Chapter 10

**OVERTIME COMPENSATION**

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I. Overview

The overtime pay provisions of the Fair Labor Standards Act (FLSA) generally require that employers pay their covered, nonexempt employees one and one-half times their regular rate of pay for all overtime hours worked in any given workweek.[[1]](#footnote-1) Therefore, in order to comply with the overtime provisions of the FLSA, an employer must first determine what constitutes a nonexempt employee’s “workweek,” ascertain that employee’s “regular rate of pay” for that workweek, and then calculate and pay the statutorily required overtime premium for all hours worked over 40 in that workweek.

This chapter covers overtime pay requirements, including consideration of the workweek concept and principles for determining an employee’s regular rate under the FLSA, as well as the potential impact of state and local minimum wage laws on that determination. The chapter also reviews the way several types of supplemental payments are handled with respect to the calculation of the regular rate and includes a review of methods for computing the regular rate when employees are paid on other than an hourly basis. Special problems that arise concerning the regular rate, including deductions from pay, lump-sum overtime payments, and the like, are also addressed, as well as exceptions from regular rate principles, including *Belo*-type wage agreements.

The chapter concludes with coverage of special overtime provisions relating to veterans’ subsistence allowances, hospital and residential care establishments, and employees receiving remedial education.

In December 2019, the U.S. Department of Labor (DOL) updated a range of its interpretive bulletins regarding the regular rate, and regulations on the basic rate, for the first time in more than 50 years. Those changes, which became effective on January 15, 2020, are discussed throughout this chapter where relevant.

In June 2020, the DOL updated its interpretive regulation regarding the fluctuating workweek (FWW). Those changes permit an employer to offer other payments in addition to a fixed salary to employees compensated using the FWW method of calculating overtime pay under the FLSA.[[2]](#footnote-2) The changes became effective August 7, 2020. The changes are discussed in Section IV.D.2.e [The “Regular Rate”; Calculating Regular Rate and Overtime Under Various Methods of Payment; Payment of Wages Based on a Nonhourly Rate; Salaried Employees: Fluctuating Workweek Method] of this chapter.

The following regulations and interpretive bulletins are directly relevant to the matters treated in this chapter:

• 29 C.F.R. Part 778, Overtime Compensation;[[3]](#footnote-3)

• 29 C.F.R. Part 547, Requirements of a “Bona Fide Thrift or Savings Plan”;

• 29 C.F.R. Part 548, Authorization of Established Basic Rates for Computing Overtime Pay;

• 29 C.F.R. Part 549, Requirements of a “Bona Fide Profit-Sharing Plan or Trust”; and

• 29 C.F.R. Part 550, Defining and Delimiting the Term “Talent Fees.”

II. General Principles

Employers are required by the FLSA to pay covered, nonexempt employees at a premium rate of one and one-half times their “regular rate” for all time worked in excess of 40 hours during any given workweek.[[4]](#footnote-4) An employee’s “regular rate” of pay “shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee,” subject to certain enumerated exceptions listed in Section 207(e) of the FLSA.[[5]](#footnote-5)

With the exception of the child labor provisions discussed in Chapter 12, Child Labor, nothing in the FLSA governs the number of hours that an employee may work in any day or in any workweek.[[6]](#footnote-6) Moreover, nothing in the FLSA requires premium pay for work on Saturdays, Sundays, holidays, or regular days of rest, or based upon the number of hours worked in any particular day.[[7]](#footnote-7) Generally, employers may require nonexempt employees to work as many hours per day or week as they see fit, as long as they pay those employees at least the minimum wage and an overtime premium for all hours worked in excess of 40 in a workweek.[[8]](#footnote-8) In 2019, the DOL added a provision to its interpretive bulletin on overtime compensation to

confirm … that, unless otherwise indicated, part 778 does not contain an exhaustive list of permissible or impermissible compensation practices. Rather, it provides examples of regular rate and overtime calculations that, by their terms, may or may not comply with the FLSA, and the types of compensation excludable from regular rate calculations under Section 207(e).[[9]](#footnote-9)

The DOL states that, while the categories of payments excludable from the regular rate under Section 207(e) are exhaustive, the examples of compensation practices that will fit those categories are not exhaustive unless otherwise indicated.[[10]](#footnote-10)

The FLSA does not relieve an employer of any obligation it may have assumed by contract, nor does it relieve an employer of any obligation imposed by any other federal, state, or local laws that create a maximum workweek less than 40 hours.[[11]](#footnote-11) The DOL interpretive bulletin also provides that the FLSA does not relieve employers of federal, state, or local laws that establish higher premium pay rates, or require premium pay for either working in excess of a daily standard or for working on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or workday.[[12]](#footnote-12)

III. The “Workweek” Concept

**A. Determining the Workweek**

An employee’s entitlement to overtime is generally based on the “workweek concept.”[[13]](#footnote-13) Under this principle, in order to determine overtime hours, an employer totals the number of hours an employee has worked in any given week.[[14]](#footnote-14) If the number is greater than 40, the employee is due overtime compensation for the hours over 40.[[15]](#footnote-15) It makes no difference if the employee worked on unrelated job assignments or at different facilities owned by the same employer during the workweek.[[16]](#footnote-16) Nor do the basic overtime rules change if the employee worked for two different employers in the same workweek if the two employers are “joint employers” under the FLSA[[17]](#footnote-17)—the employee is still entitled to overtime if he or she worked more than 40 hours.

The FLSA uses a single workweek as its standard and does not permit averaging hours over two or more weeks, even for weeks falling within the same pay period.[[18]](#footnote-18) Thus, if an employee works 30 hours one workweek and 50 hours the next, he or she must receive overtime compensation for the 10 overtime hours worked in the second workweek, even though the average number of hours worked in the two weeks is 40.[[19]](#footnote-19) The “regular rate” (discussed in detail in Section IV [The “Regular Rate”] of this chapter) must also be computed on a workweek basis, i.e., the compensation paid to an employee must be attributed to the week in which it was earned, not spread out over two or more workweeks.[[20]](#footnote-20) It makes no difference that the employee works on a standard or swing shift schedule: weekly calculation is required regardless of whether the employee is paid on a daily, weekly, biweekly, monthly, or other basis.[[21]](#footnote-21)

“An employee’s ‘workweek’ is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods.”[[22]](#footnote-22) Although an employer may not alter the length of the workweek, it may determine when the workweek begins and ends.[[23]](#footnote-23) The workweek need not coincide with the calendar week—it may begin on any day of the week and at any hour of the day: “a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees.”[[24]](#footnote-24)

Once the beginning time of an employee’s workweek is established, it remains fixed regardless of the schedule of hours worked.[[25]](#footnote-25) According to the DOL, the beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the FLSA.[[26]](#footnote-26) The Eighth Circuit has held that the employer’s reasons for adopting a change in schedule are irrelevant, so long as the change is intended to be permanent.[[27]](#footnote-27)

**B. Alternative Work Schedules**

Many employers and employees seek flexible work arrangements that compress the standard 40-hour workweek schedule into fewer workdays. Such arrangements are often referred to as “4/10” or “9/80” schedules. Rather than working a standard eight hours in each of five standard workdays in a workweek, under a 4/10 schedule an employee works 10 hours on each of four workdays and has the fifth day off. A 4/10 schedule can generally be accommodated by an employer without incurring additional scheduled overtime costs under the FLSA if the 40 hours are still worked within the same workweek.[[28]](#footnote-28)

However, a 9/80 schedule may result in scheduled FLSA overtime costs unless the designated start and stop of the workweek is properly established to accommodate such a schedule. Under a 9/80 schedule, an employee generally works a total of 80 hours in nine workdays over a two-week pay period. Typically, an employee works nine hours per day Monday through Thursday and eight hours every other Friday. If the established workweek begins at 12:01 a.m. Monday and ends at 12:00 a.m. Sunday, such a schedule will result in four hours of overtime every other week because 36 hours are worked in week one and 44 hours are worked in week two. But if the employee’s workweek is established to begin at 12:31 p.m. on Friday and end at 12:30 p.m. the following Friday, for an employee whose workday starts at 8:30 a.m., no scheduled overtime cost is incurred under the FLSA.[[29]](#footnote-29) There is no requirement in the statute or regulations that the FLSA workweek coincide with the employer’s payroll cycle.

**C. Overtime Must Be Paid on the Regular Payday**

Although overtime is calculated on a workweek basis, there is no FLSA requirement that overtime compensation be paid weekly.[[30]](#footnote-30) However, the DOL interpretive bulletins provide that “[t]he general rule is that overtime compensation earned in a particular workweek must be paid on the regular payday for the period in which such workweek ends.”[[31]](#footnote-31) When the correct amount of overtime compensation cannot be determined until sometime after the regular pay period, it is permissible for the employer to pay the excess overtime compensation as soon after the regular pay period as is practicable.[[32]](#footnote-32) Payment cannot be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due, and in no event can payment be delayed beyond the next payday after the computation can be made.[[33]](#footnote-33)

The Third and Seventh Circuits have reached opposite conclusions as to whether these general requirements apply where delayed payment of overtime is negotiated as part of a collective bargaining agreement (CBA).[[34]](#footnote-34)

**D. Prepayment Plans**

In some situations, a nonexempt employee’s compensation may vary significantly from week to week as a result of fluctuations in the number of hours worked each workweek or as a result of a shift schedule that spans two different workweeks. Employers may attempt to manage this fluctuation in compensation and keep total wages constant from pay period to pay period through the use of prepayment plans, which the DOL’s Wage and Hour Division (WHD) has deemed lawful in several opinion letters as well as in the *Field Operations Handbook*.[[35]](#footnote-35) Under such plans, employees are paid an amount in excess of what they actually earned in the particular pay period (i.e., week or weeks) in anticipation of work in a subsequent pay period.[[36]](#footnote-36) The excess amount is considered an advance or prepayment of compensation for work to be subsequently performed.[[37]](#footnote-37) Such prepayment plans are generally permissible so long as the employee is paid the required overtime premium in each workweek and the plan is not manipulated to avoid overtime pay.[[38]](#footnote-38)

IV. The “Regular Rate”

**A. Relationship Between the Regular Rate and Federal, State, or Local Minimum Wages**

In its interpretive bulletins addressing overtime payments, the DOL states that federal, state, or local laws containing different methods of computing overtime compensation, and which do not contravene the FLSA, are not overridden or nullified by the FLSA, but compliance with those methods does not excuse noncompliance with the FLSA.[[39]](#footnote-39) The DOL interpretive bulletin also states that where other legislation sets a higher minimum wage for an employee than that set by the FLSA, as, for example, under various state or local laws or state, local, or federal prevailing wage laws, the regular rate of the employee cannot be lower than such applicable minimum, i.e., an employee’s regular rate must at least be the rate at which the employee is lawfully employed.[[40]](#footnote-40)

**B. Regular Rate Includes “All Remuneration”**

The regular rate is the “keystone” to calculating the overtime rate.[[41]](#footnote-41) It is “the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.”[[42]](#footnote-42) No matter how an employee is paid—whether by the hour, by the piece, on a commission, on a salary, or on some other basis—the employee’s compensation must be converted to an equivalent hourly rate from which the overtime rate can be calculated.[[43]](#footnote-43) “The regular hourly rate of pay is determined by dividing the employee’s total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid.”[[44]](#footnote-44)

An employer and employee cannot agree to an established “regular rate.”[[45]](#footnote-45) Rather, the actual events that occur during the employment relationship determine the regular rate; the contents of the employment contract do not necessarily govern this determination.[[46]](#footnote-46)

As originally enacted, the FLSA contained “no definition of the regular rate of pay and no rule for its determination.”[[47]](#footnote-47) However, in 1949 Congress amended the FLSA to define the “regular rate” to include “all remuneration for employment paid to, or on behalf of, the employee,” excluding seven specific types of payments.[[48]](#footnote-48) In 2000, Congress added an eighth payment type to the list of exclusions for stock options and grants.[[49]](#footnote-49) These statutory exclusions are listed and discussed below.

There is a statutory presumption that remuneration in any form must be included in the regular rate calculation. The burden is on the employer to establish that any payment falls within one of the eight statutory exclusions.[[50]](#footnote-50) Thus, determining the regular rate starts from the premise that all payments made to an employee for work performed generally are included in the base calculation unless specifically excluded by statute.

In a case of first impression, the Third Circuit disagreed with the DOL that remuneration from employment includes all forms of payment received by the employee, other than those excepted in Section 207(e), reasoning that a payment by a third party, in this case employee bonuses, would be remuneration for employment “only when the employer and employee have effectively agreed it will.”[[51]](#footnote-51)

Following the issuance of this decision, the DOL, in June 2020, issued an opinion letter in which it found that an automobile manufacturer’s direct payments to an automobile dealership’s employee, compensating the employee for work done on behalf of the dealership, could count toward the dealership’s minimum wage obligation to the employee.[[52]](#footnote-52) The DOL reached this decision by concluding that the “employing dealerships’ role in facilitating these payments is significantly more than serving as a pass-through vehicle. The dealerships learn program terms, communicate these terms to their employees, and work with incentive program sponsors to determine when payments should be made.”[[53]](#footnote-53) Based on the facts set out in the opinion letter, the DOL found that the incentive payments would be considered part of the employment agreement and count toward minimum wage obligations by the employing automobile dealership. Although this opinion letter was not decided in the regular rate context, it may have an effect on the “remuneration” issue under a regular rate analysis.

**C. Statutory Exclusions From the Regular Rate and Payments Creditable to Overtime**

Sections 207(e)(1)–(8) of the FLSA provide for the exclusion of various payments from the regular rate. Section 207(e) provides:

As used in this section the “regular rate” at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer’s interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that the 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 and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the [Wage and Hour] Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or other third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits to employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee’s normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of 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 exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section), where such 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 such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if (A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee’s participation in the program or at the time of the grant; (B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee’s death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant; (C) exercise of any grant or right is voluntary; and (D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are (i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or (ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.[[54]](#footnote-54)

For clarity and to more closely mirror the order of the DOL’s interpretive bulletins, these statutory payment exclusions from the regular rate have been grouped for discussion purposes below as follows: (1) extra compensation for overtime work; (2) discretionary bonuses, prizes, and awards; (3) gifts and special occasion bonuses; (4) profit-sharing or trust and thrift or savings plan contributions; (5) stock option grants; (6) benefit plan payments; (7) payments made when no work is performed; (8) reimbursements for work-related expenses; (9) “other similar payments”; and (10) talent fees. Although the categories themselves are relatively straightforward, determining whether a particular type of payment fits within one of the statutory exclusions may be difficult.

It is important to note that payments excluded from the regular rate are also generally not creditable toward the statutorily required overtime payment except in the limited case of certain types of premium rate payments that are creditable pursuant to Section 207(h) of the FLSA, as discussed below.[[55]](#footnote-55)

***1. Extra Compensation Paid for Overtime Work: Sections 207(e)(5)–(7)***

Sections 207(e)(5)–(7) exclude from the regular rate extra compensation (i.e., premiums) paid by employers for specified types of overtime work. Furthermore, pursuant to Section 207(h), these overtime premiums are “creditable toward overtime compensation payable pursuant to [Section 207(a)].”[[56]](#footnote-56) Thus, overtime premiums are special because “[n]o other types of remuneration for employment may be so credited” toward overtime compensation due under Section 207(a) for work in excess of 40 hours per week.[[57]](#footnote-57) However, to qualify for exclusion from the regular rate, the premium must be paid because work is performed outside of or in excess of eight hours a day or 40 hours a week, contractually established daily or weekly work hours, or because work is done on certain special days, such as holidays or weekends, and not for some other reason.[[58]](#footnote-58)

*a. Premium Pay for Work in Excess of the Daily or Weekly Standard: Section 207(e)(5)*

Section 207(e)(5) excludes from the regular rate

a premium rate paid for certain hours worked by the employee in any day or workweek … in excess of eight in a day or in excess of the maximum workweek applicable to such employee under [Section 207(a)] or in excess of the employee’s normal working hours or regular working hours, as the case may be … .[[59]](#footnote-59)

This exclusion applies to premium rates paid for hours worked in excess of the employee’s normal hours of work, even if those hours are fewer than eight in a day or 40 in a week. For example, if an employee normally works seven hours a day and 35 hours a week, any agreed-upon premiums for work in excess of seven hours a day or 35 hours a week may lawfully be excluded from the regular rate and are creditable toward statutorily required overtime premiums.[[60]](#footnote-60) Under Section 207(e)(5), such overtime premiums may be excluded from the regular rate regardless of whether the premium matches the statutory overtime premium of time and one-half required by Section 207(a) for work in excess of 40 hours in a workweek.

**Example 10-1.** If an employee whose maximum hours standard is 40 hours is hired at the rate of $12 an hour and receives, as overtime compensation under his contract, $12.50 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the overtime rate from the employee’s regular rate and credit the total of the extra 50-cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of $13 for hours in excess of 12 per day, the extra $1 payments could likewise be credited toward overtime compensation due under the Act.[[61]](#footnote-61)

The DOL’s interpretive bulletin states that “[t]he plain wording of the statute makes it clear that extra compensation provided by premium rates other than those described [in Sections 207(e)(5)–(8)] cannot be treated as overtime premiums.”[[62]](#footnote-62) For example, premiums paid for undesirable working hours (i.e., night shift differentials) or for hazardous work do not meet these conditions and must be included in the regular rate.[[63]](#footnote-63) Moreover, premiums that are paid only in part due to overtime and that are also contingent on meeting non-overtime-related criteria will not meet the requirements for exclusion under Section 207(e)(5).[[64]](#footnote-64) These payments need not be made pursuant to a contract, but must be made pursuant to “some form of legitimate agreement or understanding.”[[65]](#footnote-65)

The DOL’s interpretive bulletin further provides that “[w]here payment at premium rates for hours worked in excess of a specified daily or weekly standard is made pursuant to the requirements of another applicable statute, the extra compensation provided by such premium rates will be regarded as a true overtime premium.”[[66]](#footnote-66) The DOL confirmed this view in a December 2020 opinion letter regarding live-in care givers who work extended shifts of 24 hours or more.[[67]](#footnote-67)

*b. Premium Pay for Work on Saturdays, Sundays, and Other Special Days: Section 207(e)(6)*

Additionally, under Section 207(e)(6), the regular rate excludes premiums

paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, *where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days … .*[[68]](#footnote-68)

Unlike Section 207(e)(5)’s exclusion of premium pay for work outside normal hours over eight in a day or 40 in a week, the exclusion in Section 207(e)(6) requires that the premium rate for work on special days be equal to or exceed the statutory overtime premium set forth in Section 207(a) of the FLSA.[[69]](#footnote-69) If a premium rate for work on special days falls short of one and one-half times the employee’s regular rate, “the extra compensation … must be included in determining the employee’s regular rate of pay and cannot be credited toward statutory overtime due, unless it qualifies as an overtime premium under section 207(e)(5).”[[70]](#footnote-70)

This exclusion was originally enacted because of congressional dissatisfaction with the Supreme Court’s treatment of weekend and holiday premiums.[[71]](#footnote-71) In *Bay Ridge Operating Co. v. Aaron*,[[72]](#footnote-72) the Court narrowly defined the types of overtime payments that could be excluded from the regular rate and credited toward an employer’s statutory overtime obligations.[[73]](#footnote-73) The Court concluded that neither premium pay for work on special days nor “clock-pattern” overtime rates could be excluded from calculation of an employee’s regular rate of pay.[[74]](#footnote-74) In response, Congress enacted Sections 207(e)(6) and 207(e)(7).[[75]](#footnote-75)

The Section 207(e)(6) exclusion only applies to premium rate payments made because the employee worked on a “special day,” such as a weekend day, holiday, regular day of rest, or sixth or seventh day of work.[[76]](#footnote-76) If the premium rate is paid for some other reason—such as the employer’s failure to give timely notice of Saturday work or for working on vacation days—the premium pay does not fit within the contours of the statutory exclusion and not only must the extra compensation be included in the regular rate, it may not be credited toward statutory overtime premiums owed.[[77]](#footnote-77) The Secretary’s interpretive bulletins provide a concise example of the workings of the Section 207(e)(6) exclusion of weekend and holiday premiums:

**Example 10-2.** Suppose an agreement of employment calls for the payment of $7.50 an hour for all hours worked on a holiday or on Sunday in the operation of machines by operators whose maximum hours standard is 40 hours and who are paid a bona fide hourly rate of $5 for like work performed during non-overtime hours on other days. Suppose further that the workweek of such an employee begins at 12:01 a.m. Sunday, and in a particular week he works a schedule of 8 hours on Sunday and on each day from Monday through Saturday, making a total of 56 hours worked in the workweek. Tuesday is a holiday. The payment of $320 to which the employee is entitled under the employment agreement will satisfy the requirements of the Act since the employer may properly exclude from the regular rate the extra $20 paid for work on Sunday and the extra $20 paid for holiday work and credit himself with such amount against the statutory overtime premium required to be paid for the 16 hours worked over 40.[[78]](#footnote-78)

It is important to distinguish premium pay for work performed on holidays from “holiday pay” that is paid when no work is performed. Although the latter is still excludable from the regular rate under Section 207(e)(2) as compensation for which no work is performed, it is not premium pay under Section 207(e)(6) and thus is not creditable under Section 207(h).

*c. “Clock Pattern” Premium Pay: Section 207(e)(7)*

Section 207(e)(7) excludes “clock pattern” premium pay from the regular rate.[[79]](#footnote-79) Such premium pay, also called “clock overtime,” is “payable solely on the basis of the time of day in which the work is performed, independent of the number of hours worked.”[[80]](#footnote-80) In order to qualify for this exclusion, the premium must

(1) be paid pursuant to an employment contract or collective bargaining agreement;[[81]](#footnote-81)

(2) be paid “for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek [not exceeding 40 hours]” (i.e., outside the clock pattern);[[82]](#footnote-82) and

(3) equal or exceed “one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.”[[83]](#footnote-83)

The regulations provide the following example: if the employment contract establishes normal work hours of 9 a.m. to 5 p.m. at a rate of $5 per hour and provides for premium pay at a rate of $7.50 per hour for work performed outside such normal hours, the premium pay of $2.50 per hour may be properly excluded from the regular rate under Section   
207(e)(7) and is creditable toward statutorily required overtime payments under Section 207(h).[[84]](#footnote-84)

If the premium is payable for any reason other than that the hours worked fell outside the normal workday or workweek, it does not qualify for clock pattern exclusion.[[85]](#footnote-85) For example, a premium rate paid only for work between midnight and 6 a.m. does not qualify for the clock pattern exclusion.[[86]](#footnote-86) Such premium pay is more akin to a shift differential that is paid for undesirable hours, and thus it must be included in the employee’s regular rate.[[87]](#footnote-87)

*d. Other Types of Premium Pay Distinguished*

Generally, premium pay other than the types discussed above does not qualify for exclusion from the regular rate or as overtime.[[88]](#footnote-88) In other words, if an employer pays an employee extra compensation in any way other than premium pay for a workday longer than eight hours, for work on weekends or holidays, or for clock pattern overtime, it does not substitute for, get credited as, or offset FLSA-required overtime pay.[[89]](#footnote-89) The interpretive bulletin provides examples of premium pay arrangements that are not excludable from the regular rate, including: (1) extra pay for night shifts; (2) hazard pay; (3) extra pay for particularly difficult or unpleasant work; and (4) additional compensation offered as an incentive for quick work.[[90]](#footnote-90)

*e. Premium Pay Creditable to Overtime Under Section 207(h) and as a Setoff*

Section 207(h) of the FLSA provides:

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) of this section shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.[[91]](#footnote-91)

Thus, where premium payments are properly excludable from the regular rate pursuant to Sections 207(e)(5)–(7), such payments may also be credited against overtime pay.[[92]](#footnote-92) However, although payments described in Sections 207(e)(1)–(4) and (8) are excludable from the regular rate, they are generally not creditable towards an employer’s overtime pay obligations.[[93]](#footnote-93) Employers have argued that certain payments not included in Section 207(h) also may be set off against the overtime due an employee.[[94]](#footnote-94)

Even where additional payments are creditable, the courts have struggled with determining how to apply such payment credits. Neither the FLSA nor the DOL regulations and interpretive bulletins provides direct guidance on whether the payments can be credited against an employer’s cumulative overtime liability or is limited in application to the particular workweek in which the premium payments were earned.[[95]](#footnote-95) Guidance from DOL opinion letters and decisions from some federal circuits have restricted the credit to the workweek in which the offsetting premium was paid.[[96]](#footnote-96) Other federal circuits have permitted employers to apply a credit over periods longer than a single workweek.[[97]](#footnote-97)

***2. Discretionary Bonuses, Prizes, and Awards: Section 207(e)(3)(a)***

*a. Discretionary Versus Nondiscretionary*

The DOL interprets the term “bonuses” to mean payments made to an employee in addition to the employee’s regular earnings, usually to reward extra effort, loyal service, or the like.[[98]](#footnote-98) Under the FLSA, only discretionary bonuses may be properly excluded from the regular rate.[[99]](#footnote-99) In order to be considered discretionary,

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 and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.[[100]](#footnote-100)

If, by word or deed, the employer forgoes its discretion as to either the fact or rate of payment, the bonus must be included in the regular rate of pay.[[101]](#footnote-101) The DOL interprets this limitation to mean that if the employer announces in advance that it will pay a bonus, such as announcing at the beginning of the year an intent to pay a bonus at mid-year, it no longer has total discretion and the payment cannot be excluded from the employee’s regular rate.[[102]](#footnote-102) Thus, a bonus promised to employees when they are hired that is announced as an incentive for hard work or that is the product of a CBA must be included in calculating the employees’ regular rate.[[103]](#footnote-103) Consequently, most types of structured bonus programs must be included in regular rate calculations, including attendance, quality, production, hiring, longevity, training, and other similar work-incentive bonuses.[[104]](#footnote-104)

In December 2019, the DOL updated its interpretation to emphasize that the label assigned to a bonus is not determinative, but that it will be evaluated based on whether it meets the test in Section 207(e)(3).[[105]](#footnote-105) The DOL also added a non-exhaustive list of examples of bonuses that may be discretionary, including bonuses for unique or extraordinary efforts not awarded pursuant to pre-established criteria, severance bonuses, referral bonuses for employees not primarily engaged in recruiting activities, bonuses for overcoming challenging or stressful situations, and bonuses for employee of the month.[[106]](#footnote-106)

An employer’s custom or practice of paying a bonus year after year at the same time may suggest the existence of an understanding between employee and employer that will render a bonus nondiscretionary and thus includable in the regular rate, even though the employer retains largely unfettered discretion to deny the bonus based on unilaterally determined or even subjective factors or to discontinue, withdraw, or modify it at any time.[[107]](#footnote-107) Conversely, the fact that a bonus plan is formalized and in writing does not render it nondiscretionary, where the written terms of the bonus plan clearly state that the bonus grant and amount remain within the sole discretion of the employer.[[108]](#footnote-108) In *McPhee v. Lowe’s Home Centers, LLC*,[[109]](#footnote-109) the Fourth Circuit affirmed a finding that a one-time bonus paid in response to federal tax reform legislation was a discretionary bonus where it was not made pursuant to contract or other agreement; the fact that it was announced two weeks before it was paid did not eliminate its discretionary character, in part because the period was too short.[[110]](#footnote-110)

Discretionary bonuses are not within the scope of payments creditable toward overtime compliance under Section 207(h).[[111]](#footnote-111)

*b. Prizes, Contest Awards, and Suggestion Systems*

For employers that occasionally award prizes to employees, such as by winning a contest, the DOL will consider the prizes part of an employee’s regular rate of pay unless the employer shows “either that the prize was not paid to the employee for employment or that it was not a thing of value which is part of wages.”[[112]](#footnote-112)

The DOL considers a prize paid to an employee additional remuneration when it is awarded based on some aspect of the employee’s work—for example, a prize given for best attendance or for employees who identify unauthorized credit transactions.[[113]](#footnote-113) The amount of such a prize, whether a cash payment or the value of awarded merchandise, must be allocated to the employee’s regular rate in the same manner as a nondiscretionary bonus.[[114]](#footnote-114)

Excludable prizes must be awarded for activities outside the employee’s working hours, beyond the employee’s ordinary duties, or away from the employer’s premises.[[115]](#footnote-115) Factors the DOL considers in determining whether a prize is part of an employee’s remuneration include the amount of time spent competing for the prize, whether the type of work completed for the prize is similar to work performed for the employer by this or other employees, and whether the employer rewards or punishes participation with work-related incentives such as promotion.[[116]](#footnote-116)

The DOL has also provided specific guidelines under which an employer may properly exclude from the regular rate awards paid under a bona fide suggestion system.[[117]](#footnote-117) Under these guidelines, prizes paid pursuant to a bona fide suggestion system plan may generally be excluded from the regular rate where all of the following factors are present:

(a) The amount of the prize has no relation to the earnings of the employee at his job but is rather geared to the value to the company of the suggestion which is submitted; and

(b) 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

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

(d) The invitation to employees to submit suggestions is general in nature and no specific assignment is outlined to employees (either as individuals or as a group) to work on or develop; and

(e) There is no time limit during which suggestions must be submitted; and

(f) The employer has, prior to the submission of the suggestion by an employee, no notice or knowledge of the fact that an employee is working on the preparation of a suggestion under circumstances indicating that the company approved the task and the schedule of work undertaken by the employee.

