

CHAPTER 32

OVERTIME

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Chapter 32

OVERTIME

32a STATUTORY AND REGULATORY PROVISIONS

32a00 Interpretations and instructions. (a) IB 778, Reg 50-201.103, R & I No. 3, and FOH Chapter 32 contain the official Wage-Hour interpretations and instructions regarding the applicability of the maximum hours and OT premium pay provisions of the FLSA and PCA.

(b) In each instance where a new OT standard is applicable, e.g., 48 hours to 44 hours, or where employment is newly subject to an OT standard, it shall be effective as to any w/w beginning on or after the date indicated.

32a01 Application of partial OT exemptions.^(a) Notwithstanding IB 778.603, where OT has not been paid for hours worked in excess of the statutory w/w standard, BW are owed to the employee only for the hours worked in excess of the statutory standard (e.g., 48, 46, 44) in the following exemptions:

- Sec 13(b)(4) - Fish processing
- Sec 13(b)(7) - Local transit
- Sec 13(b)(8) - Restaurant and hotel
- Sec 13(b)(18) - Food service
- Sec 13(b)(19) - Bowling alley
- Sec 13(b)(23) - Telegraph

(b) BW will be based, with appropriate modifications, on the enforcement policy in FOH 20i09 in the following exemptions:

- Sec 7(m) - Tobacco (see also FOH 20r01(c).)
- Sec 7(c) and 7(d) - Seasonal industries
- Sec 13(b)(25) - Cotton
- Sec 13(b)(26) - Sugar
- Sec 13(h) - Cotton, Cottonseed and Sugar

(c) If OT has not been paid for hours over 8 or 80, as required by Sec 7(j), BW are owed for hours worked over these standards. However, if there is no prior agreement (see FOH 25h02) to utilize 7(j), BW are due for hours over 40 a week.

(d) The policy in FOH 25c01 will be followed for BW if the conditions in Sec 7(b)(3) are not met.

(e) If no work period is designated or otherwise objectively established for purposes of Sec 7(k), as for example by employee agreement or established practice, BW are owed for hours over 40 a week. However, if the preconditions are met, BW are owed for hours worked in excess of the work period standard.

32b REGULAR RATE OF PAY

32b00 Computation of regular rate of pay. An employee's regular rate of pay is computed by dividing his total remuneration for his hours worked in the w/w, minus any true OT pay and any other specific statutory exclusions, by the number of hours of work for which the remuneration was paid.

32b00a Regular rate for w/w's in which employee receives no pay or only partial payment. (a) The regular rate for purposes of BW computations for OT weeks in which an employee subject to the OT provisions of the Acts receives no pay or only part of his pay shall be determined on the basis of the established practice, agreement, or understanding. In the case of an employee paid solely on the basis of an hourly rate, this hourly rate shall be the regular rate for purposes of computations during such weeks. Similarly, where it is determined that the practice or agreement by which an employee's wages are computed is, for example, an established weekly salary, piece rate or day rate, such salary, piece rate or day rate shall be used to compute the regular rate. The following examples illustrate the application of this principle:

(1) An employee works a total of 48 hours in a particular week and receives no pay for that w/w. He regularly receives a weekly salary of \$96 as ST payment for all hours in a week. For the w/w in question the employee's regular rate would be \$2 an hour (\$96 divided by 48 hours). He would be due \$2 an hour for the first 40 hours and \$3 an hour for each hour over 40 or a total of \$104 for the week.

(2) An employee is paid \$1.90 per hour and has 38 recorded hours and has received \$72.20 but has actually worked 44 hours. He would be due \$1.90 for the 39th hour, \$1.90 for the 40th hour, and \$2.85 for each additional hour.

(b) If the regular rate cannot be determined as in (a) above, or if the regular rate so determined is less than the legal minimum, the regular rate for OT purposes shall be the legal minimum (see FOH 32j01 and 32j02).

32b01 Hourly rate employees. Where an employee is employed solely on the basis of a single hourly rate that rate is his "regular rate". If, in addition to his earnings at the hourly rate of pay, other payments are made, such as a production bonus, the amount of the bonus must be added to his total straight time earnings. The new "regular rate" is then determined by dividing the total straight time earnings by the number of hours worked.

32b01a Hourly rate employees paid semimonthly or monthly. It is permissible under the FLSA OT requirements for hourly rate employees to receive semimonthly or monthly payments which include OT premium if the requirements as described in FOH 32j11 are met.

32b02 Pieceworkers. When an employee is employed on a piece rate basis, his regular hourly rate of pay is computed by adding together his total weekly earnings from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week to yield the pieceworker's "regular rate" for that week. In some cases, the pieceworker is hired on a piece rate basis with a minimum hourly guarantee. Where the total piece rate earnings for the week fall short of the amount that would be earned for the total hours at the guaranteed rate, the employee is paid the difference. In those weeks in which the "make-up" payment is made, the employee is in fact paid at an hourly rate and the minimum hourly guaranty which he was paid is his regular rate for that week.

32b03 Day rates and job rates. If the employee is paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for his services, his regular rate is determined by totaling all the sums received in the workweek at the day or job rates and dividing by the total hours actually worked.

32b04 Salaried employees

32b04a General rule. (a) If an employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which premium pay for OT must be calculated, is computed by dividing the straight time salary by the number of hours for which the salary is intended to compensate. Where there was a written or oral agreement between the employer and the employee as to the number of hours which the salary was to compensate and it is determined that in actual practice the terms of the agreement have been modified, the practices of the parties will control. Where the salary covers a period longer than a w/w, such as a month, it must be reduced to its w/w equivalent. A monthly salary is converted to its equivalent weekly wage by multiplying by 12 (months) and dividing by 52 (weeks) or by multiplying by the coefficient 0.2308. A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52 or by multiplying by the coefficient 0.4615.

(b) For purposes of Sec 7(j) of the amended Act, a monthly salary is converted into its bi-weekly equivalent by multiplying by 12 (months) and dividing by 26 (bi-weekly periods) or by multiplying by the coefficient 0.4615. A semi-monthly salary is translated into its equivalent bi-weekly wage by multiplying by 24 and dividing by 26 or by multiplying by the coefficient 0.9230.

32b04b Irregular hours worked. (a) If an employee is given a stipulated salary with the understanding that it constitutes straight time pay for all hours he works, and if his hours of work fluctuate from week to week, his regular rate of pay ordinarily will vary from week to week in accordance with the number of hours worked each week. The regular rate, of course, cannot be less than the applicable MW. Since straight time compensation has already been paid, such an employee must receive additional OT compensation for each OT hour in a particular w/w computed at not less than one-half the regular rate obtained by dividing the weekly salary by the number of hours worked in that w/w. If the employer to avoid weekly computations chooses to pay extra half-time based on the salary divided by 40 hours, such a method is permissible.

(b). The above rule will apply where an employee works a varying number of hours, and normally receives his full salary regardless of how few the scheduled hours may be in a particular week, even though occasional disciplinary deductions for wilful absence or tardiness are made. Disciplinary deductions, of course, may not cut into the MW or OT pay required by the Act.

(c) Similarly, an employee employed on a fixed salary basis for irregular hours of work may be paid a pro rata share of his salary in the initial or terminal week of his employment, when he is not in payroll status for the entire week.

32b05 Employees employed at two rates. Where an employee in a single w/w works at two or more different types of work for which different hourly rates at not less than the legal minimum have been established, his regular rate for that week is the weighted average of the rates; that is, his total earnings (except statutory exclusions) at the different rates are divided by the total number of hours he worked in the w/w.

32b06 Payments other than cash. Where employees are paid goods or facilities which are regarded as part of their wages, the reasonable cost to the employer of the goods or the facilities must be included in the regular rate.

32b07 PM's (push money) and other wage payments made by suppliers. Certain retail establishment sales employees (for example, those who sell cosmetics and related items) may receive, in addition to the wages paid by their employer, payments from manufacturers or distributors for selling certain items or brands. Such payments may be made directly to the sales employees or to the employer for distribution to the employees. All such payments to employees for their work are "wages" and must be recorded by the employer and included in the regular rate of pay of the employees involved.

32b08 Annual salary earned in shorter period - regular rate. Certain employment such as that in schools does not normally constitute 12 months of work each year. For the convenience of the employee, the annual salary earned during the duty months is often paid in equal monthly installments throughout the entire year. For purposes of finding the regular rate of pay for OT purpose in such cases, the annual salary is considered in relation to the duty month rather than in relation to the entire year. Thus, for example, a school bus driver may receive an annual salary of \$3000 for 10 months duty but be paid equal monthly installments of \$250 each. In such a case, he is considered as being paid at the salary rate of \$300 per month or \$69.23 per week. The regular rate for OT purposes is found in the usual manner based on this weekly salary. (See FOH 22b11 and 30b18.)

32c BONUSES

32c00 Bonuses as a part of the regular rate. (a) FLSA Sec 7(e) requires the inclusion in the regular rate of all remuneration for employment except seven specified types of payments including certain bonuses. (For a discussion of remuneration, other than bonuses, excludable from the regular rate, see FOH 32d.) Bonuses which do not qualify for exclusion from the regular rate must be totaled with other earnings to determine the rate on which OT pay must be based. (See IB 778.208.)

(b) Examples of bonuses which would normally be included in the regular rate are

- (1) production bonuses,
- (2) bonuses which are paid for performing work in less than an established standard time,
- (3) bonuses which are paid when certain types of merchandise are sold through an employee's effort,
- (4) cost-of-living bonuses,
- (5) attendance bonuses, and
- (6) bonuses paid as an incentive to attract employees to an isolated or otherwise undesirable job site.

32c01 Discretionary bonuses. (a) Sums paid in recognition of service performed during a given period need not be included in the regular rate of pay if

- (1) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period (regularity and/or repetitive payment of a bonus is not in itself sufficient

to destroy the discretionary character of a bonus), and

(2) the payments are not made pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.

(b) Where a substantial group of employees receive uniform treatment in the actual payment of a bonus, the statements of a scattered few will not be conclusive in determining whether there is, or is not, a prior contract, agreement, or promise causing the employee to expect such payments regularly. Statements must be taken from that number of employees which will insure a preponderance of evidence on which a proper decision can be made. Statements such as "I was told about the quarterly bonus", "When I was first employed I was told of this bonus", "I believe that Mr. _____ told me about this bonus when I was hired", or "When I was first employed it was mentioned as a part of the pay I was to receive" are not in themselves conclusive statements. Employee information should tell who made the promise, under what circumstances, and whether any reassurances were received at some later time.

32c02 Profit-sharing plans or trusts. Payments made to employees pursuant to a bona fide profit-sharing plan or trust which meets the requirements of Reg 549 need not be included in the regular rate of pay.

