

**§ 779.418 Grace period for computing portion of compensation representing commissions.**

Where it is not practicably possible for the employer to compute the commission earnings of the employee for all workweeks ending in a prior representative period in time to determine the overtime pay obligations, if any, for the workweek or workweeks immediately following, 1 month of grace may be used by the retail or service establishment. This month of grace will not change the length of the current period in which the prior period is used as representative. It will merely allow an interval of 1 month between the end of the prior period and the beginning of the current period in order to permit necessary computations for the prior period to be made. For example, assume that the representative period used is the quarter-year immediately preceding the current quarter, and commissions for the prior period cannot be computed in time to determine the overtime pay obligations for the workweeks included in the first pay period in the current quarter. By applying a month of grace, the next earlier quarterly period may be used during the first month of the current quarter; and the quarter-year immediately preceding the current quarter will then be used for all workweeks ending in a quarter-year period which begins 1 month after the commencement of the current quarter. Thus, a January 1-March 31 representative period may be used for purposes of section 7(i) in a quarterly period beginning May 1 and ending July 31, allowing the month of April for necessary commission computations for the representative period. Once this method of computation is adopted it must be used for each successive period in like manner. The prior period used as representative must, of course, as in other cases, meet all the requirements of a representative period as previously explained.

**§ 779.419 Dependence of the section 7(i) overtime pay exemption upon the level of the employee's "regular rate" of pay.**

(a) If more than half of the compensation of an employee of a retail or service establishment for a representa-

tive period as previously explained represents commissions on goods or services, one additional condition must be met in order for the employee to be exempt under section 7(i) from the overtime pay requirement of section 7(a) of the Act in a workweek when his hours of work exceed the maximum number specified in section (a). This additional condition is that his "regular rate" of pay for such workweek must be more than one and one-half times the minimum hourly rate applicable to him from the minimum wage provisions of section 6 of the Act. If it is not more than one and one-half times such minimum rate, there is no overtime pay exemption for the employee in that particular workweek.

(b) The meaning of the "regular rate" of pay under the Act is well established. As explained by the Supreme Court of the United States, it is "the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed" and "by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments." (*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419.) It is a rate per hour, computed for the particular workweek by a mathematical computation in which hours worked are divided into straight-time earnings for such hours to obtain the statutory regular rate (*Overnight Motor Co. v. Missel*, 316 U.S. 572). By definition (Act, section 7(e), the "regular rate" as used in section 7 of the Act includes "all remuneration paid to, or on behalf of, the employee" except payments expressly excluded by the seven numbered clauses of section 7(e). The computation of the regular rate for purposes of the Act is explained in part 778 of this chapter. The "regular rate" is not synonymous with the "basic rate" which may be established by agreement or understanding of the parties to the employment agreement under the provisions of section 7(g)(3) of the Act; that section, like section 7(i), merely provides an exemption from the general requirement of overtime compensation based on the regular rate contained in section 7(a), if certain prescribed conditions are met (in section 7(g)(3) these

include payment of overtime compensation on a basic rate established and authorized in accordance with its terms). The requirement of section 7(i) with respect to the “regular rate” of pay of an employee who may come within the exemption which it provides is a simple one: “the regular rate of pay of such employee,” when employed “for a workweek in excess of the applicable workweek specified” in section 7(a), must be “in excess of one and one-half times the minimum hourly rate applicable to him under section 6.” The employee’s “regular rate” of pay must be computed, in accordance with the principles discussed above, on the basis of his hours of work in that particular workweek and the employee’s compensation attributable to such hours. The hourly rate thus obtained must be compared with the applicable minimum rate of pay of the particular employee under the provisions of section 6 of the Act. If the latter rate is \$1.60 an hour, for example, then the employee’s regular rate must be *more* than \$2.40 an hour if the exemption is to apply.

**§ 779.420 Recordkeeping requirements.**

The records which must be kept with respect to employees for whom the overtime pay exemption under section 7(i) is taken are specified in §516.16 of this chapter.

**§ 779.421 Basic rate for computing overtime compensation of non-exempt employees receiving commissions.**

The overtime compensation due employees of a retail or service establishment who do not meet the exemption requirements of section 7(i) may be computed under the provisions of section 7(g)(3) of the Act if the employer and employee agree to do so under the conditions there provided. Section 7(g)(3) permits the use of a basic rate established, pursuant to agreement or understanding in advance of the work, in lieu of the regular rate for the purpose of computing overtime compensation. The use of such a basic rate for employees of a retail or service establishment compensated wholly or partly by commissions is authorized under the conditions set forth in part 548 of this chapter.

**Subpart F—Other Provisions Which May Affect Retail Enterprises**

GENERAL

**§ 779.500 Purpose of subpart.**

In Subpart A of this part, reference was made to a number of regulations which discuss provisions of the Act, such as general coverage, overtime compensation, joint employment, hours worked, and methods of payment of wages, which are applicable to others as well as to retailers and their employees. (See §779.6.) In addition to those provisions, the act contains other provisions of interest to retailers and their employees. It is the purpose of this subpart to focus attention on several of the more significant provisions in these categories.

EQUAL PAY PROVISIONS

**§ 779.501 Statutory provisions.**

Section 6(d) of the Act provides:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.