisky distilled at proofs higher than 160° and less than 190° and stored in used cooperage has taste and characteristics that are unlike the taste and characteristics which distinguish the American types of whiskies.

The higher distillation proof produces a distillate containing less pronounced natural flavoring components (both desirable and undesirable ones). Thus a smaller amount of wood extractives is needed to produce a balanced, palatable whisky. Whiskies distilled at such higher proofs are matured abroad in American used charred oak containers, "small wood," sherry casks, sherry butts, or other oak containers of varying capacities. Storing of such whisky in charred new oak containers would not produce a balanced whisky since it would be overburdened with wood extractives. Consistent with the higher distillation proof, such whiskies may be properly entered for storage at proofs higher than 125°.

In view of the distinctive characteristics of this whisky, adequate consumer information requires that it bear a distinctive designation and that a standard of identity be established. The word "light" aptly describes the distinguishing character of this whisky. The featuring of the name of a State which is associated in the consumer's mind with an American type whisky would be likely to mislead the consumer into confusing this whisky with the dissimilar American type.

The present regulations with respect to whisky distilled at not exceeding 160° proof are appropriate for the traditional American types but discriminate against the domestic production of whisky distilled at high distillation proof and stored in used cooperage. Although the latter type of whisky is properly matured in used containers, the regulations prohibit it from bearing the normal age statement and require the statement "stored __ years in reused cooperage." This statement, although descriptive of the actual maturing process, adversely affects marketability. The appearance of a storage statement is likely to mislead the consumer into believing the product to be inferior because it was matured in used containers instead of new oak containers. In fact, the product properly matures in used containers although it is different in character than the traditional American types of whiskies. Similar foreign whiskies so matured are, however, permitted to claim age.

Conclusion. The proposal is adopted with modifications. A standard of identity under the distinctive type designation "light whiskey" should be prescribed for a domestic whisky distilled at more than 160° proof, and aged in used or uncharred new oak containers. (The opportunity to use uncharred new containers is provided since the aging effect would be comparable to that of used containers.) If "light whisky" is mixed with less than 20 percent by volume of 100° proof straight whisky, the mixture shall be designated "blended light whiskey." The establishment of a type designation employing the word "light" does not preclude the use of such word as an adjective to describe other whiskies, but it shall not be used as a part of the class or type designation. The names of states which are associated in the consumer's mind with the production of the American types of whiskies shall not be permitted to be featured on the labels and in the advertising of "light whisky" or "blended light whisky."

The regulations as so amended will permit the production in this country of a whisky distilled at relatively high proof on a parity with the production of such whiskies abroad.

3. *Proposal.* One petitioner proposed (subject 8 in the notice) that a maximum limit of 53 wine gallons be imposed on the size of new white oak barrels used for the aging of domestic whiskies.

Findings. The evidence has disclosed that barrels of varying sizes are used for the storage of whiskies in other major whisky-producing countries. Canadian regulations require that whisky be stored in "small wood," i.e., wood casks or barrels of any size not greater than approximately 180 U.S. gallon capacity. Scotch and Irish regulations are silent, but, as far as can be determined, malt and grain whiskies are aged in casks not in excess of 150 gallons. Normally the barrels used have had prior use for other purposes, e.g., as sherry butts or American whisky barrels.

The American type whisky container shows a high degree of standardization, normally approximately 53 gallons. Although size has been relatively constant, domestic containers show marked and important variations in other respects, principally degree and depth of char. The maturing process for American-type whiskies (other than corn whiskies) depends on contact between the whisky and charred new oak and thus there is a necessary relationship between the volume of whisky and the volume of wood surface area available. So far, however, there has not been sufficient experimentation to determine the point at which a barrel would become so large as to be deficient for aging purposes.

Of course, no product, regardless of the size of the barrel in which aged, can bear a type designation unless it possesses the taste, aroma, and characteristics generally attributed to that type. The practice of adding powdered oak, or wood chips, whether large (slabs) or small in size, in order to make up for deficiencies in wood extractives resulting from excessive barrel size is limited by the regulatory requirement that where such materials are used the label state such fact.

Conclusion. The proposal to set maximum size for whisky barrels is rejected. Although the available evidence indicates that the size of the container suitable for aging may vary with the

character of the whisky to be produced, the maximum size of the oak container is effectively limited by the regulatory requirement that the product must possess the taste, aroma, and characteristics generally attributed to it. In addition, the consumer is advised by an appropriate label statement of any attempt to short cut normal aging processes through the addition of wood or wood extractives. The present regulation requiring label disclosure of the addition of wood chips should be amended to make clear that the disclosure requirement applies to the addition of any wood pieces regardless of size. Thus the selection of the size of the container suitable for maturing a product may continue to be left to the distiller.

4. *Proposal.* One petitioner requested that the regulations be amended (subject 7 in the notice) to provide that all domestically produced whiskies must be aged a minimum of 2 years before bottling; a second petition requested a 4-year minimum.

Findings. No need was established for a minimum age requirement for current domestic types of whisky. There are no appreciable amounts of immature whiskies currently being sold. Although some whisky is being offered at less than 2 years of age, this is, in the main, corn whisky. In any event, the present regulations protect the consumer by requiring all whiskies less than 4 years old to bear a true age statement. Although Ireland, Great Britain, and Canada have enacted immature spirits acts, requiring spirits to remain in storage for a specific minimum period, their laws do not require that the consumer be provided with information as to age.

Conclusion. The proposal to establish a minimum age requirement for whiskies is rejected. It is preferable to permit the consumer an adequate basis for the selection of whiskies (even immature ones) than to limit his choice by banning them from the market. The mere desire to conform American regulations to those applicable in foreign countries is not sufficient justification for imposing the proposed limitation.

5. *Proposal.* One petitioner proposed (subjects 9 and 10 in the notice) to relax the standard for straight whisky (and the various types thereof) so as to permit blends of straight whisky of one type or of different types to be designated as straight whisky without the words "blend" or "blended" appearing in the designation.

Findings. No evidence was submitted which would establish that the present regulations, as to the labeling of blends of straight whiskies, fail in their purpose of providing the consumer with information as to the identity of the whiskies he purchases. Nor was any evidence submitted to indicate that this information is meaningless, misunderstood or unimportant to the consumer.

In one respect, however, the present regulations burden the industry with no appreciable benefit to the consumer. Under the present regulations two straight whiskies (unmixed) 4 or more years old produced at the same distillery may be offered to the consumer under identical labels even though differing in age. This being the case, there seems to be no compelling reason insofar as the consumer is concerned why they could not be mixed and offered to him under the same label. Such mixing, under the designation of straight whisky, would give the distiller a greater degree of flexibility in the area of quality control and uniformity of his individual straight whisky brands. In view of the connotation of the designation "straight" whisky as implying a product which is all whisky, the present provisions prohibiting the addition of harmless coloring, flavoring, and blending ingredients, such as caramel, should be applicable to mingled whiskies if designated as "straight" whisky.

Conclusion. The proposal to permit a mixture of different types of straight whisky as "straight" whisky is rejected since it would deprive the consumer of important information which he is now furnished. The consumer is entitled to be advised that he is not buying a single type distillate when, for example, straight bourbon and straight rye whiskies are mixed. Although it was argued that a straight whisky can be produced through the mixture of predominant mashes, prior to distillation, and that therefore similar labeling should be applied to a mixture of straight whiskies, this argument is not relevant to the appropriate designation for a mixture of whiskies.

As to requiring blends of straight whiskies of the same type to be designated as "straight" whisky, the proposal is adopted provided that the straight whiskies are produced by the same distiller at the same distillery, and are not less than 4 years old.

6. *Proposal.* One petitioner proposed (subject 11 in the notice) that grain neutral spirits stored in reused cooperage for not less than 2 years be designated as "grain spirits" and be permitted to claim age. This proposal is related to the subject matter of a hearing held in April 1966; thus, the record of the earlier hearing has been considered at this time.

Findings. Grain neutral spirits when stored in reused cooperage undergo changes which modify the neutral character of the spirits. Such spirits possess a distinctive character which differs from that of neutral spirits which have not been so stored.

The formation of esters, acids, solids and color in the neutral spirits evidences a development of flavoring components related to the period of storage in wood. In general, the development of flavoring components is analogous to that which occurs when whisky is stored in reused cooperage. However, the flavoring components in neutral spirits are minimal and this distinguishes the maturing process from that of whisky.

Aging is a two-step process. Interaction between the distillate and the wood results first in the improvement of the original characteristics in the spirits and second in the development of additional flavoring components. The storage of neutral spirits in oak containers results only in the latter. Therefore, neutral spirits do not "age" in the fullest sense, although they do mature in some respects.

The presence of residual whisky soaked into the staves of the barrels is not necessary to the development of flavoring components in the neutral spirits although it may add to them. The neutral character of the spirits is altered when the spirits come in contact with oak containers, whether new or used.

Conclusion. The proposal is adopted with modifications. It has been established that the neutral character of the spirits is affected when the spirits are put in oak containers and that storage in such containers develops in the spirits certain of the characteristics attributed to age.

In order to recognize the distinction between neutral spirits which have come in contact with oak wood and those which have not, a type designation, "grain spirits," is established within the class "neutral spirits." Similarly, in recognition of the fact that the storage of such spirits in oak containers results in a development of flavoring components, analogous in certain respects to that which occurs in the aging of whisky, the period of such storage may be stated on the label; for example, "* * * stored _____ (years and/or months) in oak casks." No minimum period of storage is prescribed because the neutral spirits begin to acquire their distinctive character and to develop flavoring components when placed in the oak container.

Accordingly, the following amendments to 27 CFR Part 5 are hereby adopted:

PARAGRAPH 1. Section 5.21(a) is amended by adding at the end thereof a new subparagraph (2) reading as follows:

(2) "Grain spirits" are neutral spirits distilled from a fermented mash of grain stored in oak containers and bottled at not less than 80° proof.

PAR. 2. Section 5.21(b) is amended:

A. By striking out the first paragraph and inserting in lieu thereof the following:

(b) *Class 2; Whisky.* "Whisky" is an alcoholic distillate from a fermented mash of grain distilled at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky, and bottled at not less than 80° proof, and also includes mixtures of the foregoing distillates for which no specific standards of identity are prescribed in this part. The types of whisky specified in subparagraphs (1) to (10) of this paragraph shall be deemed "American type" whiskies;

B. By inserting in subparagraph (1) in the first sentence ", at more than 125° proof," after "March 31, 1938, stored";

C. By inserting in subparagraph (1) in the second sentence ", at not more than 125° proof," after "corn grain, stored";

D. By striking out the period in the last sentence of subparagraph (2) and adding at the end thereof "and mixtures of straight whiskies of the same type produced by the same proprietor at the

same distillery all of which are not less than 4 years old."; and

E. By redesignating subparagraphs (11) through (13) as (12) through (14), respectively, and by inserting after subparagraph (10) the following new subparagraph:

(11) "Light whisky" is whisky which has been distilled in the United States at more than 160° proof, stored in used or uncharred new oak containers, and bottled at not less than 80° proof, and also includes mixtures of such whiskies. If "light whisky" is mixed with less than 20 percent by volume of 100° proof straight whisky, the mixture shall be designated "blended light whisky."

PAR. 3. Section 5.21(h) is amended by adding at the end thereof a new subparagraph (5) reading as follows:

(5) The name of any State which the Director finds is associated by consumers with an American type whisky shall not appear in any manner on any label for light whisky, as defined in paragraph (b)(11) of this section, except as a part of the name and address of the distiller, bottler, or person bottled for, as required by § 5.35 (a) and (c).

PAR. 4. Section 5.34(d) is amended to read as follows:

(d) In the case of whisky, including any of the types thereof, produced on or after March 31, 1938, and in the case of brandy produced on or after July 1, 1941, which, in whole or in part, is treated with wood through percolation or otherwise, during distillation, rectification, or storage (other than through contact with the oak container), there shall be stated as a part of the class and type designation the phrase "colored and flavored with wood _____ (insert chips, slabs, etc., as appropriate)": *Provided*, That this paragraph shall not be construed as authorizing the treatment of any of the types of corn whisky with charred wood.

PAR. 5. Section 5.34(f) is amended by striking out in the last sentence "§ 5.21 (b) (11), (12) and (13)," and inserting in lieu thereof "§ 5.21(b) (12), (13) and (14),".

PAR. 6. Section 5.35(e) is amended by adding at the end thereof the following new sentence: "In the case of 'light whisky', as defined in § 5.21(b)(11), the State of distillation shall not appear in any manner on any label, when the Director finds that such State is associated by consumers with an American type whisky, except as a part of a name and address as set forth in paragraph (a) of this section."

PAR. 7. Section 5.38(a) is amended by striking out the period in the last sentence and adding at the end thereof "; or '_____ percent grain spirits,' as appropriate."

PAR. 8. Section 5.39(a) is amended:

A. By inserting in the first sentence of subparagraph (1) "(14)," after (13), "; and".

B. By striking out the first sentence of subparagraph (2) and inserting in lieu thereof the following "In the case of any of the types of straight whisky, if not mixed, the age of the straight whisky; if mixed, the age of the youngest straight whisky."

PAR. 9. Section 5.39(c) is amended to read as follows:

(c) *Other distilled spirits.* Age, maturity, or similar statements or representations as to neutral spirits (except for grain spirits as stated below), gin, liqueurs, cordials, vodka, cocktails, gin fizzes, highballs, bitters, and specialties are misleading and are prohibited from being stated on any label. In the case of grain spirits, the period of storage in oak containers may be stated in immediate conjunction with the required percentage statement; e.g., "_____ percent grain spirits stored _____ (years and/or months) in oak casks".

PAR. 10. Section 5.39(d) is amended by inserting in the second sentence of subparagraph (5) "(except as provided for grain spirits in paragraph (c) of this section)" after "neutral spirits".

PAR. 11. Section 5.62(d) is amended by striking out the period in the last sentence of subparagraph (1) and adding at the end thereof "; or '_____ percent grain spirits,' as appropriate."

The amendments contained in paragraphs 2D and 8B above relieve restrictions presently contained in the regulations and require very little trade adjustment. Therefore, these amendments shall become effective on the first day of the month that begins not less than 30 days after the date of publication in the FEDERAL REGISTER.

In the interest of equity as between members of the distilling industry, to avoid any unfair advantages or windfalls resulting from existing stocks of distilled spirits, the status of which would otherwise be affected by these regulations, and to permit the industry an opportunity to adjust their operations to the changed rules, all other amendments shall become effective July 1, 1972, but shall in no event apply to the labeling of spirits distilled before the date of publication. As to spirits distilled before the date of publication, the present regulations shall continue in effect.

(49 Stat. 981, as amended; 27 U.S.C. 205)

[SEAL] SHELDON S. COHEN,
Commissioner of Internal Revenue.

Approved: January 23, 1968.

STANLEY S. SURREY,
Assistant Secretary of the Treasury.

[F.R. Doc. 68-981; Filed, Jan. 25, 1968; 8:45 a.m.]

Title 29—LABOR

Chapter V—Wage and Hour Division, Department of Labor

SUBCHAPTER B—STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS

PART 778—OVERTIME COMPENSATION

Part 778 of Title 29 of the Code of Federal Regulations is hereby revised as set forth below in order to adapt it to the overtime compensation requirements effective under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) as amended by the Fair Labor Standards Amendments of 1966 (80 Stat. 830), and as affected by the Service Contract Act of 1965 (79 Stat. 1034). The revisions consist principally of clarification of statutory references and changes in figures used to illustrate pay computations so that they will conform to the legislative changes made in provisions of the Act, and other changes of an editorial nature.

The provisions of section 4 of the Administrative Procedure Act (5 U.S.C. 553) which require notice of proposed rule making, opportunity for public participation, and delay in effective date are not applicable because these are interpretative rules. I do not believe such procedures will serve a useful purpose here. Accordingly, this amendment shall become effective immediately.

The revised 29 CFR Part 778 reads as follows:

Subpart A—General Considerations

Subpart B—The Overtime Pay Requirements

INTRODUCTORY

PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE "REGULAR RATE"

Subpart C—Payments That May Be Excluded From the "Regular Rate"

THE STATUTORY PROVISIONS

AUTHORITY: The provisions of this Part 778 issued under 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

Subpart A—General Considerations

§ 778.0 Introductory statement.

The Fair Labor Standards Act, as amended, hereinafter referred to as the Act, is a Federal statute of general application which establishes minimum wage, overtime pay, child labor, and equal pay requirements that apply as provided in the Act. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act. Such employers are also required to comply with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 778.1 Purpose of interpretative bulletin.

This Part 778 constitutes the official interpretation of the Department of

Labor with respect to the meaning and application of the maximum hours and overtime pay requirements contained in section 7 of the Act. It is the purpose of this bulletin to make available in one place the interpretations of these provisions which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. These official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 F.R. 3290).

§ 778.2 Coverage and exemptions not discussed.

This Part 778 does not deal with the general coverage of the Act or various specific exemptions provided in the statute, under which certain employees within the general coverage of the wage and hours provisions are wholly or partially excluded from the protection of the Act's minimum-wage and overtime-pay requirements. Some of these exemptions are self-executing; others call for definitions or other action by the Administrator. Regulations and interpretations relating to general coverage and specific exemptions may be found in other parts of this chapter.

