

§ 778.310

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]

29 CFR Ch. V (7-1-14 Edition)

§ 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 regular rate; no part of the amount may be credited toward statutory overtime compensation due.

(b) *Application of rule illustrated.* It may be helpful to give a specific example illustrating the result of paying an employee on the basis under discussion.

(1) An employment agreement calls for the payment of \$5 per hour for work during the hours established in good faith as the basic workday or workweek; it provides for the payment of \$7.50 per hour for work during hours outside the basic workday or workweek. It further provides that employees doing a special task outside the basic workday or workweek shall receive 6 hours' pay at the rate of \$7.50 per hour (a total payment of \$45) regardless of the time actually consumed in performance. The applicable maximum hours standard is 40 hours in a workweek.

(2) Suppose an employee under such an agreement works the following schedule:

	M	T	W	T	F	S	S
Hours within basic workday	8	8	7	8	8	0	0
Pay under contract	\$40	\$40	\$35	\$40	\$40	0	0
Hours outside basic workday	2	2 ¹	1	0	0	4	0
Pay under contract	\$15	\$45	\$7.50	0	0	\$30	0

¹ Hours spent in the performance of special work.

(3) To determine the regular rate, the total compensation (except statutory exclusions) must be divided by the total number of hours worked. The

only sums to be excluded in this situation are the extra premiums provided by a premium rate (a rate per hour) for work outside the basic workday and workweek, which qualify for exclusion under section 7(e)(7) of the Act, as discussed in § 778.204. The \$15 paid on Monday, the \$7.50 paid on Wednesday and the \$30 paid on Saturday are paid pursuant to rates which qualify as premium rates under section 7(e)(7) of the Act. The total extra compensation (over the straight time pay for these hours) provided by these premium rates is \$17.50. The sum of \$17.50 should be subtracted from the total of \$292.50 due the employee under the employment agreement. No part of the \$45 payment for the special work performed on Tuesday qualifies for exclusion. The remaining \$275 must thus be divided by 48 hours to determine the regular rate—\$5.73 per hour. The employee is owed an additional one-half this rate under the Act for each of 8 overtime hours worked—\$22.92. The extra compensation in the amount of \$17.50 payable pursuant to contract premium rates which qualify as overtime premiums may be credited toward the \$22.92 owed as statutory overtime premiums. No part of the \$45 payment may be so credited. The employer must pay the employee an additional \$5.42 as statutory overtime pay—a total of \$297.92 for the week.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7315, Jan. 23, 1981]

“TASK” BASIS OF PAYMENT

§ 778.312 Pay for task without regard to actual hours.

(a) Under some employment agreements employees are paid according to a job or task rate without regard to the number of hours consumed in completing the task. Such agreements take various forms but the two most usual forms are the following:

(1) It is determined (sometimes on the basis of a time study) that an employee (or group) should complete a particular task in 8 hours. Upon the completion of the task the employee is credited with 8 “hours” of work though in fact he may have worked more or less than 8 hours to complete the task. At the end of the week an employee en-

titled to statutory overtime compensation for work in excess of 40 hours is paid at an established hourly rate for the first 40 of the “hours” so credited and at one and one-half times such rate for the “hours” so credited in excess of 40. The number of “hours” credited to the employee bears no necessary relationship to the number of hours actually worked. It may be greater or less. “Overtime” may be payable in some cases after 20 hours of work; in others only after 50 hours or any other number of hours.

(2) A similar task is set up and 8 hours’ pay at the established rate is credited for the completion of the task in 8 hours or less. If the employee fails to complete the task in 8 hours he is paid at the established rate for each of the first 8 hours he actually worked. For work in excess of 8 hours or after the task is completed (whichever occurs first) he is paid one and one-half times the established rate for each such hour worked. He is owed overtime compensation under the Act for hours worked in the workweek in excess of 40 but is paid his weekly overtime compensation at the premium rate for the hours in excess of 40 actual or “task” hours (or combination thereof) for which he received pay at the established rate. “Overtime” pay under this plan may be due after 20 hours of work, 25 or any other number up to 40.

(b) These employees are in actual fact compensated on a daily rate of pay basis. In plans of the first type, the established hourly rate never controls the compensation which any employee actually receives. Therefore, the established rate cannot be his regular rate. In plans of the second type the rate is operative only for the slower employees who exceed the time allotted to complete the task; for them it operates in a manner similar to a minimum hourly guarantee for piece workers, as discussed in § 778.111. On such days as it is operative it is a genuine rate; at other times it is not.

(c) Since the premium rates (at one and one-half times the established hourly rate) are payable under both plans for hours worked within the basic or normal workday (if one is established) and without regard to whether the hours are or are not in excess of 8