

§ 778.305

the making of some of the above deductions.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

§ 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 paragraphs (a)(1), (2), and (3) of § 778.304 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 § 778.304(a)(4) 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 \$200 for a 40-hour week, his hourly rate is \$5. When he works only 36 hours he is therefore entitled to \$180. The employer makes a “deduction” of \$20 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

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that the salary covers a fixed workweek.

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§ 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 pieceworker'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 part 531 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 part 531 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.

[46 FR 7314, Jan. 23, 1981]

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,

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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 non-overtime 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 bonafide rate established in good faith for like work performed during non-overtime 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 \$5 per hour, the overtime rate may not be less than \$7.50 but may be set at a higher arbitrary figure such as \$8 per hour.

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§ 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 non-overtime 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 \$75 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 \$5 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 \$75 or time and one-half the employee's regular rate for all hours worked on Sunday, whichever is greater, the \$75 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.

[46 FR 7314, Jan. 23, 1981]

§ 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 through 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