32c03 How a bonus is to be included in the regular rate. (a) If a bonus covers only one weekly pay period, the amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by the total hours worked by the employee.

(b) Where the calculation of a bonus is deferred over a period of time longer than one workweek, the employer may disregard the bonus in computing the regular hourly rate until the amount of the bonus can be ascertained. At the time the amount of the bonus is ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned, so that the employee will receive an additional amount of compensation for each week in which he worked OT during the period. This additional amount will be based on one-half the hourly rate of pay allocable to the bonus for that week multiplied by the number of OT hours worked during the week.

(c) If it is impractical to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation should be adopted. For example, it may be assumed that the employee earned an equal amount of bonus each hour worked in the bonus period. The hourly increase is then determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid.

32c04 Distribution of bonuses as a percentage of total earnings or by the boosted hour method. (a) Whether a bonus may be distributed as a percentage of total earnings of each participating employee or by the boosted hour method to achieve compliance with the OT provisions of the FLSA or PCA, depends on whether the additional money to be paid is a true bonus or whether it is a device to evade the payment of OT. If the so-called "regular rate" of the employee is so low as to be obviously fictitious, the "bonus" in all probability will be a part of the regular straight-time earnings upon which OT compensation must be computed. On the other hand, if the additional money to be paid is a true bonus, it may be distributed in proportion to the total earnings (exclusive of the bonus) of each participating employee properly computed to include time and one-half for the OT hours or in proportion to the boosted hours worked during the bonus period.

(b) Extra payments not directly related to hours worked, production, or efficiency, such as profit-sharing type bonuses and year-end or Christmas bonuses which fail to meet the tests for exclusion from the regular rate of pay under FLSA Sec 7 will generally be found to be true bonuses. Production bonuses and labor saving bonuses present a more difficult problem. For investigation purposes, if the Inv finds that such bonuses or other additional payments periodically made are not merely devices for the postponement of the full payment to the employees of their ordinary wage or salary or devices for the perpetuation of an obsolete pay structure, he will be justified in concluding that the payments are true bonuses. In this event, such payments could be made as a percentage of total earnings or by the boosted hour method. Evidence that the payment is not being used for evasive purposes may be found in the fact that the wages otherwise paid to the employees are fair and not out of line with wages which might ordinarily be expected to be paid for the occupation in the locality. The determination

should be based on the actual or potential operation of the bonus plan during a reasonably extended series for pay periods.

(c) Many employers distribute bonuses on the basis of total straight time hours or earnings. If an investigation discloses that a bonus has been distributed in this manner and OT has been worked, the investigation will be handled as follows:

(1) If the bonus is of the type not directly related to hours worked, production or efficiency but which for some reason fails to qualify for exclusion from the regular rate under Sec 7(e), no request for back wages shall be made. In such cases the employer shall be informed of possible Sec 16(b) liability and of the steps necessary to effect compliance. The number of employees and the estimated amount of back wages shall not be shown on Form WH-51. The narrative shall contain a concise statement of the facts. Where an employee involved in such bonus payments is due back wages arising from other causes, the payment of such other back wages will be requested and supervised.

(2) If the bonus is a production bonus, a cost of living bonus or any other bonus directly related to hours worked, production or efficiency, OT violations will be recorded and the employer will be requested to pay the back wages.

(3) In the case of either (1) or (2) above, it must be kept in mind that the payments may be excludable under the provisions of FLSA Sec 7(g)(3)—Reg 548.

32c05 Methods of distributing bonuses.

32c05a Bonuses on total earnings. A total bonus may be distributed to each individual member sharing therein on a percentage basis by dividing the total payroll (both straight time and OT at time and one-half) of the participating employees into the total bonus. If each participating employee is then paid as his share this percentage of his total earnings for the bonus period, the bonus mathematically will include both straight-time and OT and payment will be in compliance with the FLSA and PCA.

32c05b Bonuses on hours. A total bonus may be distributed on the basis of boosted hours instead of gross earnings. Thus, the total bonus to be paid to the group may be

divided by the total number of boosted hours of all participating employees. Each employee will then be entitled to his proportionate share calculated on his total boosted hours worked during the bonus period as follows:

$$\frac{\text{Total bonus}}{\text{Total boosted hours of all employees}} = \text{Amount of bonus allocable for each hour of work}$$

$$\text{Amount of bonus allocable for each hour of work} \times \text{Number of boosted hours of employee} = \text{Employee's share of bonus}$$

32c05c Distribution according to length of service and similar factors. (a) Distribution of a total bonus may also take into account such factors as length of service, attendance lateness, production, efficiency, place of employment, job classifications, and the like. For example, the gross earnings of each participating employee may be weighted by multiplying them by a length of service factor such as 1.0 for one year, 1.1 for two years, 1.2 for three years, and so on. A total bonus can then be distributed on a percentage basis to each individual member sharing in the bonus by dividing the total weighted payroll of the participating employees into the total bonus. If each participating employee is then paid as his share this percentage of his total weighted earnings for the bonus period, the bonus mathematically will include both straight-time and OT and the payment will be in compliance with the FLSA and PCA. Such a bonus distribution may be based on more than one such factor by multiplying the gross earning of each employee by the additional factors and then determining each employee's share as above.

(b) The weighting of employees' gross earnings to take into account length of service and similar factors is not invalid provided it is not designed to circumvent the OT requirements of the FLSA or PCA. It would, for example, be improper to apply a factor that decreases in inverse proportion to the OT worked by various groups of employees. A "group" to which a particular factor is to be applied may happen to include only one employee and still be valid. However, it should be clear that the dollar amount of the employee's share of the total bonus has not been determined before establishment of the value of the length of service or other factor that is applied to his gross earnings. If the gross earnings of each of the participating employees is weighted by a factor of different value, there would be some evidence that the values of the factors had not been predetermined. In any instance where there is a question, the Inv shall discuss his findings with his FOS.

32d OTHER REMUNERATION WHICH MAY BE EXCLUDABLE FROM COMPUTATION OF REGULAR RATE

32d00 Sums paid as gifts. Sums paid as gifts and payments in the nature of gifts are not a part of the regular rate of pay, nor may they be credited toward OT compensation which may be due an employee. To qualify for exclusion from the regular rate, the sum paid must actually be paid as a gift or in the nature of a gift. If the amount of the payment is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and so is not in the nature of a gift. If the payment is made pursuant to a contract so that the employee has a legal right to bring suit to enforce it, or if the employees reasonably assume or consider the payment to be a part of the wages for which they work, it is not a gift or in the nature of a gift. If the sum is paid at Christmas or on other special occasions and it is a bona fide gift or in the nature of a gift, it may be excluded from the regular rate even though paid with regularity and to different employees or groups in amounts which vary with the amounts of the salaries or regular hourly rates of the employees or according to their length of service.

32d01 Payments for suggestions. (a) There is no hard and fast rule on payments for suggestions for the term *suggestion plan* has been used to describe a variety of plans. Generally though, prizes paid pursuant to a bona fide suggestion plan may be excluded from the regular rate at least in situations where

(1) the amount of the prize has no relation to the earnings of the employee at his job, but is instead geared to the value to the employer of the suggestion submitted, and

(2) the prize represents a bona fide award for a suggestion which is the result of additional effort or ingenuity unrelated to and outside the scope of the usual and customary duties of any employee of the class eligible to participate and the prize is not used as a substitute for wages, and

(3) no employee is required or specifically urged to participate in the suggestion plan or led to believe that he will not merit promotion or advancement (or retention of his existing job) unless he submits suggestions, and

(4) the invitation to employees to submit suggestions is general in nature and no specific assignment is outlined to the em-

ployees, either as individuals or as a group, to work on or develop, and

(5) there is no time limit during which suggestions must be submitted, and

(6) the employer has, prior to the submission of the suggestion by an employee, no notice or knowledge that an employee is preparing a suggestion, and there are no circumstances indicating that the employer approved the task and the schedule of work undertaken by the employee.

32d02 New business contest awards. (a) Employees are not required to be credited with hours worked for time spent participating in a new business contest, and prizes and awards received for such participation are not required to be included in the employees' regular rates of pay, provided the contest is conducted under conditions which are substantially in accord with those set forth below. Any major deviation therefrom might of course require a different conclusion. (See IB 778.330-.333.)

(1) The contests are designed to obtain new business and are of limited duration, frequently three months or less.

(2) Participation is strictly voluntary.

(3) The activities of the employee in connection with the contest do not involve significant amounts of time.

(4) Employees are regularly compensated for any time spent on the contest during regular working time.

(5) After hours solicitation is usually done among friends, relatives, neighbors and acquaintances as a part of the employee's social activity.

(6) Door-to-door solicitation is prohibited.

(7) Awards for participation are provided under the contest rules and may be in the nature of points to be accumulated toward merchandise prizes or cash payments.

32d03 Payments for absences, holidays, or leave.

32d03a Payment for occasional absences. Payments made by an employer to an employee for occasional periods when no work is performed due to vacation, holiday, illness, weather conditions, failure of the employer to provide sufficient work because of machinery breakdown, shortage of material, and the like, may be excluded from the regular rate of pay

of the employee. Likewise, payment for infrequent, occasional or sporadic excused absences of a non-routine character, such as for jury duty, attending court, attending funerals, physical check-ups, and for engaging in purely personal pursuits like going fishing or to the beauty parlor, will not invalidate an otherwise valid pay plan, unless these absences show a pattern of such consistency as to result in a change in rate or appear to be in furtherance of, or adaptable to, a scheme to avoid payment of OT at the proper rate.

32d03b **Holiday defined.** The term *holiday* refers to those days customarily observed in the community in celebration of some historical or religious occasion. It does not refer to days of rest given to employees in lieu of, or as an addition to, compensation for working other days.

32d03c **Permissive counting of excused absence in computing OT.** Where it is the custom or practice to pay employees for hours during which no work is performed due to vacation, holiday, illness, failure of employer to provide sufficient work, or other similar cause, as these terms are explained in **18.218**, it is permissible (but not required) for the employer to count these hours as hours worked in determining whether OT is due under the employment agreement.

32d03d **Payment of OT by an additional period of vacation with pay.** Payment of statutory OT compensation by an additional period of vacation with pay in an amount equal to the total accrued OT will not satisfy the requirement of the FLSA that the full amount of ST and extra half-time due for all hours worked in excess of 40 in each w/w be paid promptly at the end of the regular pay period either in cash or in "facilities" as defined in FLSA Sec 3 (m) and Reg 531.

32d03e **Payment for foregoing a vacation or sick leave.** (a) Where a sum is paid to an employee for foregoing a vacation which is in addition to the employee's normal compensation for working it is not in fact compensation for hours worked, and hence need not be counted in determining the regular rate of pay. This rule is limited to situations where there is a bona fide agreement or understanding that the employee shall receive a vacation with pay, and the sum paid for foregoing the vacation is the approximate equivalent of the employee's normal earnings for a similar period of working time.