*c. Incentive Payments Determined and Paid by Others*

The WHD’s *Field Operations Handbook* provides that extra payments from manufacturers or distributors to the sales employees of a retail establishment for selling certain items or brands are wages that must be included in the regular rate.[[118]](#footnote-118) In 2005, the DOL referenced that statement in an opinion letter that found a very similar bonus arrangement to be nondiscretionary.[[119]](#footnote-119) The opinion letter addressed the following scenario:

[The] vendor sponsors a bonus program relating to its products. … The vendor then pays to the employer the bonus earned by each employee based upon the vendor’s established formula. The employer, in turn, pays the employees the vendor’s bonus. The vendor decides if and when to provide these bonuses and how to calculate the amount each employee will receive. … [T]he vendor announces the bonus to employees prior to the employees selling the vendor’s product.[[120]](#footnote-120)

On these facts, the DOL found that the bonuses were not excludable from the regular rate because the bonuses were announced in advance to the employees and were paid according to an established formula.[[121]](#footnote-121)

The Third Circuit held that, where an incentive bonus is paid by a third party, courts must first determine if the payment even constitutes “remuneration for employment” within the meaning of the FLSA before asking if it falls within or outside the exceptions under Section 207(e).[[122]](#footnote-122) To determine if an implicit agreement exists, the Third Circuit explained that “the question is whether there has been a course of dealing sufficient to characterize the payment as one that is legitimately expected by the employees and legitimately understood as being sponsored in a meaningful way by the employer.”[[123]](#footnote-123) On the facts, the court held that the record did not show that efficiency and “completion of work” or “pacesetter” bonuses were understood by employees as remuneration for employment, as opposed to gifts or gratuities from the third party, and remanded on those bonuses for further fact development.[[124]](#footnote-124) However, a safety bonus was remuneration for employment under the Third Circuit’s analysis, where employees knew the requirements to earn it and the employer had “effectively adopted” the third party’s bonus program as its own by asking to allow employee participation in it, tracking awards, and even charging a small processing fee for handling the bonus.[[125]](#footnote-125)

*d. Nondiscretionary Bonuses That Include Overtime*

In some instances, nondiscretionary bonuses provided by contract or plan may include a provision for the simultaneous payment of overtime compensation due on the bonus.[[126]](#footnote-126) This can be accomplished where the bonus is structured as a percentage of total earnings.[[127]](#footnote-127) A bonus so structured, while nondiscretionary and subject to inclusion in the regular rate, already satisfies in full the overtime provisions of the FLSA with no re-computation required.[[128]](#footnote-128) As explained in an opinion letter by the DOL:

Under the method of allocation discussed in this section, where a bonus is paid as a predetermined percentage of an employee’s total compensation, including straight-time, overtime, bonuses, and commissions, the overtime pay due under the FLSA is automatically included and no additional computation or payment of overtime is required. However, the employer must pay the same percentage of the straight time and overtime earnings.[[129]](#footnote-129)

However, the DOL’s interpretive bulletins caution that a percentage-of-earnings bonus will not be valid “where this form of payment is used as a device to evade the overtime requirements of the Act rather than to provide actual overtime compensation.”[[130]](#footnote-130) Artificial labeling of regular wages as bonuses and “pseudo ‘percentage bonuses’” will not be accepted.[[131]](#footnote-131)

Where a nondiscretionary bonus payment does not automatically include overtime, it must be included in the regular rate through a separate computation method. Those methods are discussed below in Section IV.D [The “Regular Rate”; Calculating Regular Rate and Overtime Under Various Methods of Payment] of this chapter.

***3. Gifts, Christmas, and Special Occasion Bonuses: Section 207(e)(1)***

Gifts paid as a reward for service with the employer are excluded from the regular rate as long as the amounts given “are not measured by or dependent on hours worked, production, or efficiency.”[[132]](#footnote-132) In order for a payment to qualify as an excluded gift, the employees must not have a legally enforceable contractual right to the “gift.”[[133]](#footnote-133) Gifts are not among the types of payments that may be credited toward overtime compensation under Section 207(h).[[134]](#footnote-134)

The FLSA specifically identifies Christmas bonuses as gifts that qualify for exclusion even though paid yearly so that employees expect it.[[135]](#footnote-135) However, according to the DOL’s interpretive bulletin, such payments will not qualify for exclusion if the amount is so substantial that it can be assumed the employees count it as part of their wages or if the amount paid is based on hours worked, productivity, or efficiency, as such payments would be considered incentives in the nature of wages.[[136]](#footnote-136)

Amounts paid as a reward for service, such as longevity pay, will constitute excluded gifts as long as the employees have no contractual right to the payments.[[137]](#footnote-137) In updating its regular rate interpretations in 2019, the DOL declined to add a provision identifying sign-on bonuses as excluded under Section 207(e)(2), reasoning that they are already covered by Section 207(e)(1) if the bonus meets the requirements in the interpretation.[[138]](#footnote-138)

The DOL added in 2019 “office coffee” and “snacks” as examples of payments that could be excluded under this provision.[[139]](#footnote-139)

***4. Profit-Sharing or Trust or Thrift or Savings Plans: Section 207(e)(3)(b)***

Under Section 207(e)(3)(b), an employee’s regular rate does not include payments made by the employer to a profit-sharing plan or trust, or a thrift or savings plan.[[140]](#footnote-140) In order to be excluded, employer contribution payments must be made pursuant to a bona fide plan that meets the requirements of the appropriate regulations set forth by the Wage and Hour Administrator.[[141]](#footnote-141) As directed by statute, the DOL has adopted regulations that set forth the minimum requirements that a “bona fide thrift or savings plan”[[142]](#footnote-142) and a “bona fide ­profit-sharing plan or trust”[[143]](#footnote-143) must meet in order for employer contributions to such a plan or trust to be excluded from an employee’s regular rate. In general, the regulations require that such plans and trusts be in writing, be adopted by the employer or by a CBA, and be communicated or made available to the eligible employees.[[144]](#footnote-144)

Although the precise regulatory requirements are detailed and differ for each type of plan, broadly speaking, the regulations require that such plans or trusts meet standards for employee eligibility and contain clearly defined formulas for calculating contributions and benefits.[[145]](#footnote-145) For example, thrift and savings plans must specifically define by category the participating employees and the basis of their eligibility, but eligibility cannot be based on hours of work and other work incentives except to determine the eligibility of part-time and casual employees.[[146]](#footnote-146) Thrift and savings plans must also specify definite formulas to use in determining the amount that each employee may save under the plan and how “[t]he employer’s contributions shall be apportioned among the individual employees.”[[147]](#footnote-147) Moreover, unless the Administrator specifically approves the plan, the employer’s contributions to a thrift or savings plan may not exceed the amount of the employee’s contributions up to a maximum employer contribution of 15 percent of the employee’s total annual earnings.[[148]](#footnote-148)

Contributions to a thrift or savings plan will not qualify for exclusion if employee participation is mandatory;[[149]](#footnote-149) if an employee’s wages are dependent on the plan’s existence or the employer’s contributions to the plan;[[150]](#footnote-150) or if the amount of either employee or employer contributions is in any way based on the employee’s hours of work, production, or efficiency.[[151]](#footnote-151)

Similarly, contributions to a profit-sharing plan or trust will not qualify for exclusion if any employee’s share of profits is determined by the employee’s attendance or other measure of work productivity,[[152]](#footnote-152) if the employer’s contribution is determined by any standard other than profits,[[153]](#footnote-153) or if the employer’s contribution or the employee’s share is so standardized as to constitute wages.[[154]](#footnote-154)

***5. Stock Option Grants: Section 207(e)(8)***

In response to a DOL opinion letter finding that the value of employer-granted stock options must be included in the regular rate,[[155]](#footnote-155) Congress amended the FLSA in 2000 to allow any income derived from a stock option, stock appreciation right, or employee stock purchase plan to be excluded from a nonexempt employee’s regular rate, provided the following requirements are met:

• the plan requires that employees hold their stock options for at least six months before cashing them in;

• the plan requires that the option price be at least 85 percent of the market price when the option is granted;

• employee participation in the plan is voluntary; and

• the terms of the plan are disclosed to the employees.[[156]](#footnote-156)

Section 207(e)(8) also states that qualifying plans would be permitted to grant stock options based on employees’ past performance without overtime consequences provided that the options are not awarded pursuant to any prior contract.[[157]](#footnote-157) Further, this provision allows employers to grant stock options that are without overtime consequences based on the future performance for a facility of any size or a business unit or group that consists of at least 10 employees.[[158]](#footnote-158)

The exclusions allowed by Section 207(e)(8) apply to income or value derived from a stock option, stock appreciation right, or employee stock purchase program that was in existence before the date of the 2000 amendment if (1) “the grants or rights were obtained before the effective date”; (2) “the grants or rights were obtained within the 12-month period beginning on the effective date … so long as such program was in existence on the date of enactment … and will require shareholder approval to modify such program to comply with [the stock option amendment to the Act]”; or (3) “[the grants or rights were] … provided under a collective bargaining agreement that is in effect on the effective date.”[[159]](#footnote-159)

***6. Benefit Plan Contributions: Section 207(e)(4)***

Pursuant to Section 207(e)(4), the regular rate excludes “contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.”[[160]](#footnote-160) Such profit-sharing and benefit payments that qualify for exclusion may not be credited under Section 207(h) toward statutory overtime premiums due.[[161]](#footnote-161)

Employee benefit plans must also meet certain minimum DOL standards in order for the employer’s contributions to qualify for exclusion from the regular rate pursuant to Section 207(e)(4).[[162]](#footnote-162) Generally, the interpretive bulletins require that

(1) contributions must be made pursuant to a specific plan communicated to the employees and adopted by an employer independently or through collective bargaining;[[163]](#footnote-163)

(2) the plan’s primary purpose must be to provide for payment of employee benefits in the event of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, accident, unemployment, legal services, or other events that could cause significant future financial hardship or expense;[[164]](#footnote-164)

(3) the plan or trust must define, by formula or otherwise, either the benefits payable to employees or the contributions required of the employer, or both;[[165]](#footnote-165)

(4) the employer’s contribution must be paid irrevocably, pursuant to an insurance agreement or other funded arrangement, to a third person who assumes fiduciary responsibility for the money as a trustee;[[166]](#footnote-166) and

(5) the plan must not give employees the right to assign benefits or the option, generally, to receive any part of employer contributions in cash rather than benefits.[[167]](#footnote-167)

In its December 2019 update of these interpretive bulletins, the DOL expanded the scope of the presumption that benefit plans meet the requirements of 29 C.F.R. §778.215(a)(1), (2), (4), and (5), from the preexisting provision that a plan or trust must be approved by the Internal Revenue Service (IRS) as satisfying the requirements of Internal Revenue Code (IRC) Section 401(a).[[168]](#footnote-168) A plan or trust will presumptively meet those requirements if it (1) has been approved by the IRS as satisfying the requirements of IRC Section 401(a), 403(a), or 403(b); (2) is maintained pursuant to a written document that the plan sponsor reasonably believes complies with IRC Section 401(a), 403(a), 403(b), 408(k), or 408(p); or (3) is sponsored by a government employer who reasonably believes the plan complies with IRC Section 457(b).

The Ninth Circuit has held that benefit payments by the employer directly to the employee do not qualify for this exclusion, even if they are made to supplement benefit payments under a qualified plan.[[169]](#footnote-169) The Administrator has opined that an employer’s decision to offer different benefit levels to different employee groups will not affect the employer’s ability to claim the exclusion of Section 207(e)(4), so long as all of the statutory criteria are met.[[170]](#footnote-170)

The Ninth Circuit, in *Flores v*. *City of San Gabriel*,[[171]](#footnote-171) held that cash payments taken by employees in lieu of health benefits were compensation for work performed and thus were not excludable from the regular rate of pay under the FLSA provision excluding payments for nonworking time such as vacation, sick time, reimbursable travel expenses, and “other similar payments.” The DOL’s December 2019 update of its interpretations is consistent with this view.[[172]](#footnote-172) However, the DOL says that contributions to Individual Retirement Accounts or Health Savings Accounts by an employer may qualify if the contributions are communicated to employees.[[173]](#footnote-173) Likewise, discretionary employer contributions to a retirement plan may be excludable if the formula quantifies each variable and defines the variables in relation to each other, but would not be if the plan provided nothing more than that the Board “at its discretion may make a greater or lesser contribution for any plan year.”[[174]](#footnote-174)

*a. Cafeteria Plans*

The term “cafeteria plan” refers to an employer-provided benefit plan under IRC Section 125 that provides employee participants an opportunity to receive certain benefits on a pretax basis.[[175]](#footnote-175) Cafeteria plans raise special exclusion issues under Section 207(e)(4) of the FLSA. Under IRS regulations, participants in a cafeteria plan must be permitted to choose among at least one taxable benefit (such as cash) and one qualified benefit.[[176]](#footnote-176)

The DOL’s interpretive bulletin regarding Section 207(e)(4) states that in order for an employer’s contribution to qualify for exclusion from the regular rate under Section 207(e)(4), a plan “must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer’s contribution in cash instead of the benefits under the plan.”[[177]](#footnote-177) However, as a limited exception to this rule, the interpretive bulletin provides that

if a plan otherwise qualified as a bona fide benefit plan under section 7(e)(4) of the Act, it will still be regarded as a bona fide plan even though it provides, *as an incidental part thereof*, for the payment to an employee in cash of all or a part of the amount standing to his credit (i) at the time of the severance of the employment relationship due to causes other than retirement, disability, or death, or (ii) upon proper termination of the plan, or (iii) during the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7(e)(4) of the Act.[[178]](#footnote-178)

With respect to the word “incidental,” a DOL opinion letter has noted a cafeteria plan may qualify as a bona fide benefit plan for purposes of Section 207(e)(4) if (1) no more than 20 percent of the employer’s contribution is paid out in cash; and (2) the cash is paid under circumstances that are consistent with the plan’s overall primary purpose of providing benefits.[[179]](#footnote-179) The Ninth Circuit rejected the DOL’s opinion letter as unpersuasive, but nevertheless held that a plan where more than 40 percent of the contributions were made in cash to employees in lieu of benefits was not a “bona fide” plan, because the amount of cash payments were not an “incidental” part of the plan “under any fair reading of that term.”[[180]](#footnote-180) Employer contributions to cafeteria plans that meet these criteria may be excluded from the regular rate under Section 207(e)(4) and are not creditable under Section 207(h).[[181]](#footnote-181)

***7. Payments Made When No Work Is Performed: Section 207(e)(2)***

Generally, when an employer pays an employee for time he or she is not at work, the compensation may be excluded from an employee’s regular rate.[[182]](#footnote-182) Thus, the FLSA does not require an employer to count payments made for “occasional periods when no work is performed,” such as holidays,[[183]](#footnote-183) leave with pay,[[184]](#footnote-184) illnesses,[[185]](#footnote-185) or vacations,[[186]](#footnote-186) in determining an employee’s regular rate.

Section 207(e)(2) lists “illnesses” as one of the categories for which payments can be excluded; however, court authority is split regarding whether a buy-back of accrued sick leave is properly excluded from the regular rate of pay. The Sixth Circuit has held that payments for unused sick leave made in accordance with a CBA were properly excludable from the regular rate of pay in the same manner as used sick leave, where payments were made when no work was performed due to illness.[[187]](#footnote-187) However, the Eighth Circuit has ruled that payments under a sick leave buy-back program were not properly excluded from the regular rate of pay.[[188]](#footnote-188) Under that program, employees were permitted to sell the employer a portion of their unused sick days at 75 percent of their regular hourly rate. Significant to the court’s conclusion was that the purpose and effect of the program was to encourage employees to report to work.[[189]](#footnote-189) The Tenth Circuit, in *Chavez v. City of Albuquerque*,[[190]](#footnote-190) and the DOL[[191]](#footnote-191) have joined the Eighth Circuit in concluding that while vacation buy-back is not part of the regular rate, sick leave buy-back is because it is analogous to an attendance bonus.[[192]](#footnote-192) The Ninth Circuit has held that the accrued, unused portion of a combined annual sick and vacation leave account was properly excluded from the regular rate.[[193]](#footnote-193)

In 2019, the DOL dropped the distinction between vacation and sick leave for purposes of excluding buy-backs of unused leave, reasoning that employers generally do not provide separate categories of leave.[[194]](#footnote-194) In explaining its change, the DOL criticized the Tenth and Eighth Circuit decisions.[[195]](#footnote-195) Because there was no reference to sick leave buy-back in the regulation, the Tenth Circuit in *Chavez v. City of Albuquerque*[[196]](#footnote-196) concluded that sick leave buy-back was not excludable. The DOL criticized the Tenth Circuit for reaching that conclusion because (1) there was a specific statement in the *Field Operations Handbook* stating that rules governing the exclusion of payments for unused vacation leave also apply to payments for unused sick leave and (2) the court’s use of a 2009 opinion letter was in error because that opinion letter was based on the specific nature of the buy-back program at issue there, which functioned as an attendance bonus.[[197]](#footnote-197) The DOL criticized the Eighth Circuit’s holding in *Acton v. City of Columbia*,[[198]](#footnote-198) noting that the court applied the wrong interpretive bulletin—29 C.F.R. §778.223—and failed to address (1) the statutory language of Section 207(e)(2) permitting exclusion for payments for illness, and (2) 29 C.F.R. §778.219, which interprets that provision.[[199]](#footnote-199)

If an employee works on a day that he or she could have taken as a paid holiday, or as vacation or sick leave (i.e., paid time off), and receives the holiday pay or other paid leave in addition to pay for the work performed on the holiday or when the employee was otherwise going to be absent, the holiday pay or paid leave may be excluded from the calculation of the employee’s regular rate because it does not compensate the employee for work performed.[[200]](#footnote-200) When it updated its interpretive bulletin in 2019, the DOL explained that whether an employee works a holiday voluntarily or not has no bearing on the analysis.[[201]](#footnote-201) Further, the DOL said that the payment does not have to be paid in the same pay period as the unused leave to be excluded, and that the payment can be a lump sum.[[202]](#footnote-202)

Prior to a change in December 2019, the interpretive bulletin stated that, in order to qualify for exclusion, the absence for which the employee is being paid must be “infrequent or sporadic or unpredictable,” which it contrasted with meal (or lunch) periods and regular days of rest, such as Sundays.[[203]](#footnote-203) In 2019, the DOL removed the reference to “lunch periods” in the interpretive bulletin because it recognized that it conflicted with another 29 C.F.R. Part 778 interpretive bulletin that permits employers to pay for bona fide meal periods by agreement and not include that payment in the regular rate.[[204]](#footnote-204) The DOL still says that the absence must be “infrequent or sporadic or unpredictable.”[[205]](#footnote-205)

Section 207(e)(2) lists, in addition to vacation, holiday, and illness, “other similar cause[s]” as types of payments that may be excluded from the regular rate.[[206]](#footnote-206) The interpretive bulletin was updated in December 2019 to add a range of what the DOL considers more relevant examples, such as jury duty, reporting to a draft board, attending a funeral, absences due to weather conditions, attending adoption or child custody hearings, attending school activities, donating organs or blood, voting, volunteering as a first responder, absences due to military or family medical leave, and nonroutine paid leave required under state or local laws, as some additional types of paid absences this exclusion is intended to cover.[[207]](#footnote-207) These absences must be “infrequent or sporadic or unpredictable.”[[208]](#footnote-208) Further, to qualify for this exclusion, the payments must approximate the employee’s earnings for similar time under normal conditions.[[209]](#footnote-209)

Section 207(e)(2) also lists payments for failure of the employer to provide sufficient work as a category of potentially excluded payments.[[210]](#footnote-210) In certain circumstances, the DOL says that an employer can use this exclusion when it has paid employees even though the employer has not provided sufficient work.[[211]](#footnote-211) If employees would normally be working except that a machine has broken or supplies have not arrived, the employer may exclude these hours from the employee’s ­regular rate.[[212]](#footnote-212) However, the exclusion for lack of sufficient work is not available for a reduction in work schedule, ordinary temporary layoffs, or any type of routine recurrent absence of the employee.[[213]](#footnote-213)

***8. Reimbursement for Work-Related Expenses: Section 207(e)(2)***

The regular rate excludes reimbursements made by the employer to the employee for the actual or reasonably approximate amount of expenses “incurred by an employee in the furtherance of his employer’s interests.”[[214]](#footnote-214) Moreover, because such reimbursements are not paid as compensation for hours worked, “no part of such payments can be credited toward overtime compensation due under the Act” under Section 207(h).[[215]](#footnote-215) In 2019, the DOL revised the interpretive bulletin to clarify that the expense does not have to be incurred “solely” in the interest of the employer to be excluded, explaining that the statute does not say so and neither the DOL nor the courts had interpreted the expense reimbursement exclusion so restrictively.[[216]](#footnote-216)

Whether a particular payment may be excluded is determined on a case-by-case basis.[[217]](#footnote-217) DOL guidance and case law provide several examples of expense reimbursements (including per diem approximations of likely expenses) that are properly excludable, including purchases of tools, equipment, supplies, and uniforms, away-from-home travel expenses and meals, and, per the December 2019 revisions, cell phone charges, exam fees, and membership dues.[[218]](#footnote-218)

By contrast, payments for expenses that are personal to the employee and incurred for the employee’s own benefit must be included in the regular rate.[[219]](#footnote-219) For example: “An employee normally incurs expenses in traveling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as ‘reimbursement for expenses.’”[[220]](#footnote-220) Moreover, DOL interpretations provide that, even where the reimbursement includes legitimate employer expenses, “if the reimbursed amount is disproportionately large, the excess amount will be included in the regular rate.”[[221]](#footnote-221) Likewise, courts have held that per diem payments must be included in the regular rate if they are tied to the number of hours worked rather than expenses incurred,[[222]](#footnote-222) or if the employer views the payments as supplementing wages rather than reimbursing expenses.[[223]](#footnote-223) The DOL, in 2019, modified its interpretation to say that if the expense is equal to or less than Federal Travel Regulation rates or IRS-approved amounts, the expense is “per se reasonable and not disproportionately large.”[[224]](#footnote-224) However, the reverse is not true: an expense in excess of either of these guidelines “does not create an inference” that the expense is per se unreasonable.[[225]](#footnote-225)

The DOL has opined that an employer that provides an employee with an on-site apartment and requires the employee to occupy it should not include the cost of the apartment in the employee’s regular rate of pay.[[226]](#footnote-226) As stated in an opinion letter, the DOL will deem a residential facility to be for the employer’s benefit, and hence excludable from the regular rate, where (1) the employer requires the employee to occupy the facility for the employer’s benefit, (2) the employer provides the facility at no cost, and (3) “it is understood that the furnishing of the apartment is not considered a part of the employee’s wages.”[[227]](#footnote-227) A Texas district court held that allowing employees a discount on renting an apartment is not “furnishing” the facility, and thus the value of the discount is not considered part of employee wages.[[228]](#footnote-228)

***9. “Other Similar Payments”: Section 207(e)(2)***

In addition to the specific exclusions just discussed, Section 207(e)(2) also excludes from the regular rate “other similar payments to an employee which are not made as compensation for his hours of employment.”[[229]](#footnote-229) As discussed below, the DOL’s interpretive bulletins give a number of examples of specific types of payments that can be excluded from the regular rate under this provision. In 2019, the DOL updated and modified its examples to address evolving laws, such as state laws, that might impact when and how certain payments are made.[[230]](#footnote-230) In providing these examples, the DOL explained that some courts have equated “remuneration for employment” with “compensation for work,” which are different terms, and the latter is a more narrow term encompassing payments that cannot be excluded from the regular rate.[[231]](#footnote-231) The DOL explained that payments can be “remunerative” and still be excluded, and would be as other similar payments, if “they do not function as formulaic wage supplements and are not tied to hours worked, services rendered, job performance, or other criteria linked to the quality or quantity of an employee’s work, but are conditioned merely on one being an employee,” and include conditions such as a waiting period for eligibility, repayment of benefits as a remedy for employee misconduct, or eligibility limitations based on geographic location or job position.[[232]](#footnote-232) One example of such a payment is a sign-on bonus that has no clawback provision, and which is “granted before any work is performed.”[[233]](#footnote-233)

*a. Show-Up, Call-Back, and Short-Call Pay*

The DOL’s interpretive bulletins provide that “show-up” and “call-back pay,”[[234]](#footnote-234) if they are paid, fall within this exclusion.[[235]](#footnote-235) Show-up pay is a minimum amount of compensation payable to an employee for showing up at work on a regularly scheduled workday even when the employer is unable to provide the employee a full day’s work.