§ 778.3 Interpretations made, continued, and superseded by this part.

On and after publication of this part in the FEDERAL REGISTER, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded or withdrawn. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as Part 778 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended by the Fair Labor Standards Amendments of 1966 are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn. Questions on matters not fully covered by this part may be addressed to the Administrator of the Wage and Hour and Public Contracts Divisions, U.S. Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Divisions.

§ 778.4 Reliance on interpretations.

The interpretations of the law contained in this Part 778 are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (61 Stat. 84).

§ 778.5 Relation to other laws generally.

Various Federal, State, and local laws require the payment of minimum hourly, daily or weekly wages different from the minimum set forth in the Fair Labor Standards Act, and the payment of overtime compensation computed on bases different from those set forth in the Fair Labor Standards Act. Where such legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act, nothing in the act, the regulations or the interpretations announced by the Administrator should be taken to override or nullify the provisions of these laws. Compliance with other applicable legislation does not excuse noncompliance with the Fair Labor Standards Act. Where a higher minimum wage than that set in the Fair Labor Standards Act is applicable to an employee by virtue of such other legislation, the regular rate of the employee, as the term is used in the Fair Labor Standards Act, cannot be lower than such applicable minimum, for the words "regular rate at which he is employed" as used in section 7 must be construed to mean the regular rate at which he is lawfully employed.

§ 778.6 Effect of Davis-Bacon Act.

Section 1 of the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 276a) provides for the inclusion of certain fringe benefits in the prevailing wages that are predetermined by the Secretary of Labor, under that Act and related statutes, as minimum wages for laborers and mechanics employed by contractors and subcontractors performing construction activity on Federal and federally assisted projects. Laborers and mechanics performing work subject to such predetermined minimum wages may, if they work overtime, be subject to overtime compensation provisions of other laws which may apply concurrently to them, including the Fair Labor Standards Act. In view of this fact, specific provision was made in the Davis-Bacon Act for the treatment of such predetermined fringe benefits in the computation of overtime compensation under other applicable statutes including the Fair Labor Standards Act. The application of this provision is discussed in § 5.32 of this title, which should be considered together with the interpretations in this Part 778 in determining any overtime compensation payable under the Fair Labor Standards Act to such laborers and mechanics in any workweek when they are subject to fringe benefit wage determinations under the Davis-Bacon and related acts.

§ 778.7 Effect of Service Contract Act of 1965.

The McNamara-O'Hara Service Contract Act of 1965, which provides for the predetermination and the specification in service contracts entered into by the Federal Government or the District of Columbia, of the minimum wages and fringe benefits to be received by employees of contractors and subcontractors employed in work on such contracts, contains the following provision:

SEC. 6. In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(e)* thereof. (*Subsection designation changed in text from section 7(d) to 7(e) to conform with the relettering enacted by the Fair Labor Standards Amendments of 1966.)

Where the fringe benefits specified in such a service contract are furnished to an employee, the above provision permits exclusion of such fringe benefits from the employee's regular rate of pay under the Fair Labor Standards Act pursuant to the rules and principles set forth in Subpart C of this Part 778. However, the McNamara-O'Hara Act permits an employer to discharge his obligation to provide the specified fringe benefits by furnishing any equivalent combinations of bona fide fringe benefits or by making equivalent or differential payments in cash. Permissible methods of doing this are set forth in Part 4 of this title, Subpart B. If the employer furnishes equivalent benefits or makes cash payments, or both, to an employee as therein authorized, the amounts thereof, to the extent that they operate to discharge the employer's obligation under the McNamara-O'Hara Act to furnish such specified fringe benefits, may be excluded pursuant to such Act from the employee's regular or basic rate of pay in computing any overtime pay due the employee under the Fair Labor Standards Act, pursuant to the rule provided in § 4.55 of this title. This means that such equivalent fringe benefits or cash payments which are authorized under the McNamara-O'Hara Act to be provided in lieu of the fringe benefits specified in determinations issued under such Act are excludable from the regular rate in applying the overtime provisions of the Fair Labor Standards Act if the fringe benefits specified under the McNamara-O'Hara Act would be so excludable if actually furnished. This is true regardless of whether the equivalent benefits or payments themselves meet the requirements of section 7(e) of the Fair Labor Standards Act and Subpart C of this Part 778.

Subpart B—The Overtime Pay Requirements

INTRODUCTORY

§ 778.100 The maximum-hours provisions.

Section 7(a) of the Act deals with maximum hours and overtime compensation for employees who are within the general coverage of the Act and are not specifically exempt from its overtime pay requirements. It prescribes the maximum weekly hours of work permitted for the employment of such employees in any workweek without extra compensation for overtime, and a general overtime rate of pay not less than one and one-half times the employee's regular rate which the employee must receive for all hours worked in any workweek in excess of the applicable maximum hours. The employment by an employer of an employee in any work subject to the Act in any workweek brings these provisions

into operation. The employer is prohibited from employing the employee in excess of the prescribed maximum hours in such workweek without paying him the required extra compensation for the overtime hours worked at a rate meeting the statutory requirement.

§ 778.101 Maximum nonovertime hours.

As a general standard, section 7(a) of the Act provides 40 hours as the maximum number that an employee subject to its provisions may work for an employer in any workweek without receiving additional compensation at not less than the statutory rate for overtime. Hours worked in excess of the statutory maximum in any workweek are overtime hours under the statute; a workweek no longer than the prescribed maximum is a nonovertime workweek under the Act, to which the pay requirements of section 6 (minimum wage and equal pay) but not those of section 7(a) are applicable. With respect to employees brought within the overtime pay provisions for the first time by the Fair Labor Standards Amendments of 1966, a deferment until February 1, 1969, of the application of the general 40-hour standard maximum nonovertime workweek was provided in section 7(a)(2) of the Act pursuant to the following schedule:

Effective February 1, 1967—overtime for hours in excess of 44 in a workweek;
Effective February 1, 1968—overtime for hours in excess of 42 in a workweek;
Effective February 1, 1969—overtime for hours in excess of 40 in a workweek.

Thus the overtime requirements for all employment subject to any provision of section 7(a) on and after February 1, 1969, are the same; i.e., not less than the statutory overtime rate for all hours worked in excess of 40 in any workweek.

§ 778.102 Application of overtime provisions generally.

Since there is no absolute limitation in the Act on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed by section 7(a). The Act does not require, however, that an employee be paid overtime compensation for hours in excess of eight per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more than the maximum number of hours prescribed in the Act are actually worked in the workweek, overtime compensation pursuant to section 7(a) need not be paid. Nothing in the Act, however, will relieve an employer of any obligation he may have assumed by contract or of any obligation imposed by other Federal or State law to limit overtime hours of work or to pay premium rates for work in excess of a daily standard or for work on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or workday. (The effect of making such payments is discussed in §§ 778.201–207 and 778.219.)

§ 778.103 The workweek as the basis for applying section 7(a).

If in any workweek an employee is covered by the Act and is not exempt from its overtime pay requirements, the employer must total all the hours worked by the employee for him in that workweek (even though two or more unrelated job assignments may have been performed), and pay overtime compensation for each hour worked in excess of the maximum hours applicable under section 7(a) of the Act. In the case of an employee employed jointly by two or more employers (see Part 791 of this chapter), all hours worked by the employee for such employers during the workweek must be totaled in determining the number of hours to be compensated in accordance with section 7(a). The principles for determining what hours are hours worked within the meaning of the Act are discussed in Part 785 of this chapter.

§ 778.104 Each workweek stands alone.

The Act takes a single workweek as its stndard and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40. This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis. The rule is also applicable to pieceworkers and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a weekly basis.

§ 778.105 Determining the workweek.

An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made, is discussed in §§ 778.301 and 778.302.

§ 778.106 Time of payment.

There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next pay day after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in § 778.303. For a discussion of overtime payments due because of increases by way of bonuses, see § 778.209.

Principles for Computing Overtime Pay Based on the "Regular Rate"

§ 778.107 General standard for overtime pay.

The general overtime pay standard in section 7(a) requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed. The regular rate of pay at which the employee is employed may in no event be less than the statutory minimum. (The statutory minimum is the specified minimum wage applicable under section 6 of the Act, except in the case of workers specially provided for in section 14 and workers in Puerto Rico, the Virgin Islands, and American Samoa who are covered by wage orders issued pursuant to section 8 of the Act.) If the employee's regular rate of pay is higher than the statutory minimum, his overtime compensation must be computed at a rate not less than one and one-half times such higher rate. Under certain conditions prescribed in section 7 (f), (g), and (j), the Act provides limited exceptions to the application of the general standard of section 7(a) for computing overtime pay based on the regular rate. With respect to these, see §§ 778.400 through 778.421 and 778.601 and Part 548 of this chapter. The Act also provides, in section 7 (b), (c), (d), and (i) and in section 13, certain partial and total exemptions from the application of section 7(a) to certain employees and under certain conditions. Regulations and interpretations concerning these exemptions are outside the scope of this Part 778 and reference should be made to other applicable parts of this chapter.

§ 778.108 The "regular rate".

The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (Bay Ridge Operating Co. v. Aaron, 334 U.S. 446). The Supreme Court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed—an

"actual fact" (Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419). Section 7(e) of the Act requires inclusion in the "regular rate" of "all remuneration for employment paid to, or on behalf of, the employee" except payments specifically excluded by paragraphs (1) through (7) of that subsection. (These seven types of payments, which are set forth in § 778.200 and discussed in §§ 778.201 through 778.224, are hereafter referred to as "statutory exclusions.") As stated by the Supreme Court in the Youngerman-Reynolds case cited above: "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

§ 778.109 The regular rate is an hourly rate.

The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§ 778.400–778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).

§ 778.110 Hourly rate employee.

(a) *Earnings at hourly rate exclusively.* If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his "regular rate." For his overtime work he must be paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $2 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $98 (46 hours at $2 plus 6 at $1). In other words, the employee is entitled to be paid an amount equal to $2 an hour for 40 hours and $3 an hour for the 6 hours of overtime, or a total of $98.

(b) *Hourly rate and bonus.* If the employee receives, in addition to his earnings at the hourly rate, a production bonus of $4.60, the regular hourly rate of pay is $2.10 an hour (46 hours at $2 yields $92; the addition of the $4.60 bonus makes a total of $96.60; this total divided by 46 hours yields a rate of $2.10). The employee is then entitled to be paid a total wage of $102.90 for 46 hours (46 hours at $2.10 plus 6 hours at $1.05, or 40 hours at $2.10 plus 6 hours at $3.15).

§ 778.111 Pieceworker.

(a) *Piece rates and supplements generally.* When an employee is employed on a piece-rate basis, his regular hourly rate of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's "regular rate" for that week. For his overtime work the pieceworker is entitled to be paid, in addition to his total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers are concerned, see § 778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, if the employee has worked 50 hours and has earned $83.60 at piece rates for 46 hours of productive work and in addition has been compensated at $1.60 an hour for 4 hours of waiting time, his total compensation, $90, must be divided by his total hours of work, 50, to arrive at his regular hourly rate of pay—$1.80. For the 10 hours of overtime the employee is entitled to additional compensation of $9 (10 hours at 90 cents). For the week's work he is thus entitled to a total of $99 (which is equivalent to 40 hours at $1.80 plus 10 overtime hours at $2.70).

(b) *Piece rates with minimum hourly guarantee.* In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum hourly guaranty which he was paid is his regular rate in that week. In the example just given, if the employee was guaranteed $1.70 an hour for productive working time, he would be paid $78.20 (46×$1.70) for the 46 hours of productive work (instead of the $83.60 earned at piece rates). In a week in which no waiting time was involved, he would be owed an additional 85 cents (half-time) for each of the 6 overtime hours worked, to bring his total compensation up to $83.30 (46 hours at $1.70 plus 6 hours at 85 cents or 40 hours at $1.70 plus 6 hours at $2.55). If he is paid at a different rate for waiting time, his regular rate is the weighted average of the two hourly rates, as discussed in § 778.115.

§ 778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

§ 778.113 Salaried employees—general.

(a) *Weekly salary.* If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $70 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $70 divided by 35 hours, or $2 an hour, and when he works overtime he is entitled to receive $2 for each of the first 40 hours and $3 (one and one-half times $2) for each hour thereafter. If an employee is hired at a salary of $70 for a 40-hour week, his regular rate is $1.75 an hour.

(b) *Salary for periods other than workweek.* Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $277.33, or a regular semimonthly salary of $138.67 for 40 hours a week, is thus found to be $1.60 per hour. The Administrator has announced that, as an enforcement policy, he will consider that payment of such regular monthly or semimonthly salary is in accordance with the minimum wage requirements of the Act for employment to which the $1.60 minimum rate is applicable. Under regulations of the Administrator, pursuant to the authority given to him in section 7(g)(3) of the Act, the parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage.

§ 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he

will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $80 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $2, $1.82, $1.60, and $1.67, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $80; for the second week $83.64 ($80 plus 4 hours at 91 cents, or 40 hours at $1.82 plus 4 hours at $2.73); for the third week $88 ($80 plus 10 hours at 80 cents, or 40 hours at $1.60 plus 10 hours at $2.40); for the fourth week approximately $86.72 ($80 plus 8 hours at 84 cents or 40 hours at $1.67 plus 8 hours at $2.51).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

§ 778.115 Employees working at two or more rates.

Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternative methods of computing overtime pay in such cases are discussed in §§ 778.400 and 778.415 through 778.421.

§ 778.116 Payments other than cash.

Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the regular rate. (See §§ 531.32 and 531.37(b) of this chapter for a discussion as to the inclusion of goods and facilities in wages and the method of determining reasonable cost.) Where, for example, an employer furnishes lodging to his employees in addition to cash wages, the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined.

§ 778.117 Commission payments—general.

Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on a fixed allowance per unit agreed upon as a measure of accomplishment, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay day or pay period, does not excuse the employer from including this payment in the employee's regular rate.

§ 778.118 Commission paid on a workweek basis.

When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek (except overtime premiums and other payments excluded as provided in section 7(e) of the Act), and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard.

§ 778.119 Deferred commission payments—general rules.

If the calculation and payment of the commission cannot be completed until sometime after the regular pay day for the workweek, the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained. Until that is done he may pay compensation for overtime at a rate not less than one and one-half times the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. The employee must then receive additional overtime compensation for each week during the period in which he worked in excess of the applicable maximum hours standard. The additional compensation for that workweek must be not less than one-half of the increase in the hourly rate of pay attributable to the commission for that week multiplied by the number of hours worked in excess of the applicable maximum hours standard in that workweek.

§ 778.120 Deferred commission payments not identifiable as earned in particular workweeks.

If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reaasonably presumed to be earned each week, some other reasonable and equitable method must be adopted. The following methods may be used:

(a) *Allocation of equal amounts to each week.* Assume that the employee earned an equal amount of commission

in each week of the commission computation period and compute any additional overtime compensation due on this amount. This may be done as follows:

(1) For a commission computation period of 1 month, multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week. If there is a semimonthly computation period, multiply the commission payment by 24 and divide by 52 to get each week's commission. For a commission computation period of a specific number of workweeks, such as every 4 weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week.

(2) Once the amount of commission allocable to a workweek has been ascertained for each week in which overtime was worked, the commission for that week is divided by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due is computed by multiplying one-half of this figure by the number of overtime hours worked in the week. A shorter method of obtaining the amount of additional overtime compensation due is to multiply the amount of commission allocable to the week by the decimal equivalent of the fraction $\frac{\text{Overtime hours}}{\text{Total hours} \times 2}$. A coefficient table (WH–134) has been prepared which contains the appropriate decimals for computing the extra half-time due.

Examples:

(i) If there is a monthly commission payment of $41.60, the amount of commission allocable to a single week is $9.60 ($41.60×12=$499.20÷52=$9.60). In a week in which an employee who is due overtime compensation after 40 hours works 48 hours, dividing $9.60 by 48 gives the increase to the regular rate of $0.20. Multiplying one-half of this figure by 8 overtime hours gives the additional overtime pay due of $0.80. The $9.60 may also be multiplied by 0.083 (the appropriate decimal shown on the coefficient table), to get the additional overtime pay due of $0.80.

(ii) An employee received $38.40 in commissions for a 4-week period. Dividing this by 4 gives him a weekly increase of $9.60. Assume that he is due overtime compensation after 40 hours and that in the 4-week period he worked 44, 40, 44 and 48 hours. He would be due additional compensation of $0.44 for the first and third week ($9.60÷44=0.22÷2=0.11×4 overtime hours=$0.44), no extra compensation for the second week during which no overtime hours were worked, and $0.80 for the fourth week, computed in the same manner as weeks one and three. The additional overtime pay due may also be computed by multiplying the amount of the weekly increase by the appropriate decimal on the coefficient table, for each week in which overtime was worked.

(b) *Allocation of equal amounts to each hour worked.* If there are facts which make it inappropriate to assume equal commission earnings for each workweek as outlined in paragraph (a) of this section, assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period, and divide the amount of the commission payment by the number of hours worked in the period to obtain the amount of increase in the regular rate allocable to the commission payment. One-half of this figure should be multiplied by the number of statutory overtime hours worked by the employee in the overtime workweeks of the commission computation period, to get the amount of additional overtime compensation due for this period.