(b) This same rule applies to payments for unused sick leave where there is a bona fide agreement that the employees will receive a specific amount of sick leave with pay, and the sum paid for unused sick leave is the approximate equivalent of the employee's normal earnings for a similar period of working time.

32d03f **Compensation for day before or after a holiday.** *Prepayment effect of advance compensation.* Where compensation for a day off before or after a holiday is advanced by the employer with the understanding that the compensation is a bona fide advance to be earned in the succeeding week, it would be proper for the employer to offset this amount against the straight time and OT compensation caused by the make-up hours.

32d03g **Annual leave plan.** Payment for absences charged against leave under a bona fide plan granting the employee a specified amount of annual, vacation, or sick leave with pay need not be included in the regular rate of pay, if the sum paid is the approximate equivalent of the employee's normal earnings for a similar period of working time. Payments for such absences may be excluded regardless of when or how the leave is taken.

32d03h **Fringe benefits paid in cash.** In some cases employers pay their employees a proportionate part of certain fringe benefits, such as vacation pay, sick leave and holiday pay in cash on each pay day. This practice may be found in certain industries such as the construction industry where the employee usually is employed by more than one employer during the year. Such payments may be made, for example, as a certain number of cents per hour or as a percentage of the hourly rate. Such payments may be excluded from the regular rate under Sec 7(e)(2) provided (1) they represent bona fide fringe benefits, (2) they are the cash equivalent of such benefits, and (3) there is a clear understanding between the employer and employees that the payments are in lieu of such fringe benefits. There should also be a designation on the payroll records that such payments are in lieu of the specific fringe benefits. However, the absence of such a designation per se will not cause such otherwise

bona fide fringe payments to be considered part of the regular rate provided in fact that the tests set forth above are met.

32d04 Report and call back pay.

32d04a General rule. Where an employee is guaranteed pay for a minimum number of hours, if, on infrequent or sporadic occasions, he reports for work at his scheduled time and is not given work for the specified number of hours, or if he is called back to work outside of his regular schedule, the amount paid over and above what the employee would have received, if paid at his customary rate only for hours actually worked, need not be included in computing his regular rate of pay. That part of the pay for hours actually worked which may be credited as OT compensation, in accordance with FLSA Sec 7(e) (5), (6), or (7), may be applied to the statutory OT pay due.

32d04b Report and call back rule not restricted to arrangements which are so desig-

nated. The report and call back pay rule is not restricted to situations which are so designated by the employment agreement. It may be applied to any situation where the employee performs work outside his regular working hours, is guaranteed pay for a minimum number of hours, and does not work the number of hours covered by the guarantee. Thus, for example, this rule is applicable to some wire changing payments in the paper industry.

32d04c Straight time pay provisions in a call back agreement. Many call back pay agreements provide that where an employee is called back to work during OT hours he shall receive time and one-half or some greater multiple of his regular rate for the hours actually worked or a minimum of X hours straight time pay, whichever amount of money is greater. Since, in such situations provision is made for the payment of not less than the legal OT rate, that portion of the payment which is equal to the OT compensation due for the OT hours actually worked may be credited as a true OT premium in computing OT compensation under the FLSA or PCA despite the fact that under the employment agreement the employee receives "straight time pay".

32d04d Rest period payments may be treated as call back payments. Premium payments made solely because the employee has been called back to work before the expiration of a so-called rest period between shifts or tours of duty may be treated as call back payments and so excluded from the regular rate of pay. However, since these payments are not for OT, but are made solely because of the interruption of a rest period, they may not be offset against statutory OT.

32d05 Reimbursement of employee expenses.

32d05a General rule. (a) Payments reasonably approximating traveling or other expenses incurred by an employee in furtherance of his employer's interests, and properly reimbursable by the employer, may be excluded from the regular rate of pay. However, if the amount paid is disproportionately large, the excess amount shall be included in the regular rate of pay for OT purposes. (See IB 778.217.)

(b) Situations may be encountered where the employer makes per diem or other subsistence payments, or pays an allowance to offset the additional expenses incurred by an employee because he is required to work at a distant or isolated location and must live away from home. Such payments may be excluded from the regular rate of pay to the extent that they do not exceed a reasonable approximation of actual additional expenses involved in such situations. On the other hand, where an employee receives such payments but actually incurs no such additional expenses, the entire amount of the payments shall be included in determining the regular rate. This would be true, for example, where such payments are made to an employee who is not required to live away from home or where he establishes a new residence at or near the place of work.

(c) If the amount of per diem or other subsistence payment is based upon and thus varies with the number of hours worked per day or week, such payments are a part of the regular rate in their entirety. However, this does not preclude an employer from making proportionate payments for that part of a day that the employee is required to be away from home on the employer's business. For example, if an employee returns to his home or employer's place of business at noon, the payment of only one-half the established per diem rate for that particular day would not thereby be considered as payment for hours worked and could thus be excluded from the regular rate.

32d05b Payment for travel time. The payment for travel time which is not hours worked constitutes "other similar payments to an employee which are not made as compensation for his hours of employment" and is therefore excludable from the computation of the regular rate of pay.

32d05c Employer's share of board and lodging cost. The employer's share of the cost of board and lodging furnished employees need not be included in the regular rate where it is similar to reimbursements for expenses incurred by employees in traveling on the employer's business. This rule applies where the employees' wage rates are not influenced by the furnishing of board and lodging and where both parties understand the employer's share of the cost is not compensation for services or hours worked. Examples are employees who maintain dual residences, such as barge workers and mechanics who travel.

32d06 Benefit plans. 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, health, or layoff (such as the Ford-UAW Agreement) insurance or other similar benefits for employees are excluded from the regular rate of pay. The requirements of a bona fide benefit plan are set forth in IB 778.214-.215.

32d07 Thrift and savings plans. An employer's contributions to bona fide thrift or savings plans which meet the requirements of Reg 547 need not be included in the regular rate of pay.

32d08 Talent fees.

32d08a Radio and television broadcasting. (a) Performers and announcers on radio and television programs are customarily compensated by the payment of a fixed salary which covers certain regular duties enumerated in the contract of employment. In the case of announcers, these duties will usually include presence at the station during particular hours called the "stretch" and such duties as announcement of station breaks, routine news, weather reports, sustaining programs, et cetera.

(b) In addition to his salary, the announcer usually receives "talent fees" which are specific payments for the performance of special services that may occur in or out of the stretch. For example, some stations pay an announcer a fixed amount for each spot commercial announcement such as "Buy Bond Bread".

(c) The services for which talent fees are paid vary from station to station. In some, a talent fee is paid for any service in connection with a commercial (that is, sponsored) program while all sustaining (that is, non-sponsored) program work is considered part of the regular staff duties. In others, special services in connection with sustaining programs carry a fee. Where a collective bargaining agreement is in force, the agreement will usually specify under what circumstances talent fees will be paid and will set forth a scale of rates for such fees.

(d) Although talent fees are thus part of an announcer's regular earnings, they are excluded from the regular rate by virtue of FLSA Sec 7(e)(3)(c), provided they meet the requirements of Reg 550.

32d08b Offsetting talent fees against OT. Time spent in earning talent fees outside of regular working hours need not be included in determining the amount of OT compensation due if

- (1) the parties agree in advance of the program that a special payment therefor shall include any increased statutory compensation attributable to the additional worktime, and
- (2) the special payment, when made, is actually sufficient in amount to include the statutory straight time and OT compensation due computed without regard to the talent fees.

32d09 D-B Act fringe benefits payments. (a) Public Law 88-349 amends the D-B Act and provides in certain circumstances for the inclusion by the Secretary of the costs of fringe benefits in D-B prevailing wage determinations. It also provides that the cost of such fringe benefits (or cash equivalent paid in lieu of such benefits) shall be excluded from the regular rate under the FLSA, FCA, and CWESA.

FIELD OPERATIONS HANDBOOK - 3/17/78

ADD the following new Sec to text and Table of Contents:

32d10 Piece rate premium pay under Sec 7(e)(5).

- (a) Premium piece rate payments which are clearly allocable exclusively to hours worked in excess of 8 per day or 40 per week or normal or regular working hours, as the case may be, may be excluded from an employee's regular rate of pay pursuant to Sec 7(e)(5). Such premium rate payments may be in any amount in excess of the regular piece rate; they do not have to be at a rate, for instance, of not less than one and one-half times the regular piece rate.
- (b) An example of a piece rate payment plan which does not include any premium payments excludable pursuant to Sec 7(e)(5) is one where the employee is paid a piece rate of 15c per unit for a workday up to 9 hours a day; 17c per unit for a workday of between 9 and 10 hours; 18c per unit for a workday of between 10 and 11 hours; 19c per unit for a workday of between 11 and 12 hours; 21c per unit for a workday of 12 or more hours; and 21c per unit for Saturday and Sunday work, as such. Since the foregoing rates are paid for all hours worked in the workday and not for work performed outside of a standard specified in Sec 7(e)(5), no part of the compensation paid may be excluded from the employee's R/R.

(b) Subpart B of Reg 5 contains interpretations of the fringe benefits provisions of the D-B Act, as amended. If situations are encountered during FLSA or PCA investigations which involve D-B fringe benefit payments and the question of whether or to what extent such payments may be excluded from the regular rate cannot be resolved on the basis of Reg 5, Subpart B (including situations where there is no concurrent coverage but the employer asserts that fringe benefit payments are being made in contemplation of D-B work), the matter shall be referred through channels to the RA for an opinion.

32d10 -- SEE INSERT 1485

32e PREMIUM RATES FOR EXCESSIVE HOURS

32e00 Premium payments for excessive hours. Extra compensation provided by a premium rate paid for certain hours worked by an employee in any day or workweek because such hours are hours worked in excess of 8 in a day or the applicable statutory maximum workweek, or in excess of the employee's normal or regular working hours, need not be included in the computation of the employee's rate of pay and may be credited toward OT compensation due under the FLSA or PCA.

32e01 Valid hours standards. (a) Where the payment of a premium rate for work is made contingent upon prior work for a specified number of hours in the day, or hours or days in the workweek, that daily or weekly standard will be accepted as meeting the requirements of FLSA Sec 7(e)(5), if it qualifies as any one of the following standards:

(1) Statutory standard - a standard working day of 8 hours or a standard workweek of the applicable statutory maximum workweek. OT payments for standards in excess of 8 a day or the applicable statutory maximum workweek will also be recognized; for example, OT payments after 9 actual working hours a day are recognized as OT payments under Sec 7(e)(5) even though 9 hours are not the employee's normal or regular working hours.

(2) Regular working hours standard - a standard which coincides with the employee's regular hours or days of work during the period covered by the investigation.