**Example 10-3.** Assume that an employee entitled to overtime pay after 40 hours a week whose workweek begins on Monday and who is paid $12 an hour reports for work on Monday according to schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday, inclusive, making a total of 42 hours for the week. The employment agreement covering the employees in the plant, who normally work 8 hours a day, Monday through Friday, provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours’ work or pay. The employee thus receives not only the $24 earned in the 2 hours of work on Monday but an extra 2 hours’ “show-up” pay, or $24 by reason of this agreement. However, since this $24 in “show-up” pay is not regarded as compensation for hours worked, the employee’s regular rate remains $12 and the overtime requirements of the Act are satisfied if he receives, in addition to the $504 straight-time pay for 42 hours and the $24 “show-up” payment, the sum of $12 as extra compensation for the 2 hours of overtime work on Saturday.[[236]](#footnote-236)

Similarly, call-back pay provides a minimum amount of compensation, pursuant to an employer policy or contract, for an employee who is called back to work after the employee’s scheduled work hours, and typically this would be for calls not subject to prearrangement.[[237]](#footnote-237) In December 2019, the DOL revised the interpretation for call-back pay (and “other payments similar to ‘call-back pay’”) to remove the qualifying term “infrequent and sporadic,” reasoning that these kinds of payments are not subject to the limiting term “occasional” in Section 207(e)(2) and, thus, removing “infrequent and sporadic” better aligns the interpretation with the statute.[[238]](#footnote-238) The DOL also added language to clarify its view that “the regularity of payments, alone, does not necessarily establish that such payments are prearranged … . The key to the ‘prearrangement’ inquiry is whether work was anticipated and therefore reasonably could have been scheduled.”[[239]](#footnote-239)

“Short-call” payments are those made to employees called in on short notice.[[240]](#footnote-240) When the short call or call-back compensation exceeds the amount of pay (calculated at the regular rate) that would ordinarily have been due the employee for hours actually worked after showing up or being called back to work, the excess payment is not considered payment for hours worked and is therefore excluded from the regular rate.[[241]](#footnote-241)

The DOL left the “infrequent and sporadic” requirement in place for “show-up” pay because it views that as falling under the first clause of Section 207(e)(2) and, therefore, being subject to the “occasional” limitation—i.e., a time when no work is performed because of the “failure of the employer to provide sufficient work.”[[242]](#footnote-242) In the 2019 update, the DOL also added language to recognize the impact of state and local scheduling laws.[[243]](#footnote-243) Thus, the DOL now says under the “show-up pay” interpretation that the employer may exclude payments required by state or local scheduling laws when the employee reports to work but does not receive the expected amount of hours, so long as the pay is not for hours worked and is infrequent and sporadic.[[244]](#footnote-244)

*b. Pay for Other Nonproductive Hours*

Other payments for hours not worked are also excluded from the regular rate, including the following: extra pay “for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule”;[[245]](#footnote-245) extra pay for being called out “before the expiration of a specified number of hours between shifts” (“rest period pay”);[[246]](#footnote-246) salary advances;[[247]](#footnote-247) a signing bonus paid at time of hire;[[248]](#footnote-248) and lunch period pay.[[249]](#footnote-249)

In updating its examples of other payments “similar to ‘call-back’ pay” in December 2019, the DOL added examples of pay made pursuant to state and local scheduling laws including “clopening” or “right to rest” pay (i.e., pay where an employee does not get a sufficient break between two days’ shifts as mandated by law), and “predictability pay.”[[250]](#footnote-250) Additional examples provided by the DOL of payments that can be excluded from the regular rate include sums paid to an employee for the rental of the employee’s truck or car;[[251]](#footnote-251) loans or advances made by the employer to the employee;[[252]](#footnote-252) the cost of employee conveniences such as parking spaces, lockers, restrooms, on-the-job medical care, on-site treatment provided by specialists such as therapists and personal trainers or employee assistance program counselors, gym fees or fitness classes, and recreational facilities;[[253]](#footnote-253) the cost to the employer of providing wellness programs, including physical, financial, and mental health;[[254]](#footnote-254) discounts on employer-provided retail goods and services, and tuition (including student loan programs);[[255]](#footnote-255) and adoption assistance.[[256]](#footnote-256)

The DOL interpretive bulletin maintains that such exclusions apply only to the extent such payments are for time when “no work is performed due to … failure of the employer to provide sufficient work, or other similar cause”; payments for idle time that is deemed “time worked” under the applicable interpretive regulations must be included in the regular rate.[[257]](#footnote-257) However, the DOL has consistently considered “on call” pay, even though it may not be deemed pay for hours worked, as the kind of pay that must be included in the regular rate under this interpretive bulletin.[[258]](#footnote-258) In its December 2019 revision, the DOL extended this view to “on call” pay required by state or local law.[[259]](#footnote-259)

The Third Circuit, in *Minizza v. Stone Container Corp.*,[[260]](#footnote-260) held that annual lump-sum payments required by certain types of provisions of CBAs are excludable pursuant to Section 207(e)(2) because, as used in that section, “other similar payments” means payments for time not worked rather than payments similar in kind to those specifically mentioned in Section 207(e)(2).[[261]](#footnote-261) Similarly, the DOL has opined that lump-sum payments negotiated as part of a CBA primarily as ratification bonuses (to induce employees to settle a strike and ratify the agreement), may be excluded from the regular rate under Section 207(e)(2).[[262]](#footnote-262) Section 207(e)(2) and its accompanying interpretations[[263]](#footnote-263) have also been judicially applied to exclude some bonus payments made for ratifying CBAs. For example, the Third Circuit in *Minizza* reasoned that the “essential characteristic” of the payments enumerated in Section 207(e)(2) is that they do not compensate employees for hours worked or services rendered.[[264]](#footnote-264) Under this reasoning, a payment can qualify as “similar” if it likewise does not relate to hours of employment or service.[[265]](#footnote-265)

The “other similar” payments exception does not exclude every payment that is not measured by the number of hours an employee works. Courts have refused to treat some lump-sum payments as excluded under Section 207(e)(2).[[266]](#footnote-266) The key inquiry is whether the payments in question somehow compensate employees for work[[267]](#footnote-267)—if they do, they are not “similar” to the examples listed and must be included in the employee’s regular rate.[[268]](#footnote-268) Thus, “earned work credits” paid by a bakery to employees who did not receive two consecutive days off in a week were not excluded under Section 207(e)(2) because the credits were “tied to work schedules that employees dislike.”[[269]](#footnote-269) Similarly, “supplemental payments, designed to bring the wage of a partially disabled employee up to his or her predisability wage level” are not excludable under Section 207(e)(2).[[270]](#footnote-270) Moreover, the Ninth Circuit has held that cash payments made to employees in lieu of receiving insurance benefits—such as when an employee’s spouse has health insurance and the employee is on that plan—have been held not to be excludable because they “are not similar to payments for non-working time or reimbursement for expenses.”[[271]](#footnote-271)

In an opinion letter, the DOL addressed whether payments tendered in consideration of an employee’s agreement to a noncompetition provision must be included in the regular rate.[[272]](#footnote-272) The agreement at issue prohibited employees from competing both during their employment and for a 30-month period after their terminations, in exchange for which the employees received additional quarterly payments during the period of their employment. The DOL viewed the payments as “promised bonuses that are part of the remuneration for employment” and thus could not be excluded from the regular rate.[[273]](#footnote-273)

***10. Talent Fees in the Radio and Television Industry: Section 207(e)(3)(c)***

Pursuant to Section 207(e)(3)(c), the regular rate excludes “talent fees … paid to performers, including announcers, on radio and television programs.”[[274]](#footnote-274) Talent fees are extra payments made to staff performers for services rendered as performers on particular programs and commercials or for special services beyond the scope of the performers’ regular duties on particular sustaining programs.[[275]](#footnote-275) Talent fees are not creditable toward statutorily required overtime premiums.[[276]](#footnote-276)

**D. Calculating Regular Rate and Overtime Under Various Methods of Payment**

Once the total amount of an employee’s “regular” compensation is deduced, “the determination of the regular rate becomes a matter of mathematical computation.”[[277]](#footnote-277) The regular rate must be converted to an hourly rate[[278]](#footnote-278) because, although any method of compensating an employee is permitted, the FLSA imposes its overtime requirements in terms of hourly wages. Thus, if necessary, an employer must convert an employee’s wages to a rate per hour to determine compliance with the statute.[[279]](#footnote-279) The DOL’s interpretive bulletins provide the appropriate method of computation: “The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.”[[280]](#footnote-280) The DOL interpretations also provide a number of examples that illustrate the regular rate computation in particular instances, as discussed below.[[281]](#footnote-281)

***1. Payment of Wages Based on an Hourly Rate***

*a. Employees Paid at One Hourly Rate*

The simplest calculation of the regular rate occurs when the employee is paid entirely by the hour. In such a case, the hourly wage is the regular rate.[[282]](#footnote-282) Employees receive the regular rate for all hours worked during the week. The employee is also entitled to a premium of one and one-half times the regular rate for each hour worked in excess of 40.

*b. Employees Paid at Two or More Hourly Rates*

Some employees are paid two or more different hourly rates for different types of work during the same workweek. Under these circumstances, the employee’s regular rate is the “weighted average” of such rates.[[283]](#footnote-283) Courts have recognized that the weighted average overtime calculation may apply where employees are paid different hourly rates for the same type of work, such as in situations where drivers are paid different hourly rates for different routes or employees are paid different hourly rates for different shifts.[[284]](#footnote-284)

***2. Payment of Wages Based on a Nonhourly Rate***

*a. Piece Rates Generally*

In certain jobs, employees may be paid based on how many units they produce. These employees are referred to as piece-rate workers, or pieceworkers.[[285]](#footnote-285) Calculation of overtime for a piece-rate worker requires the preliminary calculation of the worker’s regular rate, which may vary from week to week.[[286]](#footnote-286) The method for calculating a piece-rate worker’s regular rate is to average the employee’s total earnings for piece rates, any other earnings, and waiting time or other hours worked over the hours worked in a particular workweek.[[287]](#footnote-287) So long as the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked, only additional half-time pay is required for overtime hours.[[288]](#footnote-288)

**Example 10-4.** If the employee has worked 50 hours and has earned $491 at piece rates for 46 hours of productive work and in addition has been compensated at $8 an hour for 4 hours of waiting time, the total compensation, $523, must be divided by the total hours of work, 50, to arrive at the regular hourly rate of pay—$10.46. For the 10 hours of overtime the employee is entitled to additional compensation of $52.30 (10 hours at $5.23). For the week’s work the employee is thus entitled to a total of $575.30 (which is equivalent to 40 hours at $10.46 plus 10 overtime hours at $15.69).[[289]](#footnote-289)

An employer must compensate pieceworkers for nonproductive waiting time, unless the parties agree that the pay the employee will earn at piece rates is intended to compensate them for all hours worked, both productive and nonproductive.[[290]](#footnote-290) The DOL has taken the position that this agreement need not be in writing.[[291]](#footnote-291) If there is such agreement, the regular rate is calculated by dividing the total piece-rate compensation by the total hours worked, whether productive or nonproductive.[[292]](#footnote-292)

*b. Piece Rate with Hourly Guarantee*

In some cases, the pieceworker is guaranteed a minimum hourly wage, and if the piece rate falls below the guaranteed rate, the pieceworker is paid the difference between the hourly guarantee and the piece rate.[[293]](#footnote-293) Under such an arrangement, the DOL’s interpretive bulletin provides that the regular rate of pay is determined by reference to the minimum hourly guarantee because the piece-rate worker has actually become an hourly worker during that week by virtue of the guarantee.[[294]](#footnote-294) If the pieceworker is paid at a different hourly rate for waiting time, the overtime rate is based on the weighted average of the two wages.[[295]](#footnote-295) The actual hourly wage paid to the pieceworker governs the amount of wages to be included in the calculation of the regular rate, as shown in the following example:

**Example 10-5.** [I]f the employee [in Example 10-4] was guaranteed $11 an hour for productive working time, the employee would be paid $506 (46 hours at $11) for the 46 hours of productive work (instead of the $491 earned at piece rates). In a week in which no waiting time was involved, the employee would be owed an additional $5.50 (half time) for each of the 6 overtime hours worked, to bring the total compensation up to $539 (46 hours at $11 plus 6 hours at $5.50 or 40 hours at $11 plus 6 hours at $16.50). If the employee is paid at a different rate for waiting time, the regular rate is the weighted average of the 2 hourly rates.[[296]](#footnote-296)

*c. Day Rates and Job Rates*

An employee may also be paid for each day worked or for the entire job without reference to the actual hours worked; if there is no other compensation, then the regular rate is determined by totaling all wages paid in the workweek and dividing by the total hours actually worked.[[297]](#footnote-297) All hours worked in excess of 40 for the workweek must be paid at an additional one-half times the regular rate.[[298]](#footnote-298)

In contrast to certain other provisions of the interpretive bulletins governing payment on a basis other than hourly,[[299]](#footnote-299) the DOL’s interpretation concerning overtime when payment is made on a “day rate” or “job rate” basis does not require employee understanding or agreement to this method of pay.[[300]](#footnote-300)

*d. Salaried Employees: Generally*

A salaried employee’s regular rate of pay is computed by reference to the number of hours covered by the salary:[[301]](#footnote-301) “If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate.”[[302]](#footnote-302)

**Example 10-6**. If an employee is hired at a salary of $350 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee’s regular rate of pay is $350 divided by 35 hours, or $10 an hour, and when the employee works overtime the employee is entitled to receive $10 for each of the first 40 hours and $15 (one and one-half times $10) for each hour thereafter. If an employee is hired at a salary of $375 for a 40-hour week the regular rate is $9.38 an hour.[[303]](#footnote-303)

Sometimes a salary covers a period of time that exceeds the workweek. Under these circumstances, the salary must be converted to its workweek equivalent.[[304]](#footnote-304) Specifically, a monthly salary is multiplied by 12 (the number of months in a year) and divided by 52 (the number of weeks in a year).[[305]](#footnote-305) Similarly, if the employee is paid semimonthly, the wage is translated to its weekly equivalent by multiplying by 24 and dividing by 52.[[306]](#footnote-306) Once the applicable workweek salary is determined, the regular rate is computed by dividing the derived workweek salary by the standard number of hours per workweek the salary was intended to cover.[[307]](#footnote-307) Alternatively, the regular rate can be calculated by dividing the monthly salary by the number of working days and dividing again by the number of hours in a regular day.[[308]](#footnote-308)

If the salary was intended to cover all hours worked (as opposed to a set number of hours as in the examples above), the overtime is computed as described below.

*e. Salaried Employees: Fluctuating Workweek Method*[[309]](#footnote-309)

An alternative to using a fixed workweek standard for determining an overtime rate is the “fluctuating workweek” (FWW) method of calculating overtime compensation.[[310]](#footnote-310) In June 2020, the DOL amended its interpretive bulletin concerning this method of calculating overtime compensation.[[311]](#footnote-311) According to revised 29 C.F.R. §778.114(a), an employer may use the FWW method to properly compute overtime compensation under the following circumstances:

(1) The employee works hours that fluctuate from week to week;

(2) The employee receives a fixed salary that does not vary with the number of hours worked in the workweek, whether few or many;

(3) The amount of the employee’s fixed salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest; [[312]](#footnote-312)

(4) The employee and the employer have a clear and mutual understanding that the fixed salary is compensation (apart from overtime premiums and any bonuses, premium payments, commissions, hazard pay, or other additional pay of any kind not excludable from the regular rate under section 7(e)(l) through (8) of the Act) for the total hours worked each workweek regardless of the number of hours, although the clear and mutual understanding does not need to extend to the specific method used to calculate overtime pay; and

(5) The employee receives overtime compensation, in addition to such fixed salary and any bonuses, premium payments, commissions, hazard pay, and additional pay of any kind, for all overtime hours worked at a rate of not less than one-half the employee’s regular rate of pay for that workweek. Since the salary is fixed, the regular rate of the employee will vary from week to week and is determined by dividing the amount of the salary and any nonexcludable additional pay received each workweek by the number of hours worked in the workweek. Payment for overtime hours at not less than one-half such rate satisfies the overtime pay requirement because such hours have already been compensated at the straight time rate by payment of the fixed salary and non-excludable additional pay.

Payment of any bonuses, premium payments, commissions, hazard pay, and additional pay of any kind is compatible with the fluctuating workweek method of overtime payment, and such payments must be included in the calculation of the regular rate unless excludable under section 7(e)(1) through (8) of the Act.[[313]](#footnote-313)

As noted above, under the FWW method of determining an overtime rate, if a worker is employed at a weekly salary that is intended to compensate for all hours worked in the week, regardless of the number, then the regular rate can be calculated by dividing the amount of the weekly salary by the number of hours actually worked in the week.[[314]](#footnote-314) Because such a salary and non-excludable additional pay already compensates the employee at straight-time rates for all hours worked (including any overtime hours), only one-half times the regular rate for hours worked beyond 40 in the workweek must be added to the salary as overtime compensation.[[315]](#footnote-315) This method allows employers to pay employees a fixed salary and any non-excludable additional pay (as straight-time pay) for all hours worked in the workweek and then compensate employees for their overtime hours on an additional “half-time” basis.[[316]](#footnote-316)

Under this method of overtime compensation, the employee’s regular rate will decrease as the number of hours worked increases.[[317]](#footnote-317) However, this does not impact the availability of the FWW method if all of the regulatory criteria are met.[[318]](#footnote-318)

**Example 10-7.** If during the course of 4 weeks this employee receives no additional compensation and works 37.5, 44, 50, and 48 hours, the regular rate of pay in each of these weeks is $16, $13.64, $12, and $12.50, respectively. Since the employee has already received straight time compensation for all hours worked in these weeks, only additional half-time pay is due for overtime hours. For the first week the employee is owed $600 (fixed salary of $600, with no overtime hours); for the second week $627.28 (fixed salary of $600, and 4 hours of overtime pay at one-half times the regular rate of $13.64 for a total overtime payment of $27.28); for the third week $660 (fixed salary of $600, and 10 hours of overtime pay at one-half times the regular rate of $12 for a total overtime payment of $60); for the fourth week $650 (fixed salary of $600, and 8 overtime hours at one-half times the regular rate of $12.50 for a total overtime payment of $50).[[319]](#footnote-319)

The remaining examples in 29 C.F.R. §778.114(b) were added by the 2020 final rule on the FWW method of computing overtime and concern situations where an employee is paid a nightshift differential (Example 2), and a productivity bonus in addition to a fixed salary (Example 3).[[320]](#footnote-320) The revised regulation also included the results from a 1966 opinion letter wherein the DOL opined: “where all of the legal prerequisites for use of such a method are present, the act, in requiring that ‘not less than’ the prescribed premium of 50% for overtime hours worked be paid, does not prohibit paying more.”[[321]](#footnote-321)

*(i.) Salary Basis of Payment*

Under the FWW method, the employee must be paid a “salary.”[[322]](#footnote-322) Courts have held that the standards for analyzing the salary requirement under the FWW method differ from the standards under the white-collar regulations.[[323]](#footnote-323)

The salary test for the FWW method requires that the employee be paid his or her full salary for the workweek, even though the workweek is one in which less than the full schedule of hours is worked.[[324]](#footnote-324) Thus, the employee must receive the full amount of his or her fixed salary as straight-time pay every week, regardless of the number of hours or days worked in the workweek, as long as the employee performs any work during the workweek.[[325]](#footnote-325) Moreover, the DOL’s “longstanding position” has been “that an employer utilizing the FWW method of payment may not make deductions from an employee’s salary for absences occasioned by the employee.”[[326]](#footnote-326) According to the DOL, deductions for absences of less than a week, whether for illness or sick leave, personal business, or other reasons, cannot be made from fixed salary under the FWW method.[[327]](#footnote-327) However, the 2020 final rule accounts for the view expressed by the DOL in opinion letters and provides that “employers using the fluctuating workweek method of overtime payment may take occasional disciplinary deductions from the employee’s salary for willful absences or tardiness or for infractions of major work rules, provided that the deductions do not cut into the minimum wage or overtime pay required by the Act.”[[328]](#footnote-328)

Deductions from leave time and holiday pay for absences of less than a week may also be permitted.[[329]](#footnote-329) The DOL also allows employers to pay a pro rata share of the employee’s salary in the initial and terminal weeks of employment when the employee is not in payroll status for the entire week.[[330]](#footnote-330)

Prior to 2008, courts had a mixed record on whether the fixed salary requirement permitted employees to be paid bonuses and other premium payments in addition to their fixed salary and still be paid overtime pursuant to the FWW, with many holding that additional payment based on hours worked was inconsistent with the “fixed” salary requirement,[[331]](#footnote-331) whereas others concluded that bonuses could be paid so long as they were added to the regular rate.[[332]](#footnote-332) In 2008, the DOL proposed a change to 29 C.F.R. §778.114 that it said would clarify the rule to make clear that such bonuses are permissible, that this was consistent with the Supreme Court’s analysis in *Overnight Motor Transportation Co. v. Missel*,[[333]](#footnote-333) and that the proposed rule “would eliminate any disincentive for employers to pay additional bona fide bonus or premium payments.”[[334]](#footnote-334)However, in 2011, the DOL revised its interpretation—but not the interpretive bulletin—to state that bonuses and premium payments, other than overtime premiums, are inconsistent with the FWW method.[[335]](#footnote-335) The DOL explained its change in rationale on the grounds that bonuses or other premium payments must be overtime premiums, or otherwise they would be “incompatible with the fluctuating workweek method of computing overtime under section 778.114.”[[336]](#footnote-336) The DOL speculated that the “proposed regulation could have had the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of employees’ compensation into bonus and premium payments, potentially resulting in wide disparities in employees’ weekly pay depending on the particular hours worked,” which the DOL considered antithetical to the purpose of permitting an FWW method of pay in the first place.[[337]](#footnote-337)

Some courts evaluating the DOL’s back-and-forth on the issue of bonuses and the FWW concluded that, whereas the DOL chose to leave in place the status quo that it disapproved of hours-based bonuses and premiums with the FWW, that prohibition did not extend to performance-based bonuses.[[338]](#footnote-338)

On June 8, 2020, the DOL resolved the matter by publishing a final rule[[339]](#footnote-339) allowing employers to offer other payments in addition to a fixed salary to employees compensated using the FWW method of calculating overtime pay under the FLSA. The DOL explained its change of position:

[T]he Department has considered anew the need for a clarification, particularly in light of the 2011 final rule and its interpretation by courts, now finds the reasons articulated in 2011 to be unpersuasive, and is therefore finalizing revisions that are substantially similar to those initially proposed in 2008.[[340]](#footnote-340)

The DOL then set forth its specific changes to 29 C.F.R §778.114:

• in Sec C.F.R §778.114(a) clarifying that bonuses, premium payments, and other additional pay of any kind are compatible with the use of the fluctuating workweek method of compensation;

• adding examples to Sec.778.114(b) to illustrate the fluctuating workweek method of calculating overtime where an employee is paid (1) a nightshift differential, (2) a productivity bonus in addition to a fixed salary, and (3) premium pay for weekend work;

• making non-substantive revisions to Sec.778.114(a) and (c) that were not proposed in the 2008 [notice of proposed rulemaking] to enhance clarity. [They are]

– Sec. 778.114(a) will now list each of the requirements for using the fluctuating workweek method;

– Sec. 778.114(c) will have duplicative text removed;

• changing the title of the regulation from “Fixed salary for fluctuating hours” to “Fluctuating Workweek Method of Computing Overtime.”[[341]](#footnote-341)

The 2020 final rule suggested that the amendments could alleviate some COVID-19 concerns:

The [DOL] also believes that this rule will allow employers and employees to better utilize flexible work schedules. This is especially important as workers return to work following the COVID-19 pandemic. Some employers are likely to promote social distancing in the workplace by having their employees adopt variable work schedules, possibly staggering their start and end times for the day. This rule will make it easier for employers and employees to agree to unique scheduling arrangements while allowing employees to retain access to the bonuses and premiums they would otherwise earn.[[342]](#footnote-342)

In *Hernandez v. Plastipak Packaging, Inc.*,[[343]](#footnote-343) the Eleventh Circuit reversed a district court’s finding that an employer violated the FWW method by paying shift differentials and vacation bonuses on top of the fixed salary, reasoning that the regulations did not prohibit additional payments on top of the fixed salary.[[344]](#footnote-344) The Eleventh Circuit cited as support for its conclusion the text of the regulations that mention only a fixed salary, not fixed compensation, and require only that additional compensation be at least time and one half the employee’s regular rate, as well as a 1999 DOL opinion letter stating that the regulations did not prohibit payments in addition to the fixed salary.[[345]](#footnote-345) The court refused to grant a liberal interpretation to the FLSA, relying on the Supreme Court’s pronouncement in *Encino Motorcars*[[346]](#footnote-346) that the FLSA’s text should be afforded a “fair reading.”[[347]](#footnote-347) The court further rejected reliance on the DOL’s 2011 guidance prohibiting employers from using the FWW method in conjunction with additional payments like bonuses, reasoning that the DOL did not change the text of the regulations or “substantively change” them.[[348]](#footnote-348) Finally, the court refused to distinguish between additional pay that is hours-based (e.g., a shift differential) versus performance-based compensation (e.g., a commission), reasoning that the text of the regulations did not make such a distinction.[[349]](#footnote-349)

*(ii.) Salary Exceeds Minimum Wage*

The salary paid to employees whose overtime is computed using the FWW method must exceed the statutory minimum wage.[[350]](#footnote-350) Courts will generally reject the use of the FWW method where an employee’s average hourly earnings under that computation method are less than the required minimum wage for a substantial number of workweeks.[[351]](#footnote-351) However, an employer’s limited use of a minimum wage adjustment does not preclude use of the FWW method when the shortfall is cured.[[352]](#footnote-352)

*(iii.) “Clear Mutual Understanding”*

The DOL interpretive bulletins provide that in order to use the FWW method to compute overtime, there must be a “clear mutual understanding” of the parties

that the fixed salary is compensation (apart from overtime premiums and any bonuses, premium payments, commissions, hazard pay, or other additional pay of any kind not excludable from the regular rate under section 207(e)(1) through (8) of the Act) for the total hours worked each workweek, regardless of the number of hours, although the clear and mutual understanding does not need to extend to the specific method used to calculate overtime pay.[[353]](#footnote-353)

There is no requirement for the understanding to be reduced to a written agreement or otherwise acknowledged by the employee.[[354]](#footnote-354) The clear mutual understanding requirement is satisfied if the employee is generally aware that the salary is intended as compensation for whatever hours the employee works.[[355]](#footnote-355) The employer need not prove that the employee understands the precise manner in which overtime pay is calculated.[[356]](#footnote-356) An occasional misstatement or an employee’s alleged confusion about the technical details of administering the plan will not preclude application of the FWW method.[[357]](#footnote-357) Whether the FWW method of overtime calculation can be applied to calculate damages in misclassification cases is addressed in Chapter 16, Litigation Issues, §IX.B.2 [Remedies; Monetary Damages for Unpaid Minimum Wages and Overtime; Computation: Salaried Employees Misclassified as Exempt].

*(iv.) Fluctuating Hours*

Under the FWW, an employee must work hours that fluctuate from week to week.[[358]](#footnote-358) It is not necessary that the employee’s hours of work fluctuate above and below 40 hours in a workweek for an employer to apply the FWW method to compute overtime.[[359]](#footnote-359) Nor will working a fixed schedule of hours necessarily preclude its application.[[360]](#footnote-360) An employee’s schedule need not be unpredictable for it to meet the “fluctuation” requirement.[[361]](#footnote-361) The FWW method can still apply in situations where fixed base hours are coupled with fluctuating overtime.[[362]](#footnote-362)

*f. Commission Employees*

Commissions are included in the total compensation paid to the employee for purposes of calculating the regular rate.[[363]](#footnote-363) All commissions must be included in the calculation of total wages paid, regardless of whether the commission is the sole source of the employee’s compensation or is paid in addition to a guaranteed salary or on some other basis.[[364]](#footnote-364) The fact that the commission is paid on a basis other than weekly does not excuse the employer from including this payment in the employee’s regular rate.[[365]](#footnote-365)

*(i.) Paid on a Workweek Basis*

In the easy but unusual case where a commission is paid on a weekly basis, the commission is added to the total of other wages earned. This total is then divided by the total hours worked during the week to obtain the regular rate.[[366]](#footnote-366) The employee is then paid an additional one-half times the regular rate for all hours worked in excess of 40.[[367]](#footnote-367)

*(ii.) Deferred Payments*

If the commission amount cannot be ascertained by the regular payday because, for example, it is determined quarterly, then commission payments are excluded from the regular rate until they can be determined.[[368]](#footnote-368) Under these circumstances, wages paid must be at least one and one-half times the regular hourly rate, exclusive of the commission, for overtime hours. Once the commission is ascertained, it is apportioned back to each week in which it was earned.[[369]](#footnote-369) In order to do this, the regular rate for each workweek must be recalculated, and the employer must pay any additional overtime wages at a rate of not less than one-half times the increase in the regular rate that can be attributed to the commission payments for that workweek.[[370]](#footnote-370)

When it is not possible or practicable to allocate commission payments to a single workweek, some other reasonable and equitable method must be adopted.[[371]](#footnote-371) The DOL’s interpretive regulations set out two methods for calculating the regular rate with respect to commission payments in these circumstances.

The first method allocates equal amounts to each week covered by the commission period.[[372]](#footnote-372) If the commission payment is calculated for a specific number of weeks, the commission should be divided by the number of weeks that it is intended to compensate.[[373]](#footnote-373) Mirroring the manner in which salary payments are apportioned to each week, the commission payment for a month is multiplied by 12 and divided by 52. Other units of time—for example, semimonthly pay periods—are computed in the same manner.[[374]](#footnote-374) After the amount of commission allocated to each week is ascertained, the adjusted regular rate is computed by dividing wages, including commissions, by the total number of hours worked during the week.[[375]](#footnote-375) Additional wages are due for overtime work at one-half times the difference between the adjusted regular rate and the pre-adjustment rate, multiplied by the number of overtime hours.[[376]](#footnote-376) A shorter method to determine the half-time owed is to multiply the commissions allocated to each week by the fraction: overtime hours ÷ (total hours × 2).[[377]](#footnote-377) Alternatively, a published coefficient table can be used to compute the extra wages due. The interpretive bulletins provide the following examples:

**Example 10-8.** If there is a monthly commission payment of $416, the amount of commission allocable to a single week is $96 ($416 × 12 = $4992; $4992 ÷ 52 = $96). In a week in which an employee who is due overtime compensation after 40 hours has worked 48 hours, the $96 commission payment is divided by 48 (hours), yielding $2 per hour as the increase in the regular rate attributable to the commission. Multiplying half of this figure ($1) by 8 overtime hours gives the additional overtime pay due of $8. The $96 may also be multiplied by 0.083 (the appropriate decimal shown on the coefficient table) to get the additional overtime pay of $8.[[378]](#footnote-378)

**Example 10-9.** An employee received $384 in commissions for a 4-week period. Dividing $384 by 4 gives a weekly commission of $96. Assume that, in the 4-week period, the employee worked 44, 40, 44, and 48 hours, respectively. He would be due additional compensation of $4.36 for the first and third weeks ($96 ÷ 44 = $2.18; $2.18 × .5 × 4 = $4.36), no extra compensation for the second week during which no overtime hours were worked, and $8 for the fourth week ($96 ÷ 48 = $2; $2 × .5 × 8 = $8). The additional overtime pay due may also be computed by multiplying the amount of the weekly increase by the appropriate decimal on the coefficient table, for each week in which overtime was worked.[[379]](#footnote-379)

The second method identified by the DOL allocates equal amounts to each hour worked. Under this method, commission payments that are unidentifiable with a particular week may be allocated to each hour worked when doing so is more reasonable and equitable.[[380]](#footnote-380) For this calculation, an employee’s commission should be divided by the number of hours worked within the commission payment period in order to determine the increase in the regular rate.[[381]](#footnote-381) To figure the proper additional overtime compensation, half of this increase in the regular rate should be multiplied by the number of statutory overtime hours worked within the commission payment period.[[382]](#footnote-382) The following example illustrates this method:

**Example 10-10.** An employee received an hourly rate plus commissions of $192 for a commission computation period of 96 hours, including 16 overtime hours (e.g., two workweeks of 48 hours each). Dividing the $192 by 96 gives a $2 increase in the regular rate. The employee is thus due an additional $16 for the commission computation period, representing an additional $1 for each of the 16 overtime hours.[[383]](#footnote-383)

*(iii.) Delayed Credits and Debits*

If there are delays in crediting sales or debiting returns that affect the computation of commissions, the amounts paid to the employee during any commission payment period will be accepted as the total commission earnings during such period.[[384]](#footnote-384) The commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work that actually occurred during a previous period.[[385]](#footnote-385)

*g. Bonuses*

If bonuses cannot be excluded under Section 207(e), they must be accounted for in calculating the regular rate.[[386]](#footnote-386) Like commissions, where a bonus can be linked to particular workweeks, the bonus must be allocated to those workweeks, and then the regular rate must be recalculated for each of those workweeks so that the employee receives the full overtime premiums due based on the readjusted regular rates.[[387]](#footnote-387) If a bonus cannot be identified with particular workweeks, the employer must adopt “some other reasonable and equitable method of allocation.”[[388]](#footnote-388) Likewise, if the bonus cannot be determined until the end of a bonus period, such as an annual bonus, it is permissible to delay recalculation of the regular rate until such time as the amount of the bonus can be ascertained.[[389]](#footnote-389) Unlike commissions, when a bonus plan provides in good faith for the simultaneous payment of overtime compensation by, for example, paying a bonus as a percentage of both straight-time and overtime earnings, no recalculations of rates or additional payments are required.[[390]](#footnote-390)

Some bonus plans provide for overtime due on the bonus within the contract itself. For example, an employer may promise a bonus of 10 percent of an employee’s straight-time earnings plus 10 percent of the employee’s overtime earnings. These types of plans are generally deemed to satisfy the strictures of the FLSA.[[391]](#footnote-391) However, the DOL warns that these plans will not be credited if they are used to evade overtime requirements.[[392]](#footnote-392)

*h. “Task” Basis of Payment*

*(i.) Payment for Tasks Regardless of Actual Hours Worked*

Some employees are paid based on the number of jobs or tasks completed rather than on the amount of time spent on each task.[[393]](#footnote-393) The interpretive bulletins describe two “typical” variations of this kind of compensation arrangement:

(1) It is determined (sometimes on the basis of a time study) that an employee (or group) should complete a particular task in 8 hours. Upon the completion of the task the employee is credited with 8 “hours” of work though in fact he may have worked more or less than 8 hours to complete the task. At the end of the week an employee entitled to statutory overtime compensation for work in excess of 40 hours is paid at an established hourly rate for the first 40 of the “hours” so credited and at one and one-half times such rate for the “hours” so credited in excess of 40. The number of “hours” credited to the employee bears no necessary relationship to the number of hours actually worked. It may be greater or less. “Overtime” may be payable in some cases after 20 hours of work; in others only after 50 hours or any other number of hours.