Example: An employee received commissions of $19.20 for a commission computation period of 96 hours, including 16 overtime hours (i.e., two workweeks of 48 hours each). Dividing the $19.20 by 96 gives a $0.20 increase in the hourly rate. If the employee is entitled to overtime after 40 hours in a workweek, he is due an additional $1.60 for the commission computation period, representing an additional $0.10 for each of the 16 overtime hours.

§ 778.121 Commission payments—delayed credits and debits.

If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during such period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work which actually occurred during a previous period. The hourly increase resulting from the commission may be computed as outlined in the preceding paragraphs.

§ 778.122 Computation of overtime for commission employees on established basic rate.

Overtime pay for employees paid wholly or partly on a commission basis may be computed on an established basic rate, in lieu of the method described above. See § 778.400 and Part 548 of this chapter.

Subpart C—Payments That May Be Excluded From the "Regular Rate"

THE STATUTORY PROVISIONS

§ 778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

(a) *Section 7(e).* This subsection of the Act provides as follows:

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency; [discussed in § 778.212].

(2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; [discussed in §§ 778.216 through 778.224].

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs; [discussed in §§ 778.208 through 778.215 and 778.225].

(4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees; [discussed in §§ 778.214 and 778.215].

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be; [discussed in §§ 778.201 and 778.202].

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or [discussed in §§ 778.203, 778.205, and 778.206].

(7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; [discussed in §§ 778.201 and 778.206].

(b) *Section 7(h).* This subsection of the Act provides as follows:

Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(c) *Only the statutory exclusions are authorized.* It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these seven exclusionary clauses must

be added into the total compensation received by the employee before his regular hourly rate of pay is determined.

EXTRA COMPENSATION PAID FOR OVERTIME

§ 778.201 Overtime premiums—general.

(a) Certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days are regarded as overtime premiums. In such case, the extra compensation provided by the premium rates need not be included in the employee's regular rate of pay for the purpose of computing overtime compensation due under section 7(a) of the Act. Moreover, under section 7(h) this extra compensation may be credited towards the overtime payments required by the Act.

(b) The three types of extra premium payments which may thus be treated as overtime premiums for purposes of the Act are outlined in section 7(e) (5), (6), and (7) of the Act as set forth in § 778.200(a). These are discussed in detail in the sections following.

(c) Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. No other types of remuneration for employment may be so credited.

§ 778.202 Premium pay for hours in excess of a daily or weekly standard.

(a) *Hours in excess of 8 per day or statutory weekly standard.* Many employment contracts provide for the payment of overtime compensation for hours worked in excess of 8 per day or 40 per week. Under some contracts such overtime compensation is fixed at one and one-half times the base rate; under others the overtime rate may be greater or less than one and one-half times the base rate. If the payment of such contract overtime compensation is in fact contingent upon the employee's having worked in excess of 8 hours in a day or in excess of the number of hours in the workweek specified in section 7(a) of the Act as the weekly maximum, the extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) and may be credited toward statutory overtime payments pursuant to section 7(h) of the Act. In applying these rules to situations where it is the custom to pay employees for hours during which no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, as these terms are explained in §§ 778.216 to 778.224, it is permissible (but not required) to count these hours as hours worked in determining the amount of overtime premium pay, due for hours in excess of 8 per day or the applicable maximum hours standard, which may be excluded from the regular rate and credited toward the statutory overtime compensation.

(b) *Hours in excess of normal or regular working hours.* Similarly, where the employee's normal or regular daily or weekly working hours are greater or less than 8 hours and 40 hours respectively and his contract provides for the payment of premium rates for work in excess of such normal or regular hours of work for the day or week (such as 7 in a day or 35 in a week) the extra compensation provided by such premium rates, paid for excessive hours, is a true overtime premium to be excluded from the regular rate and it may be credited towards overtime compensation due under the Act.

(c) *Premiums for excessive daily hours.* If an employee whose maximum hours standard is 40 hours is hired at the rate of $1.75 an hour and receives, as overtime compensation under his contract, $2.25 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the overtime rate from the employee's regular rate and credit the total of the extra 50-cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of $2.75 for hours in excess of 12 per day, the extra $1 payments could likewise be credited toward overtime compensation due under the Act. To qualify as overtime premiums under section 7(e)(5), the daily overtime premium payments must be made for hours in excess of 8 hours per day or the employee's normal or regular working hours. If the normal workday is artificially divided into a "straight time" period to which one rate is assigned, followed by a so-called "overtime" period for which a higher "rate" is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums will be considered part of the regular rate. For a fuller discussion of this problem, see § 778.501.

(d) *Hours in excess of other statutory standard.* Where payment at premium rates for hours worked in excess of a specified daily or weekly standard is made pursuant to the requirements of another applicable statute, the extra compensation provided by such premium rates will be regarded as a true overtime premium.

(e) *Premium pay for sixth or seventh day worked.* Under section 7(e)(5) and 7(h), extra premium compensation paid pursuant to contract or statute for work on the sixth or seventh day worked in the workweek is regarded in the same light as premiums paid for work in excess of the applicable maximum hours standard or the employee's normal or regular workweek.

§ 778.203 Premium pay for work on Saturdays, Sundays, and other "special days".

(a) Under section 7(e)(6) and 7(h) of the Act, extra compensation provided by a premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest or on the sixth or seventh day of the workweek (hereinafter referred to as "special days") may be treated as an overtime premium for the purposes of the Act. If the premium rate is less than time and one-half, the extra compensation provided by such rate must be included in determining the employee's regular rate of pay and cannot be credited toward statutory overtime due, unless it qualifies as an overtime premium under section 7(e)(5).

(b) "Special day" rate must be at least time and one-half to qualify as overtime premium: The premium rate must be at least "one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days." Where an employee is hired on the basis of a salary for a fixed workweek or at a single hourly rate of pay, the rate paid for work on "special days" must be at least time and one-half his regular hourly rate in order to qualify under section 7(e)(6). If the employee is a pieceworker or if he works at more than one job for which different hourly or piece rates have been established and these are bona fide rates applicable to the work when performed during nonovertime hours, the extra compensation provided by a premium rate of at least one and one-half times either (1) the bona fide rate applicable to the type of job the employee performs on the "special days", or (2) the average hourly earnings in the week in question, will qualify as an overtime premium under this section. (For a fuller discussion of computation on the average rate, see § 778.111; on the rate applicable to the job, see §§ 778.415 through 778.421; on the "established" rate, see § 778.400.)

(c) Bona fide base rate required: The statute authorizes such premiums paid for work on "special days" to be treated as overtime premiums only if they are actually based on a "rate established in good faith for like work performed in nonovertime hours on other days." This phrase is used for the purpose of distinguishing the bona fide employment standards contemplated by section 7(e)(6) from fictitious schemes and artificial or evasive devices as discussed in Subpart F of this part. Clearly, a rate which yields the employee less than time and one-half the minimum rate prescribed by the Act would not be a rate established in good faith.

(d) Work on the specified "special days": To qualify as an overtime premium under section 7(e)(6), the extra compensation must be paid for work on the specified days. The term "holiday" is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion. A day of rest arbitrarily granted to employees because of lack of work is not a "holiday" within the meaning of this section, nor is it a "regular day of rest". The term "regular day of rest" means a day on which the employee in accordance with his regular prearranged schedule is not

expected to report for work. In some instances the "regular day of rest" occurs on the same day or days each week for a particular employee; in other cases, pursuant to a swing shift schedule, the scheduled day of rest rotates in a definite pattern, such as 6 days of work followed by 2 days of rest. In either case the extra compensation provided by a premium rate for work on such scheduled days of rest (if such rate is at least one and one-half times the bona fide rate established for like work during nonovertime hours on other days) may be treated as an overtime premium and thus need not be included in computing the employee's regular rate of pay and may be credited toward overtime payments due under the Act.

(e) Payment of premiums for work performed on the "special day": To qualify as an overtime premium under section 7(e)(6), the premium must be paid because work is performed on the days specified and not for some other reason which would not qualify the premium as an overtime premium under section 7(e)(5), (6), or (7). (For examples distinguishing pay for work on a holiday from idle holiday pay, see § 778.219.) Thus a premium rate paid to an employee only when he received less than 24 hours' notice that he is required to report for work on his regular day of rest is not a premium paid for work on one of the specified days; it is a premium imposed as a penalty upon the employer for failure to give adequate notice to compensate the employee for the inconvenience of disarranging his private life. The extra compensation is not an overtime premium. It is part of his regular rate of pay unless such extra compensation is paid the employee on infrequent and sporadic occasions so as to qualify for exclusion under section 7(e)(2) in which event it need not be included in computing his regular rate of pay, as explained in § 778.222.

§ 778.204 "Clock pattern" premium pay.

(a) *Overtime premiums under section 7(e)(7).* Where a collective bargaining agreement or other applicable employment contract in good faith establishes certain hours of the day as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the maximum hours standard applicable under section 7(a)) and provides for the payment of a premium rate for work outside such hours, the extra compensation provided by such premium rate will be treated as an overtime premium if the premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during the basic, normal or regular workday or workweek.

(b) *Premiums for hours outside established working hours.* To qualify as an overtime premium under section 7(e)(7) the premium must be paid because the work was performed during hours "outside of the hours established * * * as the basic * * * workday or workweek" and not for some other reason. Thus, if the basic workday is established in good faith as the hours from 8 a.m. to 5 p.m. a premium of time and one-half paid for hours between 5 p.m. and 8 a.m. would qualify as an overtime premium. However, where the contract does not provide for the payment of a premium except for work between midnight and 6 a.m. the premium would not qualify under this section since it is not a premium paid for work outside the established workday but only for certain special hours outside the established workday, in most instances because they are undesirable hours. Similarly, where payments of 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 $2.70 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 $1.80 for like work performed during nonovertime 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 a schedule of 8 hours on Sunday and on each day from Monday through Saturday, making a total of 56 hours worked in the workweek. Tuesday is a holiday. The payment of $115.20 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 $7.20 paid for work on Sunday and the extra $7.20 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.

§ 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 $2 an hour under such an agreement for handling general cargo during the basic, normal, or regular workday and $3 per hour for like work outside of such workday, the extra $1 will be excluded from the regular rate and may be credited to overtime pay due under the Act. Similarly, if the straight time rate established in good faith by the contract should be higher because of handling dangerous or obnoxious cargo, recognition of skill differentials, or similar reasons, so as to be $3 an hour during the hours established as the basic or normal or regular workday or workweek, and a premium rate of $4.50 an hour is paid for the same work performed during other hours of the day or week, the extra $1.50 may be excluded from the regular rate of pay and may be credited toward overtime pay due under the Act. Similar principles are applicable where agreements following this general pattern exist in other industries.

§ 778.207 Other types of contract premium pay distinguished.

(a) *Overtime premiums are those defined by the statute.* The various types of contract premium rates which provide extra compensation qualifying as overtime premiums to be excluded from the regular rate (under section 7(e)(5),

(6), and (7)) and credited toward statutory overtime pay requirements (under section 7(h)) have been described in §§ 778.201 through 778.206. The plain wording of the statute makes it clear that extra compensation provided by premium rates other than those described cannot be treated as overtime premiums. Wherever such other premiums are paid, they must be included in the employee's regular rate before statutory overtime compensation is computed; no part of such premiums may be credited toward statutory overtime pay.

(b) *Nonovertime premiums.* The Act requires the inclusion in the regular rate of such extra premiums as nightshift differentials (whether they take the form of a percent of the base rate or an addition of so many cents per hour) and premiums paid for hazardous, arduous or dirty work. It also requires inclusion of any extra compensation which is paid as an incentive for the rapid performance of work, and since any extra compensation in order to qualify as an overtime premium must be provided by a premium rate per hour, except in the special case of pieceworkers as discussed in § 778.418, lump sum premiums which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate. For example, where an employer pays 8 hours' pay for a particular job whether it is performed in 8 hours or in less time, the extra premium of 2 hours' pay received by an employee who completes the job in 6 hours must be included in his regular rate. Similarly, where an employer pays for 8 hours at premium rates for a job performed during the overtime hours whether it is completed in 8 hours or less, no part of the premium paid qualifies as overtime premium under sections 7(e) (5), (6), or (7). (For a further discussion of this and related problems, see §§ 778.308 to 778.314.)

BONUSES

§ 778.208 Inclusion and exclusion of bonuses in computing the "regular rate."

Section 7(e) of the Act requires the inclusion in the regular rate of all remuneration for employment except seven specified types of payments. Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift and savings plans. These are discussed in §§ 778.211 through 778.214. Bonuses which do not qualify for exclusion from the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. Bonus payments are payments made in addition to the regular earnings of an employee. For a discussion on the bonus form as an evasive bookkeeping device, see §§ 778.502 and 778.503.

§ 778.209 Method of inclusion of bonus in regular rate.

(a) *General rules.* Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked. Under many bonus plans, however, calculations of the bonus may necessarily be deferred over a period of time longer than a workweek. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the hourly rate paid by the employee, exclusive of the bonus. When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.

(b) *Allocation of bonus where bonus earnings cannot be identified with particular workweeks.* If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase.

§ 778.210 Percentage of total earnings as bonus.

In some instances the contract or plan for the payment of a bonus may also provide for the simultaneous payment of overtime compensation due on the bonus. For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. In such instances, of course, payments according to the contract will satisfy in full the overtime provisions of the Act and no recomputation will be required. This is not true, however, where this form of payment is used as a device to evade the overtime requirements of the Act rather than to provide actual overtime compensation, as described in §§ 778.502 and 778.503.

§ 778.211 Discretionary bonuses.

(a) *Statutory provision.* Section 7(e)(3)(a) of the Act provides that the regular rate shall not be deemed to include "sums paid in recognition of services performed during a given period if * * * (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly * * *". Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Discretionary character of excluded bonus.* In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it. Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus would not be excluded from the regular rate under section 7(e)(3)(a). Similarly, an employer who promises to sales employees that they will receive a monthly bonus computed on the basis of allocating 1 cent for each item sold whenever, in his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate. On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in

the employer's sole discretion, the bonus would be properly excluded from the regular rate.

(c) *Promised bonuses not excluded.* The bonus, to be excluded under section 7(e)(3)(a), must not be paid "pursuant to any prior contract, agreement, or promise." For example, any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular rate of pay.

§ 778.212 Gifts, Christmas and special occasion bonuses.

(a) *Statutory provision.* Section 7(e)(1) of the Act provides that the term "regular rate" shall not be deemed to include "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency * * *". Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Gift or similar payment.* To qualify for exclusion under section 7(e)(1) the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.

(c) *Application of exclusion.* If the bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category.

§ 778.213 Profit-sharing, thrift, and savings plans.

Section 7(e)(3)(b) of the Act provides that the term "regular rate" shall not be deemed to include "sums paid in recognition of services performed during a given period if * * * the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations * * *". Such sums may not, however, be credited toward overtime compensation due under the Act. The regulations issued under this section are Parts 547 and 549 of this chapter. Payments in addition to the regular wages of the employee, made by the employer pursuant to a plan which meets the requirements of the regulations in Part 547 or 549 of this chapter, will be properly excluded from the regular rate.

§ 778.214 Benefit plans; including profit-sharing plans or trusts providing similar benefits.

(a) *Statutory provision.* Section 7(e)(4) of the Act provides that the term "regular rate" shall not be deemed to include: "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees * * *". Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Scope and application of exclusion generally.* Plans for providing benefits of the kinds described in section 7(e)(4) are referred to herein as "benefit plans". It is section 7(e)(4) which governs the status for regular rate purposes of any contributions made by an employer pursuant to a plan for providing the described benefits. This is true irrespective of any other features the plan may have. Thus, it makes no difference whether or not the benefit plan is one financed out of profits or one which by matching employee contributions or otherwise encourages thrift or savings. Where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the Profit-Sharing Regulations, Part 549 of this chapter, and the contributions made by the employer for providing the benefits described in section 7(e)(4) of the Act may be excluded from the regular rate if they meet the tests set forth in § 778.215.

(c) *Tests must be applied to employer contributions.* It should be emphasized that it is the employer's contribution made pursuant to the benefit plan that is excluded from or included in the regular rate according to whether or not the requirements set forth in § 778.215 are met. If the contribution is not made as provided in section 7(e)(4) or if the plan does not qualify as a bona fide benefit plan under that section, the contribution is treated the same as any bonus payment which is part of the regular rate of pay, and at the time the contribution is made the amount thereof must be apportioned back over the workweeks of the period during which it may be said to have accrued. Overtime compensation based upon the resultant increases in the regular hourly rate is due for each overtime hour worked during any workweek of the period. The subsequent distribution of accrued funds to an employee on account of severance of employment (or for any other reason) would not result in any increase in his regular rate in the week in which the distribution is made.

(d) *Employer contributions when included in fringe benefit wage determinations under Davis-Bacon Act.* As noted in § 778.6, where certain fringe benefits are included in the wage predeterminations of the Secretary of Labor for laborers and mechanics performing contract work subject to the Davis-Bacon Act and related statutes, the provisions of Public Law 88–349 discussed in § 5.32 of this title should be considered together with the interpretations in this Part 778 in determining the excludability of such fringe benefits from the regular rate of such employees. Accordingly, reference should be made to § 5.32 of this title as well as to § 778.215 for guidance with respect to exclusion from the employee's regular rate of contributions made by the employer to any benefit plan if, in the workweek or workweeks involved, the employee performed work as a laborer or mechanic subject to a wage determination made by the Secretary pursuant to Part 1 of this title, and if fringe benefits of the kind represented by such contributions constitute a part of the prevailing wages required to be paid such employee in accordance with such wage determination.

