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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 $5 per hour in addition to which he has received a cost-of-living bonus of $7 a week and a 2-percent commission on sales which averaged $70 per week. It is now proposed to employ him under a guaranteed pay contract which specifies a rate of $5 per hour and guarantees $200 per week, but he will continue to receive his cost-of-living bonus and commissions in addition to the guaranteed pay. Bonuses and commissions of this type are, of course, included in the ''regular rate'' as defined in section 7(e). It is also apparent that the $5 rate specified in the contract is not a ''regular rate'' under the requirements of section 7(f) since it never controls or determines the total compensation he receives. For this reason,