(3) Normal working hours standard - a standard which coincides with the employee's normal hours or days of work as established by agreement or practice, even though abnormal conditions have resulted in the employee regularly working for some time hours in excess of the standard. The standard will be considered to coincide with the employee's normal hours or days of work where

a. the facts indicate that the standard coincided with the employee's regular working hours or days in the past, that the regular working of excess hours or days at present is due to emergency or transitory conditions which are not expected to be permanent and that the parties intend again to observe the specified standard as the normal working hours or days as soon as conditions permit, there being no inconsistent guarantee of employment or pay for hours or days in excess of the standard; or,

32e00 Premium payments for excessive hours. Extra compensation provided by a premium rate paid for certain hours worked by an employee in any day or workweek because such hours are hours worked in excess of 8 in a day or the applicable statutory maximum workweek, or in excess of the employee's normal or regular working hours, need not be included in the computation of the employee's rate of pay and may be credited toward OT compensation due under the FLSA or PCA.

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(1) Statutory standard - a standard working day of 8 hours or a standard workweek of the applicable statutory maximum workweek. OT payments for standards in excess of 8 a day or the applicable statutory maximum workweek will also be recognized; for example, OT payments after 9 actual working hours a day are recognized as OT payments under Sec 7(e)(5) even though 9 hours are not the employee's normal or regular working hours.

(2) Regular working hours standard - a standard which coincides with the employee's regular hours or days of work during the period covered by the investigation.

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a. the facts indicate that the standard coincided with the employee's regular working hours or days in the past, that the regular working of excess hours or days at present is due to emergency or transitory conditions which are not expected to be permanent and that the parties intend again to observe the specified standard as the normal working hours or days as soon as conditions permit, there being no inconsistent guarantee of employment or pay for hours or days in excess of the standard; or,

b. the employee's regular working hours or days have in the past exceeded the standard but it appears certain, after considering all of the available evidence, that the standard was adopted and is being applied with the bona fide intention of establishing it as the normal daily or weekly working period to which the regular hours or days will be conformed as soon as the necessary adjustments can practicably be made, there being no inconsistent guarantee of employment or pay for hours or days in excess of the standard.

32e02 Questionable hours standard. Where alleged daily or weekly hours standards differ from the applicable statutory standard, they shall be carefully scrutinized to determine whether they are in fact bona fide standards within the criteria outlined in FOH 32e01. This is especially true of alleged daily standards of less than 8 hours and alleged weekly standards of less than the applicable statutory maximum workweek where the investigation discloses that the regular working hours per day or per week are in excess of the alleged standard. Where there is any doubt concerning the validity of the standard, the matter shall be referred to the RD for a determination on the basis of the facts submitted by the Inv and his FOS, and any other facts relating to the particular establishment or industry which may be available to the RD.

32e03 Offset of premium payments for excessive hours. Where premium rates are paid for hours in excess of a valid hours standard, the amount of the premium payment may be offset against statutory OT compensation due, regardless of whether such extra compensation is provided by a premium rate of 1 1/3, 1 1/2, double, or some other multiple of the non-OT rate of pay.

32e04 Premium rates for specified days. (a) Extra compensation provided by a premium rate paid for work by an employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where the premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-OT hours on other days, need not be included in computing the regular rate of pay and may be offset against OT compensation due under the FLSA or FCA.

(b) Where the premium rates paid for work on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek are at less than time and one-half, the extra compensation may be excluded from the regular rate only if the premium rates meet the tests of an excessivity premium.

32f PREMIUM RATES FOR WORK OUTSIDE THE BASIC WORKDAY OR BASIC WORKWEEK

32f00 General rule. Extra compensation provided by a premium rate paid to an employee pursuant to an applicable employment contract or collective-bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not

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exceeding 8 hours) or workweek (not exceeding the applicable statutory maximum workweek), where that premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during the workday or workweek, need not be included in computing the regular rate of pay and may be offset against OT compensation due under the FLSA. The basic workday or workweek, if established in good faith by contract or agreement, need not coincide with the normal or regular workday or workweek. Such a basic workday or workweek may be established in situations where there is no normal or regular workday or workweek.

32f01 Effect of regular practice where agreement does not specifically designate an hours standard workday. The fact that a collective bargaining or employment agreement does not specify the exact hours that are to constitute the workday does not preclude application of FLSA Sec 7(e)(7), nor is it necessary that the contract or agreement specifically provide for premium pay for hours "outside the workday". If in practice the parties have arranged for payment of not less than time and one-half a bona fide rate for hours outside of a workday, the practice will be deemed to modify the terms of the original contract or agreement. For example, if a contract provides for payment of time and one-half for hours beyond 8 in a day or 40 in a week, but in practice the employees normally work from 8 a. m. to 5 p. m. with 1 hour for lunch, the payment of time and one-half for the hours before 8 a. m. and after 5 p. m. will be accepted as compliance with FLSA Sec 7(e)(7). Furthermore, where the scheduled hours of the workday vary from time to time because of unforeseen contingencies, this fact does not preclude the acceptance of such a workday as an established workday under Sec 7(e)(7). Where the above conditions are met, the OT premiums are valid under Sec 7(e)(7) regardless of the number of hours during the basic, normal workday or workweek.

32f02 Employment contract. (a) Whereas a collective bargaining agreement is generally a formal agreement which has been reduced to writing, an employment contract may be either written or oral.

(b) Where there is a written employment contract and the practices of the parties differ from its provisions, it must be determined whether the practices of the parties have modified the contract. If the practices of the parties have modified the written provisions of the contract, the practices of the parties will be controlling.

(c) The determination as to the existence of an applicable oral employment contract will be based on all of the facts, including the terms of the oral contract and the actual employment and pay practices.

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32g GUARANTEED WEEKLY WAGE PLANS [FLSA SECTION 7(f)]

32g00 FLSA Section 7(f). (a) FLSA Sec 7(f) provides that no employer shall be deemed to have violated the overtime provisions of the FLSA by employing an employee for a workweek in excess of the applicable statutory OT standard

- (1) if the employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees,
- (2) if the duties of such employees necessitate irregular hours of work, and
- (3) if the contract or agreement
 - a. specifies a regular rate of pay which is not less than the applicable legal minimum,
 - b. provides for compensation at an OT rate which is not less than one and one-half times the specified rate for all hours worked in excess of the applicable statutory OT standard in any workweek, and
 - c. provides a weekly guaranty of pay covering compensation based on the specified regular and OT rates for not more than 60 hours.

32g01 Contract or agreement. (a) Employers should be encouraged to reduce FLSA Sec 7(f) contracts to writing, since a contract of this nature is complicated and proof both of its existence and of its compliance with the requirement of Sec 7(f) may be difficult if it is an oral contract. It should be kept in mind that Reg 516. 24(c) requires, in the case of an oral agreement, that a written memorandum summarizing the terms of the 7(f) agreement be made by the employer. Failure to maintain such a written memorandum would result in a recordkeeping violation but would not of itself invalidate an otherwise valid 7(f) contract or agreement. It may, however, in conjunction with other factors point toward either the invalidity or nonexistence of such an agreement.

(b) A contract cannot be a one-sided affair. Therefore, the employee must not only be aware of, but must have agreed to, the method of compensation in advance of his performance of the work.

(c) The contract whether oral or written must provide for compliance with all of the requirements of FLSA Sec 7(f), and where there is a change in the specified rate or the number of hours for which pay is guaranteed, the contract must be amended accordingly.

32g02 Irregular hours. (a) Contracts under FLSA Sec 7(f) may be made only with, or by their representatives on behalf of, employees whose duties necessitate irregular hours of work. In this connection, there is nothing in the FLSA which makes the Sec 7(f) exemption inapplicable to any class of employees. Whether or not the duties of employees necessitate irregular hours of work must be decided on the facts of employment as to such employees.

(b) The following situations do not permit a finding that the employee's hours are in fact irregular:

(1) The fluctuation results entirely from absences of the employee for reasons other than the nature of his duties, such as absences due to illness, vacation, holidays, and the like.

(2) The fluctuation results because the employee works fixed workweeks of different lengths. This would include situations where the fixed workweeks of longer length occur during seasonal peaks.

(3) The only fluctuation is minor or insignificant. The terms minor and insignificant shall be understood to mean fluctuations of 4 or less hours between the lowest number of hours worked and the highest number of hours worked in any year or where the fluctuations, even though beyond this range are only occasional.

(4) The fluctuation, (even though more than occasional, minor or insignificant) occurs exclusively or nearly so in the hours above the applicable statutory OT standard.

(c) Where irregular hours are worked during most of the contract period, the irregular hours of work criterion will be met even though there are periods in which regular hours are worked. Likewise, where irregular hours are worked during the entire period, a single Sec 7(f) contract or agreement covering the entire period may be proper even though hours fluctuated at a low level during the slack season and at a high level during the busy season. In the latter case, it is possible also to have two Sec 7(f) contracts, one for the busy season and one for the slack season. A further discussion with reference to irregular hours is contained in IB 778.405.

32g03 Agreements covering more than one employee. (a) In the case of a group of employees similarly situated with respect to the kind or nature of the work they do, a contract may be set up with the same

provisions for all individuals in the group.

(b) In determining the validity of the agreement with respect to any individual employee in a group, the experience of the group as a whole should be considered together with the experience of the individual employee. Where the experience of the individual is found to meet all the tests of a valid Sec 7(f) contract, the contract will be considered valid for him. However, the fact that an individual, who is a member of a group failed for a particular period to work hours which in fact are irregular does not necessarily invalidate his contract if it can be concluded that, on the basis of the experience of the group, it can be "reasonably expected" that he will meet this test.

32g04 Payment of the guaranty and for hours in excess of guaranty - deductions. (a) To meet the requirement for the payment of not less than time and one-half for hours over the applicable statutory OT standard in the workweek, the employee must be paid the full amount of the guaranty (except as provided in (b) below) for every workweek, however short, in which he performs any amount of work for the employer. In addition, the employee must be paid time and one-half the specified rate for all hours actually worked in excess of the number of hours covered by the guaranty. As a general rule, failure to pay such additional OT for excess hours will preclude the application of FLSA Sec 7(f).

(b) The following types of deductions may be made without affecting the validity of a Sec. 7(f) plan. In each case, however, it will be necessary to review the circumstances carefully.

(1) Deductions to cover the cost to the employer of furnishing board, lodging, and other facilities within the meaning of FLSA Sec 3(m).

(2) Deductions authorized by the employee, such as union dues, or required by law, such as taxes and garnishments.

(3) Disciplinary deductions for time during which an employee wilfully refuses to perform available work.