(2) A similar task is set up and 8 hours’ pay at the established rate is credited for the completion of the task in 8 hours or less. If the employee fails to complete the task in 8 hours he is paid at the established rate for each of the first 8 hours he actually worked. For work in excess of 8 hours or after the task is completed (whichever occurs first) he is paid one and one-half times the established rate for each such hour worked. He is owed overtime compensation under the Act for hours worked in the workweek in excess of 40 but is paid his weekly overtime compensation at the premium rate for the hours in excess of 40 actual or “task” hours (or combination thereof) for which he received pay at the established rate. “Overtime” pay under this plan may be due after 20 hours of work, 25 or any other number up to 40.[[394]](#footnote-394)

The DOL also views this as a daily rate of pay system.[[395]](#footnote-395) For slower employees who exceed the time allotted to complete the task, the hourly rate is actually the regular rate; for faster employees and for the slow employees on good days, the regular rate is still determined by dividing total compensation by total hours.[[396]](#footnote-396)

*(ii.) Computing Overtime Pay for Employees Compensated on a Task Basis*

An employee’s regular rate must be determined from actual hours worked.[[397]](#footnote-397) Overtime pay is computed by looking beyond the “hours” credited for a completed task to the actual hours worked. Under the second type of task-based payment plan discussed above, an employee may be paid the agreed-upon hourly rate at times and some other rate at other times.[[398]](#footnote-398)

**Example 10-11.** An example of the operation of a plan of the second type discussed in Sec. 778.312 may serve to illustrate the effects on statutory overtime computations of payment on a task basis. Assume the following facts: The employment agreement establishes a basic hourly rate of $5 per hour, provides for the payment of $7.50 per hour for overtime work (in excess of the basic workday or workweek) and defines the basic workday as 8 hours, and the basic workweek as 40 hours, Monday through Friday. It further provides that the assembling of a machine constitutes a day’s work. An employee who completes the assembling job in less than 8 hours will be paid 8 hours’ pay at the established rate of $5 per hour and will receive pay at the “overtime” rate for hours worked after the completion of the task. An employee works the following hours in a particular week:[[399]](#footnote-399)

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  | M | T | W | Th | F | Sa | Su |
| Hours spent on task | 6 | 7 | 7 | 9 | 8½ | 6 | 0 |
| Day’s pay under contract | $40 | $40 | $40 | $40 | $40 | $60 | $0 |
| Additional bonus | 2 | 0 | 2 | 0 | ½ | 0 | 0 |
| Additional hours | $15 | 0 | $15 | $7.50 | $7.50 | $0 | $0 |

**Example 10-12.** [In the previous example,] the employee has actually worked a total of 48 hours and is owed under the contract a total of $305 for the week. The only sums which can be excluded as overtime premiums from this total before the regular rate is determined are the extra $2.50 payments for the extra hour on Thursday and Friday made because of work actually in excess of 8 hours. The payment of the other premium rates under the contract is either without regard to whether or not the hours they compensated were in excess of a bona fide daily or weekly standard or without regard to the number of overtime hours worked. Thus only the sum of $5 is excluded from the total. The remaining $300 is divided by 48 hours to determine the regular rate—$6.25 per hour. One-half this rate is due under the Act as extra compensation for each of the 8 overtime hours—$25. The $5 payment under the contract for actual excess hours may be credited and the balance—$20—is owed in addition to the $305 due under the contract.[[400]](#footnote-400)

The interpretive bulletin contemplates “special situations” where the hours for which contract overtime compensation is paid to employees working on a “task” or “stint” basis qualify for credit as overtime hours under FLSA Sections 7(e)(5), (6), or (7).[[401]](#footnote-401) If this occurs, paying time and one-half an agreed hourly rate for “task” or “stint” work may be equivalent to payment pursuant to an agreement of one and one-half times for piece rate, in which case the employer may be able to use the alternative overtime calculations for piece rates under Section 207(g)(1) or (2).[[402]](#footnote-402)

*i. Tipped Employees*

Where the employer takes a tip credit, the DOL regulations provide that the employee’s regular rate of pay must include the amount of the tip credit taken by the employer, not just the lower direct (or cash) wage payment.[[403]](#footnote-403) Tips received by the employee in excess of the tip credit, however, are not considered payments by the employer and need not be included in the regular rate.[[404]](#footnote-404) On the other hand, if the payment is a service charge and not a tip, it can be applied toward the employer’s minimum wage and overtime obligations, unlike tips.[[405]](#footnote-405)

V. Special Problems Concerning the Regular Rate

**A. Change in the Beginning of the Workweek**

Because the workweek is the framework within which entitlement to overtime pay is determined, changes in the workweek period will change an employee’s entitlement to overtime. It is permissible for an employer to change the beginning of the workweek if the change is not an attempt to evade overtime requirements.[[406]](#footnote-406) Additionally, changes to the beginning of the workweek must be intended as permanent.[[407]](#footnote-407)

For example, the Eighth Circuit has held that the employer’s reasons for adopting a change in schedule are irrelevant so long as the change is intended to be permanent.[[408]](#footnote-408)   
“[W]hether [the defendant] in fact adopted the change in question to achieve administrative efficiencies in calculating and paying wages and overtime, … [was] not [a] genuine dispute[] of material fact that precluded the grant of summary judgment.”[[409]](#footnote-409) In that case, the court found that the employer changed an existing workweek to reduce the amount of   
overtime that was to be earned each week, reasoning that a change intended to be permanent that is made merely to avoid excess overtime is not an “evasion” within the meaning of the interpretive bulletin.[[410]](#footnote-410)

When an employer does decide to change the beginning of a workweek, there are always some days or hours that fall into both the “old” and “new” workweeks.[[411]](#footnote-411) For example, if a factory that has previously calculated workweeks as beginning at 7 a.m. Monday decides to begin the new week at 7 a.m. Sunday, the hours between 7 a.m. Sunday and 7 a.m. Monday constitute both the end of the old week and the beginning of the new week.[[412]](#footnote-412)

The DOL has historically taken the position that it will take no enforcement action against an employer that computes overtime compensation due to each of the two weeks and pays the greater total amount.[[413]](#footnote-413) This system is most easily explained by the following example:

**Example 10-13.** If the workweek in the plant commenced at 7 a.m. on Monday and it is now proposed to begin the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m. Sunday to 7 a.m. Monday will constitute both the last hours of the old workweek and the first hours of the newly established workweek. Suppose that, the employee, who receives $5 an hour and is subject to overtime pay after 40 hours a week, worked 5 hours on Sunday, March 7, 1965. Suppose also that his last “old” workweek commenced at 7 a.m. on Monday, March 1, and he worked 40 hours March 1 through March 5 so that for the workweek ending March 7 he would be owed straight time and overtime compensation for 45 hours. The proposal is to commence the “new” workweek at 7 a.m. on March 7. If in the “new” workweek of Sunday, March 7, through Saturday, March 13, the employee worked a total of 40 hours, including the 5 hours worked on Sunday, it is obvious that the allocation of the Sunday hours to the old workweek will result in higher total compensation to the employee for the 13-day period. He should, therefore, be paid $237.50 (40 x $5+5 x $7.50) for the period of March 1 through March 7, and $175 (35 x $5) for the period of March 8 through March 13.[[414]](#footnote-414)

**B. Retroactive Pay Increases**

A common question arises concerning the overtime implications when an employee is awarded a retroactive pay increase, which may occur as a result of collective bargaining.[[415]](#footnote-415) The DOL’s interpretive bulletin states that retroactive pay raises increase the employee’s regular rate back to their effective date and consequently increase overtime compensation as well.[[416]](#footnote-416) This increase in overtime is required by the FLSA, regardless of the parties’ agreement.[[417]](#footnote-417) A retroactive increase that takes the form of a lump-sum payment must also be prorated over the hours covered to determine the regular rate for that period.[[418]](#footnote-418)

**C. Deductions From Wages**

“Deductions from wages” is a phrase often used to describe various reductions in the pay rate for nonexempt employees that must be accounted for in calculating the regular rate.[[419]](#footnote-419) Generally, such deductions do not impact the calculation of the regular rate.[[420]](#footnote-420) Rather, in the usual case, and as discussed more fully in the following sections, the regular rate is determined *before* taking any of the deductions described below.[[421]](#footnote-421)

***1. Deductions for Lodging, Meals, and Other Facilities***

The interpretive bulletins distinguish between two kinds of deductions from wages. The first is “[d]eductions to cover the cost to the employer of furnishing ‘board, lodging or other facilities,’ within the meaning of section 203(m) of the [FLSA].”[[422]](#footnote-422) The regular rate of pay for an employee subject to these deductions is determined by dividing total compensation before deductions by the total hours worked in the workweek.[[423]](#footnote-423)

***2. Deductions for Items Other Than Facilities***

The second kind of deduction is for employer-provided items that are not regarded as “facilities.”[[424]](#footnote-424) Examples of this kind of deduction include the cost of tools or uniforms.[[425]](#footnote-425) Like deductions for “board, lodging or other facilities,” these amounts are included in determining an employee’s regular rate of pay.[[426]](#footnote-426) However, these deductions may not reduce hourly earnings below the statutory minimum or cut into any part of the overtime compensation due the employee.[[427]](#footnote-427)

***3. Deductions Authorized by the Employee or Required by Law***

Employers must also account for a variety of deductions authorized by the employee or required by law, such as union dues, withholding taxes, and garnishments.[[428]](#footnote-428) The amounts of these deductions are included in total compensation for ­purposes of calculating the regular rate of pay unless statutorily excluded.[[429]](#footnote-429)

***4. Salary Reductions in Short Workweeks***

Another type of deduction is a “[r]eduction in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule.”[[430]](#footnote-430) Although characterized as a “deduction,” this kind of reduction in pay is not really a “deduction” at all. If an employee is paid a fixed salary for a fixed workweek and that salary is reduced pro rata for each hour short of a full workweek, then the employee is “for all practical purposes” an hourly employee, and the regular hourly rate is not altered by this sort of “deduction.”[[431]](#footnote-431)

**Example 10-14.** If an employee is hired at a fixed salary of $200 for a 40-hour workweek, his hourly rate is $5. When he works only 36 hours, he is therefore entitled to $180. The employer makes a “deduction” of $20 from his salary to achieve this result, and the regular hourly rate is not altered.[[432]](#footnote-432)

If the employee is paid a fixed salary for a variable workweek, the DOL interprets that arrangement to require the fixed salary in longer or shorter workweeks.[[433]](#footnote-433) In such a case, if there is some question about whether there is an agreement, the DOL considers this type of “deduction” “strong, if not conclusive, evidence that the fixed salary covers a fixed workweek.”[[434]](#footnote-434)

***5. Deductions for Disciplinary Reasons***

An employer may reduce a nonexempt employee’s pay for disciplinary reasons. The WHD’s *Field Operations Handbook* and opinion letters provide that employers may make occasional disciplinary deductions for willful and unexcused absences, tardiness, or when an employee is sent home from work because of intoxication, as long as these deductions are not a frequent or consistent practice.[[435]](#footnote-435) In these situations, an employee’s regular rate is computed before the disciplinary deduction is made.[[436]](#footnote-436) An employee’s pay may not be reduced below the statutory minimum as a result of disciplinary deductions.[[437]](#footnote-437) Likewise, disciplinary deductions may not cut into an employee’s overtime pay or be used to exclude any time actually worked in determining the amount of overtime compensation due for a given workweek.[[438]](#footnote-438)

**D. Lump Sum Attributed to Overtime**

***1. The Overtime Rate Is an Hourly Rate***

The DOL interpretive bulletin acknowledges that it is permissible to pay employees on other than an hourly basis, for example, by designating a lump sum as payment for overtime, but the employer still has to correctly compute a regular hourly rate and pay overtime on an hourly basis.[[439]](#footnote-439) The lump sum must be divided by the number of hours it is intended to compensate to ascertain the hourly rate, and that rate must be at least one and one-half times the regular rate to satisfy the employer’s overtime obligations under the FLSA.[[440]](#footnote-440) Because the regular rate only excludes amounts designated under Section 207(e), and only amounts qualifying for exclusion under Sections 207(e)(5), (6), and (7) will be credited toward overtime, the interpretive bulletin provides that nonhourly payments intended to cover overtime obligations need to satisfy the criteria of one or more of those three Section 207(e) provisions.[[441]](#footnote-441)

***2. Fixed Sum: Constant Amount of Overtime***

When an employee regularly works a fixed number of hours over 40 each week, the employer may pay a set amount of extra compensation for that work.[[442]](#footnote-442) That additional amount is determined by the normal formula of multiplying overtime hours by one and one-half times the regular rate.[[443]](#footnote-443) An employer may thus agree to pay an employee who receives a regular rate of $10 per hour a fixed amount of $30 additional per week if the employee works 42 hours each week.[[444]](#footnote-444)

***3. Fixed Sum: Varying Amounts of Overtime***

An employer generally may not pay employees a fixed sum of overtime without regard to the number of overtime hours actually worked.[[445]](#footnote-445) Likewise, an agreement to pay a fixed amount for work performed in overtime hours or time and one half for overtime hours worked, whichever is greater, will not satisfy the employer’s FLSA duty.[[446]](#footnote-446)

If the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of [40] … in a workweek could label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked[, and] the Congressional purpose to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work would thus be defeated.[[447]](#footnote-447)

**Example 10-15.** An agreement that provides for payment of a flat sum of $75 to employees who work on Sunday does not provide a premium that will qualify as an overtime premium, even though the employee’s straight-time rate is $5 an hour and the employee always works fewer than 10 hours on Sunday. Likewise, where an agreement provides for payment for work on Sunday of either the flat sum of $75 or one and one-half times the employee’s regular rate for all hours worked on Sunday, whichever is greater, the $75 guaranteed payment is not an overtime premium.[[448]](#footnote-448)

***4. Flat Rate for a Special Job Performed in Overtime Hours***

A flat rate paid for specific tasks during overtime hours cannot be substituted for overtime pay, but instead will be added to the employee’s regular hourly rate, and that total will serve as the base from which overtime must be paid.[[449]](#footnote-449)

**Example 10-16.** An employment agreement calls for payment of $5 per hour for work during the hours established in good faith as the basic workday or workweek; it also provides for payment of $7.50 per hour for work during hours outside the basic workday or workweek, and further provides that employees doing a special task outside the basic workday or workweek shall receive 6 hours’ pay at the rate of $7.50 per hour (a total payment of $45), regardless of the time actually consumed in performance. The applicable maximum hours standard is 40 hours in a workweek.

Suppose an employee under such an agreement works the following schedule:

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  |  | M | T | W | Th | F | Sa | Su |
|  | Hours spent on task | 8 | 8 | 7 | 8 | 8 | 0 | 0 |
|  | Day’s pay under contract | $40 | $40 | $35 | $40 | $40 | $0 | $0 |
|  | Additional hours | 2 | 2a | 1 | 0 | 0 | 4 | 0 |
|  | Additional pay under contract | $15 | $45 | $7.50 | $0 | $0 | $30 | $0 |

aHours spent performing special work.

To determine the regular rate, the total compensation (except statutory exclusions) must be divided by the total number of hours worked. The only sums to be excluded in this situation are the extra premiums provided by a premium rate (a rate per hour) for work outside the basic workday and workweek, which qualify for exclusion under Section 7(e)(7) of the Act, as discussed in 29 C.F.R. §778.204 of the regulations. The $15 paid on Monday, the $7.50 paid on Wednesday, and the $30 paid on Saturday are paid pursuant to rates that qualify as premium rates under Section 7(e)(7) of the Act. The total extra compensation (over the straight time pay for these hours) provided by these premium rates is $17.50. The sum of $17.50 should be subtracted from the total of $292.50 due the employee under the employment agreement. No part of the $45 payment for the special work performed on Tuesday qualifies for exclusion. The remaining $275 must thus be divided by 48 hours to determine the regular rate—$5.73 per hour. The employee is owed an additional one-half this rate under the Act for each of 8 overtime hours worked—$22.92. The extra compensation in the amount of $17.50 payable pursuant to contract premium rates which qualify as overtime premiums may be credited toward the $22.92 owed as statutory overtime premiums. No part of the $45 payment may be so credited. The employer must pay the employee an additional $5.42 as statutory overtime pay—a total of $297.92 for the week.[[450]](#footnote-450)

**E. Reduction in the Workweek Schedule With No Change in Pay**

Because the regular rate of pay is determined by dividing the amount actually paid by the hours actually worked in that workweek, changing either of these variables will change the resulting regular rate.[[451]](#footnote-451) Therefore, if an employer reduces the schedule of an employee’s hours while the employee’s pay remains the same, the regular rate has been increased.[[452]](#footnote-452) When the employer reduces the fixed workweek for which a salary is paid, that reduction will have differing effects on (1) the hourly rate,[[453]](#footnote-453) (2) the weekly pay if salary was for a variable workweek,[[454]](#footnote-454) (3) the weekly pay if salary was for a fixed workweek,[[455]](#footnote-455) or (4) the weekly pay if salary covered more than 40 hours.[[456]](#footnote-456) An employer may reduce employee hours during a slow season in accord with these interpretive bulletins. However, employers are prohibited from adopting a series of different rates for the same work varying in proportion to the number of overtime hours worked.[[457]](#footnote-457)

***1. Reducing the Fixed Workweek for Which a Salary Is Paid***

When a salaried employee’s pay is based on a fixed regular workweek, and that regular workweek is reduced without changing the salary, the effect is to raise the employee’s hourly rate.[[458]](#footnote-458)

**Example 10-17.** If an employee whose maximum hours standard is 40 hours was hired at a salary of $200 for a fixed workweek of 40 hours, his regular rate at the time of hiring was $5 per hour. If his workweek is later reduced to a fixed workweek of 35 hours while his salary remains the same, it is the fact that it now takes him only 35 hours to earn $200, so that he earns his salary at the average rate of $5.71 per hour. His regular rate thus becomes $5.71 per hour; it is no longer $5 an hour.[[459]](#footnote-459)

The fact that the fixed weekly schedule is reduced to 35 from 40 does not convert the hours between 35 and 40 into overtime hours.[[460]](#footnote-460) However, if the understanding of the parties is that the salary of $200 now covers 35 hours of work and no more, the employee would be owed $5.71 per hour under his employment contract for each hour worked between 35 and 40 and then not less than one and one-half times $5.71 ($8.57) per hour, under the statute, for each hour worked in excess of 40 in the workweek.[[461]](#footnote-461) As noted in the interpretive bulletin, “[i]n weeks in which no overtime is worked only the provisions of section 6 of the Act, requiring the payment of not less than the applicable minimum wage for each hour worked, apply so that the employee’s right to receive $5.71 per hour is enforceable only under his contract.”[[462]](#footnote-462)

***2. Effect if the Salary Is for a Variable Workweek***

If, instead of a fixed workweek, a salaried employee works variable hours during the workweek, the employer in the previous example could have avoided paying the proportionately large additional amount (over $400 for 42 hours of work) by hiring the employee to work, for a $400 salary, a varying week up to 40 hours.[[463]](#footnote-463) In this case, the employee’s regular rate would remain at $10 per hour, and overtime premium pay would be at $15 per hour.[[464]](#footnote-464)

***3. Reduction of the Regular Overtime Workweek Without Reduction of Take-Home Pay***

Reducing the hours but not the total pay of an employee paid by the hour has the effect of increasing the employee’s hourly rate, similar to the employee noted in Example 10-17.[[465]](#footnote-465) When the employee’s hourly rate is effectively raised,[[466]](#footnote-466) extra hours must be compensated at the corresponding higher overtime rate.[[467]](#footnote-467)

***4. Temporary or Sporadic Reduction in Schedule***

Many seasonal employers face short-term periods of reduced business. Some employers respond by increasing their employees’ hourly rate during slow times.

The DOL is deeply skeptical of employers that pay different hourly rates based on the number of overtime hours worked.[[468]](#footnote-468) Employers that have adopted sliding wage scale schemes to effectively avoid paying overtime at all have been unsuccessful.[[469]](#footnote-469) If an employee is paid at a higher hourly rate during non-overtime weeks, and the only reason for the difference is a change in hours, the higher wage will be deemed the employee’s regular rate and must be the basis for all payment computations during overtime weeks.[[470]](#footnote-470) Thus, even though employees may prefer to have their pay evened out between busy and slow seasons, this kind of sliding pay system is effectively prohibited by the FLSA.[[471]](#footnote-471)

**F. Gap Time**

“Gap time” generally refers to the unpaid straight-time hours worked by an employee that occur before the employee has reached the 40-hour workweek overtime threshold.[[472]](#footnote-472) Issues may arise regarding whether an employee can properly bring a Section 207(a) overtime claim for alleged unpaid gap time during workweeks in which no overtime was worked.[[473]](#footnote-473)

The DOL’s interpretive bulletins provide that in an overtime workweek, overtime compensation “cannot be said to have been paid to an employee unless all the straight time compensation due him for the non-overtime hours under his contract (express or implied) … has been paid.”[[474]](#footnote-474) The DOL thus takes the view that in overtime weeks, the employee’s gap time must have been compensated at the agreed-upon or regular straight-time rate (rather than the statutory minimum wage rate) before any computation can be made of whether the overtime due has been paid.[[475]](#footnote-475) By contrast, the DOL has opined for non-overtime workweeks that,

[a]s long as the overall earnings for the non-overtime workweek in which the gap time hours were worked equal or exceeded the amount due at the FLSA minimum wage for all hours worked in that week, including gap time hours, there would be no liability under the FLSA for the gap time pay.[[476]](#footnote-476)

Similarly, the Fourth Circuit rejected the viability of a Section 207(a) claim for straight-time compensation in workweeks in which an employee is not due overtime compensation in *Monahan v. County of Chesterfield*.[[477]](#footnote-477) There, county police officers sought straight-time compensation both for weeks in which they worked only gap time and for weeks in which they worked gap time and overtime, but did not allege they were paid less than minimum wage or that they were owed overtime for any of the workweeks.[[478]](#footnote-478) In reversing the district court’s grant of summary judgment for the plaintiffs and entering it for the employer on the non-overtime workweek gap-time claims, the court attempted to “place some common sense limitations on claims for straight time brought pursuant to the FLSA.”[[479]](#footnote-479) The court held that “[a]bsent a minimum wage/maximum hour violation, [it finds] no remedy under the FLSA for pure gap time claims.”[[480]](#footnote-480) However, the court implicitly accepted the viability of a Section 207(a) claim for gap-time pay in overtime workweeks when it concluded that the employment agreements established that the officers’ salaries covered all hours worked up to the FLSA overtime threshold such that they had already been properly compensated for all gap time in the overtime workweeks.[[481]](#footnote-481) In *Conner v. Cleveland County*,[[482]](#footnote-482) the Fourth Circuit reiterated that pure gap time claims are not viable under the FLSA, but reaffirmed that an overtime gap time claim is viable. In *Conner*, the Fourth Circuit reversed a district court’s grant of a motion to dismiss and, after giving *Skidmore* deference to the DOL’s gap time interpretive bulletin,[[483]](#footnote-483) explained that a plaintiff could allege a plausible FLSA claim if the plaintiff alleged sufficient facts to support “a reasonable inference that (1) the employee worked overtime in at least one week; and (2) the employee was not paid all straight time wages due under the employment agreement or applicable statute.”[[484]](#footnote-484)

Employees have successfully sought gap-time pay at the regular rate for workweeks in which overtime was worked.[[485]](#footnote-485) In *Reich v. Midwest Body Corp*.,[[486]](#footnote-486) for example, the court held that in computing the employees’ regular rates, the employer must pay based on their contract rates, not based on minimum wage rates because “[s]uch payment is required by the FLSA, not merely by employees’ contracts.”[[487]](#footnote-487)

However, in *Lundy v*. *Catholic Health System of Long Island, Inc*.,[[488]](#footnote-488) the Second Circuit rejected the DOL’s interpretations and held that the FLSA does not provide for any type of gap-time claim, even when an employee works overtime. The court reasoned that the text of the FLSA requires only payment of minimum wages and overtime wages, and that it does not afford a remedy for gap-time hours.[[489]](#footnote-489) The court declined to follow the lead of the Fourth Circuit in *Monahan*, and instead found the DOL’s interpretations unpersuasive since no statutory support or reasoned explanation was provided for its position that the FLSA provides gap-time claims.[[490]](#footnote-490)

The Third Circuit has determined that pure gap-time claims are not cognizable under the FLSA, but it has not ruled on whether plaintiffs may state a claim for gap pay in overtime weeks.[[491]](#footnote-491)

VI. Exceptions From the Regular Rate Principles

**A. Using Basic Rates for Regular Rates**

***1. Requirements for a Basic Rate***

Section 207(g)(3) of the FLSA authorizes employers to pay their employees overtime compensation based on an established basic rate, rather than on the employees’ regular rate.[[492]](#footnote-492) According to the regulations, “basic rates” are alternatives to the regular rate of pay, and their use for calculating overtime pay is optional and “is principally intended to simplify bookkeeping and computation of overtime pay.”[[493]](#footnote-493)

An employer that chooses to use a basic rate must comply with the very strict requirements set forth in Section 207(g)(3) of the FLSA and the regulations.[[494]](#footnote-494) There are six requirements that an employer must satisfy in order to use a basic rate:

1. The employer and employee must agree to a basic rate before the employee begins the overtime work.[[495]](#footnote-495) This agreement can be reached between the employer and an individual employee, or between the employer and the employee’s representative.[[496]](#footnote-496) An employer can use a basic rate for any number of employees, as long as a collective or individual understanding is reached regarding each affected employee.[[497]](#footnote-497) A lawful, implicit agreement or understanding can be created when an employee continuously accepts for an extended period of time an employer’s use of a basic rate to determine overtime compensation.[[498]](#footnote-498)

2. The basic rate is a specified rate or a rate that can be derived from applying a specified method of calculation.[[499]](#footnote-499) The rate must be bona fide and not be less than the minimum hourly rate required by the FLSA or other federal, state, or local law.[[500]](#footnote-500)

3. The basic rate must be authorized by one of the DOL methods detailed in 29 C.F.R. §548.3 of the regulations[[501]](#footnote-501) or by the WH Administrator under 29 C.F.R. §548.4 of the regulations.[[502]](#footnote-502) The Administrator[[503]](#footnote-503) may certify the rate as “substantially equivalent to the average hourly earnings of the employee,” excluding those payments that are allowed to be omitted from computation of the regular rate.[[504]](#footnote-504) An employer may use a basic rate calculation specifically approved under the regulations without seeking authorization from the Administrator, because they “have been found in use in industry and the Administrator has determined that they are substantially equivalent to the straight-time average hourly earnings of the employee over a representative period of time.”[[505]](#footnote-505)

4. The employee’s average hourly straight-time earnings, minus payments that are permitted to be excluded from calculation of the regular rate, during the period covered by the basic rate agreement or understanding, must be greater than or equal to the minimum hourly rate required by the FLSA or other applicable law.[[506]](#footnote-506)

