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they will receive a monthly bonus computed on the basis of allocating 1 cent for each item sold whenever, in his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate. On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate.

(c) *Promised bonuses not excluded.* The bonus, to be excluded under section 7(e)(3)(a), must not be paid pursuant to any prior contract, agreement, or promise. For example, any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Most attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category; in such circumstances they must be included in the regular rate of pay.

(d) *Labels are not determinative.* The label assigned to a bonus does not conclusively determine whether a bonus is discretionary under section 7(e)(3). Instead, the terms of the statute and the facts specific to the bonus at issue determine whether bonuses are excludable discretionary bonuses. Thus, regardless of the label or name assigned to bonuses, bonuses are discretionary and excludable if both the fact that the bonuses are to be paid and the amounts are determined at the sole discretion of the employer at or near the end of the periods to which the bonuses correspond and they are not paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. Exam-

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ples of bonuses that may be discretionary include bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, referral bonuses for employees not primarily engaged in recruiting activities, bonuses for overcoming challenging or stressful situations, employee-of-the-month bonuses, and other similar compensation. Such bonuses are usually not promised in advance and the fact and amount of payment is in the sole discretion of the employer until at or near the end of the period to which the bonus corresponds.

[33 FR 986, Jan. 26, 1968, as amended at 84 FR 68772, Dec. 16, 2019]

§ 778.212 Gifts, Christmas and special occasion bonuses.

(a) *Statutory provision.* Section 7(e)(1) of the Act provides that the term "regular rate" shall not be deemed to include "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency * * *". Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Gift or similar payment.* To qualify for exclusion under section 7(e)(1) the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.

(c) *Application of exclusion.* If the bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to

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different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category. Employers may also provide gifts with more regularity throughout the year, as long as they are provided with the understanding that they are gifts. Office coffee and snacks provided to employees, for example, would also be excludable from the regular rate under this category.

[33 FR 986, Jan. 26, 1968, as amended at 84 FR 68772, Dec. 16, 2019]

§ 778.213 Profit-sharing, thrift, and savings plans.

Section 7(e)(3)(b) of the Act provides that the term "regular rate" shall not be deemed to include "sums paid in recognition of services performed during a given period if * * * the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations * * *". Such sums may not, however, be credited toward overtime compensation due under the Act. The regulations issued under this section are parts 547 and 549 of this chapter. Payments in addition to the regular wages of the employee, made by the employer pursuant to a plan which meets the requirements of the regulations in part 547 or 549 of this chapter, will be properly excluded from the regular rate.

§ 778.214 Benefit plans; including profit-sharing plans or trusts providing similar benefits.

(a) *Statutory provision.* Section 7(e)(4) of the Act provides that the term "regular rate" shall not be deemed to include: "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement,

life, accident, or health insurance or similar benefits for employees * * *". Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Scope and application of exclusion generally.* Plans for providing benefits of the kinds described in section 7(e)(4) are referred to herein as "benefit plans". It is section 7(e)(4) which governs the status for regular rate purposes of any contributions made by an employer pursuant to a plan for providing the described benefits. This is true irrespective of any other features the plan may have. Thus, it makes no difference whether or not the benefit plan is one financed out of profits or one which by matching employee contributions or otherwise encourages thrift or savings. Where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the Profit-Sharing Regulations, part 549 of this chapter, and the contributions made by the employer for providing the benefits described in section 7(e)(4) of the Act may be excluded from the regular rate if they meet the tests set forth in § 778.215. Advance approval by the Department of Labor is not required.

(c) *Tests must be applied to employer contributions.* It should be emphasized that it is the employer's contribution made pursuant to the benefit plan that is excluded from or included in the regular rate according to whether or not the requirements set forth in § 778.215 are met. If the contribution is not made as provided in section 7(e)(4) or if the plan does not qualify as a bona fide benefit plan under that section, the contribution is treated the same as any bonus payment which is part of the regular rate of pay, and at the time the contribution is made the amount thereof must be apportioned back over the workweeks of the period during which it may be said to have accrued. Overtime compensation based upon the resultant increases in the regular hourly rate is due for each overtime hour