

§ 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

Wage and Hour Division, Labor

§ 778.202

the contract or agreement for like work performed during such workday or workweek; [discussed in §§ 778.201 and 778.206].

(8) Any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (a)(1) through (a)(7) of this section if—

(i) Grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(ii) In the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(iii) Exercise of any grant or right is voluntary; and

(iv) Any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(A) Made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(B) Made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

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

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section 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.

[33 FR 986, Jan. 26, 1968, as amended at 76 FR 18858, Apr. 5, 2011]

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 toward 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