(e) *Employer contributions or equivalents pursuant to fringe benefit determinations under Service Contract Act of 1965.* Contributions by contractors and subcontractors to provide fringe benefits specified under the McNamara-O'Hara Service Contract Act of 1965, which are of the kind referred to in section 7(e)(4), are excludable from the regular rate under the conditions set forth in § 778.215. Where the fringe benefit contributions specified under such Act are so excludable, equivalent benefits or payments provided by the employer in satisfaction of his obligation to provide the specified benefits are also excludable from the regular rate if authorized under Part 4 of this title, Subpart B, pursuant to the McNamara-O'Hara Act, and their exclusion therefrom is not dependent on whether such equivalents, if separately considered, would meet the requirements of § 778.215. See § 778.7.

§ 778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).

(a) *General rules.* In order for an employer's contribution to qualify for exclusion from the regular rate under section 7(e)(4) of the Act the following conditions must be met:

(1) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.

(3) In the plan or trust, either:

(i) The benefits must be specified or definitely determinable on an actuarial basis; or

(ii) There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

(iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under section 7(e)(4) of the Act.

(iv) NOTE: The requirements in subdivisions (ii) and (iii) of this subparagraph for a formula for determining the amount to be contributed by the employer may be met by a formula which requires a specific and substantial minimum contribution and which provides that the employer may add somewhat to that amount within specified limits; provided, however, that there is a reasonable relationship between the specified minimum and maximum contributions. Thus, formulas providing for a minimum contribution of 10 percent of profits and giving the employer discretion to add to that amount up to 20 percent of profits, or for a minimum contribution of 5 percent of compensation and discretion to increase up to a maximum of 15 percent of compensation, would meet the requirement. However, a plan which provides for insignificant minimum contributions and permits a variation so great that, for all practical purposes, the formula becomes meaningless as a measure of contributions, would not meet the requirements.

(4) The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the Act may result if the employee contributions cut into the required minimum or overtime wages. See §§ 531.35, 531.36, 531.37, and 531.38 of this chapter.) Although an employer's contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the employer. In such a case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

(5) The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan: *Provided, however,* That if a plan otherwise qualifies as a bona fide benefit plan under section 7(e)(4) of the Act, it will still be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit (i) at the time of the severance of the employment relation due to causes other than retirement, disability, or death, or (ii) upon proper termination of the plan, or (iii) during the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7(e)(4) of the Act.

(b) *Plans under section 401(a) of the Internal Revenue Code.* Where the benefit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(a) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in subparagraphs (1), (4), and (5) of paragraph (a) of this section.

PAYMENTS NOT FOR HOURS WORKED

§ 778.216 The provisions of section 7(e)(2) of the Act.

Section 7(e)(2) of the Act provides that the term "regular rate" shall not be deemed to include "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment * * *". However, since such payments are not made as compensation for the employee's hours worked in any workweek, no part of such payments can be credited toward overtime compensation due under the Act.

§ 778.217 Reimbursement for expenses.

(a) *General rule.* Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

(b) *Illustrations.* Payment by way of reimbursement for the following types of expenses will not be regarded as part of the employee's regular rate:

(1) The actual amount expended by an employee in purchasing supplies, tools, materials, or equipment on behalf of his employer.

(2) The actual or reasonably approximate amount expended by an employee in purchasing, laundering or repairing uniforms or special clothing which his employer requires him to wear.

(3) The actual or reasonably approximate amount expended by an employee, who is traveling "over the road" on his employer's business, for transportation (whether by private car or common carrier) and living expenses away from home, other travel expenses, such as taxicab fares, incurred while traveling on the employer's business.

(4) "Supper money", a reasonable amount given to an employee, who ordinarily works the day shift and can ordinarily return home for supper, to cover the cost of supper when he is requested by his employer to continue work during the evening hours.

(5) The actual or reasonably approximate amount expended by an employee as temporary excess home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had an opportunity to find living quarters at the new location or (ii) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.

The foregoing list is intended to be illustrative rather than exhaustive.

(c) *Payments excluding expenses.* It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as "reimbursement" is disproportionately large, the

excess amount will be included in the regular rate.

(d) *Payments for expenses personal to the employee.* The expenses for which reimbursement is made must, in order to merit exclusion from the regular rate under this section, be expenses incurred by the employee on the employer's behalf or for his benefit or convenience. If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in travelling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as "reimbursement for expenses." Whether the employer "reimburses" the employee for such expenses or furnishes the facilities (such as free lunches or free housing), the amount paid to the employee (or the reasonable cost to the employer or fair value where facilities are furnished) enters into the regular rate of pay as discussed in § 778.116. See also § 531.37(b) of this chapter.

§ 778.218 Pay for certain idle hours.

(a) *General rules.* Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for his hours of employment. Therefore, such payments may be excluded from the regular rate of pay under section 7(e)(2) of the Act and, for the same reason, no part of such payments may be credited toward overtime compensation due under the Act.

(b) *Limitations on exclusion.* This provision of section 7(e)(2) deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as lunch periods nor to regularly scheduled days of rest. Sundays may not be workdays in a particular plant, but this does not make them either "holidays" or "vacations," or days on which the employee is absent because of the failure of the employer to provide sufficient work. The term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.

(c) *Failure to provide work.* The term "failure of the employer to provide sufficient work" is intended to refer to occasional, sporadically recurring situations where the employee would normally be working but for such a factor as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer. The term does not include reduction in work schedule (as discussed in §§ 778.321 through 778.329), ordinary temporary layoff situations, or any type of routine, recurrent absence of the employee.

(d) *Other similar cause.* The term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, sickness, and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral of a family member, inability to reach the workplace because of weather conditions. Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category.

§ 778.219 Pay for foregoing holidays and vacations.

(a) *Sums payable whether employee works or not.* As explained in § 778.218, certain payments made to an employee for periods during which he performs no work because of a holiday or vacation are not required to be included in the regular rate because they are not regarded as compensation for working. Suppose an employee who is entitled to such a paid idle holiday or paid vacation foregoes his holiday or vacation and performs work for the employer on the holiday or during the vacation period. If, under the terms of his employment, he is entitled to a certain sum as holiday or vacation pay, whether he works or not, and receives pay at his customary rate (or higher) in addition for each hour that he works on the holiday or vacation day, the certain sum allocable to holiday or vacation pay is still to be excluded from the regular rate. It is still not regarded as compensation for hours of work if he is otherwise compensated at his customary rate (or at a higher rate) for his work on such days. Since it is not compensation for work it may not be credited toward overtime compensation due under the Act. Two examples in which the maximum hours standard is 40 hours may serve to illustrate this principle:

(1) An employee whose rate of pay is $2 an hour and who usually works a 6-day 48-hour week is entitled, under his employment contract, to a week's paid vacation in the amount of his usual straight-time earnings—$96. He foregoes his vacation and works 50 hours in the week in question. He is owed $100 as his total straight time earnings for the week, and $96 in addition as his vacation pay. Under the statute he is owed an additional $10 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of $2 per hour has not been increased by virtue of the payment of $96 vacation pay, but no part of the $96 may be offset against the statutory overtime compensation which is due. (Nothing in this example is intended to imply that the employee has a statutory right to $96 or any other sum as vacation pay. This is a matter of private contract between the parties who may agree that vacation pay will be measured by straight time earnings for any agreed number of hours or days, or by total normal or expected take-home pay for the period or that no vacation pay at all will be paid. The example merely illustrates the proper method of computing overtime for an employee whose employment contract provides $96 vacation pay.)

(2) An employee who is entitled under his employment contract to 8 hours' pay at his rate of $2 an hour for the Christmas holiday, foregoes his holiday and works 9 hours on that day. During the entire week he works a total of 50 hours. He is paid under his contract, $100 as straight time compensation for 50 hours plus $16 as idle holiday pay. He is owed, under the statute, an additional $10 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of $2 per hour has not been increased by virtue of the holiday pay but no part of the $16 holiday pay may be credited toward statutory overtime compensation due.

(b) *Premiums for holiday work distinguished.* The example in paragraph (a)(2) of this section should be distinguished from a situation in which an employee is entitled to idle holiday pay under the employment agreement only when he is actually idle on the holiday, and who, if he foregoes his holiday also, under his contract, foregoes his idle holiday pay.

(1) The typical situation is one in which an employee is entitled by contract to 8 hours' pay at his rate of $2 an hour for certain named holidays when no work is performed. If, however, he is required to work on such days, he does not receive his idle holiday pay. Instead he receives a premium rate of $3 (time and one-half) for each hour worked on the holiday. If he worked 9 hours on the holiday and a total of 50 hours for the week, he would be owed, under his contract, $27 (9×$3) for the holiday work and $82 for the other 41 hours worked in the week, a total of $109. Under the statute (which does not require premium pay for a holiday) he is owed $110 for a workweek of 50 hours at a rate of $2 an hour. Since the holiday premium is one and one-half times the established rate for nonholiday work, it does not increase the regular rate because it qualifies as an overtime premium under section 7(e)(6), and the employer may credit it toward statutory overtime compensation due and need pay the employee only the additional sum of $1 to meet the statutory requirements. (For a discussion of holiday premiums see § 778.203.)

(2) If all other conditions remained the same but the contract called for the payment of $4 (double time) for each hour worked on the holiday, the employee would receive, under his contract, $36 (9×$4) for the holiday work in addition to $82 for the other 41 hours worked, a total of $118. Since this holiday premium is also an overtime premium under section 7(e)(6), it is excludable from the regular rate and the employer may credit it toward statutory overtime compensation due. Because the total thus paid exceeds the statutory requirements, no additional compensation is due under the Act. In distinguishing this situation from

that in the example in paragraph (a)(2) of this section, it should be noted that the contract provisions in the two situations are different and result in the payment of different amounts. In example (2) the employee received a total of $34 attributable to the holiday: 8 hours' idle holiday pay at $2 an hour, due him whether he worked or not, and $18 pay at the nonholiday rate for 9 hours' work on the holiday. In the situation discussed in this paragraph the employee received $36 pay for working on the holiday—double time for 9 hours of work. Thus, clearly, all of the pay in this situation is paid for and directly related to the number of hours worked on the holiday.

§ 778.220 "Show-up" or "reporting" pay.

(a) *Applicable principles.* Under some employment agreements, an employee may be paid a minimum of a specified number of hours' pay at the applicable straight time or overtime rate on infrequent and sporadic occasions when, after reporting to work at his scheduled starting time on a regular work day or on another day on which he has been scheduled to work, he is not provided with the expected amount of work. The amounts that may be paid under such an agreement over and above what the employee would receive if paid at his customary rate only for the number of hours worked are paid to compensate the employee for the time wasted by him in reporting for work and to prevent undue loss of pay resulting from the employer's failure to provide expected work during regular hours. One of the primary purposes of such an arrangement is to discourage employers from calling their men in to work for only a fraction of a day when they might get full-time work elsewhere. Pay arrangements of this kind are commonly referred to as "show-up" or "reporting" pay. Under the principles and subject to the conditions set forth in Subpart B of this part and §§ 778.201 through 778.207, that portion of such payment which represents compensation at the applicable rates for the straight time or overtime hours actually worked, if any, during such period may be credited as straight time or overtime compensation, as the case may be, in computing overtime compensation due under the Act. The amount by which the specified number of hours' pay exceeds such compensation for the hours actually worked is considered as a payment that is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due him.

(b) *Application illustrated.* To illustrate, assume that an employee entitled to overtime pay after 40 hours a week whose workweek begins on Monday and who is paid $2 an hour reports for work on Monday according to schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday, inclusive making a total of 42 hours for the week. The employment agreement covering the employees in the plant, who normally work 8 hours a day, Monday through Friday, provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours' work or pay. The employee thus receives not only the $4 earned in the 2 hours of work on Monday but an extra 2 hours' "show-up" pay, or $4 by reason of this agreement. However, since this $4 in "show-up" pay is not regarded as compensation for hours worked, the employee's regular rate remains $2 and the overtime requirements of the Act are satisfied if he receives, in addition to the $84 straight-time pay for 42 hours and the $4 "show-up" payment, the sum of $2 as extra compensation for the 2 hours of overtime work on Saturday.

§ 778.221 "Call-back" pay.

(a) *General.* In the interest of simplicity and uniformity, the principles discussed in § 778.220 are applied also with respect to typical minimum "call-back" or "call-out" payments made pursuant to employment agreements. Typically, such minimum payments consist of a specified number of hours' pay at the applicable straight time or overtime rates which an employee receives on infrequent and sporadic occasions when, after his scheduled hours of work have ended and without prearrangement, he responds to a call from his employer to perform extra work.

(b) *Application illustrated.* The application of these principles to call-back payments may be illustrated as follows: An employment agreement provides a minimum of 3 hours' pay at time and one-half for any employee called back to work outside his scheduled hours. The employees covered by the agreement, who are entitled to overtime pay after 40 hours a week, normally work 8 hours each day, Monday through Friday, inclusive, in a workweek beginning on Monday, and are paid overtime compensation at time and one-half for all hours worked in excess of 8 in any day or 40 in any workweek. Assume that an employee covered by this agreement and paid at the rate of $2 an hour works 1 hour overtime or a total of 9 hours on Monday, and works 8 hours each on Tuesday through Friday, inclusive. After he has gone home on Friday evening he is called back to perform an emergency job. His hours worked on the call total 2 hours and he receives 3 hours' pay at time and one-half, or $9, under the call-back provision, in addition to $80 for working his regular schedule and $3 for overtime worked on Monday evening. In computing overtime compensation due this employee under the Act, the 43 actual hours (not 44) are counted as working time during the week. In addition to $86 pay at the $2 rate for all these hours, he has received under the agreement a premium of $1 for the 1 overtime hour on Monday and of $2 for the 2 hours of overtime work on the call, plus an extra sum of $3 paid by reason of the provision for minimum call-back pay. For purposes of the Act, the extra premiums paid for actual hours of overtime work on Monday and on the Friday call (a total of $3) may be excluded as true overtime premiums in computing his regular rate for the week and may be credited toward compensation due under the Act, but the extra $3 received under the call-back provision is not regarded as paid for hours worked; therefore, it may be excluded from the regular rate, but it cannot be credited toward overtime compensation due under the Act. The regular rate of the employee, therefore, remains $2, and he has received an overtime premium of $1 an hour for 3 overtime hours of work. This satisfies the requirements of section 7 of the Act. The same would be true, of course, if, in the foregoing example, the employee was called back outside his scheduled hours for the 2-hour emergency job on another night of the week or on Saturday or Sunday, instead of on Friday night.

§ 778.222 Other payments similar to "call-back" pay.

The principles discussed in §§ 778.220–778.221 are also applied with respect to certain types of extra payments which are similar to call-back pay, such as: (a) Extra payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule; and (b) extra payments made, on infrequent and sporadic occasions, solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a "rest period". The extra payment, over and above the employee's earnings for the hours actually worked at his applicable rate (straight time or overtime, as the case may be), is considered as a payment that is not made for hours worked.

§ 778.223 Pay for non-productive hours distinguished.

Under the Act an employee must be compensated for all hours worked. As a general rule the term "hours worked" will include (a) all time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, in such activities as waiting for work, remaining "on call", traveling on the employer's business or to and from workplaces, and in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in Part 785 of this chapter (interpretative bulletin on "hours worked") and Part 790 of this chapter (statement on effect of Portal-to-Portal Act of 1947). To the extent that these hours are regarded as working time, payment made

as compensation for these hours obviously cannot be characterized as "payments not for hours worked." Such compensation is treated in the same manner as compensation for any other working time and is, of course, included in the regular rate of pay. Where payment is ostensibly made as compensation for such of these hours as are not regarded as working time under the Act, the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one of a type of "payments made for occasional periods when no work is performed due to * * * failure of the employer to provide sufficient work, or other similar cause" as discussed in § 778.218 or is excludable on some other basis under section 7(e)(2). For example, an employment contract may provide that employees who are assigned to take calls for specific periods will receive a payment of $2 for each 8-hour period during which they are "on call" in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent "on call" are not considered as hours worked. Although the payment received by such employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and is not of a type excludable under section 7(e)(2). The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work.

§ 778.224 "Other similar payments".

(a) *General.* The preceding sections have enumerated and discussed the basic types of payments for which exclusion from the regular rate is specifically provided under section 7(e)(2) because they are not made as compensation for hours of work. Section 7(e)(2) also authorizes exclusion from the regular rate of "other similar payments to an employee which are not made as compensation for his hours of employment." Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must, however, be "similar" in character to the payments specifically described in section 7(e)(2). It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

(b) *Examples of other excludable payments.* A few examples may serve to illustrate some of the types of payments intended to be excluded as "other similar payments":

(1) Sums paid to an employee for the rental of his truck or car.

(2) Loans or advances made by the employer to the employee.

(3) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities.

Talent Fees in the Radio and Television Industry

§ 778.225 Talent fees excludable under regulations.

Section 7(e)(3) provides for the exclusion from the regular rate of "talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs." Regulations defining "talent fees" have been issued as Part 550 of this chapter. Payments which accord with this definition are excluded from the regular rate.