32g05 Regular rate in relation to guaranty - "excessivity" standard not controlling. As a result of judicial decisions, the failure of the pay arrangement to meet the "excessivity" standard referred to in IB 778408 and 778410-414 is no longer considered sufficient

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in itself to be a controlling criterion in testing the validity of a Sec 7(f) contract. In substance, the "excessivity" standard contemplated that the relationship between the hourly rate specified in the contract and the amount of the guaranty must be such that the employee would have worked or could reasonably have been expected to work sufficient hours to earn in excess of the guaranty in a significant number of weeks and thus demonstrate that the regular rate was designed to be operative in controlling the compensation. The weight to be given to a failure to meet this standard will depend on all the facts and the total situation. While the courts have declined to accept the view that validity of a pay arrangement under Sec 7(f) may be tested by this standard alone, the factors involved still may have evidential bearing, at least in conjunction with other pertinent considerations, on the bona fides of the contract. In situations where the fluctuations in weekly hours seem plainly unrelated to the guaranteed contract hours (for example, the employee's hours ordinarily fluctuate between 35 and 45 or 50 but the contract guaranty covers 60 hours), the bona fides of the contract are subject to doubt. It is unlikely that under a bona fide contract an employer will pay week after week for more hours than actually worked.

32g06 Guaranty of pay for not more than 60 hours in a workweek. (a) The guaranty must be a weekly guaranty. A guaranty of monthly, semi-monthly, or biweekly pay does not qualify under FLSA Sec 7(f). However, the weekly guarantee may be paid every 2 weeks, or at the end of a semimonthly or monthly pay period for all workweeks ending within the pay period. (See FOH 32j11.)

(b) The contract must provide a guaranty of pay, and the amount must be specified. A mere guaranty to provide work for a particular number of hours is not sufficient. The pay guaranteed must be for not more than 60 hours based on specified rates.

32g07 Computations, invalid Sec 7(f) plans. (a) Where it is found that a guaranteed weekly wage plan does not meet the requirements of FLSA Sec 7(f) during a particular period of time for a particular employee, a violation will exist for that employee and the total amount of his guaranteed wage as specified in the contract or agreement determines his regular rate of pay during the period of violation. In any week in the violation period for which it is necessary to compute his regular rate of pay for OT purposes, the rate shall be determined as follows:

- (1) In workweeks not exceeding the guaranteed number of hours, the total amount of the guaranty shall be divided by the number of hours actually worked.
- (2) In workweeks exceeding the number of hours covered by the guaranty, the guaranteed salary shall be divided by the guaranteed

number of hours. Compensation received by the employee for work in excess of the guaranty may, of course, be offset against the amount found due by computing his earnings on the regular rate of pay calculated as explained above.

(b) Illustration:

A Sec 7(f) plan has been determined to be invalid for a particular employee. The rate specified in the contract or agreement is \$4.00 per hour and a guaranty of \$220.00 to cover ST and OT compensation for 50 hours is provided. No bonuses or other additions to wages are paid to the employee.

- (1) In a week in which he worked 45 hours, the employee's regular rate of pay would be \$220.00 divided by 45 hours, or \$4.88. In addition to the \$220.00 already paid to him under his guaranty, he would be entitled to receive half-time for the five OT hours, or \$12.20.
- (2) In a week in which the employee worked 50 hours, the number of hours for which pay was guaranteed, his regular rate would be \$220.00 divided by 50 hours, or \$4.40. He would be entitled to receive an additional \$22.00 for the 10 OT hours.
- (3) In a week in which the employee worked 55 hours and received under his contract or agreement the total amount of \$250.00 (\$220.00 under his guaranty and \$20.00 as ST pay and \$10.00 as OT premium for the five additional hours) his regular rate of pay would still be determined by dividing the amount of his guaranty, \$220.00 by the number of hours for which pay was guaranteed, 50 hours. His regular rate for that week would thus again be \$4.40 and total compensation due would be (\$220.00 + \$22.00) + (5 X 1-1/2 X \$4.40) or \$275.00. BW due would be \$275.00 - \$250.00 or \$25.00.

- (c) The illustrations in (b) above merely state the principle involved. The actual computation should be made by use of the coefficient table as appropriate. (See "Transcription and Computation Short Cuts for Overtime".)

32g08 Sec 7(f) plans and the PCA.

A Sec 7(f) plan which is found to be valid may continue to operate during periods in which the work of the employee is subject to the provisions of the PCA, provided that during those periods the employer complies with the MW and OT provisions of the PCA.

32g09 Exempt workweeks.

An otherwise valid Sec 7(f) contract will not be invalidated because of the failure to pay time and a half for the hours in excess of the contract maximum hours in weeks in which the employer has availed himself of an applicable OT exemption.

32h OVERTIME BASED ON RATE FOR SAME WORK WHEN PERFORMED DURING NON-OVERTIME HOURS

32h00 General provisions of FLSA Secs 7(g)(1) and 7(g)(2). (a) FLSA Secs 7(g)(1) and 7(g)(2) provide exceptions from the OT requirements of FLSA Sec 7(a) in the case of:

- (1) an employee employed at piece rates, or
- (2) an employee performing two or more kinds of work for which different hourly or piece rates have been established, provided:
 - a. the payments are made pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work,
 - b. the OT rate is not less than one and one-half times the bona fide rate applicable to the same work when performed during non-OT hours,
 - c. the number of daily or weekly OT hours, for which such OT compensation is paid, equals or exceeds the number of hours worked in excess of the applicable statutory maximum workweek by the employee in the workweek,
 - d. the employee's average hourly earnings for the workweek, exclusive of payments described in clauses (1) through (7) of FLSA Sec 7(e), are not less than the minimum hourly rate required by applicable law, and
 - e. extra OT compensation is computed and paid on other forms of additional pay required to be included in computing the regular rate.

32h01 Prior agreement or understanding. The FLSA specifies that an agreement or understanding must be reached before the performance of the work.

32h02 Two or more kinds of work for which different rates of pay have been established. (a) Whether or not an employee is performing two or more different kinds of work for which different straight time piece rates or hourly rates have been established must be determined on the basis of all the facts in each instance. The following are considered to be different rates of pay for different types of work for purposes of Secs 7(g)(1) or 7(g)(2):

- (1) Differential rates for night shift and Sunday work.
- (2) Differential rates for hazardous work, such as differential rates in construction based on height.
- (3) Different rates pursuant to a collective bargaining agreement

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for travel which is hours worked between shop and job site and for travel during the workday between job sites. (If such different rates are found in situations not arising from collective bargaining agreements, the question shall be referred through channels to the RA for opinion.)

32h03 Bona fide rates - FLSA Sec 7(g)(1) and 7(g)(2). IB 778.418(a)(4) and 778.419(a)(3) provide that a piece rate or hourly rate will be regarded as a "bona fide" rate for OT purposes if it meets the MW requirements and is the rate "actually paid" for the particular kind of work during nonovertime hours. However, situations may arise where the particular kind of work for which the rate has been established is performed only during OT hours. In such cases, and if the MW requirement is met, the rate established for this work will be considered bona fide for OT purposes provided it is the rate which would be paid for the particular kind of work should it be performed during nonovertime hours. For example, a rate of \$2 an hour (which is equal to or in excess of the rate normally paid) may be established for janitorial work in a welding shop under an arrangement whereby the work will be done by certain of the shop welders, whose welding rate is \$3 an hour. (The prior understanding of the parties is that this different kind of work will be performed by the welders at the \$2 rate and OT paid at $1\frac{1}{2}$ the rate which is applicable to the work performed during OT hours.) If the circumstances are such that the welders perform the janitorial work only in their OT hours, the \$2 rate shall be considered a bona fide rate for OT purposes provided it is the rate which would have been paid to the welders had they performed the janitorial work in nonovertime hours. The fact that the janitorial rate in this instance is $\frac{2}{3}$ of the welding rate (thus making the time and one-half OT rate for janitorial work equal to the straight time rate for welding work) is not material so long as the janitorial rate is a bona fide rate.

32h04 Overtime compensation on other forms of pay. Where the FLSA Secs 7(g)(1) and (2) methods of compensating for OT are used, extra OT compensation must be properly computed and paid on other forms of additional compensation required to be included in computing the regular rate.

32h05 Number of hours for which compensation is due. Where the hours, for which OT is paid under FLSA Secs 7(g)(1) and (2), qualify as OT hours under FLSA Secs 7(e)(5), (6), or (7), the requirements of FLSA Sec 7 will be met if the number of those hours equals or exceeds the number of hours worked in excess of the applicable statutory maximum in the workweek. It is not necessary to determine whether the total amount of compensation paid for such hours equals or exceeds the amount of compensation which would be due at the applicable rates for work performed during the hours after the applicable statutory maximum in any workweek.

32h06 Computation under FLSA Sec 7(g)(2) when one of the rates is averaged. The computation of OT under FLSA Sec 7(g)(2) when one of the rates is averaged may best be shown by an illustration. Assume that an employee works 42 hours at a piece rate and 4 hours at an hourly rate. Payment of OT for the 2 piece rate OT hours at one-half the employee's average piece rate earnings for the workweek and 4 hours at time and one-half the hourly rate will be acceptable as a proper payment of OT.

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321 OVERTIME BASED ON RATE ESTABLISHED AS OVERTIME RATE BY AGREEMENT OR UNDERSTANDING

32100 General provisions of FLSA Sec 7(g)(3). Sec 7(g)(3) permits the payment of OT compensation based on a rate not less than one and one-half times the rate established by agreement or understanding arrived at between the employer and the employee before performance of the work, if the rate is authorized by Reg 548.

32101 Payments under Regulations, Part 548. (a) Reg 548 provides for the exclusion of certain "additional" payments in cash or in kind which would have a trivial effect on OT compensation and which would otherwise require prorating over a retroactive period to compute the OT due. Exclusions are limited to "additional" or "incidental" payments; payments which are an "integral part" of the employee's regular wages may not be excluded.

(b) As a general rule, payments which are regularly paid on every payday are not excludable as they are not "additional", but an integral part of the employee's regular wages. Furthermore, the mere fact that payments are deferred to a future time will not make them excludable as additional payments if they amount to nothing more than an increase in the rate per hour or per piece. An exception is made for payments in kind and certain cash payments, such as Social Security taxes which are excludable even if paid every payday.

(c) An "additional" payment within the meaning of the Reg generally is one which is made on a different basis from that which determines the wages to which the employee is regularly entitled and is not regularly made every payday.

(d) The following types of payment may be excluded if the 50 cents condition and the requirements of 548.2 are met:

- (1) Prizes.
- (2) Merchandise awards.
- (3) Housing of nominal value.
- (4) Lunches.
- (5) Social Security taxes.
- (6) Flat sum payments or retroactive rate increase made as the result of an increase in the cost of living.
- (7) Retroactive wage increases.