5. All overtime hours worked during the period covered by the agreement or understanding must be paid at a rate of at least one and one-half times the basic rate.[[507]](#footnote-507)

6. Additional overtime compensation must be properly calculated and paid on other forms of pay that are not covered by the basic rate agreement but that must be included in determining the regular rate, such as shift differential pay or incentive bonuses.[[508]](#footnote-508)

***2. Methods for Calculating Basic Rates***

*a. Averaging Salary*

The DOL’s regulations authorize as an established basic rate a rate per hour that is obtained by dividing the monthly or semimonthly salary of an employee by the number of regular working days in the monthly or semimonthly period and dividing that figure by the number of hours in the regular workday.[[509]](#footnote-509) This basic rate may be used to compute overtime compensation “only where the salary is paid for a specified number of days per week and a specified number of hours per day normally or regularly worked by the employee.”[[510]](#footnote-510)

*b. Averaging Earnings for a Period Other Than a Workweek*

The DOL’s regulations also authorize as an established basic rate a rate per hour that is obtained by averaging the hourly earnings of an employee for all work that he or she performs during a single workday or any other longer period up to 16 calendar days.[[511]](#footnote-511) The period used for calculation should be the period for which average earnings are regularly computed based on an agreement or understanding established with and agreed to by the employee before the work is performed.[[512]](#footnote-512) The established basic rate may be used to determine the overtime compensation due for all overtime hours that the employee worked in the period specified in the agreement.[[513]](#footnote-513)

In *Firestone v. Southern California Gas Co.*,[[514]](#footnote-514) the Ninth Circuit affirmed dismissal of the plaintiffs’ FLSA claims that the employer’s practice of calculating the basic rate on a daily basis, pursuant to a complicated formula[[515]](#footnote-515) set forth in a CBA, violated the FLSA. The employees alleged that the basic rate would often “fluctuate wildly” as a result of the employer’s method of calculation and relied upon 29 C.F.R. §548.2(e) of the regulations, which provides that an employee’s basic rate must be “substantially equivalent” to an employee’s average earnings “over a representative period of time.”[[516]](#footnote-516) The court rejected the plaintiffs’ argument, emphasizing that 29 C.F.R. §548.3(b) permits calculating an employee’s average earnings on a daily basis.[[517]](#footnote-517) The Ninth Circuit also explained that 29 C.F.R. §548.2(e) provides that the basic rate must be substantially equivalent to the average earnings over a “representative period of time” *or* authorized by 29 C.F.R. §548.3, and the employer’s practice was in accord with 29 C.F.R. §548.3(b).[[518]](#footnote-518)

*c. Averaging Earnings for Each Type of Work*

The DOL’s regulations also authorize as an established basic rate a rate per hour that is obtained by averaging the employee’s earnings for each type of work performed during each workweek or any longer period not to exceed 16 calendar days.[[519]](#footnote-519) The basic rate so established may be used to compute overtime compensation during the period for which said average is computed for all the overtime hours that the employee expends in doing the type of work to which the basic rate applies.[[520]](#footnote-520)

Using this third basic rate calculation, an employer and employee could form an agreement covering a 10-day period. If the employee had three different types of work during the 10-day period, a basic rate would be established for each type of work by dividing the earnings from each type of work by the number of hours that the employee engaged in that particular work. If the first type of work had a basic rate of $10, the second type of work had a basic rate of $7, the third type of work had a basic rate of $6, and the employee worked 8 overtime hours while performing the second type of work and 12 overtime hours of the third type of work, the employee would receive $10.50 (1.5 × $7) per hour as compensation for 8 overtime hours and $9 (1.5 × $6) per hour as compensation for 12 overtime hours, in addition to the total due for the first 40 hours.[[521]](#footnote-521)

*d. Regular Rate Minus Certain Meals*

The regulations authorize an established basic rate per hour that excludes the cost of a meal if the employer customarily furnishes not more than a single meal per day.[[522]](#footnote-522) An employer may calculate a basic rate simply by omitting from the employee’s regular rate the cost of that meal.[[523]](#footnote-523) If the employer customarily furnishes more than one meal per day, the cost of all meals that the employer supplies to the employee must be factored into the regular rate of pay and the overtime compensation owed.[[524]](#footnote-524)

If an employer supplies one free meal every day and also occasionally pays “supper money” when the employee works overtime, the cost of both the meal and the supper money may be omitted from the overtime computation.[[525]](#footnote-525)

*e. Regular Rate Minus Incidentals*

The regulations authorize an established basic rate per hour that excludes certain incidental payments.[[526]](#footnote-526) These payments can be either cash or in-kind compensation.[[527]](#footnote-527) In 2019, the DOL updated for the first time since 1966 the amount to be used for calculating whether incidental payments could be excluded from overtime, opting for a percentage of minimum wage limit rather than a fixed dollar amount.[[528]](#footnote-528) Such payments may be excluded only if the value is so low that if they were included in the calculation of overtime, they would not raise the total compensation of the employee by more than 40 percent of the applicable hourly minimum wage under either the FLSA or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week on the average for all overtime weeks (the prior amount had been 50 cents per week) in which the payments would be made.[[529]](#footnote-529) Examples of such incidental payments given in the regulations are payments for “modest housing, bonuses or prizes of various sorts, tuition paid by the employer for the employee’s attendance at a school, and cash payments or merchandise awards for soliciting or obtaining new business.”[[530]](#footnote-530) Other forms of compensation, such as payment by the employer of the employee’s Social Security tax, may also be considered an incidental payment.[[531]](#footnote-531) The amounts in the examples were changed in 2019 with updated dollar amounts.[[532]](#footnote-532)

*f. Average Earnings for the Year or Quarter Year Preceding the Current Quarter*

The regulations authorize an established basic rate per hour that is equal to an employee’s average hourly pay during the annual period or the quarterly period that immediately precedes the calendar or fiscal quarter year in which the given workweek ends.[[533]](#footnote-533) The employer and employee must reach their basic rate agreement before the beginning of the quarter in which the work will be performed.[[534]](#footnote-534)

This method may be used only when the employer sufficiently documents that the “terms, conditions and circumstances of employment during th[e] prior [annual or quarterly] period were not significantly different from those affecting the employee’s regular rates of pay during the current quarterly period.”[[535]](#footnote-535) Therefore, the basic rate cannot be computed based on the hourly earnings in a previous period that is substantially dissimilar in terms of weekly hours of work, work assignments or duties, or other factors.[[536]](#footnote-536)

A further condition for using this basic rate calculation is that the average hourly earnings in the immediately preceding period must be calculated in the following manner: (1) all of the employee’s remuneration received during the annual or quarterly period is totaled; (2) that sum is divided by the total number of hours worked during all of the workweeks that ended in that annual or quarterly period.[[537]](#footnote-537) This resulting figure is the basic rate that may be used in the calendar or fiscal quarterly period covered by the basic rate agreement, regardless of fluctuations in the average straight-time hourly earnings during the quarter in which it is used.[[538]](#footnote-538)

In the event that the average earnings for the period directly before the quarter specified in the basic rate agreement cannot be computed by the end of the prior four-quarter or quarterly base period, such as where there are commissions or bonuses that take longer to calculate, the parties can agree to adopt a practice of allowing a one-month grace period before using the average hourly earnings of the preceding annual or quarterly period as the basic rate.[[539]](#footnote-539)

***3. Rates Authorized on Application***

If an employer or group of employers wants to use an established basic rate other than the ones specifically set forth in 29 C.F.R. §548.3 of the regulations, prior approval must be obtained from the Administrator.[[540]](#footnote-540)

Prior approval is also required if the basic rate sought results from a combination of two or more of the authorized methods for calculating basic rates found in 29 C.F.R. §548.3.[[541]](#footnote-541) For example, prior approval is required if employees receive free lunches and an attendance bonus, and both are excluded by agreement from the rate used to compute overtime compensation.[[542]](#footnote-542)

The Administrator requires no particular application form to apply for authorization for a basic rate,[[543]](#footnote-543) but the application should contain the following five components:[[544]](#footnote-544)

(1) “[a] statement of the agreement or understanding arrived at between the employer and employee, including the proposed effective date, the term of the agreement or understanding, and a statement of the applicable overtime provisions”;[[545]](#footnote-545)

(2) “[a] description of the … method or formula to be used in computing the basic rate for the type of work or position to which it will be applicable”;[[546]](#footnote-546)

(3) “[a] statement of the kinds of jobs or employees covered by the agreement”[[547]](#footnote-547) (names of specific employees are not required; the application, however, should adequately describe the affected employees by job classification, department, location, or other appropriate identifying characteristics);[[548]](#footnote-548)

(4) facts and reasons showing that the applied-for basic rate is substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, if, during a representative period, the employee’s total overtime earnings calculated at the basic rate in accordance with the applicable overtime provisions are substantially equivalent to the amount of such earnings when computed in accordance with Section 207(a) on the basis of the employee’s average hourly earnings for each workweek;[[549]](#footnote-549) and

(5) any additional information required by the Administrator.[[550]](#footnote-550)

When an application is made, the Administrator will require that notice be given to all affected employees in a manner that the Administrator deems appropriate.[[551]](#footnote-551) When the notification period is completed, the Administrator will notify the applicants in writing of the decision on each application.[[552]](#footnote-552) In authorizing a basic rate, the Administrator may include additional conditions to ensure that the basic rate is used only as long as it is substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premium.[[553]](#footnote-553) Upon motion of the Administrator or written request of any interested person with reasonable grounds, the Administrator may revoke or amend any authorization given.[[554]](#footnote-554) Such a revocation or amendment must not occur until after a hearing or other opportunity for any interested party to present their views.[[555]](#footnote-555)

***4. Computation of Overtime Pay***

The methods for computing overtime based on the basic rate for pieceworkers, hourly employees, and salaried employees are the same as those for computing overtime pay that is based on the regular rate.[[556]](#footnote-556) If an employee is paid a bonus or shift differential in excess of the basic rate, that extra compensation must be included in overtime calculations if those payments would be included under a regular rate system.[[557]](#footnote-557)

**B. *Belo-*Type Wage Contracts**

***1. Statutory Exception Provided by Section 207(f)***

Section 207(f) of the FLSA provides an exception to the usual rule that employees who work irregular hours each week receive varying pay each week, including varying amounts of overtime if they work more than 40 hours.[[558]](#footnote-558) Under Section 207(f), it is possible for employees to receive a constant weekly wage under certain conditions even when overtime is worked.[[559]](#footnote-559)

This type of payment arrangement is known as a “*Belo* plan,” named after the Supreme Court’s decision in *Walling v. A.H. Belo Corp.*[[560]](#footnote-560) In *Belo*, the defendant published newspapers and other periodicals, and the nature of reporting and publishing the news required employees to work widely varying hours from week to week.[[561]](#footnote-561) The employer accordingly structured its employment contracts to pay an hourly rate above the statutory minimum, and a weekly guarantee of pay that was higher than the hourly rate times the statutory maximum for regular hours.[[562]](#footnote-562) The result was that, during the first year of the contract, when the statutory maximum for regular hours was 44, an employee had to work 54.5 hours before being entitled to any pay in addition to the weekly guarantee.[[563]](#footnote-563) The DOL considered the employment contracts to be for a weekly guarantee and that the regular rate should be calculated by dividing the weekly guarantee by the number of hours actually worked.[[564]](#footnote-564) The DOL argued that the employer should have paid the affected employees as follows: the regular rate times 44 (statutory maximum) plus one and one-half times the regular rate for time worked in excess of 44 hours.[[565]](#footnote-565) The Court found no violation of the FLSA.[[566]](#footnote-566)

The Court’s holding was codified as Section 207(f), which includes the following exception from general overtime rules:

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such 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, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rates for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.[[567]](#footnote-567)

Section 207(f) thus provides an exception to the general overtime pay rule when employees are paid the same amount every week without regard to the number of hours worked, up to 60.[[568]](#footnote-568) Under this exception, the guaranteed weekly wage compensates the employee for all hours of work up to 60 during the workweek, not just the straight-time hours.[[569]](#footnote-569) If all statutory requirements are met, an employer may pay a fixed weekly salary in all workweeks, except for workweeks when exceptionally long hours (over 60) are worked.[[570]](#footnote-570)

To take advantage of the *Belo* exception, each of the following requirements must be met:

(1) the employees’ duties must necessitate irregular or variable hours of work from workweek to workweek;

(2) there must be a bona fide individual agreement or a CBA that specifies a regular rate of pay of not less than the statutory minimum hourly rate;

(3) the agreement must state that the employees will receive at least one and one-half times the employees’ regular rate for all hours worked in excess of the applicable statutory maximum;

(4) the agreement must contain a weekly guarantee of pay;

(5) the weekly guarantee of pay must be for no more than 60 hours during the workweek; and

(6) the guaranteed wage must be weekly, not semimonthly or monthly.[[571]](#footnote-571)

Failure to satisfy any one of the statutory requirements will result in overtime pay being computed by applying the guaranteed weekly wage only as payment for the straight-time hours, and the employer will be required to compute overtime pay for all overtime hours worked in each workweek.[[572]](#footnote-572)

***2. Detailed Requirements of a Belo Plan***

*a. Irregular Hours Required*

For hours of work to be considered irregular within the meaning of Section 207(f), they must vary in a significant number of workweeks and fluctuate both above and below 40 hours per week.[[573]](#footnote-573) Moreover, the fluctuations below 40 hours must result from the employee’s duties, which would exclude vacations, holidays, illness, or reasons personal to the employee.[[574]](#footnote-574) In a case of first impression, the Sixth Circuit interpreted “necessitate irregular hours” to mean the irregular hours must be due to “the inherent nature of the employee’s work—i.e., the inalienable qualities of his industry, profession, or specific position.”[[575]](#footnote-575) There must be weekly fluctuation in non-overtime hours to meet the requirements for irregular hours.[[576]](#footnote-576) However, the hours need not fluctuate above the number covered by the weekly guarantee.[[577]](#footnote-577)

*b. Bona Fide Agreement Required*

To utilize the *Belo* method, there must be a bona fide agreement to the payment system arrived at before the work is performed.[[578]](#footnote-578) Although an agreement in writing is not mandated, oral agreements are disfavored by the DOL because of the complexities of Section 207(f)’s requirements,[[579]](#footnote-579) and oral agreements have not fared well in court.[[580]](#footnote-580) Mere payment and acceptance of the guaranteed weekly wage will not suffice.[[581]](#footnote-581)

*c. Specified Regular Rate*

A *Belo* agreement must also specify a regular rate of pay of at least the statutory minimum wage for the employees, and the regular rate must bear some reasonable relationship to the guaranteed wage.[[582]](#footnote-582) An employee whose weekly pay includes bonuses or commissions cannot satisfy this aspect of Section 207(f)’s requirements.[[583]](#footnote-583) However, the DOL says that irregular payments over and above the guarantee, such as annual bonuses or premiums for working excessive hours or on holidays, will not invalidate a Section 207(f) plan.[[584]](#footnote-584)

*d. Provisions for Overtime Pay*

The agreement must state that all hours worked in excess of the statutory maximum for a workweek will be compensated at least at one and one-half times the regular rate of pay.[[585]](#footnote-585) However, the overtime rate may be higher than one and one-half times the regular rate.[[586]](#footnote-586)

*e. Guarantee of Weekly Salary*

The *Belo* exemption requires that employees be paid the guaranteed weekly salary regardless of hours worked.[[587]](#footnote-587) The computation of the guaranteed weekly wage must be based on no more than 60 hours.[[588]](#footnote-588) The employee must be paid, for each hour worked in excess of 60, the overtime compensation set forth in the agreement in addition to the guaranteed amount.[[589]](#footnote-589)

*f. Approval of Section 207(f) Contracts*

Although the courts are the final arbiters of whether a particular scheme will qualify for the Section 207(f) exception,[[590]](#footnote-590) the Administrator will issue advisory opinions regarding compliance with Section 207(f).[[591]](#footnote-591) The interpretive bulletins encourage employers that seek such advisory opinions to include as much factual background as possible to assist the Administrator in making a determination.[[592]](#footnote-592)

**C. Computing Overtime Pay With the Rate Applicable to the Type of Work Performed in Overtime Hours**

***1. General Requirements of Section 207(g)***

Sections 207(g)(1) and (2) of the FLSA provide:

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employees under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours;

… .

and if (i) the employee’s average hourly earnings for the workweek … are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.[[593]](#footnote-593)

The purpose of this exception is to allow a simpler way of computing overtime for employees who are paid by the piece for all or part of their compensation.[[594]](#footnote-594) There are two basic requirements that must be met before an employer can compute overtime under Section 207(g).[[595]](#footnote-595) First, the employee’s weekly earnings must average at least the minimum wage for every hour worked.[[596]](#footnote-596) Second, additional pay, such as bonuses or a base rate, must be included in the regular rate for purposes of computing an employee’s overtime premium.[[597]](#footnote-597) The DOL interprets the statute to permit payment at piece rates and hourly rates, so long as the payment satisfies the requirements for each type of payment set forth in the bulletin.[[598]](#footnote-598)

***2. Piecework***

Piecework employees can agree in advance that they will be paid for overtime at one and one-half times their regular piece rate.[[599]](#footnote-599) No additional overtime compensation is required,[[600]](#footnote-600) but there are four conditions that must be met before an employer can use this overtime compensation system:

(1) the piece rate must be a bona fide rate;[[601]](#footnote-601)

(2) the hours for which the employee is being paid a premium must qualify as overtime hours under the FLSA;[[602]](#footnote-602)

(3) employees must be paid the premium rate for at least every hour they work over 40 in any workweek;[[603]](#footnote-603) and

(4) overtime rates must be at least one and one-half times the minimum rate.[[604]](#footnote-604)

***3. Hourly Workers Employed at Two or More Rates***

Under Section 207(g)(2), an employee who performs two or more kinds of work for which different straight-time hourly rates are established may agree with the employer in advance of the performance of the work that the employee will be paid during overtime hours at a rate not less than one and one-half times the hourly non-overtime rate established for the type of work the employee is performing during overtime hours.[[605]](#footnote-605) No additional overtime pay will be due as long as the following conditions are met:

(1) the hourly rate upon which the overtime rate is based must be bona fide;[[606]](#footnote-606)

(2) the overtime hours must qualify as overtime hours under the FLSA;[[607]](#footnote-607) and

(3) the employee must be paid overtime for all hours worked in excess of 40.[[608]](#footnote-608)

The DOL has opined that the agreement may be reached on an individual, group, or collective bargaining basis, and there is no requirement that it be in writing.[[609]](#footnote-609)

***4. Hour-for-Hour Offset***

Where a statute or contract requires it, employees working over eight hours in any one day must be paid premium compensation.[[610]](#footnote-610) On these days, Sections 207(g)(1) and (2) are satisfied if the number of hours during which overtime rates are paid equals or exceeds the number of hours worked in excess of the applicable maximum hours workweek.[[611]](#footnote-611)

VII. Examples of Pay Plans That Circumvent the FLSA

The DOL’s interpretive bulletin provides several examples of payment systems that have been found to circumvent the requirements of the FLSA’s overtime pay requirements.[[612]](#footnote-612) Most of the impermissible payment systems attempt to artificially depress the employee’s regular rate in order to reduce the economic cost of paying overtime compensation.

An employer may not pay an employee an artificially low rate to avoid the economic disincentive of requiring overtime work.[[613]](#footnote-613) In *Walling v. Youngerman-Reynolds Hardwood Co.*,[[614]](#footnote-614) the employer set a low hourly rate upon which overtime compensation at time and a half was computed for all hours worked in excess of 40, but it guaranteed employees a minimum payment per piece produced.[[615]](#footnote-615) The result was that employees were always paid the piece rate, not the hourly rate, and were not properly compensated for overtime work, thus violating the FLSA.[[616]](#footnote-616) Additionally, the use of two different regular rates cannot be implemented to circumvent the FLSA’s overtime requirements by using one rate for weeks in which the employee did not work overtime, and another lower rate for weeks the employee did work overtime.[[617]](#footnote-617)

Another example of a pay plan that circumvents the FLSA is illustrated by the Ninth Circuit’s decision in *Brunozzi v*. *Cable Communications, Inc*.[[618]](#footnote-618)The plaintiffs were cable installation technicians who were paid a piece rate plus a “production bonus” of one sixth their piece-rate total in non-overtime weeks. In weeks they worked overtime, the employer omitted the “bonus” from their regular rate, resulting in a reduction in their hourly rate during overtime weeks. The Ninth Circuit reasoned that it was not a true “bonus” but instead was an impermissible agreement to pay less per hour in overtime weeks than in non-overtime weeks.[[619]](#footnote-619)

By contrast, in *Parth v*. *Pomona Valley Hospital Medical Center*,[[620]](#footnote-620) the Ninth Circuit upheld the validity of a pay plan structured such that a nurse who worked the longer shift schedule at a lower wage rate would make approximately the same amount of money as a nurse who worked the shorter shift schedule at a higher wage rate while working the same number of hours over a 14-day period and performing the same duties. Adopting the analytical framework proposed in a DOL amicus brief, the court concluded that the reduced rates for the longer shift schedule were “bona fide,” in that they were “(1) agreed to by the employee; (2) in place for a substantial period of time; and (3) equal to or in excess of the Act’s minimum wage.”[[621]](#footnote-621) The court rejected the argument that the rates were “artificial” or “unrealistic,” reasoning that they did not fall into any of the categories described in the DOL’s interpretive bulletin for pay plans that circumvent the FLSA, were not artificially low, and there was no evidence that the employer sought to avoid paying time and a half for overtime.[[622]](#footnote-622) The court held that “an employer subject to the FLSA may alter the ‘regular rate’ of pay in order to provide employees a schedule they desire.”[[623]](#footnote-623)

Another method described by the DOL as evading the FLSA is the use of a “Poxon” or “split-day” plan.[[624]](#footnote-624) Under this arrangement, employees are paid a “straight” rate for part of their regular workday, usually for the first one or two hours.[[625]](#footnote-625) This rate is set very low (usually minimum wage) and is designated as the employees’ regular rate.[[626]](#footnote-626) For the remainder of the day, employees are paid one and one-half times the regular rate.[[627]](#footnote-627) The result is that employees are paid no premium for their true overtime work, because the employer claims to have already paid “overtime.”[[628]](#footnote-628) These plans violate the FLSA.[[629]](#footnote-629)

Employers are also prohibited from artificially lowering an employee’s regular rate by designating some portion of the employee’s pay as a “bonus.”[[630]](#footnote-630) The DOL describes an example of one as a fixed salary that is paid regardless of hours worked, and then retro-engineered to pay a low hourly rate, time and one half that hourly rate for hours over 40, and then the balance as a “bonus,” rather than simply dividing the fixed payment by all hours worked and paying overtime after deriving the hourly rate.[[631]](#footnote-631) The bulletin also provides an example involving pieceworkers, whereby employees are assigned an arbitrary minimum wage per hour and it is agreed that straight-time and overtime earnings will be computed at this rate, but if earnings at this rate do not amount to the sum the employee would have earned had the earnings been computed on a piece-rate basis of *x* cents per piece, the employee is paid the difference as a “bonus.”[[632]](#footnote-632) In reality, this employee is being paid on a piece-rate basis, and the employee’s regular rate should be the piece-rate earnings divided by the number of hours the employee has actually worked.[[633]](#footnote-633) In general, if the employee is guaranteed a fixed or determinable sum as wages each week, no part of this sum is a true bonus for purposes of determining the employee’s regular rate.[[634]](#footnote-634)

As noted in Section IV.C [The “Regular Rate”; Statutory Exclusions From the Regular Rate and Payments Creditable to Overtime] of this chapter, a bonus based on a percentage of total wages—both straight-time and overtime wages—satisfies the FLSA’s overtime requirements. However, some bonuses, although expressed as a percentage of both straight-time and overtime wages, are in fact a sham.[[635]](#footnote-635) These bonuses are generally separated out of a fixed weekly wage and usually decrease in amount in direct proportion to increases in the number of hours worked in a week in excess of 40.[[636]](#footnote-636)

In *Gagnon v*. *United Technisource, Inc*.,[[637]](#footnote-637) the Fifth Circuit considered a pay plan under which the employer paid a “straight time” rate of $5.50, an “overtime rate” of $20 per hour, and a “per diem” rate of $12.50 for every hour up to a maximum of $500 per week. The court held that the employer tried to avoid paying the plaintiff by “artificially designating” a portion of his pay as straight time and a portion as “per diem,” and that the “per diem” amounts had to be included in the regular rate computation.[[638]](#footnote-638)

In *Lee v. Vance Executive Protection, Inc.*,[[639]](#footnote-639) security agency employees regularly worked 12-hour shifts and occasionally worked more than 12 hours in a given day. The employer paid a fixed amount per shift, regardless of the number of hours worked. At issue was the calculation of overtime. While the plaintiffs contended that they were paid a day rate, the employer claimed that the shift payment consisted of two parts, a straight-time rate for the first eight hours and “double time” for the following four hours. The district court determined that the employer’s approach was not prohibited by the FLSA and awarded no relief. On the plaintiffs’ appeal, the Fourth Circuit noted the regulatory prohibition on “compensation schemes in which ‘the normal workday is artificially divided into a straight time period to which one rate is assigned, followed by a so-called overtime period for which a higher rate is specified’”[[640]](#footnote-640) and concluded that the agents were in fact paid a day rate. Accordingly, the judgment was reversed in part so that some of the overtime claimed would be awarded.

VIII. Special Overtime Provisions

**A. Veterans’ Subsistence Allowance**

Under the GI Bill, veterans are paid subsistence allowances while employed in on-the-job training programs. Because these payments are not paid for services rendered to the employer, these allowances may not be counted toward either straight-time or overtime wages.[[641]](#footnote-641)

**B. Hospital and Residential Care Establishments**

Section 207(j) of the FLSA provides special treatment for hospital and residential care employers.[[642]](#footnote-642) This provision allows these employers to substitute a 14-day period for the “workweek” concept for purposes of calculating overtime.[[643]](#footnote-643) Under this system, the employee is entitled to overtime for all hours worked “in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period.”[[644]](#footnote-644)

Three conditions must be met before a hospital or residential care employer can qualify for this exemption:

(1) there must be an agreement or understanding between the employer and the employee that this system will be used, and this agreement must be reached before the employee begins work;[[645]](#footnote-645)

(2) the employee must be paid one and one-half times his or her regular rate of pay for all hours worked in excess of 8 hours per day or 80 hours during the 14-day period;[[646]](#footnote-646) the premium payments for long work days may be credited toward overtime due for work in excess of 80 hours;[[647]](#footnote-647) and

(3) the 14-day period must be used to calculate the employee’s regular rate of pay.[[648]](#footnote-648)

The DOL issued an opinion letter concerning the applicability of Section 207(j) to the employees of a multisite medical testing laboratory that did much of its work for hospital patients.[[649]](#footnote-649) There were five hospitals for whom the laboratory employees performed laboratory work at a central laboratory location not within any of the hospitals but within the same geographical area.[[650]](#footnote-650) The five hospitals were owned by a single entity; the central laboratory was owned by that entity and another organization. Eighty percent of the employer’s laboratory employees worked in the hospitals on a full-time basis and performed their work such as collection of blood, tissue and other samples, testing, and analysis; the other 20 percent of the employees worked at the central laboratory facility.[[651]](#footnote-651) The DOL found that the entities constituted an enterprise under the FLSA and that the employees in medical laboratories operated by the employer as an integral part of the hospital could be paid subject to Section 207(j), so long as its requirements were followed.[[652]](#footnote-652) However, the DOL cautioned that where the laboratory operated as an independent business that was not part of the hospital enterprise, Section 207(j) would not apply to the employees of the laboratory.[[653]](#footnote-653)

In another opinion letter,[[654]](#footnote-654) the DOL responded to an inquiry concerning payment arrangements for tribal nurse employees working at tribal health facilities under contract with the Indian Health Service. The requestor sought a waiver of the overtime requirements so that these employees could be paid the same as federal employees. After pointing out that the administration of the FLSA with respect to both federal and tribal nurses is carried out by the Office of Personnel Management, and that the DOL has no authority to grant waivers of overtime, the letter discussed Sections 213(a)(1) and 207(j) of the FLSA, pointing out how Section 207(j), if applicable, permits nine-five-four scheduling without any overtime liability if the workweek is set to begin and end in the middle of the eight-hour day that separates the two sets of four nine-hour days of the two-week work period.