Subpart D—Special Problems

Introductory

§ 778.300 Scope of subpart.

This subpart applies the principles of computing overtime to some of the problems that arise frequently.

Change in the Beginning of the Workweek

§ 778.301 Overlapping when change of workweek is made.

As stated in § 778.105, the beginning of the workweek may be changed for an employee or for a group of employees if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. A change in the workweek necessarily results in a situation in which one or more hours or days fall in both the "old" workweek as previously constituted and the "new" workweek. Thus, if the workweek in the plant commenced at 7 a.m. on Monday and it is now proposed to begin the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m. Sunday to 7 a.m. Monday will constitute both the last hours of the old workweek and the first hours of the newly established workweek.

§ 778.302 Computation of overtime due for overlapping workweeks.

(a) *General rule.* When the beginning of the workweek is changed, if the hours which fall within both "old" and "new" workweeks as explained in § 778.301 are hours in which the employee does no work, his statutory compensation for each workweek is, of course, determinable in precisely the same manner as it would be if no overlap existed. If, on the other hand, some of the employee's working time falls within hours which are included in both workweeks, the Department of Labor, as an enforcement policy, will assume that the overtime requirements of section 7 of the Act have been satisfied if computation is made as follows:

(1) Assume first that the overlapping hours are to be counted as hours worked only in the "old" workweek and not in the new; compute straight time and overtime compensation due for each of the 2 workweeks on this basis and total the two sums.

(2) Assume now that the overlapping hours are to be counted as hours worked only in the new workweek and not in the old, and complete the total computation accordingly.

(3) Pay the employee an amount not less than the greater of the amounts computed by methods (1) and (2).

(b) *Application of rule illustrated.* Suppose that, in the example given in § 778.301, the employee, who receives $2 an hour and is subject to overtime pay after 40 hours a week, worked 5 hours on Sunday, March 7, 1965. Suppose also that his last "old" workweek commenced at 7 a.m. on Monday, March 1, and he worked 40 hours March 1 through March 5 so that for the workweek ending March 7 he would be owed straight time and overtime compensation for 45 hours. The proposal is to commence the "new" workweek at 7 a.m. on March 7. If in the "new" workweek of Sunday, March 7, through Saturday, March 13, the employee worked a total of 40 hours, including the 5 hours worked on Sunday, it is obvious that the allocation of the Sunday hours to the old workweek will result in higher total compensation to the employee for the 13-day period. He should, therefore, be paid $95 ($40\times\$2+5\times\$3$) for the period of March 1 through March 7, and $70 ($35\times\$2$) for the period of March 8 through March 13.

(c) *Nonstatutory obligations unaffected.* The fact that this method of compensation is permissable under the Fair Labor Standards Act when the beginning of the workweek is changed will not alter any obligation the employer may have under his employment contract to pay a greater amount of overtime compensation for the period in question.

Additional Pay for Past Period

§ 778.303 Retroactive pay increases.

Where a retroactive pay increase is awarded to employees as a result of collective bargaining or otherwise, it operates to increase the regular rate of pay of the employees for the period of its retroactivity. Thus, if an employee is awarded a retroactive increase of 10 cents per hour, he is owed, under the Act, a retroactive increase of 15 cents for each overtime hour he has worked during the period, no matter what the agreement of the parties may be. A retroactive pay increase in the form of a lump sum for a particular period must be prorated back over the hours of the period to which it is allocable to determine the resultant increases in the regular rate, in precisely the same manner as a lump sum bonus. For a discussion of the method of allocating bonuses based on employment in a prior period to the workweeks covered by the bonus payment, see § 778.209.

HOW DEDUCTIONS AFFECT THE REGULAR RATE

§ 778.304 Amounts deducted from cash wages—general.

(a) The word "deduction" is often loosely used to cover reductions in pay resulting from several causes:

(1) Deductions to cover the cost to the employer of furnishing "board, lodging or other facilities," within the meaning of section 3(m) of the Act.

(2) Deductions for other items such as tools and uniforms which are not regarded as "facilities."

(3) Deductions authorized by the employee (such as union dues) or required by law (such as taxes and garnishments).

(4) Reductions in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule.

(5) Deductions for disciplinary reasons.

(b) In general, where such deductions are made, the employee's "regular rate" is the same as it would have been if the occasion for the deduction had not arisen. Also, as explained in §§ 531.27–531.40 of this chapter, the requirements of the Act place certain limitations on the making of some of the above deductions.

§ 778.305 Computation where particular types of deductions are made.

The regular rate of pay of an employee whose earnings are subject to deductions of the types described in subparagraphs (1), (2), and (3) of § 778.304 (a) is determined by dividing his total compensation (except statutory exclusions) before deductions by the total hours worked in the workweek. (See also §§ 531.36–531.40 of this chapter.)

§ 778.306 Salary reductions in short workweeks.

(a) The reductions in pay described in subparagraph (4) of § 778.304(a) are not, properly speaking, "deductions" at all. If an employee is compensated at a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for all practical purposes, employed at an hourly rate of pay. This hourly rate is the quotient of the fixed salary divided by the fixed number of hours it is intended to compensate. If an employee is hired at a fixed salary of $80 for a 40-hour week, his hourly rate is $2. When he works only 36 hours he is therefore entitled to $72. The employer makes a "deduction" of $8 from his salary to achieve this result. The regular hourly rate is not altered.

(b) When an employee is paid a fixed salary for a workweek of variable hours (or a guarantee of pay under the provisions of section 7(f) of the Act, as discussed in §§ 778.402 through 778.414), the understanding is that the salary or guarantee is due the employee in short workweeks as well as in longer ones and "deductions" of this type are not made. Therefore, in cases where the understanding of the parties is not clearly shown as to whether a fixed salary is intended to cover a fixed or a variable workweek the practice of making "deductions" from the salary for hours not worked in short weeks will be considered strong, if not conclusive, evidence that the salary covers a fixed workweek.

§ 778.307 Disciplinary deductions.

Where deductions as described in § 778.304(a)(5) are made for disciplinary reasons, the regular rate of an employee is computed before deductions are made, as in the case of deductions of the types in paragraphs (a) (1), (2), and (3) of § 778.304. Thus where disciplinary deductions are made from a piece-worker's earnings, the earnings at piece rates must be totaled and divided by the total hours worked to determine the regular rate before the deduction is applied. In no event may such deductions (or deductions of the type described in § 778.304 (a)(2)) reduce the earnings to an average below the applicable minimum wage or cut into any part of the overtime compensation due the employee. For a full discussion of the limits placed on such deductions, see §§ 531.36 and 531.37 of this chapter. The principles set forth therein with relation to deductions have no application, however, to situations involving refusal or failure to pay the full amount of wages due. See § 531.37 of this chapter; also § 778.306. It should be noted that although an employer may penalize an employee for lateness subject to the limitations stated above by deducting a half hour's straight time pay from his wages, for example, for each half hour, or fraction thereof, of his lateness, the employer must still count as hours worked all the time actually worked by the employee in determining the amount of overtime compensation due for the workweek.

LUMP SUM ATTRIBUTED TO OVERTIME

§ 778.308 The overtime rate is an hourly rate.

(a) Section 7(a) of the Act requires the payment of overtime compensation for hours worked in excess of the applicable maximum hours standard at a rate not less than one and one-half times the regular rate. The overtime rate, like the regular rate, is a rate per hour. Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived, as previously explained, by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made. To qualify as an overtime premium under section 7(e) (5), (6), or (7), the extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour (subject to certain statutory exceptions discussed in §§ 778.400 through 778.421).

(b) To qualify under section 7(e)(5), the overtime rate must be greater than the regular rate, either a fixed amount per hour or a multiple of the nonovertime rate, such as one and one-third, one and one-half, or two times that rate. To qualify under section 7 (e) (6) or (7), the overtime rate may not be less than one and one-half times the bona fide rate established in good faith for like work performed during nonovertime hours. Thus, it may not be less than time and one-half but it may be more. It may be a standard multiple greater than one and one-half (for example, double time); or it may be a fixed sum of money per hour which is, as an arithmetical fact, at least one and one-half times the nonovertime rate (for example, if the nonovertime rate is $2 per hour, the overtime rate may not be less than $3 but may be set at a higher arbitrary figure such as $3.20 per hour).

§ 778.309 Fixed sum for constant amount of overtime.

Where an employee works a regular fixed number of hours in excess of the statutory maximum each workweek, it is, of course, proper to pay him, in addition to his compensation for nonovertime hours, a fixed sum in any such week for his overtime work, determined by multiplying his overtime rate by the number of overtime hours regularly worked.

§ 778.310 Fixed sum for varying amounts of overtime.

A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per-hour basis. For example, an agreement that provides for the payment of a flat sum of $30 to employees who work on Sunday does not provide a premium which will qualify as an overtime premium, even though the employee's straight time rate is $2 an hour and the employee always works less than 10 hours on Sunday. Likewise, where an agreement provides for the payment for work on Sunday of either the flat sum of $30 or time and one-half the employee's regular rate for all hours worked on Sunday, whichever is greater, the $30 guaranteed payment is not an overtime premium. The reason for this is clear. If the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of the applicable maximum hours standard could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked. The 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.

§ 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 §§ 778.220–778.222 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 $2 per hour for work during the hours established in good faith as the basic workday or workweek; it provides for the payment of $3 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 $3 per hour (a total payment of $18) 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	$16	$16	$14	$16	$16	0	0
Hours outside basic workday	2	[1] 2	1	0	0	4	0
Pay under contract	$6	$18	$3	0	0	$12	0

[1] 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 $6 paid on Monday, the $3 paid on Wednesday and the $12 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 $7. The sum of $7 should be subtracted from the total of $117 due the employee under the employment agreement. No part of the $18 payment for the special work performed on Tuesday qualifies for exclusion. The remaining $110 must thus be divided by 48 hours to determine the regular rate—$2.29 per hour. The employee is owed an additional one-half this rate under the Act for each of 8 overtime hours worked—$9.16. The extra compensation in the amount of $7 payable pursuant to contract premium rates which qualify as overtime premiums may be credited toward the $9.16 owed as statutory overtime premiums. No part of the $18 payment may be so credited. The employer must pay the employee an additional $2.16 as statutory overtime pay—a total of $119.16 for the week.

"Task" Basis of Payment

§ 778.312 Pay for task without regard to actual hours.

(a) Under some employment agreements employees are paid according to a job or task rate without regard to the number of hours consumed in completing the task. Such agreements take various forms but the two most usual forms are the following:

(1) It is determined (sometimes on the basis of a time study) that an employee (or group) should complete a particular task in 8 hours. Upon the completion of the task the employee is credited with 8 "hours" of work though in fact he may have worked more or less than 8 hours to complete the task. At the end of the week an employee entitled to statutory overtime compensation for work in excess of 40 hours is paid at an established hourly rate for the first 40 of the "hours" so credited and at one and one-half times such rate for the "hours" so credited in excess of 40. The number of "hours" credited to the employee bears no necessary relationship to the number of hours actually worked. It may be greater or less. "Overtime" may be payable in some cases after 20 hours of work; in others only after 50 hours or any other number of hours.

(2) A similar task is set up and 8 hours' pay at the established rate is credited for the completion of the task in 8 hours or less. If the employee fails to complete the task in 8 hours he is paid at the established rate for each of the first 8 hours he actually worked. For work in excess of 8 hours or after the task is completed (whichever occurs first) he is paid one and one-half times the established rate for each such hour worked. He is owed overtime compensation under the Act for hours worked in the workweek in excess of 40 but is paid his weekly overtime compensation at the premium rate for the hours in excess of 40 actual or "task" hours (or combination thereof) for which he received pay at the established rate. "Overtime" pay under this plan may be due after 20 hours of work, 25 or any other number up to 40.

(b) These employees are in actual fact compensated on a daily rate of pay basis. In plans of the first type, the established hourly rate never controls the compensation which any employee actually receives. Therefore, the established rate cannot be his regular rate. In plans of the second type the rate is operative only for the slower employees who exceed the time allotted to complete the task; for them it operates in a manner similar to a minimum hourly guarantee for piece workers, as discussed in § 778.111. On such days as it is operative it is a genuine rate; at other times it is not.

(c) Since the premium rates (at one and one-half times the established hourly rate) are payable under both plans for hours worked within the basic or normal workday (if one is established) and without regard to whether the hours are or are not in excess of 8 per day or 40 per week, they cannot qualify as overtime premiums under section 7(e)(5), (6), or (7) of the Act. They must therefore be included in the regular rate and no part of them may be credited against statutory overtime compensation due. Under plans of the second type, however, where the pay of an employee on a given day is actually controlled by the established hourly rate (because he fails to complete the task in the 8-hour period) and he is paid at one and one-half times the established rate for hours in excess of 8 hours actually worked, the premium rate paid on that day will qualify as an overtime premium under section 7(e)(5).

§ 778.313 Computing overtime pay under the Act for employees compensated on task basis.

(a) An example of the operation of a plan of the second type discussed in § 778.312 may serve to illustrate the effects on statutory overtime computations of payment on a task basis. Assume the following facts: The employment agreement establishes a basic hourly rate of $2 per hour, provides for the payment of $3 per hour for overtime work (in excess of the basic workday or workweek) and defines the basic workday as 8 hours, and the basic workweek as 40 hours, Monday through Friday. It further provides that the assembling of a machine constitutes a day's work. An employee who completes the assembling job in less than 8 hours will be paid 8 hours' pay at the established rate of $2 per hour and will receive pay at the "overtime" rate for hours worked after the completion of the task. An employee works the following hours in a particular week:

	M	T	W	T	F	S	S
Hours spent on task	6	7	7	9	8½	6	0
Day's pay under contract	$16	$16	$16	$16	$16	$24	0
Additional hours	2	----	2	----	½	----	----
Additional pay under contract	$6	----	$6	$3	$3	----	----

(b) In the example in paragraph (a) of this section the employee has actually worked a total of 48 hours and is owed under the contract a total of $122 for the week. The only sums which can be excluded as overtime premiums from this total before the regular rate is determined are the extra $1 payments for the extra hour on Thursday and Friday made because of work actually in excess of 8 hours. The payment of the other premium rates under the contract is either without regard to whether or not the hours they compensated were in excess of a bona fide daily or weekly standard or without regard to the number of overtime hours worked. Thus only the sum of $2 is excluded from the total. The remaining $120 is divided by 48 hours to determine the regular rate—$2.50 per hour. One-half this rate is due under the Act as extra compensation for each of

the 8 overtime hours—$10. The $2 payment under the contract for actual excess hours may be credited and the balance—$8—is owed in addition to the $122 due under the contract.

§ 778.314 Special situations.

There may be special situations in which the facts demonstrate that the hours for which contract overtime compensation is paid to employees working on a "task" or "stint" basis actually qualify as overtime hours under section 7(e) (5), (6), or (7). Where this is true, payment of one and one-half times an agreed hourly rate for "task" or "stint" work may be equivalent to payment pursuant to agreement of one and one-half time a piece rate. The alternative methods of overtime pay computation permitted by section 7(g) (1) or (2), as explained in §§ 778.415 through 778.421 may be applicable in such a case.

Effect of Failure To Count or Pay for Certain Working Hours

§ 778.315 Payment for all hours worked in overtime workweek is required.

In determining the number of hours for which overtime compensation is due, all hours worked (see § 778.223) by an employee for an employer in a particular workweek must be counted. Overtime compensation, at a rate not less than one and one-half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. This extra compensation for the excess hours of overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid.

§ 778.316 Agreements or practices in conflict with statutory requirements are ineffective.

While it is permissible for an employer and an employee to agree upon different base rates of pay for different types of work, it is settled under the Act that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked. Since a lower rate cannot lawfully be set for overtime hours it is obvious that the parties cannot lawfully agree that the working time will not be paid for at all. An agreement that only the first 8 hours of work on any days or only the hours worked between certain fixed hours of the day or only the first 40 hours of any week will be counted as working time will clearly fail of its evasive purpose. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, will not impair the employee's right to compensation for work which he is actually suffered or permitted to perform.

§ 778.317 Agreements not to pay for certain nonovertime hours.

An agreement not to compensate employees for certain nonovertime hours stands on no better footing since it would have the same effect of diminishing the employee's total overtime compensation. An agreement, for example, to pay an employee whose maximum hours standard for the particular workweek is 40 hours, $2 an hour for the first 35 hours, nothing for the hours between 35 and 40 and $3 an hour for the hours in excess of 40 would not meet the overtime requirements of the Act. Under the principles set forth in § 778.315, the employee would have to be paid $10 for the 5 hours worked between 35 and 40 before any sums ostensibly paid for overtime could be credited toward overtime compensation due under the Act.

§ 778.318 Productive and nonproductive hours of work.

(a) *Failure to pay for nonproductive time worked.* Some agreements provide for payment only for the hours spent in productive work; the work hours spent in waiting time, time spent in travel on the employer's behalf or similar nonproductive time are not made compensable and in some cases are neither counted nor compensated. Payment pursuant to such an agreement will not comply with the Act; such nonproductive working hours must be counted and paid for.