- (8) Payments made as a reward for attendance paid periodically.
- (9) Individual or group production bonuses which are not earned every payday and are paid on a basis other than the employee's regular wages.

(e) The following types of payment are not excludable even if the other conditions are met:

- (1) Night shift differentials.
- (2) Higher rates paid as premium pay for non-OT hours.
- (3) Rate increases which become effective after a rise in the cost of living.
- (4) Commissions and incentive or production bonuses earned regularly every payday which are an integral part of the employee's wage structure.

32102 Public agencies may utilize Sec 7(g). Public agencies, including public agencies engaged in fire protection or law enforcement activities, may utilize Sec 7(g) in the same manner as employers in the private sector. (See IB 778.400, 778.401, 778.415 thru 778.421, and Reg 548.)

32j SPECIAL OT PROBLEMS**32j00 Multiple minima where records do not show segregation.**

In those cases where different wage rates are applicable under the FLSA-PCA-SCA, and records are not kept showing the time worked at each rate, for the purpose of computing OT payments under the FLSA-PCA the regular rate of pay under the FLSA or the basic hourly rate under the PCA cannot be lower than the highest MW rate applicable.

32j01 Multiple minima under State, Territorial, and U.S. laws.

If no OT has been worked in a w/w, no attempt shall be made to enforce any other State, Territorial, or Federal MW higher than that provided under the FLSA-PCA-SCA. If OT has been worked, the regular rate of pay for OT purposes under FLSA-PCA cannot be lower than the applicable State, Territorial, or Federal MW, whichever is higher. However, Inv's shall not interpret any law other than that administered by Wage-Hour. Thus, if it is not clear that such a higher MW rate applies, the Inv shall accept the payroll rate shown (if it is at least that required by FLSA-PCA-SCA) in determining OT compensation due. Any question as to a possible violation of some other statutes should be referred to the appropriate authorities in accordance with regular procedures.

32j02 Straight time compensation to be paid in full.

If an employee who is paid an hourly rate works statutory OT hours (whether or not the employer recognized them as OT hours), the employer must pay the employee for all hours worked at the agreed rate plus at least an extra half-time that rate for all OT hours less the total wages actually paid. Before an employee can be said to be paid statutory OT compensation due, the employee must first be paid all ST compensation due for all hours worked under any express or implied contract or under any applicable statute. (See Reg 778.315). Where an employer has an express or implied agreement with an employee over a deduction policy covering particular items, then *bona fide* deductions pursuant to the policy will be allowed during OT workweeks if the requirements of FOH 32j08 are met.

32j03 Owner-operators of equipment.

- (a) In the case of nonexempt operators who own and operate their own equipment (trucks, scrapers, mules, horses, etc.) as employees of the persons or companies for whom they perform the work, whenever separate rates have not been established for the rental of equipment and for the labor, or when such separate rates, if made, appear to be unreasonable or disproportionate, the following rates shall be deemed to have been paid as wages:

- (1) the regular hourly rate being paid by the same employer to operators of similar company-owned equipment, or
 - (2) where the regular hourly rate noted in the foregoing clause (1) is not available, the rate usually paid in the area to operators of similar company-owned equipment, or
 - (3) when rates noted in foregoing clauses (1) or (2) are not available, a percentage formula such as 80% rent and 20% wages, or 75%-25% or some similar formula should be used. When it is necessary to use a formula of this type, one should be selected which will result in a reasonable relation between the cost of renting equipment and the wages paid to operators.
- (b) Wherever possible, clause (1) above shall be followed. Clause (2) shall be followed only when clause (1) cannot be used, and clause (3) shall be used only as a last resort.
- (c) In order to be in compliance in the future, particularly as to the recordkeeping regulations, employers shall be required to break down the compensation paid into labor rates and equipment rental. By agreement with the employees involved, separate rates shall be established for the rental of the equipment and for the labor.
- (d) The separate rates for labor and equipment rentals thus established, wherever they appear unreasonable or disproportionate, shall be scrutinized for possible evasion of the OT requirements of the FLSA or PCA. Such evasions might be evident, for example, if the rates set up for labor of an owner-operator are grossly out-of-line with the rate paid by the same employer to operators of similar company-owned equipment or with the prevailing rate in the area for such operators. It may be found that in breaking down the rates which covered both the equipment and labor, the employer has allocated an unreasonable or disproportionate part of the rate to the equipment rental with the intent of diminishing the regular rate of pay on which OT has to be computed.
- (e) The half time OT premium on a regular rate determined as above shall be paid in addition to the total contract earnings and may not be charged to or deducted from equipment earnings.

32j04 Wage raises cannot cover overtime.

Payments made to employees cannot be wage or salary increases and extra compensation for OT at the same time. Where additional amounts are paid without any understanding that they are OT compensation, and the payment of such amounts remains constant even during weeks in which the employee works no OT, the payments are in fact wage or salary increases and must necessarily be reflected in an increase in the employee's regular hourly rate of pay rather than as an offset against extra compensation due for OT.

32j05 Changes in scheduled hours without changes in pay.**(a) Permanent reduction.**

- (1) A permanent reduction in a fixed schedule of workweek hours without a reduction in the salary or take-home pay results in an increased regular rate. Where the employer has continued to use the original rate in computing OT, a violation shall be charged. However, where such a violation resulted from a genuine misunderstanding of the OT requirements, no request for payment of back wages shall be made. The employees involved and the amount of back wages shall not be reported on Form WH-51. A brief explanation shall be made in the narrative. The employer shall be advised of the rights of employees under Sec 16(b).
- (2) The following conditions will be indicative of a genuine misunderstanding:
 - a. It is clear that there was compliance before the change, that is, the rates then used for straight time and OT purposes were bona fide and properly paid; and
 - b. the reduction in hours without a reduction in take-home pay was intended to and did benefit the employees; and
 - c. there was no intention to evade the payment of the OT premium required by the Act.
- (3) The employer shall be advised that the payment of the same take-home pay for the reduced workweek establishes an increased regular rate of pay which must be used to compute OT compensation for all statutory OT hours.

(b) Temporary or seasonal-reduction.

- (1) As a general rule, a reduction in a fixed schedule of workweek hours without reduction in salary or take-home pay for all weeks of a specified period of definite and reasonably long duration, such as a seasonal slack period, will result in an increased regular rate, as in the case of a permanent reduction. The policy set forth in (a) above will be followed as to the requirements for future compliance and in making the determination as to whether to request payment of back wages in such cases.
- (2) Where employees are given time off on a temporary basis such as all Saturdays or some part of them in the summer months, or other bona fide seasonal vacation periods, without reduction of salary or take-home pay, the time off will be regarded as vacation time within the meaning of Sec 7(e)(2). Thus, the pay for such time off will not affect the regular rate of pay. Likewise, there would be

no violation of the Act if the employer required the employees to work those hours which were scheduled as vacation time off, without paying them additional compensation. The same result would follow if a half day off was given every other Saturday during the period of Daylight Savings Time.

(c) **Permanent schedule of alternating workweeks of different fixed lengths.**

Where an employer has established a permanent schedule of alternating workweeks of different fixed lengths he/she may, by agreement or understanding with the employee, pay the same straight-time compensation for the scheduled hours of the "long" and "short" workweeks, but he/she may not pay the same fixed salary for the long and short schedules of hours to cover total compensation including the OT pay. The payment of the same straight-time compensation for the scheduled long and short workweeks establishes different rates of pay for the long and short scheduled workweek. If in such a case the employer has paid the same total compensation for both long and short scheduled workweeks the policy expressed in (a) above will be followed.

32j06 Lump-sum overtime payment.

Under appropriate circumstances, and where close scrutiny reveals there is a clear understanding between the employer and the employee that a lump-sum payment is predicated on at least time and one-half the established rate, and that OT payment is clearly intended, the fact that the payment is a lump sum will not result in a violation if it equals or exceeds the proper OT payment due. For example, during a limited period each year hourly-rated employees worked after regular hours on a special job for their employer. Under a clearly understood agreement with his/her employees, the employer, based on experience, paid for this special job in a lump sum arrived at by computing time and one-half the regular rate for the estimated special job hours, and then adding an additional bonus amount. This policy shall be applied very narrowly and shall not be applied to lump-sum payments which are nothing more than bonuses for working undesirable hours.

32j07 Retroactive increases.

- (a) If retroactive increases are given as compensation for services, they must be included in determining the employee's regular rate of pay and must be prorated over the previous weeks in which the work, to which the compensation is attributed, was performed.
- (b) If it is not feasible to allocate the retroactive increases among the workweeks of the period in proportion to the amount of the increases actually applicable to each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be assumed that the employee earned an equal amount of the increase each hour of the pay period and so the resultant hourly increase may be determined by dividing the total amount of increase by the number of hours worked by the employee during the period for which it is paid.

32j08 Deductions in overtime weeks.

- (a) FLSA Sec 7(a) requires that an employee receive compensation for OT hours at “a rate not less than one and one-half times the regular rate at which he/she is employed”. Where board, lodging, and facilities are charged to the employee and the employer recovers the amount by deductions from the employee’s cash wages, the regular rate is determined before the deductions are made. There is no limit to the amount which may be deducted for these items, provided that the deductions are confined to the reasonable cost of the board and lodging furnished. Where such deductions are in amounts which exceed the “reasonable cost”, the excess amount shall be handled the same as deductions for items other than “board, lodging, or other facilities”. The term “other facilities” means such items as meals furnished at company restaurants, housing furnished, general merchandise bought at company stores (including food, clothing, and household effects), and fuel, electricity, water, and gas furnished for the personal use of the employee.
- (b) Employers must pay statutorily-required MW and OT premium pay finally and unconditionally, or “free and clear.” The cost of furnishing items that are primarily for the benefit or convenience of the employer do not qualify as “facilities” under FLSA section 3(m); thus, they may not be included as part of wages due. Further, deductions for articles that do not qualify as “board, lodging, or other facilities” under FLSA section 3(m), such as tools, equipment, cash register shortages, and other similar items, may not be made if they cut into required MW or OT premium pay. Deductions that reduce an employee’s average hourly earnings for the workweek after the deductions to less than the highest applicable MW rate are illegal in an OT week unless the law establishing that MW (*e.g.*, State law, DBRA, SCA, H-2A, H-1B, H-2B, or a MSPA contracted “promised wage”) allows the particular deduction. (NOTE: If a MSPA contract specifically discloses that the employer will make certain particularized deductions not otherwise prohibited by other law, those deductions would be permitted. For example, if a MSPA-covered employer disclosed a wage rate of \$8.00/hour and fully disclosed in writing at the time of recruitment that \$1.50/hour would be deducted for non-3(m) items, and the deductions are otherwise legal and not prohibited by other applicable laws, then those fully-disclosed deductions are permitted to reduce the hourly wage rate to below the \$8.00/hour contracted “promised wage” (*i.e.*, to \$6.50/hour). Deductions for non-3(m) items may be made in an OT workweek to the same extent as permitted in a non-OT workweek *if* their purpose and effect are not to evade the OT requirements of the FLSA *or other law*, and *if* they are *bona fide* deductions made for *particular items* according to a prior *agreement or understanding* between the employer and the employee before the work is performed (Regs 531.37(a) and 778.315).
- (c) If an employer and an employee have an express or implied agreement about a deduction policy for particular items, then bona fide deductions pursuant to the policy will be allowed during an OT workweek to the extent that they would be allowed in a non-OT workweek, *provided that* the deductions do not violate other applicable laws

(e.g., State law), the employee receives “free and clear” the highest applicable MW (including prevailing wages) required by *any* Federal, State or local law for the non-OT hours, and the employee receives time and one-half the regular rate of pay based on the stipulated wage, before any deductions are made, for all the OT hours. For example, if a forestry worker subject to a \$9.00 per hour SCA prevailing WD is paid \$10.00 per hour (\$1.00 above the legally-required SCA WD rate of \$9.00) and works 50 hours in a particular workweek, the most that may be deducted from this worker’s wages for that week pursuant to a prior agreement covering specific deductions (e.g., purchase of a saw) is 40 times \$1.00 (\$40.00). (Statutory wages due net after deductions = [40 x \$9.00 (\$360.00 MW)] + [(10 x 1.5) x \$10.00 (\$150.00 OT)] or \$510.00 total MW & OT.)

