

§ 778.314

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§ 778.314 Special situations.

There may be special situations in which the facts demonstrate that the hours for which contract overtime compensation is paid to employees working on a “task” or “stint” basis actually qualify as overtime hours under section 7(e)(5), (6), or (7). Where this is true, payment of one and one-half times an agreed hourly rate for “task” or “stint” work may be equivalent to payment pursuant to agreement of one and one-half times a piece rate. The alternative methods of overtime pay computation permitted by section 7(g)(1) or (2), as explained in §§ 778.415 through 778.421 may be applicable in such a case.

EFFECT OF FAILURE TO COUNT OR PAY FOR CERTAIN WORKING HOURS

§ 778.315 Payment for all hours worked in overtime workweek is required.

In determining the number of hours for which overtime compensation is due, all hours worked (see § 778.223) by an employee for an employer in a particular workweek must be counted. Overtime compensation, at a rate not less than one and one-half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. This extra compensation for the excess hours of overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid.

§ 778.316 Agreements or practices in conflict with statutory requirements are ineffective.

While it is permissible for an employer and an employee to agree upon different base rates of pay for different types of work, it is settled under the Act that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which

statutory overtime is worked. Since a lower rate cannot lawfully be set for overtime hours it is obvious that the parties cannot lawfully agree that the working time will not be paid for at all. An agreement that only the first 8 hours of work on any days or only the hours worked between certain fixed hours of the day or only the first 40 hours of any week will be counted as working time will clearly fail of its evasive purpose. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, will not impair the employee's right to compensation for work which he is actually suffered or permitted to perform.

§ 778.317 Agreements not to pay for certain nonovertime hours.

An agreement not to compensate employees for certain nonovertime hours stands on no better footing since it would have the same effect of diminishing the employee's total overtime compensation. An agreement, for example, to pay an employee whose maximum hours standard for the particular workweek is 40 hours, \$5 an hour for the first 35 hours, nothing for the hours between 35 and 40 and \$7.50 an hour for the hours in excess of 40 would not meet the overtime requirements of the Act. Under the principles set forth in § 778.315, the employee would have to be paid \$25 for the 5 hours worked between 35 and 40 before any sums ostensibly paid for overtime could be credited toward overtime compensation due under the Act. Unless the employee is first paid \$5 for each nonovertime hour worked, the \$7.50 per hour payment purportedly for overtime hours is not in fact an overtime payment.

[46 FR 7315, Jan. 23, 1981]

§ 778.318 Productive and nonproductive hours of work.

(a) *Failure to pay for nonproductive time worked.* Some agreements provide for payment only for the hours spent in productive work; the work hours spent in waiting time, time spent in travel on the employer's behalf or similar nonproductive time are not made compensable and in some cases are neither counted nor compensated. Payment

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pursuant to such an agreement will not comply with the Act; such nonproductive working hours must be counted and paid for.

(b) *Compensation payable for non-productive hours worked.* The parties may agree to compensate nonproductive hours worked at a rate (at least the minimum) which is lower than the rate applicable to productive work. In such a case, the regular rate is the weighted average of the two rates, as discussed in § 778.115 and the employee whose maximum hours standard is 40 hours is owed compensation at his regular rate for all of the first 40 hours and at a rate not less than one and one-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