

§ 778.503

§ 778.503 Pseudo “percentage bonuses.”

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

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

Week 1—40 hours worked:	
40 hours at \$5.62 per hour	\$224.80
Percentage of total earnings bonus at 33.45% of \$224.80	75.20
Total	300.00
Week 2—43 hours worked:	
40 hours at \$5.62 per hour	224.80
3 hours at \$8.43 per hour	25.29
Subtotal	250.09
Percentage of total earnings bonus at 19.96% of \$250.09	49.91
Total	300.00
Week 3—48 hours worked:	
40 hours at \$5.62 per hour	224.80
8 hours at \$8.43 per hour	67.44
Subtotal	292.24
Percentage of total earnings bonus at 2.66% of \$292.24	7.76
Total	300.00

This employee is in fact being paid no overtime compensation at all. The records in fact reveal that the employer pays exactly \$300 per week, no matter how many hours the

employee works. The employee’s regular rate is \$300 divided by the number of hours worked in the particular week, and his overtime compensation due must be computed as shown in § 778.114.

[46 FR 7319, Jan. 23, 1981]

Subpart G—Miscellaneous

§ 778.600 Veterans’ subsistence allowances.

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

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

(a) *The statutory provision.* Section 7(j) of the Act provides, for hospital and residential care establishment employment, under prescribed conditions, an exemption from the general requirement of section 7(a) that overtime compensation be computed on a work-week basis. It permits a 14-day period to be established for the purpose of computing overtime compensation by an agreement or understanding between an employer engaged in the operation of a hospital or residential care establishment, 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 part 516 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 or residential care establishment'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.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7319, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

§ 778.602 Special overtime provisions under section 7(b).

(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 subsection (b),