- (d) Unless there is an agreement as to deductions for particular items, or if the employer reduces an employee’s wages for a reason not addressed in the contractual arrangement or for no legitimate reason, the deductions will be considered illegal and will not be allowed during OT workweeks. To determine if these criteria are met, apply the following standards:

- (1) **Deductions must be for particular items according to an agreement or understanding between the parties:** The agreement must be reached before the employee performs the work that becomes subject to the deductions. The agreement must be specific concerning the particular items for which the deductions will be made, and the employee must know how the amount of the deductions will be determined that are included in the agreement (e.g., cash register shortages). The employee must affirmatively agree or assent to the employer’s deduction policy. While the employee’s assent to the policy may be written or unwritten, the employer bears the burden of proof that an employee has agreed to the deduction policy.
- (2) **Only bona fide deductions, made for particular items, are permitted:** Deductions that are otherwise prohibited by other laws or authority (Federal, State *or* local) are not *bona fide* (e.g., if a State law prohibits *any* deductions from employees’ wages for tools and similar items or equipment that are business expenses of the employer, WH would not allow any such deductions in that State in an OT workweek, regardless of whether the highest WH-enforced MW was paid (net after the deductions). Deductions for amounts above the reasonable cost to the employer of furnishing a particular item to an employee are also not *bona fide* (e.g., furnishing items to employees “at a profit”; deductions for substandard housing). Deductions from wages where no prior agreement exists as to particular items are never permitted in an OT workweek.
- (3) **The regular rate of pay is based on the stipulated wage before any deductions are made:** Deductions for non-3(m) items that reduce an employee’s rate of pay to below the highest applicable legally-required MW are illegal *unless* the law establishing that MW allows the particular deductions. In OT workweeks (where

OT requirements apply), deductions may be made according to an agreement that reduce the effective hourly rate down to the highest required MW, but only from the non-OT hours (first 40 hours in the week). Proper time and one-half the full regular rate (pre-deductions) must be paid for all statutory OT hours.

- (4) *The purpose and effect of the deductions are not to evade the OT requirements or other laws:* Deductions made only in OT workweeks, or increases in prices charged during OT workweeks compared to non-OT workweeks, will be considered manipulations to evade statutory OT requirements which are prohibited. Deductions that violate other applicable laws are prohibited in an OT workweek. (See Regs 531.37(a) and 778.315.)

32j09 Payment for activities not normally hours worked.

Payments for those voluntary clothes-changing and wash-up periods and bona fide lunch periods which need not be regarded as hours worked, but which take place at the establishment or work site either during or at the beginning or end of the workday, shall be treated as follows:

- (1) Where the activity has been paid for and the time has been included in computing the hours worked, in the absence of evidence of an attempt to evade the OT requirements, the time shall be accepted as hours worked for the purpose of determining whether the OT provisions have been met.
- (2) Sec 778.320(b) of IB 778 indicates that the conversion of certain activities into hours worked by virtue of the employer's payment for such time depends on "whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked". It is explained in this section of the IB that the parties may agree to exclude from hours worked those activities, such as eating meals between working hours, which would not be hours worked even if they were paid for pursuant to a contract, custom, or practice. Sec 778.320(b) states further that where "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)" of the FLSA..

32j10 Delayed payment of overtime compensation.

In the ordinary case, the FLSA and the PCA require the payment of both MW and OT compensation earned in a given workweek at the regular payday for that workweek or, where the pay period covers more than a single week, at the regular payday for the pay period in which the particular workweek ends. However, if the correct OT compensation cannot be determined until sometime after the regular pay period, the requirements of the FLSA or the PCA will be satisfied if the employee is paid the excess OT compensation as soon after the regular payday as is practicable, but not later than the next pay day after the computation can be made. Where bonuses are paid, any extra OT pay due upon the increase in the regular rate resulting from the bonus payment is due only at the time the bonus itself is paid, not earlier.

32j11 Semimonthly or monthly payments which include overtime.

Where the wages due an employee are properly computed on a workweek basis, an employer may pay the determinable portion of such wage in semimonthly or monthly installments without destroying the validity of the regular rate of pay or violating the OT provisions of the FLSA or PCA. For example, where an employee is hired to work a regularly scheduled workweek of 44 hours at a rate of \$2.00 per hour with time and one-half that rate (\$3.00) for hours in excess of 40 in the workweek, which equals \$92.00, it is permissible for the employer to make semimonthly wage payments to him/her of \$199.33 (\$92.00 X 52 weeks in a year divided by 24 semimonthly payments in a year), provided additional compensation at time and one-half pay day for any workweek in which hours in excess of 44 are worked, or the proper reduction in pay is made where other than excused absences occur. Likewise, payment on this basis will not of itself destroy an otherwise valid Sec 7(f) plan.

32j12 Concurrently working for more than one employer.

Where two or more employers arrange to, and do, jointly employ an employee, the total hours worked by the employee for the employers shall be added together to determine the total number of hours worked in the workweek by the employee for which straight time and OT should be paid.

32j13 Change of workweek.

- (a) A change of the workweek from one period of seven consecutive days to another period of seven consecutive days necessarily creates an overlap between the last workweek in the old schedule and the first workweek in the new; that is, certain hours fall within both workweeks.
- (b) If the hours which fall within both workweeks are hours in which the employee does no work, his/her statutory compensation for each workweek is, of course, determined as it would be if no overlap existed.
- (c) If, on the other hand, some of the employee's work time falls within hours which are included in both workweeks, the employee's straight-time and OT compensation shall be computed by counting such work time as hours worked in whichever of the two workweeks its inclusion will yield the higher total compensation for both workweeks. After thus determining the workweek to which the overlapping work time shall be allocated, the remaining workweek shall be treated as one in which the only compensable worktime is that falling exclusively within that workweek and outside the portion which overlaps the other workweek. Subject to this modification, the compensation due an employee for straight-time and for overtime on a daily or weekly basis shall be computed and paid for each workweek as in workweeks when no overlap occurs.

32j14 Stint or task system.**32j14a Characteristics.**

A predetermined amount of work is regarded as a day's work. Upon completion of this stint, the employee is credited with 8 hours of work. The stint system is a piecework system. Instead of setting a price per number of units of work produced, as is done in most piecework systems, the number of hours allowed to complete a quantity of work is predetermined and paid for at the agreed hourly rate. Payment of one and one-half times the agreed hourly rate for stint work is equivalent to paying one and one-half times an established piecework rate. Payment of one and one-half times the agreed hourly rate for stint work or hourly rated work in excess of eight credited hours per day will comply with the FLSA overtime requirement and be in accordance with FLSA overtime requirement and be in accordance with FLSA Section 7(g)(1) or (2), if the hours for which the overtime rate is paid qualify as overtime hours under FLSA Section 7(e)(5), (6), or (7).

32j14b The stint as an hours standard.

The number of hours necessary to complete a predetermined daily stint can be considered the employee's normal working hours for the purpose of determining overtime hours under FLSA Section 7(e)(5), even though the time necessary to complete the stint varies somewhat from day to day, if the stint reasonably approximates a normal day's work and the employees normally work only these hours. This will also be true, even though the employees are working longer hours, if the stint reasonably approximates a normal day's work and the regular working of excess hours at present is due to emergency or transitory conditions which are not expected to be permanent and the parties intend again to observe the standard as the normal working hours as soon as conditions permit. In the same circumstances, the number of hours necessary to complete five predetermined daily stints can be considered the employees' normal working hours weekly. Of course, hours worked on the sixth day worked in the week may qualify as overtime hours under Section 7(e)(5) and hours worked on Saturday as such may qualify as overtime hours under Section 7(e)(6).

32j14c Application of Section 7(g)(1) or (2).

In any establishment in the brick manufacturing industry where the time necessary to complete a stint is the employees' "normal working hours" (daily) and the time necessary to complete five stints is the employees' "normal working hours" (weekly), payment of one and one-half times the agreed rate for hours worked each day on stint work or hourly rated work after the completion of the daily stint, or for work performed each workweek after the completion of five daily stints, is in compliance with the FLSA overtime provisions in accordance with Section 7(g)(1) or (2). Payment of one and one-half times the agreed rate for hours worked on the sixth day worked in the workweek or for hours worked on Saturday as such is true overtime compensation under the FLSA in accordance with Section 7(g)(1) or (2).

32j14d IB Sec 778.312 distinguished.

This situation is distinguished from that described in IB Sec 778.312 in that, in the latter situation, the time necessary to complete the task varied without any relationship to the employee's normal working hours and premium payments were made for hours worked within the employee's normal working hours, and not because the hours worked were in excess of the employee's normal working hours. If the employees normally work after completion of the daily stint and this is not an emergency or transitory condition, the number of hours necessary to complete the stint cannot be said to be the employees' normal working hours within the meaning of FLSA Section 7(e)(5). If the time it normally takes to complete the stint is of such short duration that it does not approximate a normal day's work, the working of excess hours can not be considered an emergency or transitory condition, and premium payments for work performed after completion of the stint can not be considered true overtime compensation under the FLSA. The situation would then be the same as that described in IB 778.312.

32j14e Variations in plans.

