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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

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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

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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 to change the basis of the employment arrangement by providing that the salary which formerly covered a fixed workweek of 40 hours now covers a variable workweek up to 40 hours. If this is the new agreement, the employee receives \$200 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. His rate thus varies from week to week, but in weeks of 40 hours or over, it is \$5 per hour (since the agreement of the parties is that the salary covers up to 40 hours and no more) and his overtime rate, for hours in excess of 40, thus remains \$7.50 per hour. Such a salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his full salary if he worked only 25 or 30 hours. No deductions for hours not worked in short workweeks would be made. (For a discussion of the effect

of deductions on the regular rate, see §§ 778.304 to 778.307.)

[46 FR 7316, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

§ 778.324 Effect on hourly rate employees.

A similar situation is presented where employees have been hired at an hourly rate of pay and have customarily worked a fixed workweek. If the workweek is reduced from 40 to 35 hours without reduction in total pay, the average hourly rate is thereby increased as in § 778.322. If the reduction in work schedule is accompanied by a new agreement altering the mode of compensation from an hourly rate basis to a fixed salary for a variable workweek up to 40 hours, the results described in § 778.323 follow.

§ 778.325 Effect on salary covering more than 40 hours' pay.

The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of \$275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of \$2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of \$7.50 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains \$5 per hour and he is due, in addition to his salary, extra compensation of \$2.50 for each hour over 40 but not over 55 and full time and one-half, or \$7.50, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is \$5.50 per hour in all weeks. This assumes that when an employee works