

## § 778.221

## 29 CFR Ch. V (7-1-10 Edition)

actually worked, if any, during such period may be credited as straight time or overtime compensation, as the case may be, in computing overtime compensation due under the Act. The amount by which the specified number of hours' pay exceeds such compensation for the hours actually worked is considered as a payment that is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due him.

(b) *Application illustrated.* To illustrate, assume that an employee entitled to overtime pay after 40 hours a week whose workweek begins on Monday and who is paid \$5 an hour reports for work on Monday according to schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday, inclusive, making a total of 42 hours for the week. The employment agreement covering the employees in the plant, who normally work 8 hours a day, Monday through Friday, provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours' work or pay. The employee thus receives not only the \$10 earned in the 2 hours of work on Monday but an extra 2 hours' "show-up" pay, or \$10 by reason of this agreement. However, since this \$10 in "show-up" pay is not regarded as compensation for hours worked, the employee's regular rate remains \$5 and the overtime requirements of the Act are satisfied if he receives, in addition to the \$210 straight-time pay for 42 hours and the \$10 "show-up" payment, the sum of \$5 as extra compensation for the 2 hours of overtime work on Saturday.

[46 FR 7312, Jan. 23, 1981]

### § 778.221 "Call-back" pay.

(a) *General.* In the interest of simplicity and uniformity, the principles discussed in § 778.220 are applied also with respect to typical minimum "call-back" or "call-out" payments made pursuant to employment agreements. Typically, such minimum payments consist of a specified number of hours' pay at the applicable straight time or overtime rates which an employee re-

ceives on infrequent and sporadic occasions when, after his scheduled hours of work have ended and without prearrangement, he responds to a call from his employer to perform extra work.

(b) *Application illustrated.* The application of these principles to call-back payments may be illustrated as follows: An employment agreement provides a minimum of 3 hours' pay at time and one-half for any employee called back to work outside his scheduled hours. The employees covered by the agreement, who are entitled to overtime pay after 40 hours a week, normally work 8 hours each day, Monday through Friday, inclusive, in a workweek beginning on Monday, and are paid overtime compensation at time and one-half for all hours worked in excess of 8 in any day or 40 in any workweek. Assume that an employee covered by this agreement and paid at the rate of \$5 an hour works 1 hour overtime or a total of 9 hours on Monday, and works 8 hours each on Tuesday through Friday, inclusive. After he has gone home on Friday evening he is called back to perform an emergency job. His hours worked on the call total 2 hours and he receives 3 hours' pay at time and one-half, or \$22.50, under the call-back provision, in addition to \$200 for working his regular schedule and \$7.50 for overtime worked on Monday evening. In computing overtime compensation due this employee under the Act, the 43 actual hours (not 44) are counted as working time during the week. In addition to \$215 pay at the \$5 rate for all these hours, he has received under the agreement a premium of \$2.50 for the 1 overtime hour on Monday and of \$5 for the 2 hours of overtime work on the call, plus an extra sum of \$7.50 paid by reason of the provision for minimum call-back pay. For purposes of the Act, the extra premiums paid for actual hours of overtime work on Monday and on the Friday call (a total of \$7.50) may be excluded as true overtime premiums in computing his regular rate for the week and may be credited toward compensation due under the Act, but the extra \$7.50 received under the call-back provision is not regarded as paid for

hours worked; therefore, it may be excluded from the regular rate, but it cannot be credited toward overtime compensation due under the Act. The regular rate of the employee, therefore, remains \$5, and he has received an overtime premium of \$2.50 an hour for 3 overtime hours of work. This satisfies the requirements of section 7 of the Act. The same would be true, of course, if in the foregoing example, the employee was called back outside his scheduled hours for the 2-hour emergency job on another night of the week or on Saturday or Sunday, instead of on Friday night.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7313, Jan. 23, 1981]

**§ 778.222 Other payments similar to “call-back” pay.**

The principles discussed in §§ 778.220 and 778.221 are also applied with respect to certain types of extra payments which are similar to call-back pay, such as: (a) Extra payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule; and (b) extra payments made, on infrequent and sporadic occasions, solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a “rest period.” The extra payment, over and above the employee’s earnings for the hours actually worked at his applicable rate (straight time or overtime, as the case may be), is considered as a payment that is not made for hours worked.

**§ 778.223 Pay for non-productive hours distinguished.**

Under the Act an employee must be compensated for all hours worked. As a general rule the term “hours worked” will include: (a) All time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but

includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, in such activities as waiting for work, remaining “on call”, traveling on the employer’s business or to and from workplaces, and in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in part 785 of this chapter (interpretative bulletin on “hours worked”) and part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). To the extent that these hours are regarded as working time, payment made as compensation for these hours obviously cannot be characterized as “payments not for hours worked.” Such compensation is treated in the same manner as compensation for any other working time and is, of course, included in the regular rate of pay. Where payment is ostensibly made as compensation for such of these hours as are not regarded as working time under the Act, the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one of a type of “payments made for occasional periods when no work is performed due to \* \* \* failure of the employer to provide sufficient work, or other similar cause” as discussed in § 778.218 or is excludable on some other basis under section 7(e)(2). For example, an employment contract may provide that employees who are assigned to take calls for specific periods will receive a payment of \$5 for each 8-hour period during which they are “on call” in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent “on call” are not considered as hours worked. Although the payment received by such employees for such “on call” time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee’s job and is not of a type excludable