**C. Employees Receiving Remedial Education**

Section 207(q) of the FLSA provides an exemption from the overtime pay requirements of the FLSA for certain employees who are receiving remedial education.[[655]](#footnote-655) The exemption allows any employer to require that an employee spend up to 10 hours in the aggregate in any workweek in remedial education without payment of overtime compensation, provided that the following conditions are met:

(1) the employee lacks a high school diploma or educational attainment of the eighth-grade level;

(2) the remedial education is designed to provide reading and other basic skills at an eighth-grade level or below, or to fulfill the requirements for a high school diploma or GED certificate; and

(3) the remedial education does not include job-specific training.[[656]](#footnote-656)

The employer must compensate employees at their regular rate of pay for all time spent receiving such remedial education.[[657]](#footnote-657) The remedial education must be conducted during discrete periods of time set aside for such a program and, to the maximum extent practicable, must occur away from the employee’s work station.[[658]](#footnote-658)

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1. 29 U.S.C. §207. [↑](#footnote-ref-1)
2. 85 Fed. Reg. 34,970 *et seq.* (June 8, 2020). [↑](#footnote-ref-2)
3. Part 778 is an interpretive bulletin. 29 C.F.R. §778.1(a) (“This part contains the Department of Labor’s general interpretations with respect to the meaning and application of the maximum hours and overtime pay requirements contained in Section 207 of the Fair Labor Standards Act of 1938, as amended (‘the Act’ or ‘FLSA’). The Administrator of the Wage and Hour Division (WHD) will use these interpretations to guide the performance of his or her duties under the Act, and intends the interpretations to be used by employers, employees, and courts to understand employers’ obligations and employees’ rights under the Act. These official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary.”). The reader should consult Chapter 2, Operations and Functions of the Department of Labor, for a detailed discussion of deference with respect to interpretive versus noninterpretive bulletins. [↑](#footnote-ref-3)
4. 29 U.S.C. §207(a)(1). The premium payment called for by §207(a)(1) is generally calculated as .5 times the regular rate, multiplied by all hours worked over 40 in that workweek. A full discussion of how to calculate the regular rate under various weekly pay arrangements is contained in §IV.D [The “Regular Rate”; Calculating Regular Rate and Overtime Under Various Methods of Payment] of this chapter. [↑](#footnote-ref-4)
5. *Id*. §207(e). [↑](#footnote-ref-5)
6. *Id.* §207; 29 C.F.R. §778.102; Youngblood v. Vistronix, Inc., 2006 WL 2092636, at \*5 (D.D.C. July 27, 2006) (recognizing that “[t]he FLSA gives no limitation of the number of hours an employee may work in any week”) (citing 29 C.F.R. §778.102). [↑](#footnote-ref-6)
7. 29 U.S.C. §207; 29 C.F.R. §778.102; *Youngblood*, 2006 WL 2092636, at \*5; *see also* Clark v. Atlanta Newspapers, Inc., 366 F. Supp. 886, 21 WH Cases 612 (N.D. Ga. 1973) (holding employer not required to pay overtime for holiday workweeks where employee did not work more than 40 hours). [↑](#footnote-ref-7)
8. 29 U.S.C. §207; 29 C.F.R. §778.102; Chavez v. City of Albuquerque, 630 F.3d 1300, 1311 (10th Cir. 2011) (holding that FLSA “does not provide a right to overtime until an employee has first worked forty hours”); Mendez v. MCSS Rest. Corp., 564 F. Supp. 3d 195, 216 (E.D.N.Y. 2021) (stating that failure to compensate properly “even one hour of [statutorily required] overtime” establishes liability) (quoting Estrella v. P.R. Painting Corp., 356 F. App’x 495, 497 (2d Cir. 2009) and collecting cases)). [↑](#footnote-ref-8)
9. 84 Fed. Reg. 68,736, 68763 (Dec. 16, 2019); 29 C.F.R. §778.1(b) (2019). [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. 29 U.S.C. §218(a). [↑](#footnote-ref-11)
12. 29 C.F.R. §778.102. [↑](#footnote-ref-12)
13. 29 U.S.C. §207(a). [↑](#footnote-ref-13)
14. 29 C.F.R. §778.103. [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *Id*. The principles for determining whether two employers are “joint employers” are addressed in Chapter 3, The Employment Relationship, §IV.A [Employer Status; Joint Employers]. [↑](#footnote-ref-17)
18. 29 C.F.R. §778.104; *see also* Martin v. Saunders Constr. Co., 813 F. Supp. 893, 898, 1 WH Cases2d 427 (D. Mass. 1992) (holding that employment contract violated FLSA because it did not pay employees for any hours over 50 worked in particular week unless employee averaged more than 50 hours a week over entire course of employment). A limited exception for hospital and residential care establishments is discussed in §VIII.B [Special Overtime Provisions; Hospital and Residential Care Establishments] of this chapter. [↑](#footnote-ref-18)
19. 29 C.F.R. §778.104; *see also* Schmitt v. Kansas, 864 F. Supp. 1051, 1060, 2 WH Cases2d 481 (D. Kan. 1994) (stating that general rule under FLSA is that employer must pay at rate not less than one and one-half times regular rate for all hours worked more than 40 in given workweek); Masters v. City of Huntington, 800 F. Supp. 355, 359 (S.D. W. Va. 1992) (concluding averaging hours over two weeks violates FLSA). But see also the discussion of alternative work schedules in §III.B [The “Workweek” Concept; Alternative Work Schedules] of this chapter. [↑](#footnote-ref-19)
20. 29 C.F.R. §778.109; WH Op. FLSA2008-6, 2008 WL 4906278 (Sept. 22, 2008). [↑](#footnote-ref-20)
21. 29 C.F.R. §778.104. *Cf. id.* §§778.120, 778.209 (requiring that commissions and bonuses not attributable to particular workweek be allocated across workweeks or hours worked using some “reasonable and equitable method”). *See* Freixa v. Prestige Cruise Servs.,LLC,853 F.3d 1344, 1347 (11th Cir. 2017) (finding that although plaintiff’s commission structure made it difficult to determine any particular week commission was earned, when commissions are computed monthly, court may not allocate commissions earned in one month across weeks worked in other months; recognizing that federal regulations limit allocation of commissions to weeks within time period when commissions were earned); Walsh v Fusion Japanese Steakhouse, Inc., 548 F. Supp. 3d 513, 524 (W.D. Pa. 2021) (bi-monthly lump sum pay system failed to provide for statutorily required overtime premium on hours over 40 in any workweek). [↑](#footnote-ref-21)
22. 29 C.F.R. §778.105; *see also* Christenberry v. Rental Tools, Inc., 655 F. Supp. 374, 375, 28 WH Cases 265 (E.D. La. 1987) (applying regulatory definition of “workweek”), *aff’d*, 851 F.2d 1419, 29 WH Cases 936 (5th Cir. 1988) (table). [↑](#footnote-ref-22)
23. 29 C.F.R. §778.105; *see* Johnson v. Heckmann Water Res. (CVR), Inc., 758 F.3d 627 (5th Cir. 2014) (rejecting claim that employers’ fixed workweek of Monday to Sunday violated FLSA where employees worked Monday to Wednesday, even if it reduced overtime exposure because it was consistent with §778.105 and DOL opinion letter) (citing 29 C.F.R. §778.105 and WH Op. FLSA2009-16, 2009 WL 649018, at \*1 (Jan. 16, 2009)). [↑](#footnote-ref-23)
24. 29 C.F.R. §778.105; WH Op. FLSA2009-16, 2009 WL 649018 (Jan. 16, 2009); WH Op., FLSA2004-18NA, 2004 WL 5303053 (Oct. 8, 2004). [↑](#footnote-ref-24)
25. 29 C.F.R. §778.105. [↑](#footnote-ref-25)
26. *Id*.; *see* 29 C.F.R. §778.301. Procedures for changing the beginning of a workweek are discussed more thoroughly in §V.A [Special Problems Concerning the Regular Rate; Change in the Beginning of the Workweek] of this chapter. [↑](#footnote-ref-26)
27. Abshire v. Redland Energy Servs., LLC, 695 F.3d 792, 796 (8th Cir. 2012) (citing to regulations that describe how to compute overtime when permanent change results in “overlapping” hours that fall within both old and new workweeks). *See also* *Johnson,* 758 F.3d at 632–33 (agreeing with reasoning in *Abshire*); 29 C.F.R. §§778.301–.302. [↑](#footnote-ref-27)
28. Some state laws, however, have daily overtime requirements that would result in increased overtime liability. *See generally* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-28)
29. *See* WH Op. FLSA2009-16, 2009 WL 649018 (Jan. 16, 2009); WH Op., FLSA2004-18NA, 2004 WL 5303053 (Oct. 8, 2004). [↑](#footnote-ref-29)
30. See Chapter 9, Minimum Wage Requirements, §II.C [Payment of the Minimum Wage; Time of Payment and Changing Pay Periods]. [↑](#footnote-ref-30)
31. 29 C.F.R. §778.106; *see* D.P. v. United States, 151 Fed. Cl. 148, 155 (2020) (denying motion to dismiss FLSA claim of unpaid overtime where federal employees worked during federal government shutdown and were not paid on regularly scheduled payday). [↑](#footnote-ref-31)
32. 29 C.F.R. §778.106; *see also*

    *Third Circuit:* Brooks v. Village of Ridgefield Park, 185 F.3d 130 (3d Cir. 1999) (recognizing principle and finding DOL interpretive bulletin reasonable, but finding that city’s paying overtime monthly for convenience of police officers, not because it could not be calculated, and even though it was a negotiated provision in the collective bargaining agreement at the request of the union, violated the FLSA); Bishop v. City of Phila., 2021 BL 375091, 2021 WL 4477097, at \*13–14 (E.D. Pa. Sept. 30, 2021) (applying Third Circuit standard to find that city’s delay in making certain payments was not unreasonable and thus not an FLSA violation given rollout of new pay system and initial technical problems where city paid employee overtime compensation by the immediate next pay period) (following *Brooks, supra*); Brennan v. City of Phila., 2016 WL 3405449, at \*2–4 (E.D. Pa. June 21, 2016) (noting exception to general rule that overtime must be paid on regular payday for period in which workweek ended where employer has legitimate reason for delaying payment, and denying summary judgment in order for additional discovery on whether the city’s policy of delaying payment was reasonable);

    *Seventh Circuit:* Ortega v. Due Fratelli, Inc., 2015 WL 7731863, at \*7 (N.D. Ill. Dec. 1, 2015) (noting exception to general rule that overtime must be paid on regular payday for period in which workweek ended where employer has legitimate reason for delaying a payment, such as where plaintiff submitted untimely and noncompliant timecards). [↑](#footnote-ref-32)
33. 29 C.F.R. §778.106; *see also*

    *Second Circuit:* Rogers v. City of Troy, 148 F.3d 52, 57 (2d Cir. 1998) (wages must be paid “in a timely fashion” based on “objective standards,” and timeliness is not just what the parties contract).

    *Seventh Circuit:* Calderon v. Witovet, 999 F.2d 1101, 1107 (7th Cir. 1993) (holding employer’s withholding of wages “for the benefit of the employees” violated FLSA’s prohibition of untimely payments).

    *Eighth Circuit*: Gaul v. Accura Health Ventures, LLC, 651 F. Supp. 3d 1054, 1064 (S.D. Iowa 2023) (holding that employer’s alleged FLSA violation for undercalculation of employee’s overtime was not cured by subsequent overpayment in later weeks, reasoning that employer had the obligation to “get it right, on time, the first time”).

    *Federal Circuit:* Martin v. United States, 117 Fed. Cl. 611 (2014). [↑](#footnote-ref-33)
34. *Compare* Brooks v. Village of Ridgefield Park, 185 F.3d 130, 135–36 (3d Cir. 1999) (accepting interpretive bulletin on time of payment as reasonable interpretation of FLSA, and holding employer’s collectively bargained overtime payment schedule, under which employees’ overtime compensation was accumulated and payment deferred for as much as six weeks after their regular pay day, violated FLSA’s implied prompt payment requirement), *with* Reich v. Interstate Brands Corp., 57 F.3d 574, 576 (7th Cir. 1995) (concluding that “employer and employee may agree to deferred payment of wages to the extent they exceed the minimum wage,” reasoning that “[a]lthough the ‘general rule [(i.e., 29 C.F.R. §778.106)] is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends’ … nothing in the FLSA prevents a collective bargaining agreement from providing a different rule”). *But see* Nolan v. City of Chi., 162 F. Supp. 2d 999, 1004–05 & n.1 (N.D. Ill. 2001) (following but questioning Seventh Circuit result and reasoning in light of well-established rule that FLSA rights are nonwaivable, but also finding that overtime and holiday pay payments made after conclusion of 28-day period negotiated under CBA, rather than on next regular payday, were lawful under FLSA because they were made “in a way that was ‘reasonably necessary for the employer to compute and arrange for payment of the amount due’” under 29 C.F.R. §778.106, based on steps necessary for calculating overtime due for 4,000 to 6,000 officers working overtime during 28-day period). [↑](#footnote-ref-34)
35. *See* WH Op. FLSA2005-17, 2005 WL 2086806 (May 27, 2005); WH Op. FLSA2005-3, 2005 WL 330611 (Jan. 7, 2005); WH Op. (July 20, 1993); WH Op., 1971 WL 33069 (May 21, 1971); U.S. Dep’t of Labor, Wage & Hour Div., FieldOperationsHandbook §32j16c, https://www.dol.gov/agencies/whd/field-operations-handbook [hereinafter FOH]. [↑](#footnote-ref-35)
36. FOH §32j16c(a) (“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 overtime to be subsequently worked.”). [↑](#footnote-ref-36)
37. *Id.* [↑](#footnote-ref-37)
38. *See, e.g.,* WH Op. FLSA2005-17, 2005 WL 2086806 (May 27, 2005). [↑](#footnote-ref-38)
39. 29 C.F.R. §778.5; Masters v. Maryland Mgmt. Co., 493 F.2d 1329, 1332, 21 WH Cases 604 (4th Cir. 1974) (evaluating pay under requirements of Service Contract Act (SCA), Walsh-Healy Act (WHA), and FLSA, explaining that SCA and WHA supplement FLSA and are not mutually exclusive, noting that DOL agreed, citing 29 C.F.R. §778.5); Hernandez v. KBR, Inc., 2023 BL 159634, 2023 WL 3355332 (E.D. Va. May 10, 2023) (following *Masters* and finding that plaintiffs could bring FLSA claims even if their work was subject to the Service Contract Act because the statutes are not mutually exclusive). [↑](#footnote-ref-39)
40. 29 C.F.R. §778.5; *cf.* 29 C.F.R. §778.107 (stating that if the regular rate is higher than the federal minimum wage, overtime compensation must be computed based on higher regular rate). Several district courts in New York have applied this principle. *See* Demirovic v. Ortega, 2018 WL 1935981, 2018 U.S. Dist. LEXIS 68790, at \*6–7 (E.D.N.Y. Apr. 24, 2018) (applying New York state minimum wage to calculate regular rate for unpaid overtime in tip case, citing favorably DOL interpretive bulletin); Maddison v. Comfort Sys. USA (Syracuse) Inc., 2018 WL 679477, 2018 U.S. Dist. LEXIS 16090, at \*10–14 (N.D.N.Y. Feb. 1, 2018) (holding that plaintiff could state FLSA claim based on employer’s failure to use local prevailing wage rate as regular rate) (collecting cases); Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253, 291 (S.D.N.Y. 2011) (citing interpretive bulletin in case under FLSA and New York Labor Law (NYLL), where employer paid overtime based on post-tip-credit base rate, and finding rate too low under both FLSA and NYLL). [↑](#footnote-ref-40)
41. Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424, 5 WH Cases 367 (1945). [↑](#footnote-ref-41)
42. *Id.* (quoting Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 40, 4 WH Cases 782 (1944)). *See* 29 C.F.R. §778.108 (“regular rate” must be “must be drawn from what happens under the employment contract”).

    *See also*

    *Supreme Court:* 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 204, 6 WH Cases 846, *modified by* 331 U.S. 795, 6 WH Cases 995 (1947) (following *Helmerich & Payne* and *Youngerman-Reynolds*).

    *Fifth Circuit:* Lopez v. Genter’s Detailing, Inc., 511 F. App’x 374, 376–77 (5th Cir. 2013) (rejecting argument that hourly rate paid for all hours worked constituted blended straight time and included overtime pay, but instead holding that it was the regular rate from which overtime would be calculated and noting that employees received same hourly rate of pay whether they worked overtime or not).

    *Eleventh Circuit:* Boyle v. City of Pell City, 866 F.3d 1280, 1286 (11th Cir. 2017) (holding that appropriate regular rate was the one on which the parties agreed and was what the plaintiff was paid).

    *Opinion Letters:* WH Op. FLSA2018-28, 2018 WL 6839425,at \*2 (Dec. 21, 2018) (finding that pay plan where home health nurses’ regular rate was calculated by dividing hourly rate times visit time by total hours of visits plus drive time, and “typically” resulted in a regular rate of $10 per hour, would violate FLSA if the regular rate fell below the actual hourly rate, but would be compliant if the resulting rate was above the hourly rate, because FLSA prohibits “arbitrarily” establishing a regular rate but allows paying overtime in excess of the minimum required by the statute). [↑](#footnote-ref-42)
43. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460–61, 8 WH Cases 20 (1948); *Helmerich & Payne*, 323 U.S. at 40; 29 C.F.R. §778.109; *see also* Acosta v. Min & Kim Inc.*,* 2018 WL 500333, 2018 U.S. Dist. LEXIS 9507, at \*17–18 (E.D. Mich. Jan. 22, 2018) (quoting 29 C.F.R. §778.109). [↑](#footnote-ref-43)
44. 29 C.F.R. §778.109; *Min & Kim Inc.,* 2018 U.S. Dist. LEXIS 9507, at \*17–18 (quoting 29 C.F.R. §778.109); Turner v. BFI Waste Servs., LLC, 268 F. Supp. 3d 831, 837 (D.S.C. 2017) (holding that, “in line with the plain language of Section 778.109 and cases from other circuits,” regular rate is determined by dividing pay by all hours actually worked, rather than “‘normal workweek’ of 40 hours”); WH Op. 2018-28, 2018 WL 6839425 (Dec. 21, 2018) (assuming an average hourly rate of $10 for overtime would not comply with FLSA if the actual regular rate exceeded $10 per hour, but would if the actual hourly rate was less than $10 per hour, because FLSA only establishes a floor for wages). [↑](#footnote-ref-44)
45. *Bay Ridge*, 334 U.S. at 446 (“the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee”); *but cf.* 29 C.F.R. §778.309 (“Where an employee works a regular fixed number of hours in excess of the statutory maximum each workweek, it is, of course, proper to pay him, in addition to his compensation for nonovertime hours, a fixed sum in any such week for his overtime work, determined by multiplying his overtime rate by the number of overtime hours regularly worked.”). [↑](#footnote-ref-45)
46. *Supreme Court: Bay Ridge*, 334 U.S. at 464–65.

    *First Circuit:* Pingatore v. Town of Johnston, 2011 WL 6056891, at \*5–6 (D.R.I. Oct. 31, 2011) (pay formula in CBA violates FLSA where it excluded longevity, hazardous materials, and rescue pay from inclusion in regular rate).

    *Sixth Circuit:* *Min & Kim Inc.,* 2018 U.S. Dist. LEXIS 9507, at \*16–17 (rejecting employer’s “agreed” regular and overtime rates as compliant, and explaining that regular and overtime rate would be determined based on all remuneration paid and hours actually worked).

    *Tenth Circuit:* Albers v. Board of Cnty. Comm’rs of Jefferson Cnty., 771 F.3d 697 (10th Cir. 2014) (dismissing overtime claim based on promised hourly rate that was higher than actual rate paid). [↑](#footnote-ref-46)
47. *Bay Ridge*, 334 U.S. at 460. [↑](#footnote-ref-47)
48. Pub. L. No. 81-393 (codified as amended at 29 U.S.C. §207(e)). [↑](#footnote-ref-48)
49. Pub. L. No. 106-202 (codified as amended at 29 U.S.C. §207(e)(8)). [↑](#footnote-ref-49)
50. Madison v. Resources for Human Dev., Inc., 233 F.3d 175, 187, 6 WH Cases2d 961 (3d Cir. 2000). [↑](#footnote-ref-50)
51. U.S. Dep’t of Labor v. Bristol Excavating, Inc., 935 F.3d 122, 135 (3d Cir. 2019). In reaching its conclusion, the court disagreed with the DOL’s argument that the broader reading was consistent with the FLSA’s remedial purpose, both because that broader reading (1) ignored the fact that “[i]mposing unexpected costs on employers does not work to the long-term benefit of employees,” and (2) because the Supreme Court had rejected the premise that “the FLSA pursues its remedial purposes at all costs,” but instead calls for a “fair reading of the FLSA, neither narrow nor broad.” *Id.* at 134–35 (quoting Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018)) (internal quotations omitted). [↑](#footnote-ref-51)
52. WH Op. FLSA2020-7, 2020 WL 3577829 (June 25, 2020). [↑](#footnote-ref-52)
53. *Id.* [↑](#footnote-ref-53)
54. 29 U.S.C. §207(e); *see also* WH Op. FLSA2018-11, 2018 WL 2348791 (Jan. 5, 2018) (opining that a “job bonus” of $100 per day worked must be included in the regular rate; it fit no exception under §207(e)). [↑](#footnote-ref-54)
55. *Id*. §207(h). In litigation, some payments that have been made may be creditable toward unpaid overtime wages as a setoff despite not fitting within the express confines of §207(h), under the theory that the FLSA is not designed to confer a “windfall” on plaintiffs but instead make them whole for unpaid wages. *See, e.g.,* Roman v. Maietta Constr., Inc., 147 F.3d 71, 76–77 (1st Cir. 1998). See Chapter 16, Litigation Issues. [↑](#footnote-ref-55)
56. 29 U.S.C. §207(h); 29 C.F.R. §778.201(a). Although §207(h) was amended in 2000 by the Worker Economic Opportunity Act, the amendments did not alter the rule that the only payments excluded from the regular rate but still creditable toward overtime compensation are those described in §207(e)(5)–(7). Pub. L. No. 106-202, 114 Stat. 308 (2000). For a discussion of the 2000 amendments, see text and discussion at Chapter 1, A Brief History of the Fair Labor Standards Act, §VII.A [Legislative Developments: 2000–Present; The Worker Economic Opportunity Act of 2000]. [↑](#footnote-ref-56)
57. 29 C.F.R. §778.201(c). [↑](#footnote-ref-57)
58. 29 U.S.C. §207(e)(5)–(7); 29 C.F.R. §§778.201(a), 778.202.

    *See also*

    *First Circuit:* Lemieux v. City of Holyoke, 740 F. Supp. 2d 246, 257 (D. Mass. 2010) (holding that work performed outside of firefighter’s regular duty cycle already compensated as overtime and thus excluded from regular rate calculation under §207(e)(5) and (7)).

    *Sixth Circuit:* Adams v. Nature’s Expressions Landscaping Inc.,2017 WL 4844560, 2017 U.S. Dist. LEXIS 176427, at \*27–28 (E.D. Ky. Oct. 25, 2017) (explaining that an employee allegedly paid a premium for hours over eight in a day will not qualify if the hours over eight are paid at the same rate as the first eight hours).

    *Eleventh Circuit:* Gonzalez v. Home Nurse Corp., 2018 WL 318472, 2018 U.S. Dist. LEXIS 1787, at \*12–14 (S.D. Fla. Jan. 4, 2018) (finding daily shift rate that included premium for overtime for hours over 40 at 1.5 times rate for first 40 hours permitted employer to exclude the hours over 40 from the regular rate and credit them as overtime payments). [↑](#footnote-ref-58)
59. 29 U.S.C. §207(e)(5); Slugocki v. United States, 816 F.2d 1572, 1578, 28 WH Cases 127 (Fed. Cir. 1987) (holding flat percentage premium not paid for “certain hours” does not qualify for exclusion per §207(e)(5)); St. Amant v. Knights’ Marine & Indus. Serv., Inc., 2015 WL 4568813, at \*10 (S.D. Miss. July 28, 2015) (holding that premium rate payments based on one and one-half times straight-time rate were properly excluded from calculation of regular rate). *But see* Alexander v. United States, 32 F.3d 1571, 1575, 2 WH Cases2d 392 (Fed. Cir. 1994) (concluding premium paid in lump sum that varied depending on number of hours worked fell within exclusion). [↑](#footnote-ref-59)
60. 29 C.F.R. §778.202(b). *Cf.* WH Op., 1999 WL 33210914 (Oct. 21, 1999), (opining that where premium payment for hours worked in excess of regular workweek of 36 hours excludable under §207(e)(5) and creditable toward overtime, when that premium resulted in employees regularly working 44 hours per week, premium payment could no longer be excluded from regular rate or credited against overtime). [↑](#footnote-ref-60)
61. 29 C.F.R. §778.202(c) (Dec. 16, 2019). This example was revised in December 2019 as part of an update of certain Part 778 interpretive bulletins dealing with the regular rate. [↑](#footnote-ref-61)
62. *Id*. §778.207(a). *But see* Albanese v. Bergen Cnty., 991 F. Supp. 410, 422–23 (D.N.J. 1997) (excluding from regular rate and crediting against overtime owed collectively bargained stipends paid for dog care and training, despite DOL regulation, holding that “[a]lthough the Court normally grants the [DOL’s] regulations great deference … [t]he Court finds that [29 C.F.R. §778.207] as applied in this case would lead to an unjust result [(i.e., a “windfall”)], and is therefore an impermissible construction of the statute;” choosing to “relax the [DOL’s] regulation”). [↑](#footnote-ref-62)
63. 29 C.F.R. §778.207(b).

    *See also*

    *Supreme Court:* Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 468–69, 8 WH Cases 20 (1948) (holding regular rate of pay must include shift differential).

    *First Circuit:* O’Brien v. Town of Agawam, 350 F.3d 279, 9 WH Cases2d 193 (1st Cir. 2003) (deeming contractually guaranteed shift differential not excludable from regular rate computation as contract overtime premium under either §207(e) or 29 C.F.R. §778.206).

    *Sixth Circuit:* Featsent v. City of Youngstown, 70 F.3d 900, 904, 2 WH Cases2d 1697 (6th Cir. 1995) (concluding hazardous duty pay must be included in regular rate used to compute overtime compensation); Abbey v. City of Jackson, 883 F. Supp. 181, 185, 2 WH Cases2d 1235 (E.D. Mich. 1995) (determining “minimum manning payments” to firefighters in excess of contractual rate not excluded from regular rate under §207(e)(5) because such payments not for hours in excess of standard minimum).