(b) *Compensation payable for nonproductive hours worked.* The parties may agree to compensate nonproductive hours worked at a rate (at least the minimum) which is lower than the rate applicable to productive work. In such a case, the regular rate is the weighted average of the two rates, as discussed in § 778.115 and the employee whose maximum hours standard is 40 hours is owed compensation at his regular rate for all of the first 40 hours and at a rate not less than one and one-half times this rate for all hours in excess of 40. (See § 778.415 for the alternative method of computing overtime pay on the applicable rate.) In the absence of any agreement setting a different rate for nonproductive hours, the employee would be owed compensation at the regular hourly rate set for productive work for all hours up to 40 and at a rate at least one and one-half times that rate for hours in excess of 40.

(c) *Compensation attributable to both productive and nonproductive hours.* The situation described in paragraph (a) of this section is to be distinguished from one in which such nonproductive hours are properly counted as working time but no special hourly rate is assigned to such hours because it is understood by the parties that the other compensation received by the employee is intended to cover pay for such hours. For example, while it is not proper for an employer to agree with his pieceworkers that the hours spent in down-time (waiting for work) will not be paid for or will be neither paid for nor counted, it is permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours. If this is the agreement of the parties, the regular rate of the pieceworker will be the rate determined by dividing the total piecework earnings by the total hours worked (both productive and nonproductive) in the workweek. Extra compensation (one-half the rate as so determined) would, of course, be due for each hour worked in excess of the applicable maximum hours standard.

Effect of Paying for But Not Counting Certain Hours

§ 778.319 Paying for but not counting hours worked.

In some contracts provision is made for payment for certain hours, which constitute working time under the Act, coupled with a provision that these hours will not be counted as working time. Such a provision is a nullity. If the hours in question are hours worked, they must be counted as such in determining whether more than the applicable maximum hours have been worked in the workweek. If more hours have been worked, the employee must be paid overtime compensation at not less than one and one-half times his regular rate for all overtime hours. A provision that certain hours will be compensated only at straight time rates is likewise invalid. If the hours are actually hours worked in excess of the applicable maximum hours standard, extra half-time compensation will be due regardless of any agreement to the contrary.

§ 778.320 Hours that would not be hours worked if not paid for.

In certain cases an agreement provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities, time spent in travel outside the hours of the normal workday and time spent in eating meals between working hours fall in this category. The agreement of the parties to provide compensation for such hours implies an agreement to regard them as working time although they are not otherwise required to be so regarded under the Act. The agreement of the parties will be respected if reasonable. Thus, for example, payments for such hours, although not excluded from the regular rate, will not have the mathematical effect of increasing the regular rate of an employee if the hours are treated as working time under the agreement and compensated at the same rate as other working hours, and the requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum. Of course, under the principles set forth in

§ 778.319, where the payments are made for time spent in an activity which, if compensable under contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of section 4 of the Portal-to-Portal Act of 1947 (see Parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. In the case of time spent in activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, the parties may reasonably agree that the time will be paid for but will not be counted as hours worked. Since, however, such payments are part of the employee's remuneration for his employment, section 7(e) of the Act requires that the compensation paid for such hours be included in his regular rate of pay, unless it appears from all the pertinent facts that the payments are of a type qualifying for exclusion therefrom under the provision of section 7(e)(2), as explained in §§ 778.216 to 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

REDUCTION IN WORKWEEK SCHEDULE WITH NO CHANGE IN PAY

§ 778.321 Decrease in hours without decreasing pay—general.

Since the regular rate of pay is the average hourly rate at which an employee is actually employed, and since this rate is determined by dividing his total remuneration for employment (except statutory exclusions) for a given workweek by the total hours worked in that workweek for which such remuneration was paid, it necessarily follows that if the schedule of hours is reduced while the pay remains the same, the regular rate has been increased.

§ 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 $80 for a fixed workweek of 40 hours, his regular rate at the time of hiring was $2 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 $80, so that he earns his salary at the average rate of $2.29 per hour. His regular rate thus becomes $2.29 per hour; it is no longer $2 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 $80 now covers 35 hours of work and no more, the employee would be owed $2.29 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 $2.29 ($3.44) 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 $2.29 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—$80, 5 hours pay at $2.29 per hour for the 5 hours between 35 and 40—$11.45, and 1 hour's pay at $3.44 for the 1 hour in excess of 40—$3.44, or a total of $94.89 for the week.

§ 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 $80 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 $2 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 $3 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.)

§ 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 hired at a fixed salary of $110 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $1 per hour (half-time) in addition to his salary, and to statutory overtime pay of $3 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains $2 per hour and he is due, in addition to his salary, extra compensation of $1 for each hour over 40 but not over 55 and full time and one-half, or $3, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is $2.20 per hour in all weeks. This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of $2.20 per hour for the hours not worked.

§ 778.326 Reduction of regular overtime workweek without reduction of take-home pay.

The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earnings at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of $2 an hour and regularly worked 50 hours, earning $110 as his total straight time and overtime compensation, and the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from $2 per hour to $2.32 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be $110.20. The parties cannot, however, agree that the employee is to receive exactly $110.20 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an "agreed" number of hours. To permit such a practice without proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a

rate not less than one and one-half times his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee under such a plan until the workweek exceeded 50 hours.

§ 778.327 Temporary or sporadic reduction in schedule.

(a) The problem of reduction in the workweek is somewhat different where a temporary reduction is involved. Reductions for the period of a dead or slow season follow the rules announced above. However, reduction on a more temporary or sporadic basis presents a different problem. It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his straight time rate no matter how many hours he worked. If he set the rate at $2 per hour for all workweeks in which the employee worked 40 hours or less, approximately $1.98 per hour for workweeks of 41 hours, approximately $1.97 for workweeks of 42 hours, approximately $1.87 for workweeks of 50 hours, and so on, the employee would always receive (for straight time and overtime at these "rates") $2 an hour regardless of the number of overtime hours worked. This is an obvious bookkeeping device designed to avoid the payment of overtime compensation and is not in accord with the law. See Walling v. Green Head Bit & Supply Co., 138 F. 2d 453. The regular rate of pay of this employee for overtime purposes is, obviously, the rate he earns in the normal nonovertime week—in this case, $2 per hour.

(b) The situation is different in degree but not in principle where employees who have been at a bona fide $2 rate usually working 50 hours and taking home $110 as total straight time and overtime pay for the week are, during occasional weeks, cut back to 42 hours. If the employer raises their rate to $2.50 for such weeks so that their total compensation is $107.50 for a 42-hour week the question may properly be asked, when they return to the 50-hour week, the $2 rate and the gross pay of $110 whether the $2 rate is really their regular rate. Are they putting in 8 additional hours of work for that extra $2.50 or is their "regular" rate really now $2.50 an hour since this is what they earn in the short workweek? It seems clear that where different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee—the longer he works the lower the rate—the device is evasive and the rate actually paid in the shorter or nonovertime week is his regular rate for overtime purposes in all weeks.

§ 778.328 Plan for gradual permanent reduction in schedule.

In some cases, pursuant to a definite plan for the permanent reduction of the normal scheduled workweek from say, 48 hours to 40 hours, an agreement is entered into with a view to lessening the shock caused by the expected reduction in take-home wages. The agreement may provide for a rising scale of rates as the workweek is gradually reduced. The varying rates established by such agreement will be recognized as bona fide in the weeks in which they are respectively operative provided that (a) the plan is bona fide and there is no effort made to evade the overtime requirements of the Act; (b) there is a clear downward trend in the duration of the workweek throughout the period of the plan even though fluctuations from week-to-week may not be constantly downward; and (c) the various rates are operative for substantial periods under the plan and do not vary from week-to-week in accordance with the number of hours which any particular employee or group happens to work.

§ 778.329 Alternating workweeks of different fixed lengths.

In some cases an employee is hired on a salary basis with the understanding that his weekly salary is intended to cover the fixed schedule of hours (and no more) and that this fixed schedule provides for alternating workweeks of different fixed lengths. For example, many offices operate with half staff on Saturdays and, in consequence, employees are hired at a fixed salary covering a fixed working schedule of 7 hours a day Monday through Friday and 5 hours on alternate Saturdays. The parties agree that extra compensation is to be paid for all hours worked in excess of the schedule in either week, at the base rate for hours between 35 and 40 in the short week and at time and one-half such rate for hours in excess of 40 in all weeks. Such an arrangement results in the employee's working at two different rates of pay—one thirty-fifth of the salary in short workweeks and one-fortieth of the salary in the longer weeks. If the provisions of such a contract are followed, if the nonovertime hours are compensated in full at the applicable regular rate in each week and overtime compensation is properly computed for hours in excess of 40 at time and one-half the rate applicable in the particular workweek, the overtime requirements of the Fair Labor Standards Act will be met. While this situation bears some resemblance to the one discussed in § 778.327 there is this significant difference; the arrangement is permanent, the length of the respective workweeks and the rates for such weeks are fixed on a permanent-schedule basis far in advance and are therefore not subject to the control of the employer and do not vary with the fluctuations in business. In an arrangement of this kind, if the employer required the employee to work on Saturday in a week in which he was scheduled for work only on the Monday through Friday schedule, he would be paid at his regular rate for all the Saturday hours in addition to his salary.

Prizes as Bonuses

§ 778.330 Prizes or contest awards generally.

All compensation (except statutory exclusions) paid by or on behalf of an employer to an employee as remuneration for employment must be included in the regular rate, whether paid in the form of cash or otherwise. Prizes are therefore included in the regular rate if they are paid to an employee as remuneration for employment. If therefore it is asserted that a particular prize is not to be included in the regular rate, it must be shown either that the prize was not paid to the employee for employment, or that it is not a thing of value which is part of wages.

§ 778.331 Awards for performance on the job.

Where a prize is awarded for the quality, quantity or efficiency of work done by the employee during his customary working hours at his normal assigned tasks (whether on the employer's premises or elsewhere) it is obviously paid as additional remuneration for employment. Thus prizes paid for cooperation, courtesy, efficiency, highest production, best attendance, best quality of work, greatest number of overtime hours worked, etc., are part of the regular rate of pay. If the prize is paid in cash, the amount paid must be allocated (for the method of allocation see § 778.209) over the period during which it was earned to determine the resultant increase in the average hourly rate for each week of the period. If the prize is merchandise, the cost to the employer is the sum which must be allocated. Where the prize is either cash or merchandise, with the choice left the employee, the amount to be allocated is the amount (or the cost) of the actual prize he accepts.

§ 778.332 Awards for activities not normally part of employee's job.

(a) Where the prize is awarded for activities outside the customary working hours of the employee, beyond the scope of his customary duties or away from the employer's premises, the question of whether the compensation is remuneration for employment will depend on such factors as the amount of time, if any, spent by the employee in competing, the relationship between the contest activities and the usual work of the employee, whether the competition involves work usually performed by other employees for employers, whether an employee is specifically urged to participate or led to believe that he will not merit promotion or advancement unless he participates.

(b) By way of example, a prize paid for work performed in obtaining new business for an employer would be regarded as remuneration for employment. Although the duties of the employees who participate in the contest may not normally encompass this type of work, it is work of a kind normally performed by salesmen for their employers, and the time spent by the employee in competing for such a prize (whether successfully or not) is working time and

must be counted as such in determining overtime compensation due under the Act. On the other hand, a prize or bonus paid to an employee when a sale is made by the company's sales representative to a person whom he recommended as a good sales prospect would not be regarded as compensation for services if in fact the prize-winner performed no work in securing the name of the sales prospect and spent no time on the matter for the company in any way.

§ 778.333 Suggestion system awards.

The question has been raised whether awards made to employees for suggestions submitted under a suggestion system plan are to be regarded as part of the regular rate. There is no hard and fast rule on this point as the term "suggestion system" has been used to describe a variety of widely differing plans. It may be generally stated, however, that prizes paid pursuant to a bona fide suggestion system plan may be excluded from the regular rate at least in situations where it is the fact that:

(a) The amount of the prize has no relation to the earnings of the employee at his job but is rather geared to the value to the company of the suggestion which is submitted; and

(b) The prize represents a bona fide award for a suggestion which is the result of additional effort or ingenuity unrelated to and outside the scope of the usual and customary duties of any employee of the class eligible to participate and the prize is not used as a substitute for wages; and

(c) No employee is required or specifically urged to participate in the suggestion system plan or led to believe that he will not merit promotion or advancement (or retention of his existing job) unless he submits suggestions; and

(d) The invitation to employees to submit suggestions is general in nature and no specific assignment is outlined to employees (either as individuals or as a group) to work on or develop; and

(e) There is no time limit during which suggestions must be submitted; and

(f) The employer has, prior to the submission of the suggestion by an employee, no notice or knowledge of the fact that an employee is working on the preparation of a suggestion under circumstances indicating that the company approved the task and the schedule of work undertaken by the employee.

Subpart E—Exceptions From the Regular Rate Principles

Computing Overtime Pay on an "Established" Rate

§ 778.400 The provisions of section 7(g)(3) of the Act.

Section 7(g)(3) of the Act provides the following exception from the provisions of section 7(a):

> (g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—
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> * * * * *
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> (3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;
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> and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additonal pay required to be included in computing the regular rate.

§ 778.401 Regulations issued under section 7(g)(3).

Regulations issued pursuant to section 7(g)(3) of the Act are published as Part 548 of this chapter. Payments made in conformance with these regulations satisfy the overtime pay requirements of the Act.

Guaranteed Compensation Which Includes Overtime Pay

§ 778.402 The statutory exception provided by section 7(f) of the Act.

Section 7(f) of the Act provides the following exception from the provisions of section 7(a):

> (f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifices a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.

§ 778.403 Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f).

Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. (See in this connection the discussion in §§ 778.207, 778.321–778.329, and 778.308–778.315.) Unless the pay arrangements in a particular situation meet the requirements of section 7(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act. Section 7(f) is an exemption from the overtime provisions of the Act. No employer will be exempt from the duty of computing overtime compensation for an employee under section 7(a) unless the employee is paid pursuant to a plan which actually meets all the requirements of the exemption. These requirements will be discussed separately in the ensuing sections.

§ 778.404 Purposes of exemption.

The exception to the requirements of section 7(a) provided by section 7(f) of the Act is designed to provide a means whereby the employer of an employee whose duties necessitate irregular hours of work and whose total wages if computed solely on an hourly rate basis would of necessity vary widely from week to week, may guarantee the payment, week-in, week-out, of at least a fixed amount based on his regular hourly rate. Section 7(f) was proposed and enacted in 1949 with the stated purpose of giving express statutory validity, subject to prescribed limitations, to a judicial "gloss on the Act" by which an exception to the usual rule as to the actual regular rate had been recognized by a closely divided Supreme Court as permissible with respect to employment in such situations under so-called "Belo" contracts. See McComb v. Utica Knitting Co., 164 F. 2d 670, rehearing denied 164 F. 2d 678 (C.A. 2); Walling v. A. H. Belo Co., 316 U.S. 624; Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17; 95 Cong. Rec. 11893, 12365, 14938, A2396, A5233, A5476. Such a contract affords to the employee the security of a regular weekly income and benefits the employer by enabling him to anticipate and control in advance at least some part of his labor costs. A guaranteed wage plan also provides a means of limiting overtime computation costs so that wide leeway is provided for working employees overtime without increasing the cost to the employer, which he would otherwise incur under the Act for working employees in excess of the statutory maximum hours standard. Recognizing both the inherent advantages and disadvantages of guaranteed wage plans, when viewed in this light, Congress sought to strike a balance between them which would, on the one hand, provide a feasible method of guaranteeing pay to employees who needed this protection without, on the other hand, nullifying the overtime requirements of the Act. The provisions of section 7(f) set forth the conditions under which, in the view of Congress, this may be done. Plans which do not meet these conditions were not thought to provide sufficient advantage to the employee to justify Congress in relieving employers of the overtime liability of section 7(a).

§ 778.405 What types of employees are affected.

The type of employment agreement permitted under section 7(f) can be made only with (or by his representatives on behalf of) an employee whose "duties * * * necessitate irregular hours of work". It is clear that no contract

made with an employee who works a regularly scheduled workweek or whose schedule involves alternating fixed workweeks will qualify under this subsection. Even if an employee does in fact work a variable workweek, the question must still be asked whether his duties necessitate irregular hours of work. The subsection is not designed to apply in a situation where the hours of work vary from week to week at the discretion of the employer or the employee, nor to a situation where the employee works an irregular number of hours according to a predetermined schedule. The nature of the employee's duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week. Furthermore, for the reasons set forth in § 778.406, his duties must necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours. Some examples of the types of employees whose duties may necessitate irregular hours of work would be outside buyers, on-call servicemen, insurance adjusters, newspaper reporters and photographers, propmen, script girls and others engaged in similar work in the motion picture industry, firefighters, troubleshooters and the like. There are some employees in these groups whose hours of work are conditioned by factors beyond the control of their employer or themselves. However, the mere fact that an employee is engaged in one of the jobs just listed, for example, does not mean that his duties necessitate irregular hours. It is always a question of fact whether the particular employee's duties do or do not necessitate irregular hours. Many employees not listed here may qualify. Although office employees would not ordinarily qualify, some office employees whose duties compel them to work variable hours could also be in this category. For example, the confidential secretary of a top executive whose hours of work are irregular and unpredictable might also be compelled by the nature of her duties to work variable and unpredictible hours. This would not ordinarily be true of a stenographer or file clerk, nor would an employee who only rarely or in emergencies is called upon to work outside a regular schedule qualify for this exemption.

