

12 in any day or 56 in the week if, and only if, his "compensation for employment in excess of forty hours" is "at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6", as provided in section 7(b)(3). This means that in addition to the requirement of section 6, under which the first 40 hours of work must be paid for at a rate not less than the minimum hourly wage rate therein specified, the compensation requirements applicable to such an employee for whom the 7(b)(3) exemption is claimed include any increase in his regular straight-time pay rate for the hours worked in excess of 40 which may be necessary in order to raise the wage rate for such hours to a level of 50 percent above the rate required under section 6. Of course, if the employee is employed at a regular straight-time rate for all his hours of work which is as great or greater than one and one-half times the minimum wage applicable to him under section 6, no increase for the hours in excess of 40 will be required under the provisions of section 7(b)(3).

(b) The general minimum wage rate applicable to employees in employment that was subject to the minimum wage provisions of the Act prior to the effective date of the Fair Labor Standards Amendments of 1966 is \$1.60 an hour. Under section 7(b)(3) an employee of a wholesale or bulk petroleum products distributor to whom this rate is applicable must be paid at least \$2.40 an hour for hours worked in excess of 40 in the workweek in order for the exemption to apply. Many employees of such distributors are subject to the \$1.60 minimum wage rate under section 6 either because they are traditionally covered as employees individually engaged in commerce or in the production of goods for commerce as defined in the Act or because the enterprise coverage provisions in effect prior to the 1966 amendments (applicable to enterprises with an annual gross volume of \$1 million or more including excise taxes) would subject their employment to the minimum wage provisions if the 1966 amendments had not been enacted. In the case, however, of an employee of such a distributor whose employment comes within the minimum wage pro-

visions only because of the 1966 amendments (which reduced the annual gross volume for covered enterprises to \$500,000 on Feb. 1, 1967, and to \$250,000 on Feb. 1, 1969, exclusive of specified separately stated excise taxes at the retail level), the minimum wage rate applicable under section 6 was \$1.30 an hour until February 1, 1970, when it increased to \$1.45 an hour. Beginning February 1, 1971, the minimum wage rate applicable to such an employee will be the same (\$1.60 an hour) as that presently applicable to employment covered by the provisions of the prior Act. For employees subject to the \$1.30 minimum wage rate the rate required for work over 40 hours under section 7(b)(3) was accordingly \$1.95 an hour; for those subject to the \$1.45 rate beginning February 1, 1970, such rate is \$2.175. A discussion of the present and prior coverage of the Act will be found in part 776 of this chapter, when a revision of such part discussing enterprise coverage is published.

**§794.142 Special compensation when overtime in excess of 12 daily or 56 weekly hours is worked in the workweek.**

(a) As noted in §794.141, the partial exemption provided by section 7(b)(3) from the requirement that overtime hours be paid for at not less than one and one-half times the employee's regular rate applies only to "employment up to 12 hours in any workday and up to 56 hours in any workweek." The statute makes it plain that in any workweek when an employee otherwise eligible for the exemption works more than the specified daily or weekly hours the exemption applies only "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." Failure of the employer to pay overtime compensation under these special standards defeat the exemption. (See *Wirtz v. Osceola Farms Co.*, 372 F. 2d 584 (C.A. 5); *Holtville Alfalfa Mills v. Wyatt*, 230 F. 2d 298 (C.A. 9).)

(b) Under this provision, the number of hours worked in the workweek

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which are in excess of 12 in any workday or workdays therein, or the number in excess of 56 in the week, whichever is the greater number, must be compensated as provided in section 7(b)(3). Thus, the requisite time-and-one-half compensation must be paid for all daily overtime hours in excess of 12 per day worked by an employee in a workweek when his hours worked do not exceed 56 in the week; and for all weekly overtime hours in excess of 56 which he works in a workweek when he does not work more than 12 hours in any day. When an employee works in excess of both the daily and weekly maximum hours standards in any workweek for which the 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. As an example, suppose an employee employed at an hourly rate of \$2.40 is employed under the other conditions specified for exemption under section 7(b)(3) and works the following schedule:

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

Number of overtime hours in excess of 56 in the workweek, 12; number of hours in excess of 12 per day, five.

Since the weekly overtime hours are greater, the employee is entitled to overtime pay for 12 hours at \$3.60 an hour ( $1\frac{1}{2} \times \$2.40$ ), a total of \$43.60 for the overtime hours, in addition 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 4 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 ( $5 \times 1\frac{1}{2} \times \$2.40 = \$18$ ) 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) The overtime compensation payable to an employee under section 7(b)(3) when his hours worked in the workweek are in excess of 12 in any workday or in excess of 56 in the week must be "at a rate not less than one and one-half times the regular rate at which he is employed." This extra compensation for the excess hours cannot be said to have been paid to an employee unless all the straight time compensation due him for the non-overtime hours under his contract (express or implied) or under any applicable statute has been paid (§778.315 of this chapter). In computing the extra compensation due, the "regular rate" of the employee is calculated in accordance with section 7(e) of the Act, as explained in §778.107 of this chapter, et seq., and can in no event be less than the minimum required by the Act (see §778.107 of this chapter). Since, for exemption from section 7(a) under section 7(b)(3) in workweeks exceeding 40 hours, the Act requires that the employee receive not only compensation for 40 hours at not less than the minimum rate prescribed in section 6 but also "compensation for employment in excess of 40 hours" at a rate not less than one and one-half times such minimum rate, the "regular rate", on which time-and-one-half overtime pay must be computed for daily hours worked in excess of 12 or weekly hours worked in excess of 56, must be calculated in conformity with these minimum standards.