    *Tenth Circuit:* Schmitt v. Kansas, 844 F. Supp. 1449, 1461, 1 WH Cases2d 1552 (D. Kan. 1994) (holding shift differential must be included in regular rate of pay when calculating overtime). [↑](#footnote-ref-63)
64. Brock v. Two “R” Drilling Co., 789 F.2d 1177, 1179 (5th Cir. 1986) (“[W]here the facts do not permit it, we cannot arbitrarily divide bonuses … into regular and overtime segments.”) (quoting Walling v. Harnischfeger Corp., 325 U.S. 427, 432 (1945)); Beltran v. Maxfield’s LLC, 2014 WL 7139808 (W.D. Wis. Dec. 12, 2014). [↑](#footnote-ref-64)
65. 84 Fed. Reg. 68,736, 68,763 (Dec. 16, 2019) (explaining the update of the regulations at §§778.202, 778.205, and 778.207, to remove reference to just contracts because neither the DOL nor the courts had required a contract for an overtime premium to qualify for exclusion); *see also* 29 C.F.R. §§778.202(a), 778.205, 778.207. [↑](#footnote-ref-65)
66. 29 C.F.R. §778.202(d); *see also* Mitchell v. Medtronic, Inc., 684 F. App’x 624, 625 (9th Cir. 2017) (deeming pay in lieu of meal periods lawfully excluded from regular rate under §778.202(d), which excludes from regular rate premium payments required by state law); Rubin v. Wal-Mart Stores, Inc., 599 F. Supp. 2d 1176, 1178 (N.D. Cal. 2009) (deeming pay required by state law in lieu of meal period excluded from regular rate under provision of interpretive bulletins excluding from regular rate premium payments required by statute). [↑](#footnote-ref-66)
67. WH Op. FLSA 2020-20 (Dec. 31, 2020). [↑](#footnote-ref-67)
68. 29 U.S.C. §207(e)(6) (emphasis added). [↑](#footnote-ref-68)
69. Alexander v. United States, 32 F.3d 1571, 1577, 2 WH Cases2d 392 (Fed. Cir. 1994) (holding premium pay excluded and creditable where employees earned two days’ pay for working eight hours or fewer on Sundays and holidays); Bell v. Iowa Turkey Growers Coop., 407 F. Supp. 2d 1051, 1058–62 (S.D. Iowa 2006) (rejecting employer’s reliance on §207(e)(5) because employees not required to work more than 40 hours in workweek to receive sixth-day pay premium, but allowing exclusion and credit under §207(e)(6) notwithstanding plaintiffs’ argument that no credit available because defendant’s payments less than one and one-half times regular rate due to defendant’s admittedly incorrect calculations of regular rate (i.e., failure to include shift differentials); premium was established in good faith, and disregarding payment would grant plaintiffs a “windfall”). [↑](#footnote-ref-69)
70. 29 C.F.R. §778.203; *see also* 29 U.S.C. §207(e)(7). *But see Bell*, 407 F. Supp. 2d at 1062. [↑](#footnote-ref-70)
71. S. Rep. No. 81-402 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1617, 1619–22. [↑](#footnote-ref-71)
72. 334 U.S. 446, 8 WH Cases 20 (1948). [↑](#footnote-ref-72)
73. 334 U.S. at 465. [↑](#footnote-ref-73)
74. *Id*. at 475–76. [↑](#footnote-ref-74)
75. S. Rep. No. 81-402; *see also* 29 U.S.C. §207(e)(7). [↑](#footnote-ref-75)
76. 29 U.S.C. §207(e)(6); 29 C.F.R. §778.203; Dooley v. Liberty Mut. Ins. Co., 369 F. Supp. 2d 81, 85 (D. Mass. 2005) (finding hourly based premium pay for work on Saturdays could potentially qualify under §207(e)(6), even if paid in non-overtime workweeks, because it was premium rate paid on one of days described in statute); Nolan v. City of Chi., 125 F. Supp. 2d 324, 331 (N.D. Ill. 2000) (determining premium pay for hours worked on holidays at two and one-half or three times plaintiffs’ regular hourly rate may be excluded from regular rate of pay and credited against statutorily required overtime pay). [↑](#footnote-ref-76)
77. 29 C.F.R. §778.203(d). *See* Lewis v. County of Colusa, 2018 WL 1605754, 2018 U.S. Dist. LEXIS 56906, at \*2–4 (E.D. Cal. Apr. 3, 2018) (holding that biannual lump-sum payments for holidays were not premium payments contemplated by §207(e)(6), where they were not based on hours worked or not worked on holidays; thus, they were not excludable from the regular rate). *But see* Scott v. City of N.Y., 2008 WL 5099952, at \*2 (S.D.N.Y. Dec. 2, 2008) (stating premium pay for officers scheduled to work on vacation days not included in regular rate calculation nor creditable as overtime because such pay is “remuneration for loss of a flexible benefit,” different in character from premium pay for not working on one of days implicitly assumed by statute to be non-workdays, such as weekends or holidays, where there was no implicit assumption of paid vacation days in statute). [↑](#footnote-ref-77)
78. 29 C.F.R. §778.205 (Dec. 16, 2019). This section was updated in December 2019 to update the amounts but also to clarify that the premium could be paid pursuant to a “written or unwritten employment contract, agreement, understanding, handbook, policy, or practice,” which is consistent with the way DOL and courts have interpreted the provision. *Id. See* 84 Fed. Reg. 68,736, 68,761–763 (Dec. 16, 2019). *See also* 29 C.F.R. §§778.202(a) (adopting the same language) and 778.207 (removing reference to “contract” before “premium rates”). [↑](#footnote-ref-78)
79. 29 U.S.C. §207(e)(7); *see also* 29 C.F.R. §778.204(a); Brock v. Wilamowsky, 833 F.2d 11, 16, 28 WH Cases 608 (2d Cir. 1987) (determining premium portion of clock pattern overtime payment not part of “regular rate” of pay and creditable toward overtime compensation). [↑](#footnote-ref-79)
80. *Wilamowsky*, 833 F.2d at 16. [↑](#footnote-ref-80)
81. 29 U.S.C. §207(e)(7); *see also* 29 C.F.R. §778.204(c). This section of the regulations describes how to determine the terms of a written or oral employment contract outside a union setting, which is essentially a question of state contract law. Even in states where employment is presumptively at will, terms and conditions of employment for pay, benefits, and working conditions are generally enforceable contractual promises. *See, e.g*.*,* Hoffmeyer v. Davco Food, Inc., 803 S.W.2d 49, 51 (Mo. Ct. App. 1990) (deeming right to vacation pay upon termination to be a contractual right). [↑](#footnote-ref-81)
82. 29 U.S.C. §207(e)(7); Lemieux v. City of Holyoke, 740 F. Supp. 2d 246, 257 (D. Mass. 2010) (excluding from regular rate payments established by CBA for work performed outside of firefighter’s regular duty cycle and already compensated as overtime). [↑](#footnote-ref-82)
83. 29 U.S.C. §207(e)(7). [↑](#footnote-ref-83)
84. *See* 29 C.F.R. §778.206 (providing additional examples involving clock pattern exclusion). [↑](#footnote-ref-84)
85. *See id*. §778.204(b). [↑](#footnote-ref-85)
86. *Id*. [↑](#footnote-ref-86)
87. *Id.*; *see also* Gilmer v. Alameda-Contra Costa Transit Dist., 2011 WL 5242977, at \*12 (N.D. Cal. Nov. 2, 2011) (premium pay for hours worked in excess of 10 per day where there was no uniform workday not pay for hours outside normal workday, but instead for excess time between start and end times, amounting to premium paid for undesirable working conditions, and thus includable in regular rate). [↑](#footnote-ref-87)
88. 29 U.S.C. §207(h); *see also* 29 C.F.R. §778.207. [↑](#footnote-ref-88)
89. 29 U.S.C. §207(h); *see also* 29 C.F.R. §§778.201–.206. [↑](#footnote-ref-89)
90. 29 C.F.R. §778.207(b). [↑](#footnote-ref-90)
91. 29 U.S.C. §207(h). [↑](#footnote-ref-91)
92. *Id*. §207(h)(2); Garcia v. Tyson Foods, Inc., 890 F. Supp. 2d 1273 (D. Kan. 2012); *see* McGlone v. Contract Callers, Inc., 49 F. Supp. 3d 364 (S.D.N.Y. 2014) (payments associated with incentives for rapid work (“sunshine time”) not creditable toward overtime compensation). [↑](#footnote-ref-92)
93. *Id.* §207(h)(1); *see also* Smiley v. E.I. Dupont De Nemours & Co., 839 F.3d 325, 332–34 (3d Cir. 2016) (reversing lower court’s summary judgment grant; holding that offsetting was permitted only with respect to “extra compensation” not included in regular rate); Hoops v. Roth, 2017 WL 1276057, at \*3–4 (D. Nev. Mar. 31, 2017) (finding that “ancillary payments in lieu of overtime,” which defendant described as quarterly incentive payments and plaintiff described as discretionary bonuses, were not “extra compensation,” such as “premium hourly rates,” and, thus, not creditable to offset overtime); Rau v. Darling’s Drug Store, Inc., 388 F. Supp. 877, 885, 22 WH Cases 182 (W.D. Pa. 1975) (determining Christmas bonus and meal and merchandise discounts not creditable). [↑](#footnote-ref-93)
94. *See,* *e.g.*, Roman v. Maietta Constr., Inc. 147 F.3d 71, 76–77 (1st Cir. 1998) (crediting against overtime damages owed compensatory time payments previously made to employee). A fuller discussion of setoffs or credits in the context of litigation is contained in Chapter 16, Litigation Issues, §IX.B.4 [Remedies; Monetary Damages for Unpaid Minimum Wages and Overtime; Deductions and Setoffs]. [↑](#footnote-ref-94)
95. *But cf.* 29 C.F.R. §§778.104 (interpreting §207 to prohibit averaging of hours over workweeks), 778.106 (stating DOL’s view that “general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends”), and 778.202(c) (interpreting daily premium credit to be applicable “against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek”). Sometimes overtime cannot be calculated until after the regular pay day, in which case the DOL considers it compliant for the employer to pay it “as soon as practicable” after calculation. *Id.* §778.106. Thus, cases speak of limiting the credit to the workweek or work period or pay period. *See, e.g.*, Herman v. Fabri-Centers of Am., Inc., 308 F.3d 580, 589 (6th Cir. 2002) (“[P]remium credits allowed by §207(h)(2) should be limited to the same workweek or work period in which these premiums were paid.”); Howard v. City of Springfield, 274 F.3d 1141, 1148–49 (7th Cir. 2001) (holding premium payment credit could only offset overtime liability incurred during same work period). [↑](#footnote-ref-95)
96. *See*

    *Fourth Circuit:* Roland Elec. Co. v. Black, 163 F.2d 417, 420 (4th Cir. 1947) (rejecting employer’s argument that overpayments in some weeks could be used to offset deficient payments in other weeks because FLSA is based on workweek, and violations accrue once payment not made on regular pay day).

    *Sixth Circuit: Fabri-Centers of Am.*, 308 F.3d at 589 (“[P]remium credits allowed by §207(h)(2) should be limited to the same workweek or work period in which these premiums were paid.”).

    *Seventh Circuit:* *Howard*, 274 F.3d at 1148–49 (holding premium payment credit could only offset overtime liability incurred during the same work period); Nolan v. City of Chicago, 125 F. Supp. 2d 324, 331–32 (N.D. Ill. 2000) (finding that offsets “should be calculated on a period by period basis”).

    *Eighth Circuit:* Bell v. Iowa Turkey Growers Coop., 407 F. Supp. 2d 1051, 1063 (S.D. Iowa 2006) (limiting credit of premium payments to within pay period, following reasoning in *Howard, Fabri-Centers of Am.*, and *Nolan*).

    *Tenth Circuit:* Cartier v. Western Elec. Coordinating Council, 2015 WL 3581346, at \*3–4 (D. Colo. June 9, 2015) (agreeing with Sixth, Seventh, and Ninth Circuits, disagreeing with Fifth Circuit, and holding that overtime credits must be applied to workweek in which extra compensation was earned).

    *Opinion Letters:* WH Op. 526, 1985 WL 304329, at \*4 (Dec. 23, 1985) (advising that “surplus overtime premium payments, which may be credited against overtime pay pursuant to Section 207(h) of the FLSA, may not be carried forward or applied retroactively to satisfy an employer’s overtime pay obligation in future or past pay periods”). [↑](#footnote-ref-96)
97. *See*

    *First Circuit:* Lupien v. City of Marlborough, 387 F.3d 83, 88–90 (1st Cir. 2004) (allowing compensatory time credit even if not used by employee in same week earned because to do otherwise would result in windfall to plaintiffs); O’Brien v. Town of Agawam, 491 F. Supp. 2d 170, 176 (D. Mass. 2007) (adopting standard used in First, Fifth, and Eleventh Circuits in holding that town may offset its FLSA liability with premium portion of contractual overtime payments regardless of when premiums paid and when overtime work occurred).

    *Fifth Circuit:* Singer v. City of Waco, 324 F.3d 813, 826–28 (5th Cir. 2003), *reh’g denied*, 67 F. App’x 250 (5th Cir. 2003) (rejecting argument that offset not permissible because overpayments more properly characterized as prepaid overtime).

    *Eleventh Circuit:* Kohlheim v. Glynn Cnty., 915 F.2d 1473, 1481 & n.40 (11th Cir. 1990) (crediting all previously paid overtime premiums against any overtime compensation due under §207(h), regardless of when paid or whether they were 1.5 times the regular rate).

    *D.C. Circuit:* D’Camera v. District of Columbia, 722 F. Supp. 799, 803–04, 29 WH Cases 841 (D.D.C. 1989) (crediting compensatory time pay against overtime owed under FLSA, reasoning that employees “are entitled to be made whole, not to a windfall at the District’s expense”).

    *Cf.* Harold Levinson Assocs. v. Chao, 37 F. App’x 19, 22 (2d Cir. 2002) (recognizing split of authority over whether premium payments under §207(h) may be credited across workweeks, but declining to rule on issue because employer’s claimed overpayments did not satisfy §207(h)’s requirements). [↑](#footnote-ref-97)
98. 29 C.F.R. §§778.208, 778.502. [↑](#footnote-ref-98)
99. 29 U.S.C. §207(e)(3)(a). [↑](#footnote-ref-99)
100. *Id*. [↑](#footnote-ref-100)
101. 29 C.F.R. §778.211(b).

     *See also*

     *Fifth Circuit:* Mata v. Caring For You Home Health, Inc., 94 F. Supp. 3d 867 (S.D. Tex. 2015) (finding promised bonus based on hours worked not discretionary).

     *Sixth Circuit:* Featsent v. City of Youngstown, 859 F. Supp. 1134, 1136, 2 WH Cases2d 475 (N.D. Ohio 1993) (deeming bonuses not discretionary because required under CBA), *aff’d in part, rev’d in part*, 70 F.3d 900, 904–05, 2 WH Cases2d 1697 (6th Cir. 1995) (evaluating City’s argument that bonuses excludable under §207(e)(2), finding some excludable and some not, and not considering that they were discretionary).

     *Eighth Circuit:* Kreus v. Stiles Serv. Ctr., 550 N.W.2d 320, 326–27, 3 WH Cases2d 687 (Neb. 1996) (concluding employer’s assurance that “‘he would see to it that [employee] averaged $6 per hour’” was “a prior agreement or promise to pay [employee] a ‘bonus’ at a set amount, making any ‘bonus’ amount paid nondiscretionary [and not excludable] under the meaning of the FLSA”).

     *Ninth Circuit:* Haber v. Americana Corp., 378 F.2d 854, 856 & n.1, 18 WH Cases 91 (9th Cir. 1967) (finding payments dependent on fixed level of performance not discretionary and actually commissions, and thus not bonuses qualifying for exclusion).

     *Tenth Circuit:* Hensley v. Carson Dev., Inc., 2020 BL 426808, 2020 WL 6384648 (D. Colo. July 31, 2020) (giving *Skidmore* deference to 778.211 and granting summary judgment to employees where employees would have expectation to receive bonuses regularly, because criteria for bonuses were objective, employees’ daily rate was quoted as including bonus, and employees regularly received bonus). [↑](#footnote-ref-101)
102. 29 C.F.R. §778.211(b). [↑](#footnote-ref-102)
103. *Id*. §778.211(c); *see also* Walling v. Wall Wire Prods. Co., 161 F.2d 470, 474–75 (6th Cir. 1947) (finding employer collectively bargained with employees to share percentage of profits, thereby nullifying employer discretion to grant bonus). [↑](#footnote-ref-103)
104. 29 C.F.R. §778.211(c) (Dec. 16, 2019).

     *See*

     *Supreme Court:* Walling v. Harnischfeger Corp., 325 U.S. 427, 432 (1945) (incentive bonuses paid on top of hourly rate, and earned by 98.5% of workers eligible for participation, “normal and regular part of their income,” and includable in regular rate).

     *First Circuit:* O’Brien v. Town of Agawam, 350 F.3d 279, 295–96 (1st Cir. 2003) (holding longevity and career-incentive pay for police officers’ nondiscretionary bonuses and thus includable in “regular rate”).

     *Fifth Circuit:* Bourne v. Trip Equip. Rental & Servs., LLC, 2016 WL 7337550, at \*2–3 (S.D. Tex. Dec. 19, 2016) (holding that regular bonuses to oilfield workers for longer shifts worked in field as opposed to at yard were includable in regular rate, rejecting argument that bonuses were excludable as overtime pay).

     *Sixth Circuit: Featsent*, 70 F.3d at 905 (holding bonuses attributable to education degrees or longevity of service must be included in regular rate of pay).

     *Seventh Circuit:* Heder v. City of Two Rivers, 149 F. Supp. 2d 677, 692–93, 7 WH Cases2d 242 (E.D. Wis. 2001) (weekly percentage premium for being licensed paramedic, described in agreement as “stipend,” had to be included in regular rate); Tomeo v. W&E Commc’ns, Inc., 2016 WL 8711483, at \*8–11 (N.D. Ill. Sept. 30, 2016) (holding that bonus structure, which provided hourly rate plus production bonus, was in reality piece-rate system, where employer failed to calculate regular rate based on higher piece-rate production and undervalued regular rate); Gilbertson v. City of Sheboygan, 165 F. Supp. 3d 742, 750 (E.D. Wis. 2016) (holding that bonuses that were given if employee met certain objective criteria must be counted as part of regular rate for purposes of calculating overtime compensation).

     *Eighth Circuit:* Theisen v. City of Maple Grove, 41 F. Supp. 2d 932, 938 (D. Minn. 1999) (relying on *Featsent* and concluding “longevity payments” to police officers not discretionary bonuses because such payments made pursuant to provisions in applicable CBA).

     *Ninth Circuit:* Brunozzi v. Cable Commc’ns, Inc., 851 F.3d 990, 996–97 (9th Cir. 2017) (holding that piece-rate production bonus had to be included in regular rate for overtime calculation and that employer could not reduce overtime owed by amount of piece-rate bonus).

     *Tenth Circuit:* *Hensley*, 2020 WL 6384648, at \*8–9 (finding bonuses nondiscretionary and characterizing their criteria as “in essence, attendance, meeting production goals, and continuing their employment with [the employer]”).

     *Opinion Letters:* WH Op. FLSA 2020-4 (Mar. 26, 2020) (where referral bonus is paid in two installments, with second installment conditioned on continued employment by referring employee for one year, second installment must be included in regular rate as “longevity” pay); WH Op. FLSA 2020-3 (Mar. 26, 2020) (contractually required longevity bonuses must be included in regular rate); WH Op. FLSA2006-5NA, 2006 WL 4512947, at \*2 (Apr. 27, 2006) (determining team bonus plan announced to employees in advance is nondiscretionary); WH Op. FLSA2005-47, 2005 WL 3308618, at \*1 (Nov. 4, 2005) (opining retention bonus was nondiscretionary bonus and must be included in regular rate, but that interest on bonus when it was deferred did not have to be included because unrelated to hours worked and comparable to generally available interest rates); WH Op., 1999 WL 1788163, at \*1–2 (Sept. 30, 1999) (concluding that regularly paid incentive bonuses for attaining educational and other job-related credentials must be included in employees’ regular rate of pay); WH Op., 1986 WL 1171142, at \*2 (Aug. 26, 1986) (deeming education, military service, and longevity bonuses provided by contract nondiscretionary). [↑](#footnote-ref-104)
105. 84 Fed. Reg. 68,736, 68,754–55 (Dec. 16, 2019). [↑](#footnote-ref-105)
106. *Id.*; 29 C.F.R. §778.211(d). [↑](#footnote-ref-106)
107. WH Op., 1999 WL 33210906, at \*1 (Nov. 5, 1999) (opining that performance bonus based on individual performance ratings that were often subjective was still regularly awarded and expected, making it nondiscretionary); *see also* McComb v. Shepard Niles Crane & Hoist Corp., 171 F.2d 69, 71 (2d Cir. 1948) (quarterly bonuses issued on vote of board nondiscretionary because their regularity and expectation as part of pay made them nondiscretionary); Walling v. Garlock Packing Co., 159 F.2d 44, 45 (2d Cir. 1947) (bonuses based on quarterly stock dividends that had to be voted on by board were includable in regular rate despite uncertain amount and ability to withdraw or modify plan; no dividend had to be issued because it was regular and expected payment); Walling v. Richmond Screw Anchor Co., 154 F.2d 780, 784 (2d Cir. 1946) (bonuses nondiscretionary despite ability of company to discontinue them at any time because lack of guarantee did not change fact that they were regularly paid and “employees assumed that, in the normal course of events, the employees would receive them”). [↑](#footnote-ref-107)
108. WH Op. FLSA2008-12, 2008 WL 5483051, at \*1–2 (Dec. 1, 2008) (bonus paid to emergency communications operators based on high stress, later formalized in discussions with union and put into memorandum of understanding, and added to CBA for future years, was discretionary with respect to first bonus paid); WH Op., 2000 WL 1537273, at \*1 (May 19, 2000) (opining that annual performance bonus with range of zero to 10% of base pay, no guarantee of any payment, and no guarantee of payment in future years despite prior payments was discretionary); *see also* Corbin v. GoDaddy.com, Inc., 2011 WL 814752, at \*2 (D. Ariz. Mar. 2, 2011) (granting motion to dismiss based on plaintiffs’ allegations that employer’s sales bonus calculated in part on subjective “quality assurance factor” and selectively denied based on this factor, reasoning that “the allegations strongly suggest that the bonus payments, which were selectively denied to employees on the basis of a subjective and arbitrary Quality Assurance factor, fall squarely within [the employer’s] discretion” under §207(e)(3)). [↑](#footnote-ref-108)
109. 860 F. App’x 267 (4th Cir. 2021). [↑](#footnote-ref-109)
110. *Id.* at 270 (citing DOL Op. Ltr., FLSA 2020-4, 2020 WL 1640073 (bonus paid for single pay period of service was too short to qualify as nondiscretionary longevity bonus)). [↑](#footnote-ref-110)
111. 29 U.S.C. §207(h); 29 C.F.R. §778.211(a). [↑](#footnote-ref-111)
112. 29 C.F.R. §778.330. [↑](#footnote-ref-112)
113. WH Op. FLSA2001-6, 2001 WL 1558771, at \*1 (Feb. 14, 2001). For additional examples, *see* 29 C.F.R. §778.331. [↑](#footnote-ref-113)
114. 29 C.F.R. §778.209. See the discussion in §IV.D.2.g [The “Regular Rate” Calculating Regular Rate and Overtime Under Various Methods of Payment; Payment of Wages Based on a Nonhourly Rate; Bonuses] of this chapter. [↑](#footnote-ref-114)
115. 29 C.F.R. §778.332(a). [↑](#footnote-ref-115)
116. *Id*. [↑](#footnote-ref-116)
117. *See id*. §778.333(a)–(f); White v. Publix Super Mkts., Inc., 2015 WL 4949837, at \*13–14 (M.D. Tenn. Aug. 19, 2015) (finding that award payments for ideas to improve store processes constituted excludable “prizes” under §778.333’s interpretive guidance). [↑](#footnote-ref-117)
118. FOH §32b07(1). [↑](#footnote-ref-118)
119. WH Op. FLSA2005-4NA, 2005 WL 5419040, at \*1 (July 5, 2005). [↑](#footnote-ref-119)
120. *Id.* (quotations omitted). [↑](#footnote-ref-120)
121. *Id.*; *see also* Romano v. Site Acquisitions LLC, 2017 WL 2634643, at \*5 (D.N.H. June 19, 2017) (without citing opinion letter, denying summary judgment to employer that incentive bonuses paid by third party were excludable as discretionary bonuses or gifts). [↑](#footnote-ref-121)
122. U.S. Dep’t of Labor v. Bristol Excavating, Inc., 395 F.3d 122, 135 (3d Cir. 2019) (rejecting DOL’s position that the source of the payment is irrelevant to determining whether it is remuneration for employment). *But cf. Romano*, 2017 U.S. Dist. LEXIS 93627, at \*22–23 (denying summary judgment to employer that third-party bonuses were discretionary where there was evidence that the amount and timing of the bonus was announced in advance, it was based on certain conditions being met, and that it induced crews to work “harder or more efficiently, or to remain with [the employer]”). The Third Circuit distinguished *Romano* in *Bristol Excavating*, explaining that there was no argument in *Bristol* that the payments were not remuneration for employment, but only a focus on whether they were excluded under §207(e)). *Bristol Excavating*, 395 F.3d at 133–34. [↑](#footnote-ref-122)
123. *Bristol Excavating*, 395 F.3d at 137. The Third Circuit distinguished the 2005 opinion letter cited by the DOL, explaining that, in that letter (and an earlier one), the bonus was created “in concert with the employer,” making it essentially “joint” and appropriately considered remuneration for employment. *Id.* at 133. [↑](#footnote-ref-123)
124. *Id.* at 138. [↑](#footnote-ref-124)
125. *Id.* at 140–41. [↑](#footnote-ref-125)
126. 29 C.F.R. §778.210; WH Op. FLSA2009-21, 2009 WL 649023 (Jan. 16, 2009) (opining that safety bonus that includes payment of overtime premium meets overtime requirement of FLSA). [↑](#footnote-ref-126)
127. 29 C.F.R. §778.210; WH Op. FLSA2009-21, 2009 WL 649023 (Jan. 16, 2009). [↑](#footnote-ref-127)
128. *Id*; *see* White v. Publix Super Mkts., Inc., 2015 WL 4949837, at \*15–17 (M.D. Tenn. Aug. 19, 2015) (holding that retail bonuses did not have to be added into regular rate because they were percentage bonuses that already included overtime). [↑](#footnote-ref-128)
129. WH Op. FLSA2004-11, 2004 WL 3177882, at \*1 (Sept. 21, 2004); *see also* WH Op. FLSA2005-22, 2005 WL 3308593, at \*1 (Aug. 26, 2005) (applying percentage of total earnings method and advising that bonus earned in previous year need not be included in regular rate calculation of current year’s bonus calculation just because paid in current year; bonus was earned in prior year); WH Op., 2001 WL 1558953, at \*1 (Feb. 5, 2001) (“[W]here a bonus is paid as a production incentive percentage of the employee’s *total compensation*, including straight time, overtime, bonuses, and commissions, the overtime pay due under the FLSA is automatically included and no additional computation or payment of overtime is required.”) (emphasis in original). [↑](#footnote-ref-129)
130. 29 C.F.R. §778.210. [↑](#footnote-ref-130)
131. *Id*. §§778.502, 778.503. [↑](#footnote-ref-131)
132. 29 U.S.C. §207(e)(1). [↑](#footnote-ref-132)
133. *Id*. *See*

     *Fourth Circuit:* McPhee v. Lowe’s Home Ctrs., LLC, 860 F. App’x 267, 269–70 (4th Cir. 2021) (one-time bonuses paid in response to federal tax reform legislation qualified as gifts under §207(e)(1) because they were (1) made in honor of a special occasion (passage of tax reform), (2) not made pursuant to a contract, (3) not based on hours or wages, and (4) not substantial).

     *Sixth Circuit:* White v. Publix Super Mkts., Inc., 2015 BL 267679, 2015 WL 4949837, at \*11–12 (M.D. Tenn. Aug. 19, 2015) (holding that tuition reimbursement and loss prevention awards were excludable under §207(e)(1)).