§ 778.406 Nonovertime hours as well as overtime hours must be irregular if section 7(f) is to apply.

Any employment in which the employee's hours fluctuate only in the overtime range above the maximum workweek prescribed by the statute lacks the irregularity of hours for which the Supreme Court found the so-called "Belo" contracts appropriate and so fails to meet the requirements of section 7(f) which were designed to validate, subject to express statutory limitations, contracts of a like kind in situations of the type considered by the Court (see § 778.404). Nothing in the legislative history of section 7(f) suggests any intent to suspend the normal application of the general overtime provisions of section 7(a) in situations where the weekly hours of an employee fluctuate only when overtime work in excess of the prescribed maximum weekly hours is performed. Section 7(a) was specifically designed to deal with such a situation by making such regular resort to overtime more costly to the employer and thus providing an inducement to spread the work rather than to impose additional overtime work on employees regularly employed for a workweek of the maximum statutory length. The "security of a regular weekly income" which the Supreme Court viewed as an important feature of the "Belo" wage plan militating against a holding that the contracts were invalid under the Act is, of course, already provided to employees who regularly work at least the maximum number of hours permitted without overtime pay under section 7(a). Their situation is not comparable in this respect to employees whose duties cause their weekly hours to fluctuate in such a way that some workweeks are short and others long and they cannot, without some guarantee, know in advance whether in a particular workweek they will be entitled to pay for the regular number of hours of nonovertime work contemplated by section 7(a). It is such employees whose duties necessitate "irregular hours" within the meaning of section 7(f) and whose "security of a regular weekly income" can be assured by a guarantee under that section which will serve to increase their hourly earnings in short workweeks under the statutory maximum hours. It is this benefit to the employee that the Supreme Court viewed, in effect, as a quid pro quo which could serve to balance a relaxation of the statutory requirement, applicable in other cases, that any overtime work should cost the employer 50 percent more per hour. In the enactment of section 7(f), as in the enactment of section 7(b)(1) and (2), the benefits that might inure to employees from a balancing of long workweeks against short workweeks under prescribed safeguards would seem to be the reason most likely to have influenced the legislators to provide express exemptions from the strict application of section 7(a). Consequently, where the fluctuations in an employee's hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not "irregular" within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption. (See Goldberg v. Winn-Dixie Stores (S.D. Fla.), 15 WH Cases 641; Wirtz v. Midland Finance Co. (N.D. Ga.), 16 WH Cases 141; Trager v. J. E. Plastics Mfg. Co. (S.D.N.Y.), 13 WH Cases 621; McComb v. Utica Knitting Co., 164 F. 2d 670; Foremost Dairies v. Wirtz, 381 F. 2d 653 (C.A.5)).

§ 778.407 The nature of the section 7(f) contract.

Payment must be made "pursuant to a bona fide individual contract or pursuant to an agreement made as a result of collective bargaining by representatives of employees." It cannot be a one-sided affair determinable only by examination of the employer's books. The employee must not only be aware of but must have agreed to the method of compensation in advance of performing the work. Collective bargaining agreements in general are formal agreements which have been reduced to writing, but an individual employment contract may be either oral or written. While there is no requirement in section 7(f) that the agreement or contract be in writing, it is certainly desirable to reduce the agreement to writing, since a contract of this character is rather complicated and proof both of its existence and of its compliance with the various requirements of the section may be difficult if it is not in written form. Furthermore, the contract must be "bona fide." This implies that both the making of the contract and the settlement of its terms were done in good faith.

§ 778.408 The specified regular rate.

(a) To qualify under section 7(f), the contract must specify "a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable)". The word "regular" describing the rate in this provision is not to be treated as surplusage. To understand the nature of this requirement it is important to consider the past history of this type of agreement in the courts. In both of the two cases before it, the Supreme Court found that the relationship between the hourly rate specified in the contract and the amount guaranteed was such that the employee in a substantial portion of the workweeks of the period examined by the court worked sufficient hours to earn in excess of the guaranteed amount and in those workweeks was paid at the specified hourly rate for the first 40 hours and at time and one-half such rate for hours in excess of 40 (Walling v. A. H. Belo Company, 316 U.S. 624, and Walling v. Halliburton Oil Well Cementing Company, 331 U.S. 17). The fact that section 7(f) requires that a contract, to qualify an employee for exemption under section 7(f), must specify a "regular rate," indicates that this criterion of these two cases is still important.

(b) The regular rate of pay specified in the contract may not be less than the applicable minimum rate. There is no requirement, however, that the regular rate specified be equal to the regular rate at which the employee was formerly employed before the contract was entered into. The specified regular rate may be any amount (at least the applicable minimum wage) which the parties agree to and which can reasonably be expected to be operative in controlling the employee's compensation.

(c) The rate specified in the contract must also be a "regular" rate which is operative in determining the total amount of the employee's compensation. Suppose, for example, that the compensation of an employee is normally made up in part by regular bonuses, commissions, or the like. In the past he has been employed at an hourly rate of $2 per hour in addition to which he has received a cost-of-living bonus of $5 a week and a

2-percent commission on sales which averaged $10 per week. It is now proposed to employ him under a guaranteed pay contract which specifies a rate of $2 per hour and guarantees $90 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 $2 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), yearend bonuses and similar payments whic hare not regularly paid as part of the employee's usual wages, will not invalidate a contract which otherwise qualifies under section 7(f).

§ 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 quaranteed a weekly salary of $95, specified a rate of $2 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 46⅔ 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.

§ 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 rates 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 $2 an hour the weekly guaranty cannot be greater than $140. This does not mean that an 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.

§ 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 guaranted 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 empolyee 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 $2 and an overtime rate of $3 and guarantees pay for 50 hours and the maximum hours standard is 40 hours, the amount of the guaranty must be $110, if it is to be based on the rates so specified. A guaranty of $125 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, $125 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.

§ 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 requirements is a matter for determination by the courts. This determination will in all cases depend not merely on the wording of the contract but upon the actual practice of the parties thereunder. It will turn on the question of whether the duties of the employee in fact necessitate

irregular hours, whether the rate specified in the contract is a "regular rate"—that is, whether it was designed to be actually operative in determining the employee's compensation—whether the contract was entered into in good faith, whether the guaranty of pay is in fact based on the regular and overtime rates specified in the contract. While the Administrator does have the authority to issue an advisory opinion as to whether or not a pay arrangement accords with the requirements of section 7(f) he can do so only if he has knowledge of these facts.

(b) As a guide to employers, it may be helpful to describe a fact situation in which the making of a guaranteed salary contract would be appropriate and to set forth the terms of a contract which would comply, in the circumstances described, with the provisions of section 7(f).

Example: An employee is employed as an insurance claims adjuster; because of the fact that he must visit claimants and witnesses at their convenience, it is impossible for him or his employer to control the hours which he must work to perform his duties. During the past 6 months his weekly hours of work have varied from a low of 30 hours to a high of 58 hours. His average workweek for the period was 48 hours. In about 80 percent of the workweeks he worked less than 52 hours. It is expected that his hours of work will continue to follow this pattern. The parties agree upon a regular rate of $2 per hour. In order to provide for the employee the security of a regular weekly income the parties further agree to enter into a contract which provides a weekly guaranty of pay. If the applicable maximum hours standard is 40 hours, guaranty of pay for a workweek somewhere between 48 hours (his average week) and 52 would be reasonable. In the circumstances described the following contract would be appropriate.

The X Company hereby agrees to employ John Doe as a claims adjuster at a regular hourly rate of pay of $2 per hour for the first 40 hours in any workweek and at the rate of $3 per hour for all hours in excess of 40 in any workweek, with a guarantee that John Doe will receive, in any week in which he performs any work for the company, the sum of $110 as total compensation, for all work performed up to and including 50 hours in such workweek.

(c) The situation described in paragraph (b) of this section is merely an example and nothing herein is intended to imply that contracts which differ from the example will not meet the requirements of section 7(f).

COMPUTING OVERTIME PAY ON THE RATE APPLICABLE TO THE TYPE OF WORK PERFORMED IN OVERTIME HOURS (SEC. 7(g) (1) AND (2))

§ 778.415 The statutory provisions.

Sections 7(g) (1) and (2) of the Act provide:

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) In the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) In the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours;

* * * * *

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

§ 778.416 Purpose of provisions.

The purpose of the provisions set forth in § 778.415 is to provide an exception from the requirement of computing overtime pay at not less than one and one-half times the regular rate for hours worked in excess of the applicable maximum hours standard for a particular workweek and to allow, under specified conditions, a simpler method of computing overtime pay for employees paid on the basis of a piece rate, or at a variety of hourly rates or piece rates, or a combination thereof. This provision is not designed to exclude any group of employees from the overtime benefits of the Act. The intent of the provision is merely to simplify the method of computation while insuring the receipt by the affected employees of substantially the same amount of overtime compensation.

§ 778.417 General requirements of section 7(g).

The following general requirements must be met in every case before the overtime computation authorized under section 7(g) (1) or (2) may be utilized.

(a) First, in order to insure that the method of computing overtime pay permitted in this section will not in any circumstances be seized upon as a device for avoiding payment of the minimum wage due for each hour, the requirement must be met that employee's average hourly earnings for the workweek (exclusive of overtime pay and of all other pay which is excluded from the regular rate) are not less than the minimum. This requirement insures that the employer cannot pay subminimum nonovertime rates with a view to offsetting part of the compensation earned during the overtime hours against the minimum wage due for the workweek.

(b) Second, in order to insure that the method of computing overtime pay permitted in this section will not be used to circumvent or avoid the payment of proper overtime compensation due on other sums paid to employees, such as bonuses which are part of the regular rate, the section requires that extra overtime compensation must be properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

§ 778.418 Pieceworkers.

(a) Under section 7(g)(1), an employee who is paid on the basis of a piece rate for the work performed during nonovertime hours may agree with his employer in advance of the performance of the work that he shall be paid at a rate not less than one and one-half times this piece rate for each piece produced during the overtime hours. No additional overtime pay will be due under the Act provided that the general conditions discussed in § 778.417 are met and:

(1) The piece rate is a bona fide rate;

(2) The overtime hours for which the overtime rate is paid qualify as overtime hours under section 7(e) (5), (6), or (7);

(3) The number of overtime hours for which such overtime piece rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard for the particular workweek; and

(4) The compensation paid for the overtime hours is at least equal to pay at one and one-half times the applicable minimum rate for the total number of hours worked in excess of the applicable maximum hours standard.

(b) The piece rate will be regarded as bona fide if it is the rate actually paid for work performed during the nonovertime hours and if it is sufficient to yield at least the minimum wage per hour.

(c) If a pieceworker works at two or more kinds of work for which different straight time piece rates have been established, and if by agreement he is paid at a rate not less than one and one-half whichever straight time piece rate is applicable to the work performed during the overtime hours, such piece rate or rates must meet all the tests set forth in this section and the general tests set forth in § 778.417 in order to satisfy the overtime requirements of the Act under section 7(g)(2).

§ 778.419 Hourly workers employed at two or more jobs.

(a) Under section 7(g)(2) an employee who performs two or more different kinds of work, for which different straight time hourly rates are established, may agree with his employer in advance of the performance of the work that he will be paid during overtime hours at a rate not less than one and one-half times the hourly nonovertime rate established for the type of work he is performing during such overtime hours. No additional overtime pay will be due under the act provided that the general requirements set forth in § 778.417 are met and:

(1) The hourly rate upon which the overtime rate is based is a bona fide rate;

(2) The overtime hours for which the overtime rate is paid qualify as overtime hours under section 7(e) (5), (6), or (7); and

(3) The number of overtime hours for which the overtime rate is paid equals or exceeds the number of hours worked in

excess of the applicable maximum hours standard.

(b) An hourly rate will be regarded as a bona fide rate for a particular kind of work if it is equal to or greater than the applicable minimum rate therefor and if it is the rate actually paid for such work when performed during nonovertime hours.

§ 778.420 Combined hourly rates and piece rates.

Where an employee works at a combination of hourly and piece rates, the payment of a rate not less than one and one-half times the hourly or piece rate applicable to the type of work being performed during the overtime hours will meet the overtime requirements of the Act if the provisions concerning piece rates (as discussed in § 778.418) and those concerning hourly rates (as discussed in § 778.419) are respectively met.

§ 778.421 Offset hour for hour.

Where overtime rates are paid pursuant to statute or contract for hours in excess of 8 in a day, or in excess of the applicable maximum hours standard, or in excess of the employees' normal working hours or regular working hours (as under section 7(e)(5)) or for work on "special days" (as under section 7(e)(6)), or pursuant to an applicable employment agreement for work outside of the hours established in good faith by the agreement as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the applicable maximum hours standard) (under section 7(e)(7)), the requirements of section 7(g)(1) and 7(g)(2) will be met if the number of such hours during which overtime rates were paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard for the particular workweek. It is not necessary to determine whether the total amount of compensation paid for such hours equals or exceeds the amount of compensation which would be due at the applicable rates for work performed during the hours after the applicable maximum in any workweek.

Subpart F—Pay Plans Which Circumvent the Act

Devices To Evade the Overtime Requirements

§ 778.500 Artificial regular rates.

(a) Since the term "regular rate" is defined to include all remuneration for employment (except statutory exclusions) whether derived from hourly rates, piece rates, production bonuses or other sources, the overtime provisions of the act cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means. The established hourly rate is the "regular rate" to an employee only if the hourly earnings are the sole source of his compensation. Payment for overtime on the basis of an artificial "regular" rate will not result in compliance with the overtime provisions of the Act.

(b) It may be helpful to describe a few schemes that have been attempted and to indicate the pitfalls inherent in the adoption of such schemes. The device of the varying rate which decreases as the length of the workweek increases has already been discussed in §§ 778.321–778.329. It might be well, however, to re-emphasize that the hourly rate paid for the identical work during the hours in excess of the applicable maximum hours standard cannot be lower than the rate paid for the nonovertime hours nor can the hourly rate vary from week to week inversely with the length of the workweek. It has been pointed out that, except in limited situations under contracts which qualify under section 7(f), it is not possible for an employer lawfully to agree with his employees that they will receive the same total sum, comprising both straight time and overtime compensation, in all weeks without regard to the number of overtime hours (if any) worked in any workweek. The result cannot be achieved by the payment of a fixed salary or by the payment of a lump sum for overtime or by any other method or device.

(c) Where the employee is hired at a low hourly rate supplemented by facilities furnished by the employer, bonuses (other than those excluded under section 7(e)), commissions, pay ostensibly (but not actually) made for idle hours, or the like, his regular rate is not the hourly rate but is the rate determined by dividing his total compensation from all these sources in any workweek by the number of hours worked in the week. Payment of overtime compensation based on the hourly rate alone in such a situation would not meet the overtime requirements of the Act.

(d) One scheme to evade the full penalty of the Act was that of setting an arbitrary low hourly rate upon which overtime compensation at time and one-half would be computed for all hours worked in excess of the applicable maximum hours standard; coupled with this arrangement was a guarantee that if the employee's straight time and overtime compensation, based on this rate, fell short, in any week, of the compensation that would be due on a piece-rate basis of x cents per piece, the employee would be paid on the piece-rate basis instead. The hourly rate was set so low that it never (or seldom) was operative. This scheme was found by the Supreme Court to be violative of the overtime provisions of the Act in the case of Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 427. The regular rate of the employee involved was found to be the quotient of total piece-rate earnings paid in any week divided by the total hours worked in such week.

(e) The scheme is no better if the employer agrees to pay straight time and overtime compensation on the arbitrary hourly rates and to make up the difference between this total sum and the piece-rate total in the form of a bonus to each employee. (For further discussion of the refinements of this plan, see §§ 778.502 and 778.503.)

§ 778.501 The "split-day" plan.

(a) Another device designed to evade the overtime requirements of the Act was a plan known as the "Poxon" or "split-day" plan. Under this plan the normal or regular workday is artificially divided into two portions one of which is arbitrarily labeled the "straight time" portion of the day and the other the "overtime" portion. Under such a plan, an employee who would ordinarily command an hourly rate of pay well in excess of the minimum for his work is assigned a low hourly rate (often the minimum) for the first hour (or the first 2 or 4 hours) of each day. This rate is designated as the regular rate; "time and one-half" based on such rate is paid for each additional hour worked during the workday. Thus, for example, an employee is arbitrarily assigned an hourly rate of $2 per hour under a contract which provides for the payment of so-called "overtime" for all hours in excess of 4 per day. Thus, for the normal or regular 8-hour day the employee would receive $8 for the first 4 hours and $12 for the remaining 4 hours; and a total of $20 for 8 hours. (This is exactly what he would receive at the straight time rate of $2.50 per hour.) On the sixth 8-hour day the employee likewise receives $20 and the employer claims to owe no additional overtime pay under the statute since he has already compensated the employee at "overtime" rates for 20 hours of the workweek.

(b) Such a division of the normal 8-hour workday into 4 straight time hours and 4 overtime hours is purely fictitious. The employee is not paid at the rate of $2 an hour and the alleged overtime rate of $3 per hour is not paid for overtime work. It is not geared either to hours "in excess of the employee's normal working hours or regular working hours" (section 7(e)(5)) or 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 $2.50 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.