(d) The following illustrations of the application of these principles in the case of an employee whose applicable minimum wage rate under section 6 is \$1.60 an hour may be helpful. First, suppose the "regular rate" at which such an employee is employed, calculated in accordance with section 7(e) of the Act and part 778 of this chapter, is \$2.40 an hour or more. This would be true of an employee employed solely at a single hourly rate of pay of \$2.40 or more which he receives as straight time compensation for every hour of work. It would likewise be true of an employee, however compensated (whether by a salary for a fixed or variable number of hours, by commissions,

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piece rates, day rates or other pay systems or by a combination of these), whose pay for all hours worked in the workweek (except amounts excluded under section 7(e)) yields him average hourly straight-time earnings of \$2.40 or more an hour. Since the employee's regular rate received for all non-overtime hours of work is in such a case not less than one and one-half times his applicable minimum rate under section 6, the compensation requirements of section 7(b)(3) are satisfied for all nonovertime as well as overtime hours worked if he receives compensation at his "regular rate" of \$2.40 or more an hour for all hours worked in his workweek which are not in excess of 12 in his workday or 56 in his workweek, together with extra compensation for overtime in an amount sufficient to provide compensation for all his hours worked in excess of such daily or weekly hours, whichever are greater, at a rate at least 50 percent higher than such regular rate (at least \$3.60 an hour if the regular rate is \$2.40 an hour). A somewhat different situation is presented, however, where the employee whose applicable minimum wage under section 6 is \$1.60 an hour is paid, as the Act permits, at a wage rate for nonovertime hours up to 40 in the workweek which is not less than the \$1.60 minimum but is not as much as the \$2.40 required for hours of employment in excess of 40. As an example, suppose he is paid \$2 an hour for 40 hours and \$2.40 as required by section 7(b)(3) for hours in excess of 40, and works 60 hours in a workweek in which 10 of his hours worked are in excess of 12 in a workday for which overtime compensation must be paid at not less than one and one-half times his regular rate of pay. Since payment of the \$2 and \$2.40 rates for hours worked up to and in excess of 40, respectively, satisfies the straight-time requirements for compensation under section 7(b)(3), all the compensation requirements for exemption thereunder will be satisfied if, in addition, he is paid for the 10 daily overtime hours an extra sum equal to one-half his "regular rate" multiplied by 10. His regular rate is computed for the workweek by dividing his total straight-time compensation for the week by the number

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of hours worked for which it is paid and is accordingly \$2.133 an hour ( $\$2 \times 40 = \$80$ ;  $\$2.40 \times 20 = \$48$ ;  $\$80 + 48 = \$128$ ;  $\$128 + 60 = \$2.133$ ; see § 778.115 of this chapter). Thus, the section 7(b)(3) compensation requirements are satisfied by payment of straight-time compensation in the amount of \$80 for 40 hours of work and in the amount of \$48 for the 20 additional hours worked, together with \$10.67 as overtime premium for the 10 daily overtime hours ( $\$2.133 \times \frac{1}{2} \times 10$ ), or total pay of \$138.67 for the week.

**§ 794.143 Work exempt under another section of the Act.**

Where an employee performs work during his workweek, some of which is exempt under one section of the Act, and the remainder of which is exempt under another section or sections, of the Act, the exemptions may be combined. The employee's combination exemption is controlled in such case by that exemption which is narrower in scope. For example, if part of his work is exempt from both minimum wage and overtime compensation under one section of the Act, and the rest is exempt only from the overtime pay requirements by virtue of section 7(b)(3), the employee is exempt that week from the overtime pay provisions, but not from the minimum wage requirements. Similarly, an employee who spends part of his workweek in work which would, if done throughout the week, exempt him completely from the overtime pay requirements, and the remainder of the week in work exempt from such requirements only to the extent and under the conditions specified in section 7(b)(3), could be exempt from overtime pay only to such extent and under such conditions. Thus where an employee spends part of his workweek in transporting petroleum products by tank truck for an employer in an enterprise described in section 7(b)(3), and the remainder of his workweek in driving a taxicab for the employer's taxi business (work exempt from the overtime provisions under section 13(b)(17)), he is eligible for exemption from overtime pay only if he is compensated in such workweek in accordance with the provisions of section