There are a number of variations in plans but the principle is the same. For example, not all employers using the stint or task system pay daily overtime compensation. They simply credit the employees with so many hours of work for so much production in accordance with a predetermined formula. They pay one and one-half the agreed hourly rate for stint work or hourly rated work in excess of 40 credited hours. In this case there is no daily "stint" and no need to determine the employees' "normal working hours" on a daily basis. The sole question is whether the number of hours necessary to complete the weekly "stint", beyond which time and one-half is paid, is the employees' "normal working hours" weekly (See FOH 32e01). If so, the excess hours of work are true overtime hours under FLSA Section 7(e)(5) and the extra compensation paid for those hours is true overtime compensation.

32j14f Stint or task basis of payment in other industries.

- (a) The stint or task basis of payment is also used to some extent in industries other than the brick industry. In the meat packing industry, the hours paid for at the agreed rate for the completion of a predetermined amount of work are called "cow hours" or "kill time". In the smelters of the metal refining industry, the predetermined day's work is called the "heat".
- (b) Where investigations in other industries disclose that the stint or task basis of payment has been used to compensate employees for overtime and where that method would appear to fall within the principles outlined above, enforcement action shall not be

taken until an option is secured as to the validity of the method of payment. All of the facts concerning the stint or task basis of payment shall be obtained and the investigation referred to the Regional Office for discussion with, or referral to, the Regional Attorney. The facts shall include information as to:

1. whether the hours necessary to complete the predetermined amount of work, after which extra compensation of at least 50 percent is paid, are the employees normal working hours;
2. whether the employees are presently working more hours;
3. how long they have been regularly working excess hours;
4. whether the excess hours of work are due to seasonal factors or emergency or transitory conditions which are not expected to be permanent;
5. if the employees have always regularly worked excess hours, whether the overtime standard adopted and applied was with the bona fide intention of establishing it as the normal working period to which the regular working hours will be conformed as soon as the necessary adjustments can practicably be made;
6. whether the hours of work are different for different groups of employees or different departments where the same overtime standard is used;
7. whether there is any information available as to hours of work and overtime standards used in other establishments in the same industry and area; and,
8. the extent of compliance with other requirements of Section 7(g)(1) or (2), as explained in IB778.415-423 such as payment of extra overtime compensation on other forms of additional pay required to be included in computing the regular rate, or payment of extra compensation of at least 50 percent for at least the number of hours actually worked in excess of the applicable statutory maximum workweek.

32j15 Wage pool arrangement.

- (a) A bona fide wage pool arrangement will be in compliance with FLSA Section 7 and the average rate for the group will be a proper regular rate of pay if
 - (1) a group of employees work interchangeably at various occupations carrying different rates.
 - (2) the employees in the group are not paid individually the rates assigned to each occupation;
 - (3) all straight time earnings of the group, computed at the assigned rates, are totaled and divided by the total straight-time hours worked by the group;

- (4) all overtime earnings, at one and one-half times the assigned rates, are separately totaled and divided by the total overtime hours worked by the group;
- (5) the daily or weekly earnings of each employee for each day or workweek are then computed by multiplying the average straight time rate for the group by the employee's straight time hours, and the average overtime rate for the group by the number of hours the employee worked in excess of 8 a day or the applicable statutory maximum workweek.

32j16 Time off and prepayment plans.

32j16a Basic requirements to be considered.

- (a) Two ways have been proposed by employers by which they may continue to pay their employees a constant wage or salary from pay period to pay period even though overtime is worked in some weeks. The first has been termed *the time off plan* and the second *the prepayment plan*. *The time off plan*, however, is inappropriate for employees who are compensated for overtime pursuant to FLSA Section 7(e)(7) or any of the subsections of FLSA Section 7(g).
- (b) Before explaining the operation of the time off and prepayment plans, certain basic requirements of the FLSA will be outlined which are material in determining the legality of any proposed plan. It must be remembered that the FLSA takes a single w/w as its standard and permits no averaging of hours over two or more weeks. Each week stands alone. Time and one-half OT compensation must be paid the employee for all hours which he/she works in a single w/w in excess of the applicable statutory maximum w/w. The pay period need not, however, coincide with the w/w. Thus, there is no objection if the pay period is biweekly, semimonthly, or monthly, but the amount of compensation due the employee at each pay period must be computed on the basis of a single w/w. It must also be remembered that OT compensation due an employee must be paid in cash and normally at the time of the regular pay period, that is, when the employee customarily receives his/her straight time compensation. It may not be accumulated to be paid at any time subsequent thereto.

32j16b The time off plan.

To comply with the FLSA and to continue to pay a fixed wage or salary each pay period, even though the employee works OT in some week or weeks within the pay period, the employer lays off the employee a sufficient number of hours during some other week or weeks of the pay period to offset the amount of OT worked so that the desired wage or salary for the pay period covers the total amount of compensation, including OT compensation, due the employee under the FLSA for each w/w taken separately. The plan may use a standard number of hours more or less than the

applicable statutory maximum w/w. The employer does not pay for OT work in time off, nor does he/she average hours over a period longer than a week. Control of earnings by control of the number of hours an employer is permitted to work, not payment for OT in time off, is the essential principle of the time off plan. For this reason, a time off plan cannot be applied to a salaried employee who is paid a fixed salary to cover all hours he/she may work in any particular w/w or pay period.

32j16c Prepayment plans.

- (a) Though OT compensation due an employee must normally be paid at the time of the employee's regular pay period, there is no objection if the employer pays in advance OT compensation to become due to an employee. This is the basic principle of the prepayment plan. Thus some employers, in an attempt to keep the wage or salary constant from pay period to pay period, have resorted to paying their employees a sum in excess of what they earn or are entitled to in a particular week or weeks, which sum is considered to be a prepayment or advance payment of compensation for OT to be subsequently worked. In other words, the employer and the employee agree that in any week in which the employee works less than the applicable statutory maximum w/w the employer will advance to the employee the difference between the amount equal to his/her regular rate of pay for the applicable statutory maximum w/w and the amount he/she would have received if he/she had been paid only for the number of hours he/she worked. Bona fide plans of this type require the use of a record system whereby the employer can maintain a running account.
- (b) The question sometimes arises as to whether the loan or advance is really a loan or advance and not a salary arrangement. The determination of this question may depend upon what the parties understand will happen when an employee severs his/her relationship with the employer. If the employer still has some accumulated credits at that time, will some attempt be made to get back the amount of the loan or advance from the employee since there is no further possibility that it will be worked out by subsequent OT? The fact that no attempt will be made by the employer to collect the amount due him/her either by deducting such amount from the employer's last check or by some amount from the employee's last check or by some other way is one indication that the loan or advance may simply be a fictitious bookkeeping device.
- (c) Similarly, the fact that at the end of the year, or at the end of some shorter period, credits accumulated by the employer are simply wiped out and a new start is made, is one indication that there may be no loan or advance in fact but simply a bookkeeping device. If there is no prepayment in fact and the plan is nothing but a bookkeeping device, the FLSA will have been violated.
- (d) There is an additional consideration with respect to the salaried employee who works a regular number of hours. If the employer, who contemplates adopting a prepayment plan, is required by an express or implied contract or agreement with the employee to pay him/her the fixed wage or salary, even when the employee works less than the regular number of hours in some week or weeks, it cannot be said that the employee is paid in excess of what he/she earns, or to which he/she is entitled, when he/she

receives the fixed wage or salary in those weeks. He/she has received no loan or advance, and no amount therefore may be credited to the employer as a prepayment of compensation for OT to be subsequently worked.

- (e) For the same reason, a prepayment plan cannot be applied to a salaried employee who works a fluctuating number of hours. Since the nature of such an employee's employment is that he/she will receive the fixed basic salary regardless of the number of hours worked, it cannot be said that such an employee is paid in excess of what he/she earns, or to which he/she is entitled, in any week in which he/she receives his/her fixed salary, even though such weeks may have been short weeks.
- (f) Only credits to the employer may be carried over beyond the pay period. Credits to the employee, that is, OT compensation due the employee, may not be carried over beyond the pay period to be consumed by subsequent employer advances, but must be paid in cash at the pay period. In this way the employer will never owe the employee OT compensation.
- (g) Amounts paid to an employee while absent from work for a vacation, for holiday or sick leave, or for other miscellaneous periods of leave, may not be considered by the employer as prepaid OT compensation, just as the time off during such periods may not be used to balance OT worked within the pay period. Payment for idle holidays, vacations, etc., is not payment for OT and may not be considered by the employer as compensation for the employee's OT work under the FLSA.

32j16d Comparison of the time off and prepayment plans.

- (a) In two respects a prepayment plan, if it may be properly applied to salaried employees, is not subject to the same restrictions as a time off plan. It is not confined, in its operations, to the pay period. Credits to the employer, that is, amounts paid by him/her in excess of the amounts earned by the employee or to which the employee is entitled, may be carried over beyond the pay period until they are consumed by the OT work of the employee. Secondly, a prepayment plan may be applied to employees who are paid weekly.
- (b) Where applicable, a time off and prepayment plan may be applied together.
- (c) These two plans are rarely used. When a Inv finds one in operation, he/she should communicate with his/her DD and obtain instructions as to how he/she should proceed.

32j17 Domestic service employees.

- (a) **Effective 5/1/74, Sec 7(1) provides that:**

“No employer shall employ any employee in domestic service in one or more households for a workweek longer than 40 hours unless such employee receives compensation for such employment in accordance with subsection (a).”

- (b) The language of Sec 7(1) places the OT penalty on employment by an "employer". The OT provisions become applicable when a single employer employs a domestic worker for more than 40 hours in any w/w in that employer's service. Such employer shall be required to pay that employee in accordance with the OT provisions of Sec 7(a), unless exemptions in Sec 13(a)(15) or Sec 13(b)(21) are applicable.

32k PCA SPECIAL PROBLEMS**32k01 Exchanging shifts.**

If OT results from an employee exchanging shifts with another employee, he/she must be paid time and one-half his/her basic rate for the OT hours, even though the exchange of shifts was made for the employees' mutual convenience.

32k02 Making up lost time.

Where an employee works more than eight hours a day in order to make up time lost for any reason other than tardiness, such as time lost because of a holiday, he/she must be paid time and one-half his/her basic rate, even though the employee requested the arrangement or acquiesced in it.

32L SECS 7(b)(1) and 7(b)(2)**32L00 Public agency employment may qualify under Sec 7(b).**

Secs 7(b)(1) and 7(b)(2) provide partial OT exemptions for employees employed “. . . in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board . . .” under the stated conditions. The NLRB concludes it has authority to process petitions from labor organizations of government employees seeking certification as “bona fide” for purposes of Secs 7(b)(1) and 7(b)(2) of the FLSA. Consequently, if the tests for exemption under Sec 7(b)(1) and 7(b)(2) are met and the union receives such certification by the NLRB, the government employees covered under the “agreement” may qualify for such exemption.