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 $100 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 $100 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 $100 each week but arbitrarily breaks the sum down into wages for the first 40 hours at an hourly rate of $1.60 an hour, overtime compensation at $2.40 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 compensation 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 $100. The books show he has received $64 (40 hours × $1.60 an hour) as wages and $36 as bonus. No overtime has been worked so no overtime compensation is due.

(2) In the second week he works 45 hours and receives $100. The books show he has received $64 for the first 40 hours and $12 (5 hours × $2.40 an hour) for the 5 hours over 40, or a total of $76 as wages, and the balance as a bonus of $24. Overtime compensation is then computed by the employer by dividing $24 by 45 hours to discover the average hourly increase resulting from the bonus—53⅓ cents per hour—and half this rate is paid for the 5 overtime hours—$1.33. This is improper. The employee's regular rate in this week is $2.22 per hour. He is owed $105.45, not $101.33.

(3) In the third week the employee works 50 hours and is paid $100. The books show that the employee received $64 for the first 40 hours and $24 (10 hours × $2.40 per hour) for the 10 hours over 40, or a total of $88, and the balance as a bonus of $12. Overtime pay due on the "bonus" is found to be $1.20. This is improper. The employee's regular rate in this week is $2 and he is owed $110, not $101.20.

(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 a piece-rate basis of "x" cents ings do not amount to the sum he would have earned had his earnings been computed on a piecerate 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 that his regular rate is the quotient of piece-rate earnings divided by hours 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.

§ 778.503 Pseudo "percentage bonuses".

(a) (1) The device does not improve when it becomes more complex. If no true bonus in a flat sum amount can be legitimately separated out of the employee's wages, certainly no bonus in the form of a percentage of total earnings can be so derived. Yet some employers, seeking to evade the overtime requirements of the Act entirely while apparently complying with every requirement, have devised schemes of this kind. Like the employer described in § 778.502, such an employer pays his employee $100 a week without regard to the number of hours worked. He sets up a fictitious regular rate of $1.62 an hour. In a week in which the employee whose applicable maximum hours standard is 40 hours works 48 hours, his records show the following:

(The material in brackets does not usually appear in the final records.)

Straight time for 40 hours at $1.62 an hour	$64.80
Overtime for 8 hours at $2.43 an hour	19.44
	84.24
[$100−$84.24=$15.76, total amount to be distributed as a bonus.]	
[$15.76/$84.24=18.7%]	
Percentage of total earnings bonus at 18.7% of $84.24	15.76
Total	100.00

(2) Obviously, this employee can no more be said to be receiving proper overtime than the employee in the examples in § 778.502. This employee's regular rate in this week is $2.08 per hour and he is owed a total of $108.16 for the week.

(b) (1) No better claim of compliance can be made by an employer who arbitrarily pieces out a bonus from all or part of group wages. The scheme tends to be more complex, but the principle is the same and the same results follow.

(2) One relatively simple example of such a scheme is the following: Two employees are hired as salesmen on an hourly-rate-plus-commission basis. Each is hired at the rate of $2 an hour for the first 40 hours and $3 an hour for overtime and, in addition, is entitled to a share in commissions earned by each at the rate of one percent of sales. In a given week one employee works 40 hours and the other works 50. Together they sell $1,900 worth of merchandise and are thus entitled to $19 as commissions. In order to avoid payment of overtime on the commissions, the employer decides to distribute the $19 in the form of a percentage of total earnings. The total wages of the two employees are $190 in the particular week. The $19 commissions represent 10 percent of this figure. The employer therefore pays a 10 percent "bonus" to each employee on his total earnings. One receives $8 as bonus, the other, $11. The employer claims that no additional overtime is due because the "bonus" was a percentage of total earnings and the percentage was determined before the amount due any individual employee had been determined.

(3) If the commissions were a "bonus" at all, the method of distribution might be proper. But a bonus, as has been stated, is a sum paid in addition to regular wages and not as a part of such wages. The employees have contracted to work on a wage-plus-group-commission basis. No extra pay over and above the contract wage is involved. As a regular part of their duties, the employees make sales and regularly receive a one percent commission on the amount of the sale. Moreover, since the employees are owed the commissions in an amount related only to the amount of total sales and without regard to the number of hours worked, no part of such commissions is paid as overtime compensation.

(c) (1) In the example just given the employer sought only to relieve himself of the burden of paying proper overtime on part of the wages. The example must grow more complex but the principle does not change when the employer seeks to relieve himself of the entire burden of overtime by a fictitious division of regular group wages into hourly earnings and "bonus." This scheme is usually tried with respect to employees who work solely on a group piece rate or group commission basis. For simplicity we will assume that the two employees in the previous example receive no base hourly rate but are working solely on a commission basis—11 percent of total sales. In order for the scheme to function the employer must provide a minimum hourly guarantee. A low rate such as $1.64 is best suited to his purpose for it provides a greater leeway as to the number of hours that may be worked without the payment of any additional overtime compensation whatever. In a week in which the total sales amount to $1,558 the two employees are together entitled to $171.38 (11 percent). They will receive this amount regardless of the number of hours they have worked individually or collectively. If they work the same number of hours, each will get half—$85.69. This would be true whether the hours worked by each were 40, 43, or 48 hours. Only the bookkeeping is altered. If each works 40 hours the record will show for each:

Wages at $1.64 per hour	$65.60
Bonus	20.09
Total	85.69

If each works 45 hours, the record will show:

Wages at $1.64 per hour for 40 hours	$65.60
Overtime pay at $2.46 per hour for 5 hours	12.30
Bonus at 10 percent of total earnings (10 percent of $77.90)	7.79
Total	85.69

(2) The total amount earned by each employee is exactly the same in each of the 2 weeks because it is determined not

by the hours he works nor by the established rate but only by two unrelated factors: The total amount of sales and the relation between his hours of work and those of the other employees; not the total hours worked b, either or both but merely the ratio of the two.

(3) This will become apparent if we look at a workweek in which one works 40 hours and the other 50. The books then read this way:

1st employee:	
Wages at $1.64 per hour for 40 hours	$65.60
Bonus at 10 percent of total earnings	6.56
Total	72.16
2d employee:	
Wages at $1.64 per hour for 40 hours	65.60
Overtime pay at $2.46 per hour for 10 hours	24.60
Bonus at 10 percent of total earnings (10% of $90.20)	9.02
Total	99.22

(4) Note that in each case, as long as the amount of sales remains constant, the two employees together earn $171.38 regardless of whether either works overtime, or both do, and regardless of the number of hours of overtime worked. The first employee worked 40 hours in the first week and received $85.69, yet he received only $72.16 for a 40-hour week in the third week of the series. The only reason for this was that in the third week the other employee worked 10 hours of overtime for which someone had to pay. The employer had invented the scheme so that he, the employer, would not have to pay. The burden would devolve in part on the overtime worker himself. The latter worked 10 hours of overtime yet he received only $13.53 more than he received in a 40-hour week.

(5) The system is an ingenious bookkeeping device but obviously it must fail of its purpose. It is only a more elaborate method of claiming that a rate—whether a salary or a piece rate or a commission—somehow "includes" overtime even though it is paid regularly when no overtime is worked and without regard to the amount of overtime worked.

(d) The examples dealt with two employees. It is the same for 2 as for 1 or for 20. A "bonus" which is derived by subtraction of compensation, based on an assigned rate, from the total amount agreed to be paid to an employee or a group is not a bonus and cannot be treated as such.

(e) Regardless of bookkeeping devices, the regular rate of pay of employees employed on group piece rates or commissions is determined first by ascertaining the total amount which is due a particular employee under the contract and then dividing this sum by the number of hours he worked in the week. Extra overtime compensation, at half the rate thus determined, is due for each hour in excess of the maximum hours standard applicable.

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 employees under section 7(j).

(a) *The statutory provision.* Section 7(j) of the Act provides, for hospital employment, under prescribed conditions, an exemption from the general requirement of section 7(a) that overtime compensation be computed on a workweek basis. It permits a 14-day period to be established for the purpose by an agreement or understanding between an employer engaged in the operation of a hospital and any of his employees employed in connection therewith. The exemption provided by section 7(j) applies—

if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of 14 consecutive days is accepted in lieu of the workweek of 7 consecutive days for purposes of overtime computation and if, for his employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(b) *Conditions for application of exemption.* As conditions for use of the 14-day period in lieu of the workweek in computing overtime, section 7(j) requires, first, an agreement or understanding between the employer and the employee before performance of the work that such period is to be used, and second, the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate for all hours worked in excess of eight in any workday within such period and in excess of 80 during the period as a whole.

(c) *The agreement or understanding.* The agreement or understanding between the employer and employee to use the 14-day period for computing overtime must be entered into before the work to which it is intended to apply is performed. It may be arrived at directly with the employee or through his representative. It need not be in writing, but if it is not, a special record concerning it must be kept as required by § 516.23 of this chapter. The 14-day period may begin at any hour of any day of the week; it need not commence at the beginning of a calendar day. It consists of 14 consecutive 24-hour periods, at the end of which a new 14-day period begins. The election to use the 14-day period in lieu of the workweek must, like selection of an employee's workweek (§ 778.105) be with the intent to use such period permanently or for a substantial period of time. Changes from such period to the workweek and back again to take advantage of less onerous overtime pay liabilities with respect to particular work schedules under one system than under the other are not permissible.

(d) *Payment for overtime under the special provisions.* If the parties have the necessary agreement or understanding to use the 14-day period, computation of overtime pay on the workweek basis as provided in section 7(a) is not required so long as the employee receives overtime compensation at a rate not less than one and one-half times his regular rate of pay "for his employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period." Such compensation is required for all hours in such period in excess of eight in any workday or workdays therein which are worked by the employee, whether or not more than 80 hours are worked in the period. The first workday in the period, for purposes of this computation, begins at the same time as the 14-day period and ends 24 hours later. Each of the 13 consecutive 24-hour periods following constitutes an additional workday of the 14-day period. Overtime compensation at the prescribed time and one-half rate is also required for all hours worked in excess of 80 in the 14-day period, whether or not any daily overtime is worked during the first 80 hours. However, under the provisions of section 7(h) and 7(e)(5) of the Act, any payments at the premium rate for daily overtime hours within such period may be credited toward the overtime compensation due for overtime hours in excess of 80.

(e) *Use of 14-day period in lieu of workweek.* Where the 14-day period is used as authorized in section 7(j), such period is used in lieu of the workweek in computing the regular rate of pay of employees to whom it applies (i.e., those of the hospital's employees with whom the employer has elected to enter into the necessary agreement or understanding as explained in paragraph (c) of this section). With this exception, the computation of the regular rate and the application of statutory exclusions therefrom is governed by the general principles set forth in this Part 778.

§ 778.602 Special overtime provisions under section 7 (b), (c), and (d).

(a) *Daily and weekly overtime standards.* The general overtime pay requirements of the Act provide for such pay only when the number of hours worked exceeds the standard specified for the workweek; no overtime compensation on

a daily basis is required. However, section 7 of the Act, in subsections (b), (c), and (d), provides certain partial exemptions from the general overtime provisions, each of which is conditioned upon the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate of pay for his hours worked in the workweek in excess of daily, as well as weekly, standards specified in the subsection. Under these provisions, when an employee works in excess of both the daily and weekly maximum hours standards in any workweek for which such an exemption is claimed, he must be paid at such overtime rate for all hours worked in the workweek in excess of the applicable daily maximum or in excess of the applicable weekly maximum, whichever number of hours is greater. Thus, if his total hours of work in the workweek which are in excess of the daily maximum are 10, and his hours in excess of the weekly maximum are 8, overtime compensation is required for 10 hours, not 18.

(b) *Standards under section 7(b).* The partial exemptions provided by section 7(b) apply to an employee under the conditions specified in clause (1), (2), or (3) of the subsection "if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed." As an example, suppose an employee is employed under the other conditions specified for an exemption under section 7(b) at an hourly rate of $2.40 and works the following schedule:

Hours	M	T	W	T	F	S	S	Total
Worked	14	9	10	15	12	8	0	68

Number of overtime hours: Daily, 5 (hours over 12); weekly, 12 (hours over 56).

Since the weekly overtime hours are greater, the employee is entitled to pay for 12 hours at $3.60 an hour ($1\frac{1}{2}\times\$2.40$), a total of $43.20 for the overtime hours, and to pay at his regular rate for the remaining 56 hours ($56\times\$2.40$) in the amount of $134.40, or a total of $177.60 for the week. If the employee had not worked the 8 hours on Saturday, his total hours worked in the week would have been 60, of which five were daily overtime hours, and there would have been no weekly overtime hours under the section 7(b) standard. For such a schedule the employee would be entitled to 5 hours of overtime pay at time and one-half ($5\times1\frac{1}{2}\times\$2.40=\$18$) plus the pay at his regular rate for the remaining 55 hours ($55\times\$2.40=\$132$), making a total of $150 due him for the week.

(c) *Standards under section 7(c).* The partial exemption from the general overtime provisions provided by section 7(c) applies to an employee employed by an employer in work subject to such exemption "if such employee * * * receives compensation for employment by such employer in excess of 10 hours in any workday, or for employment by such employer in excess of 50 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed." This may be illustrated by such an employee working the following schedule, whose regular hourly rate is $2.

Hours	M	T	W	T	F	S	S	Total
Worked	10	12	12	12	8	0	0	54

Number of overtime hours: Daily, 6 (hours over 10); weekly, 4 (hours over 50).

Since the daily overtime hours are greater, the employee must receive overtime compensation of $3 an hour for 6 hours ($1\frac{1}{2}\times\$2\times6=\$18$) in addition to his pay at his regular rate for the remaining 48 hours ($\$2\times48=\$96$) or a total of $114 for the week. If the employee had worked 12 hours instead of eight on Friday, making a total of 58 hours in the week, his daily overtime hours and weekly overtime hours for the week would be equal in number—8 hours for each—in which event $24 would be due for these overtime hours at the $3 rate and $100 would be due for the remaining 50 hours at the regular rate of $2, so that his total pay required for the week would be $124.

(d) *Standards under section 7(d).* The partial exemptions from the general overtime provisions provided by section 7(d) apply to an employee employed by an employer in work subject to such an exemption "if such employee * * * receives compensation for employment by such employer in excess of 10 hours in any workday, or for employment in excess of 48 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed." To illustrate the application of this provision, assume that such an employee whose regular rate is $2 an hour works the following schedules:

Hours	M	T	W	T	F	S	S	Total
Worked	14	14	14	14	10	0	0	66

Number of overtime hours: Daily, 16 (hours over 10); weekly, 18 (hours over 48).

Hours	M	T	W	T	F	S	S	Total
Worked	16	14	14	14	6	0	0	64

Number of overtime hours: Daily, 18 (hours over 10) weekly, 16 (hours over 48).

Following the method of computation used in the examples in paragraphs (b) and (c) above of this section, the employee in the first of these weeks would be entitled to pay of $150 ($18\times1\frac{1}{2}\times\$2=\$54$ for overtime plus $48\times\$2=\$96$), and in the second week must be paid $146 ($18\times1\frac{1}{2}\times\$2=\$54$ for overtime plus $46\times\$2=\$92$) in order to satisfy the requirements of section 7(d).

(e) *Application of section 7(a) in lieu of special provisions.* An employer's agreement with his employees' collective bargaining representative under section 7(b) (1) or (2) must include a provision requiring payment, during the period covered by the agreement, for overtime in excess of 12 hours in a workday or 56 hours in a workweek as specified in section 7(b) if the exemption from the general overtime pay requirements of section 7(a) is to apply. (Cabunac v. National Terminals Corp., 139 F. 2d 853.) Under section 7(b)(3) and under section 7 (c) or (d), an employee otherwise qualified for the partial exemption in any workweek who does not receive the daily or weekly overtime compensation specified in the applicable subsection is required to be paid overtime compensation as prescribed in section 7(a). (Wirtz v. Osceola Farms Co., 372 F. 2d 584 (C.A. 5); Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398).

§ 778.603 Special overtime provisions for residential care establishments under section 13(b)(8) and for bowling establishments under section 13(b)(19).

The Act provides partial exemptions from its general overtime provisions for any employee employed by an establishment which is a residential care institution (other than a hospital) described in section 13(b)(8) or a bowling establishment as set forth in section 13(b)(19), if such employee "receives compensation for employment in excess of 48 hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed." These provisions permit employment of such an employee for as many as 48 hours in any workweek without payment of extra compensation for overtime, if the employee is paid at least one and one-half times his regular rate for all hours worked in excess of that number. The regular rate is determined in the same manner as under section 7(a) of the Act in accordance with the principles discussed in this part. An employee otherwise qualified for the partial overtime exemption under one of these provisions who does not receive the specified overtime compensation for hours worked in excess of 48 in any workweek is required to be paid overtime compensation as prescribed in section 7(a) for hours worked in excess of the maximum workweek applicable under that subsection.

Signed at Washington, D.C., this 18th day of January 1968.

CLARENCE T. LUNDQUIST,
Administrator.

[F.R. Doc. 68-892; Filed, Jan. 25, 1968; 8:45 a.m.]

Title 32—NATIONAL DEFENSE

Chapter VII—Department of the Air Force

SUBCHAPTER W—AIR FORCE PROCUREMENT INSTRUCTIONS

MISCELLANEOUS AMENDMENTS TO SUBCHAPTER

Subchapter W of Chapter VII of Title 32 of the Code of Federal Regulations is amended as follows: