

§778.319

half times this rate for all hours in excess of 40. (See §778.415 for the alternative method of computing overtime pay on the applicable rate.) In the absence of any agreement setting a different rate for nonproductive hours, the employee would be owed compensation at the regular hourly rate set for productive work for all hours up to 40 and at a rate at least one and one-half times that rate for hours in excess of 40.

(c) *Compensation attributable to both productive and nonproductive hours.* The situation described in paragraph (a) of this section is to be distinguished from one in which such nonproductive hours are properly counted as working time but no special hourly rate is assigned to such hours because it is understood by the parties that the other compensation received by the employee is intended to cover pay for such hours. For example, while it is not proper for an employer to agree with his pieceworkers that the hours spent in downtime (waiting for work) will not be paid for or will be neither paid for nor counted, it is permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours. If this is the agreement of the parties, the regular rate of the pieceworker will be the rate determined by dividing the total piecework earnings by the total hours worked (both productive and nonproductive) in the workweek. Extra compensation (one-half the rate as so determined) would, of course, be due for each hour worked in excess of the applicable maximum hours standard.

EFFECT OF PAYING FOR BUT NOT COUNTING CERTAIN HOURS

§778.319 Paying for but not counting hours worked.

In some contracts provision is made for payment for certain hours, which constitute working time under the Act, coupled with a provision that these hours will not be counted as working time. Such a provision is a nullity. If the hours in question are hours worked, they must be counted as such in determining whether more than the

applicable maximum hours have been worked in the workweek. If more hours have been worked, the employee must be paid overtime compensation at not less than one and one-half times his regular rate for all overtime hours. A provision that certain hours will be compensated only at straight time rates is likewise invalid. If the hours are actually hours worked in excess of the applicable maximum hours standard, extra half-time compensation will be due regardless of any agreement to the contrary.

§778.320 Hours that would not be hours worked if not paid for.

In some cases an agreement provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities and time spent in eating meals between working hours fall in this category. The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked. Except for certain activity governed by the Portal-to-Portal Act (see paragraph (b) of this section), the agreement of the parties will be respected, if reasonable.

(a) *Parties have agreed to treat time as hours worked.* Where the parties have reasonably agreed to include as hours worked time devoted to activities of the type described above, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate of an employee if the hours are compensated at the same rate as other working hours. The requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum.

(b) *Parties have agreed not to treat time as hours worked.* Under the principles set forth in §778.319, where the payments are made for time spent in an activity which, if compensable under

contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of Section 4 of the Portal-to-Portal Act of 1947 (see parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. On the other hand, in the case of time spent in activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, the parties may reasonably agree that the time will not be counted as hours worked. Activities of this type include eating meals between working hours. Where it appears from all the pertinent facts that the parties have agreed to exclude such activities from hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2), as explained in §§ 778.216 to 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

[46 FR 7315, Jan. 23, 1981]

REDUCTION IN WORKWEEK SCHEDULE
WITH NO CHANGE IN PAY

§ 778.321 Decrease in hours without decreasing pay—general.

Since the regular rate of pay is the average hourly rate at which an employee is actually employed, and since this rate is determined by dividing his total remuneration for employment (except statutory exclusions) for a given workweek by the total hours worked in that workweek for which such remuneration was paid, it necessarily follows that if the schedule of hours is reduced while the pay remains the same, the regular rate has been increased.

§ 778.322 Reducing the fixed workweek for which a salary is paid.

If an employee whose maximum hours standard is 40 hours was hired at a salary of \$200 for a fixed workweek of 40 hours, his regular rate at the time of hiring was \$5 per hour. If his workweek

is later reduced to a fixed workweek of 35 hours while his salary remains the same, it is the fact that it now takes him only 35 hours to earn \$200, so that he earns his salary at the average rate of \$5.71 per hour. His regular rate thus becomes \$5.71 per hour; it is no longer \$5 an hour. Overtime pay is due under the Act only for hours worked in excess of 40, not 35, but if the understanding of the parties is that the salary of \$200 now covers 35 hours of work and no more, the employee would be owed \$5.71 per hour under his employment contract for each hour worked between 35 and 40. He would be owed not less than one and one-half times \$5.71 (\$8.57) per hour, under the statute, for each hour worked in excess of 40 in the workweek. In weeks in which no overtime is worked only the provisions of section 6 of the Act, requiring the payment of not less than the applicable minimum wage for each hour worked, apply so that the employee's right to receive \$5.71 per hour is enforceable only under his contract. However, in overtime weeks the Administrator has the duty to insure the payment of at least one and one-half times the employee's regular rate of pay for hours worked in excess of 40 and this overtime compensation cannot be said to have been paid until all straight time compensation due the employee under the statute or his employment contract has been paid. Thus if the employee works 41 hours in a particular week, he is owed his salary for 35 hours—\$200, 5 hours' pay at \$5.71 per hour for the 5 hours between 35 and 40—\$28.55, and 1 hour's pay at \$8.57 for the 1 hour in excess of 40—\$8.57, or a total of \$237.12 for the week.

[46 FR 7316, Jan. 23, 1981]

§ 778.323 Effect if salary is for variable workweek.

The discussion in the prior section sets forth one result of reducing the workweek from 40 to 35 hours. It is not either the necessary result or the only possible result. As in all cases of employees hired on a salary basis, the regular rate depends in part on the agreement of the parties as to what the salary is intended to compensate. In reducing the customary workweek schedule to 35 hours the parties may agree