     *Ninth Circuit:* Haber v. Americana Corp., 378 F.2d 854, 856 (9th Cir. 1967) (holding payments dependent on fixed level of performance did not qualify for gift exclusion); Harris v. Best Buy Stores, L.P., 2016 WL 4073327, at \*6–7 (N.D. Cal. Aug. 1, 2016) (holding that employee discounts were “gifts” for purposes of §207(c)(1));. [↑](#footnote-ref-133)
134. 29 C.F.R. §778.212(a). [↑](#footnote-ref-134)
135. 29 U.S.C. §207(e)(1); 29 C.F.R. §778.212. [↑](#footnote-ref-135)
136. 29 C.F.R. §778.212(b); Romano v. Site Acquisitions LLC, 2017 WL 2634643, 2017 U.S. Dist. LEXIS 93627, at \*22–23 (D.N.H. June 19, 2017) (denying summary judgment to employer that incentive bonuses constituted gifts where there was evidence that they were based on “drivers” such as “quality and speed of production”). *Cf.* McPhee v. Lowe’s Home Ctrs., LLC, 860 F. App’x 267, 270 (4th Cir. 2021) (one-time tax reform bonus was gift because it was not substantial and not based on pay or hours worked). [↑](#footnote-ref-136)
137. *Compare* Moreau v. Klevenhagen, 956 F.2d 516, 520–21, 30 WH Cases 1438 (5th Cir. 1992) (holding longevity pay excluded as gift where not required by ordinance or CBA, and not tied to hours worked or wages earned, but merely as reward for tenure), *aff’d*, 508 U.S. 22, 1 WH Cases2d 569 (1993), *and* White v. Publix Super Mkts., Inc., 2015 WL 4949837, at \*3–4 (M.D. Tenn. Aug. 19, 2015) (holding holiday bonus excludable under §207(e)(1)), *with* Featsent v. City of Youngstown, 859 F. Supp. 1134, 1136 n.4, 2 WH Cases2d 475 (N.D. Ohio 1993), *aff’d in part, rev’d in part*, 70 F.3d 900, 2 WH Cases2d 1697 (6th Cir. 1995) (holding longevity pay not excluded as discretionary bonus or gift where required by CBA). *See also* Schmitt v. Kansas, 844 F. Supp. 1449, 1463–65, 1 WH Cases2d 1552 (D. Kan. 1994) (determining longevity bonus based on years of service provided for by statute not within exclusion for discretionary bonuses). [↑](#footnote-ref-137)
138. 84 Fed. Reg. 68,736, 68,750–751 (Dec. 16, 2019) (explaining that sign-on bonuses with clawback provisions, and not issued pursuant to a collective bargaining agreement, city ordinance, or policy, are excludable if they comply with §778.212). Sign-on bonuses with no clawback provision are excludable because they are not pay for hours worked under §207(e)(2). *Id.* [↑](#footnote-ref-138)
139. 29 C.F.R. §778.212(c) (2019). The DOL explained that the cost of office coffee, snacks, and other food items besides “regularly provided meals” have been considered excludable under §207(e)(1), and clarified the interpretive bulletin to add an example. 84 Fed. Reg. 68,736, 68,749–750 (Dec. 16, 2019). The DOL noted that there could be overlap between some payments excludable under §207(e)(1) and §207(e)(2)’s “other similar payments” clause, noting that the provisions are not mutually exclusive. *Id.* at 68,750. [↑](#footnote-ref-139)
140. 29 U.S.C. §207(e)(3)(b). [↑](#footnote-ref-140)
141. *Id.*; *see* 29 C.F.R. §778.213. [↑](#footnote-ref-141)
142. 29 C.F.R. pts. 547, 549. For a detailed discussion of the regulatory criteria, *see* WH Op. FLSA2006-8, 2006 WL 940664, at \*2–4 (Mar. 10, 2006) (finding employer’s matching contribution to employee stock purchase plan properly excludable from regular rate calculation where essential requirements in 29 C.F.R. §547.1(b)–(f) satisfied and none of “disqualifying” provisions of 29 C.F.R. §547.2 present). *See also* WH Op. FLSA2001-5, 2001 WL 1558785, at \*1 (Feb. 14, 2001) (finding that employer’s profit-sharing plan, which “[met] the requirements in 29 C.F.R. §547.1(b)–(f), except that under certain conditions the employer’s contributions [could] exceed the total amount deferred by the participants,” and which “[had] none of the disqualifying characteristics of 29 C.F.R. §547.2,” was plan that qualified as bona fide and thus employer’s contributions to it did not have to be included in calculation of regular rate under §207(e)(3)(b)); WH Op., 1999 WL 33210911, at \*2 (Oct. 29, 1999) (determining that distributing profit-sharing benefits at uneven levels to employees at different plants and funding plan in part from sources other than profits indicated that employer contributions “may be designed to reward employees for increased production … and may not be tied exclusively to profits,” thereby disqualifying plan as bona fide profit-sharing plan under 29 C.F.R. §549.2(e)); WH Op., 1994 WL 1004831, at \*1 (June 1, 1994) (opining that employer’s plan resembled “incentive plan that provides non-discretionary bonus payments to covered employees as compensation for increases in production or efficiency” and that bonuses in such plan must be included in regular rate). [↑](#footnote-ref-142)
143. 29 C.F.R. §§549.0–.4. [↑](#footnote-ref-143)
144. *Id*. §§547.1(b), 549.1(b). [↑](#footnote-ref-144)
145. *See generally id*. §§547.1(c)–(f) (thrift and savings plans), 549.1(c)–(g) (profit-sharing plans and trusts). [↑](#footnote-ref-145)
146. *Id*. §547.1(c). [↑](#footnote-ref-146)
147. *Id*. §547.1(f). [↑](#footnote-ref-147)
148. 29 C.F.R. §547.1(e). [↑](#footnote-ref-148)
149. *Id*. §547.2(a). [↑](#footnote-ref-149)
150. *Id*. §547.2(b). [↑](#footnote-ref-150)
151. *Id*. §547.2(c). [↑](#footnote-ref-151)
152. *Id*. §549.2(a). [↑](#footnote-ref-152)
153. 29 C.F.R. §549.2(e). [↑](#footnote-ref-153)
154. *Id*. §549.2(b)–(d). [↑](#footnote-ref-154)
155. WH Op., 1999 WL 1002365 (Feb. 12, 1999) (opining employer’s “proposed stock option plan does not qualify for any of the exclusions from the regular rate as defined in section 207(e)(1) of the FLSA”). [↑](#footnote-ref-155)
156. Pub. L. No. 106-202 (codified as amended at 29 U.S.C. §207(e)(8)). [↑](#footnote-ref-156)
157. *Id*. [↑](#footnote-ref-157)
158. *Id*. [↑](#footnote-ref-158)
159. *Id*. [↑](#footnote-ref-159)
160. 29 U.S.C. §207(e)(4); 29 C.F.R. §§778.214, 778.215. A benefit plan contribution that meets the requirements of §207(e)(4) must meet the requirements of 29 C.F.R. §§778.214 and 778.215, but not the regulations in 29 C.F.R. Part 549, which apply to profit-sharing plans under §207(e)(3). *See* Russell v. Government Emps. Ins. Co., 2018 WL 1210763, 2018 U.S. Dist. LEXIS 38425, at \*14–17 (S.D. Cal. Mar. 8, 2018). [↑](#footnote-ref-160)
161. 29 U.S.C. §207(h); 29 C.F.R. §§778.213, 778.214(a). [↑](#footnote-ref-161)
162. 29 U.S.C. §207(e)(4). [↑](#footnote-ref-162)
163. 29 C.F.R. §778.215(a)(1). [↑](#footnote-ref-163)
164. *Id*. §778.215(a)(2) (Dec. 16, 2019). This paragraph was amended in December 2019 to add accident, unemployment, and legal services, because the DOL believed they are also payments that “provide assistance in preparation for a future expense.” 84 Fed. Reg. 68,736, 68,757 (Dec. 16, 2019). To clarify that the common thread of these payments is preparation for events that could result in significant future financial hardship or expense, the DOL modified the catchall “or other events” language to focus on future expenses. *Id*. The DOL distinguished these payments from “repayment of past debt,” which is not similar to a future-looking expense, and “cash in lieu of plan participation” because cash can be used for any expense, not just future expenses. *Id.* [↑](#footnote-ref-164)
165. 29 C.F.R. §778.215(a)(3); *see* Russell v. Government Emps. Ins. Co., 2018 WL 1210763, 2018 U.S. Dist. LEXIS 38425, at \*21–22 (S.D. Cal. Mar. 8, 2018) (finding that employer’s profit-sharing plan satisfied the requirement that it define amounts payable by a “formula” where it provided an allocation of contributions and a ratio to determine the contribution to each administrative unit; no minimum contribution was required in this circumstance); Callahan v. City of Sanger, 2015 WL 2455419 (E.D. Cal. May 22, 2015) (finding that payment in lieu of health benefits not excludable from regular rate where employer failed to provide sufficient information showing that payments were intended to cover specific benefit contributions). [↑](#footnote-ref-165)
166. 29 C.F.R. §778.215(a)(4); *see also* Russell v. Government Emps. Ins. Co., 2018 WL 1210763, 2018 U.S. Dist. LEXIS 38425, at \*18–20 (S.D. Cal. Mar. 8, 2018) (finding that employer’s contributions were “irrevocable” as defined in the regulation, even though an employee’s profit-sharing plan incentive could be forfeited if he or she was not employed on the payout date, because the forfeited payments would be used to cover recordkeeping and administrative fees, and the balance distributed among other employees still employed, and no amount returned to the employer); Gilbertson v. City of Sheboygan, 165 F. Supp. 3d 742, 750 (E.D. Wis. 2016) (holding that reimbursements for medical expenses, where third-party administrator paid expense and got reimbursed by employer, did not meet “plain language of exception,” where payments were not “irrevocable contributions” to trustee or third person who assumes fiduciary responsibility). [↑](#footnote-ref-166)
167. 29 C.F.R. §778.215(a)(5). [↑](#footnote-ref-167)
168. 84 Fed. Reg. 68,736, 68,757 (Dec. 16, 2019). [↑](#footnote-ref-168)
169. Local 246, Utility Workers Union of Am. v. Southern Cal. Edison Co., 83 F.3d 292, 294, 3 WH Cases2d 449 (9th Cir. 1996). [↑](#footnote-ref-169)
170. WH Op. FLSA2004-17, 2004 WL 3177876, at \*2 (Oct. 28, 2004) (concluding that employer’s benefit plan in which “smokers pay a larger portion of their health insurance premiums” met requirements of §207(e)(4)). [↑](#footnote-ref-170)
171. 824 F.3d 890 (9th Cir. 2016). [↑](#footnote-ref-171)
172. 84 Fed. Reg. 68,736, 68,757, 68,761 (Dec. 16, 2019). [↑](#footnote-ref-172)
173. *Id.* [↑](#footnote-ref-173)
174. *Id.* [↑](#footnote-ref-174)
175. 26 U.S.C. §125. [↑](#footnote-ref-175)
176. 26 C.F.R. §1.125. Qualified pretax benefits typically include the following: (1) the employee’s share of health, disability, and life insurance premiums; (2) unreimbursed medical expenses such as copays, deductibles, and expenses not covered in the employee’s health/dental plan; and (3) work-related dependent care expenses. *Id*. [↑](#footnote-ref-176)
177. 29 C.F.R. §778.215(a)(5). [↑](#footnote-ref-177)
178. *Id*. (emphasis added). [↑](#footnote-ref-178)
179. WH Op. FLSA2003-4, 2003 WL 23374600, at \*2 (July 2, 2003). [↑](#footnote-ref-179)
180. Flores v. City of San Gabriel, 824 F.3d 890, 903 (9th Cir. 2016). [↑](#footnote-ref-180)
181. *See* WH Op. FLSA2003-4, 2003 WL 23374600, at \*2 (July 2, 2003); *see also* Madison v. Resources for Human Dev., Inc., 233 F.3d 175, 187, 6 WH Cases2d 961 (3d Cir. 2000) (remanding case to evaluate plan’s compliance under interpretive bulletin, granting deference to bulletin, but not determining whether plan complied). [↑](#footnote-ref-181)
182. 29 U.S.C. §207(e)(2); Shepard v. City of Waterloo, 2015 WL 9165915, at \*12 (N.D. Iowa Dec. 16, 2015) (holding that city’s regular compensation of two hours of non-work each week was properly excluded from regular rate under §207(e)(2), but that city may use contractual payments for hours beyond what was worked as credits to offset any potential liability); Dietrick v. Securitas Sec. Servs. USA, Inc., 50 F. Supp. 3d 1265 (N.D. Cal. 2014) (finding that payments made under vacation pay plan were nondiscretionary bonuses that must be included in regular rate, where payments were made at end of year based on hours worked in prior year and did not depend on taking vacation; vacation days were unpaid). [↑](#footnote-ref-182)
183. 29 U.S.C. §207(e)(2); *see also*

     *Fifth Circuit:* Joseph G. Moretti, Inc. v. Boogers, 376 F.2d 27, 28, 17 WH Cases 658 (5th Cir. 1967) (concluding overtime for holidays, Saturdays, and Sundays due only for time in which employee actually worked more than 40 hours).

     *Sixth Circuit:* White v. Publix Super Mkts., Inc., 2015 WL 4949837, at \*5–7 (M.D. Tenn. Aug. 19, 2015) (holding that holiday pay of lump sum of eight hours’ pay at employee’s normal hourly rate must be included in regular rate because it was not payment made for period when no work was performed, as many employees were scheduled and required to work on holidays).

     *Eighth Circuit:* Boll v. Federal Res. Bank, 365 F. Supp. 637, 646–47, 21 WH Cases 876 (E.D. Mo. 1973), *aff’d*, 497 F.2d 335, 21 WH Cases 886 (8th Cir. 1974) (holding FLSA does not require employers to pay for holiday hours).

     *Ninth Circuit:* Lewis v. County of Colusa, 2018 WL 1605754, 2018 U.S. Dist. LEXIS 56906, at \*4–7 (E.D. Cal. Apr. 3, 2018) (finding that employer’s payment of flat amount in lieu of employee taking a holiday were not payments “due to” a holiday and, thus, not excludable from the regular rate, because it was at least as plausible that the payments were for the inconvenience of being scheduled to work on a holiday, and payments were made regardless of whether someone worked on a particular holiday).

     *Eleventh Circuit:* Atlanta Pro. Firefighters Local 134 v. City of Atlanta, 920 F.2d 800, 806, 30 WH Cases 169 (11th Cir. 1991) (recognizing FLSA does not count holidays). [↑](#footnote-ref-183)
184. *See* Lanehart v. Horner, 818 F.2d 1574, 1578, 28 WH Cases 249 (Fed. Cir. 1987) (deeming allowances for paid leave to be matter of contract independent of FLSA). [↑](#footnote-ref-184)
185. 29 U.S.C. §207(e)(2). [↑](#footnote-ref-185)
186. York v. City of Wichita Falls, 763 F. Supp. 876, 884, 30 WH Cases 743 (N.D. Tex. 1990) (holding vacations, holidays, and sick leave hours not included as payable overtime hours unless actually worked by employee). *But see* Sandel v. Fairfield Indus., Inc., 2015 WL 7709583, at \*4 (S.D. Tex. June 25, 2015) (holding that, where employees worked month-long “hitches” offshore and earned one day of paid leave for each day worked, paid days off had to be included in regular rate because they were too frequent and regular to constitute excludable vacation). [↑](#footnote-ref-186)
187. Featsent v. City of Youngstown, 70 F.3d 900, 905 (6th Cir. 1995). [↑](#footnote-ref-187)
188. Acton v. City of Columbia, 436 F.3d 969, 977–79 (8th Cir. 2006) (relying on reasoning in DOL’s interpretive bulletin which treats on-call pay as includable in regular rate, 29 C.F.R. §778.223, and holding sick leave buy-back payments constituted remuneration for employment and thus must be included in calculating employee’s regular rate). [↑](#footnote-ref-188)
189. *Id*. at 977. [↑](#footnote-ref-189)
190. 630 F.3d 1300, 1307–10 (10th Cir. 2011). [↑](#footnote-ref-190)
191. WH Op. FLSA2009-19, 2009 WL 649021, at \*4 (Jan. 16, 2009). [↑](#footnote-ref-191)
192. *See also* Lemieux v. City of Holyoke, 740 F. Supp. 2d 246, 255–56 (D. Mass. 2010). [↑](#footnote-ref-192)
193. Balestrieri v. Menlo Park Fire Prot. Dist., 800 F.3d 1094, 1103 (9th Cir. 2015) (noting in dicta that “[b]uying back unused sick leave is not the same thing as allowing sick employees to stay home. And it is not reasonable to assume that employers generally want employees to come to work, sick or not. … There is no reason to assume that employers providing sick leave prefer that their employees not use it.”). [↑](#footnote-ref-193)
194. 29 C.F.R. §778.219 (“Pay for forgoing holidays and unused leave.”). [↑](#footnote-ref-194)
195. 84 Fed. Reg. 68,736, 68,742 (Dec. 16, 2019). [↑](#footnote-ref-195)
196. 630 F.3d 1300 (10th Cir. 2011). [↑](#footnote-ref-196)
197. 84 Fed. Reg. 68,736, 68,742 (citing *Chavez,* 630 F.3d at 1309). [↑](#footnote-ref-197)
198. 436 F.3d 969 (8th Cir. 2006). [↑](#footnote-ref-198)
199. 84 Fed. Reg. at 68,742 (citing *Acton*, 436 F.3d at 977–78). [↑](#footnote-ref-199)
200. Edwards v. City of N.Y., 2011 WL 3837130, at \*10 (S.D.N.Y. Aug. 29, 2011) (amounts paid for occasional periods of nonwork, including for holidays, not “bonuses” and properly excluded from regular rate); Scott v. City of N.Y., 2008 WL 5099952, at \*3 (S.D.N.Y. Dec. 2, 2008) (holding premium pay for working on day scheduled for vacation not included in regular rate calculation nor creditable as overtime); WH Op. FLSA2004-2NA, 2004 WL 5303030, at \*1 (Apr. 5, 2004) (payments for unused vacation not includable in regular rate); *see also* 29 C.F.R. §778.219(a). [↑](#footnote-ref-200)
201. 84 Fed. Reg. 68,736, 68,743 (Dec. 16, 2019). [↑](#footnote-ref-201)
202. 29 C.F.R. §778.219(a) (2019). [↑](#footnote-ref-202)
203. 29 C.F.R. §778.218(b) (2018); *see also* Wayne v. Agee Farms, L.L.C., 675 F. Supp. 2d 684, 691 (S.D. Miss. 2009) (concluding that daily “personal time” pay, including five minutes for meal periods, was “routine and frequent,” precluding exclusion under §207(e)(2), relying on 29 C.F.R. §778.218(b)). *But cf.* Reich v. Interstate Brands Corp., 57 F.3d 574, 576 (7th. Cir. 1994) (“vacation pay … [is] not infrequent by any understanding”). [↑](#footnote-ref-203)
204. 84 Fed. Reg. 68,736, 68,743 (Dec. 16, 2019); 29 C.F.R. §778.320 (2019) (permitting exclusion from regular rate of payments for bona fide meal periods by agreement). The DOL also clarified §778.320 to say that payment for a meal period would be excluded unless an agreement or established course of conduct establishes that the parties intended to treat the meal period as hours worked. 29 C.F.R. §778.320(b); 84 Fed. Reg. at 68,743. [↑](#footnote-ref-204)
205. 29 C.F.R. §778.218(b) (2019). [↑](#footnote-ref-205)
206. 29 U.S.C. §207(e)(2). [↑](#footnote-ref-206)
207. 29 C.F.R. §778.218(d) (2019). [↑](#footnote-ref-207)
208. *Id.* [↑](#footnote-ref-208)
209. *Id*. §778.218(a). [↑](#footnote-ref-209)
210. 29 U.S.C. §207(e)(2). [↑](#footnote-ref-210)
211. 29 C.F.R. §778.218(a). [↑](#footnote-ref-211)
212. *Id*. §778.218(c). [↑](#footnote-ref-212)
213. *Id*. [↑](#footnote-ref-213)
214. 29 U.S.C. §207(e)(2); 29 C.F.R. §778.217(c). [↑](#footnote-ref-214)
215. 29 U.S.C. §207(h); 29 C.F.R. §778.216. [↑](#footnote-ref-215)
216. 29 C.F.R. §778.217(a) (2019); 84 Fed. Reg. 68,736, 68,744 (Dec. 16, 2019). [↑](#footnote-ref-216)
217. Berry v. Excel Grp., Inc., 288 F.3d 252, 254, 7 WH Cases2d 1313 (5th Cir. 2002) (holding unallocated “per diem” payments may qualify for §207(e)(2) exclusion and must be examined on case-by-case basis to determine if appropriate and reasonable). [↑](#footnote-ref-217)
218. 29 C.F.R. §778.217(b) (2019).

     *See also*

     *Fifth Circuit:* Gagnon v. United Technisource, Inc., 607 F.3d 1036, 1041–42 (5th Cir. 2010) (per diem capped after employee worked 40 hours deemed part of regular rate).

     *Eighth Circuit:* Baouch v. Werner Enters., Inc., 908 F.3d 1107, 1114–18 (8th Cir. 2018) (affirming dismissal of suit claiming failure to pay minimum wage because under FLSA, company’s mileage-based payments to employees counted toward its minimum wage obligations, despite the company’s representation to IRS that they were expenses, where payments were based upon amount of work performed (miles driven), functioned as a wage rather than as true per diem reimbursements, did not require expense reports or receipts, and were introduced as a means to attract new employees by maximizing take-home pay).

     *Tenth Circuit:* Sharp v. CGG Land (U.S.) Inc., 840 F.3d 1211, 1215 (10th Cir. 2016) (finding that per diem pay was meant to compensate employees for meal expenses when away from home and therefore was travel expense; holding that per diem pay was properly excludable from regular rate, and rejecting argument that meals must be taken during transit to qualify).

     *Eleventh Circuit:* Powell v. Carey Int’l, Inc., 514 F. Supp. 2d 1302, 1318–19 (S.D. Fla. 2007) (determining limousine company entitled to exclude from “regular rate” any compensation reasonably calculated to reimburse plaintiff drivers for tolls, parking fees, and fuel surcharges incurred in connection with work).

     *Opinion Letters and Other DOL Materials:* WH Op. FLSA2004-3, 2004 WL 2146923, at \*1 (May 13, 2004) (reassuring employers that they could reimburse the actual cost of travel-related meals without including reimbursement in employee’s regular rate of pay); FOH §32d05a(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 entire[ty].”). [↑](#footnote-ref-218)
219. 29 C.F.R. §778.217(d); *see also id*. §§531.37(b), 778.116. [↑](#footnote-ref-219)
220. 29 C.F.R. §778.217(d). [↑](#footnote-ref-220)
221. *Id*. §778.217(c). [↑](#footnote-ref-221)
222. *First Circuit:* Newman v. Advanced Tech. Innovation Corp., 749 F.3d 33, 38–39 (1st Cir. 2014) (weekly per diem pay that fluctuated based on hours should be included in regular rate).

     *Second Circuit:* Lynch v. City of N.Y.*,* 291 F. Supp. 3d 537, 551 (S.D.N.Y. 2018) (finding meal allowance payments includible in regular rate because they were based on extra continuous hours worked by employee and not on actual expenses).

     *Fifth Circuit:* Gagnon v. United Technisource, Inc., 607 F.3d 1036, 1041–42 (5th Cir. 2010) (per diem capped after employee worked 40 hours deemed part of regular rate).

     *Ninth Circuit:* Clarke v. AMN Servs., LLC, 987 F.3d 848, 858 (9th Cir. 2021) (holding weekly per diem paid regardless of days worked away from home, prorated based on shifts worked, and not prorated based on existence of banked hours, and treated as wage income for non-traveling nurses, was considered compensation and must be included in regular rate); Carlino v. CHG Med. Staffing, Inc., 2020 WL 2512402 (E.D. Cal. May 15, 2020) (per diem that was reduced when employee worked fewer than minimum weekly hours must be included in regular rate). [↑](#footnote-ref-222)
223. Howell v. Advantage RN, LLC, 401 F. Supp. 3d 1078 (S.D. Cal. 2019). [↑](#footnote-ref-223)
224. 29 C.F.R. §778.217(c). [↑](#footnote-ref-224)
225. *Id.* §778.217(c)(3). [↑](#footnote-ref-225)
226. WH Op., 1999 WL 1788149, at \*1 (Sept. 1, 1999). [↑](#footnote-ref-226)
227. *Id.* A different result obtains “where payments are made to employees in the form of facilities which are regarded as part of wages.” 29 C.F.R. §778.116. In such cases, 29 C.F.R. §778.116 requires that the cost of such facilities be included in the regular rate. See Chapter 9, Minimum Wage Requirements, §III [Non-Cash Wages Under Section 203(m): “Board, Lodging, or Other Facilities”], for a discussion of when the reasonable cost of board, lodging, and other facilities may be counted as wages. [↑](#footnote-ref-227)
228. Jones v. Univesco, Inc., 529 F. Supp. 3d 627, 634 (E.D. Tex. 2021) (holding that 40% discount on apartment was not furnishing a facility within the meaning of the FLSA). [↑](#footnote-ref-228)
229. 29 U.S.C. §207(e)(2). [↑](#footnote-ref-229)
230. 84 Fed. Reg. 68,736, 68,745–54 (Dec. 16, 2019); 29 C.F.R. §778.224 (2019). [↑](#footnote-ref-230)
231. 84 Fed. Reg. at 68,746. [↑](#footnote-ref-231)
232. *Id.* at 68,746–48; 29 C.F.R. §778.224(a) (2019). [↑](#footnote-ref-232)
233. 84 Fed. Reg. at 68,750. [↑](#footnote-ref-233)
234. These sections of the interpretive bulletins do not discuss “on call” pay although some states have used that term in the vernacular to describe what these bulletins refer to as “show-up” and “call-back” pay. “On call” pay, as DOL has described it, is addressed in 29 C.F.R. §778.223 and in §IV.C.9.b [The “Regular Rate”; Statutory Exclusions From the Regular Rate and Payments Creditable to Overtime; “Other Similar Payments”: Section 207(e)(2); Pay for Other Nonproductive Hours] of this chapter. [↑](#footnote-ref-234)
235. 29 C.F.R. §§778.220, 778.221. [↑](#footnote-ref-235)
236. *Id*. §778.220(b) (Dec. 16, 2019). [↑](#footnote-ref-236)
237. *Id.* §778.221(a) (Dec. 16, 2019). The interpretive bulletins illustrate the application of the call-back pay exclusion. *See* *id*. §778.221(b). [↑](#footnote-ref-237)
238. *Id.* §§778.221(a), 778.222; 84 Fed. Reg. 68,736, 68,753 (Dec. 16, 2019). [↑](#footnote-ref-238)
239. 84 Fed. Reg. at 68,753; *see* 29 C.F.R. §§778.221(a), 778.222. [↑](#footnote-ref-239)
240. WH Op. FLSA2005-36, 2005 WL 3308607, at \*2 (Oct. 3, 2005) (concluding that company’s “short call” pay is excludable from regular rate because analogous to pay described under 29 C.F.R. §778.222). [↑](#footnote-ref-240)
241. 29 C.F.R. §778.222. [↑](#footnote-ref-241)
242. 29 U.S.C. §207(e)(2); 29 C.F.R. §778.220; 84 Fed. Reg. at 68,752. [↑](#footnote-ref-242)
243. 84 Fed. Reg. at 68,752. [↑](#footnote-ref-243)
244. *Id.*; *see* 29 C.F.R. §778.220(c). [↑](#footnote-ref-244)
245. 29 C.F.R. §778.222(a). [↑](#footnote-ref-245)
246. *Id*. §778.222(b); Reich v. Interstate Brands Corp., 57 F.3d 574, 579, 2 WH Cases2d 1281 (7th Cir. 1995) (holding compensation for abbreviated rest between work periods has potential for exclusion). [↑](#footnote-ref-246)
247. 29 C.F.R. §778.224(b)(2). [↑](#footnote-ref-247)
248. Sherald v. Embrace Tech., Inc., 2013 WL 126355, at \*5 (S.D.N.Y. Jan. 10, 2013) (excluding signing bonus paid at hiring from inclusion of regular rate; since it was paid at hire, it was not “compensation for his hours of employment” under §207(e)(2)). [↑](#footnote-ref-248)
249. Ballaris v. Wacker Siltronic Corp., 370F.3d 901, 909 (9th Cir. 2004) (relying on 29 C.F.R. §778.320 to determine that “payments for meal periods not counted as hours worked should generally be excluded in computing the regular rate of pay when the parties have agreed to exclude such activities from hours worked”). [↑](#footnote-ref-249)
250. 84 Fed. Reg. 68,736, 68,754 (Dec. 16, 2019); 29 C.F.R. §778.222(c), (d). [↑](#footnote-ref-250)
251. 29 C.F.R. §778.224(b)(1). [↑](#footnote-ref-251)
252. *Id*. §778.224(b)(2). [↑](#footnote-ref-252)
253. *Id*. §778.224(b)(3). [↑](#footnote-ref-253)
254. *Id*. §778.224(b)(4). [↑](#footnote-ref-254)
255. *Id*. §778.224(b)(5); *see* Jones v. Univesco, Inc., 529 F.3d 627, 635–36 (E.D. Tex. 2021) (holding 40 % discount on apartment was similar to discount on retail goods and services, and therefore excludable from regular rate, citing §778.224). [↑](#footnote-ref-255)
256. 29 C.F.R.§778.224(b)(6). [↑](#footnote-ref-256)
257. *Id*. §778.223 (providing example of employee paid for “on call” time, where “on call” hours not deemed hours worked because employee free to use time for his or her own use, but stating that pay must be included in regular rate because it is compensation for performing duties and not excludable under §207(e)(2)); *see* Rudy v. City of Lowell, 716 F. Supp. 2d 130 (D. Mass. 2010); Thomas v. County of Fairfax, 758 F. Supp. 353, 362, 30 WH Cases 313 (E.D. Va. 1991) (stating hours worked are determined by amount of time spent on shift, not by what is done during time). [↑](#footnote-ref-257)
258. 29 C.F.R. §778.223; *see* *Rudy*, 716 F. Supp. 2d at 133 (finding that water department’s $150 stipend for “standby” time, in which plaintiff was on call, even though time was not hours worked, includable in regular rate, relying on 29 C.F.R. §778.223 and citing multiple opinion letters from DOL). [↑](#footnote-ref-258)
259. 29 C.F.R. §778.223 (Dec. 16, 2019); 84 Fed. Reg. 68,736, 78,754 (Dec. 16, 2019). [↑](#footnote-ref-259)
260. 842 F.2d 1456, 28 WH Cases 849 (3d Cir. 1988). [↑](#footnote-ref-260)
261. 842 F.2d at 1461–62 (determining phrase “other similar payments” in FLSA does not mean just other payments for idle hours or reimbursements, but payments that are not tied to hours of compensation). [↑](#footnote-ref-261)
262. WH Op., 1986 WL 383427, at \*2 (Apr. 21, 1986) (explaining prior 1981 position where DOL considered single lump-sum payment in resolution of strike and in lieu of pay increase excludable, and applying that principle to “installment ­payments, where such payments are not contingent upon an employee’s being on the payroll in order to receive subsequent payments”). [↑](#footnote-ref-262)
263. 29 C.F.R. §778.224. [↑](#footnote-ref-263)
264. 842 F.2d 1456, 1462–63, 28 WH Cases 849 (3d Cir. 1988). [↑](#footnote-ref-264)
265. *Id*. [↑](#footnote-ref-265)
266. Reich v. Interstate Brands Corp., 57 F.3d 574, 578, 2 WH Cases2d 1281 (7th Cir. 1995). [↑](#footnote-ref-266)
267. 57 F.3d at 578–79. The Seventh Circuit rejected the Secretary’s position, however, that payment must be “infrequent” or “rare” to qualify as “other similar payment” under §207(e)(2). *Id.* at 576–77. [↑](#footnote-ref-267)
268. *Id*. at 578–79; *see also* Flores v. City of San Gabriel,824 F.3d 890 (9th Cir. 2016) (cash payments in lieu of health benefits was compensation for compensable time and therefore not excludable as pay for non-working time); Callahan v. City of Sanger, 2015 WL 2455419 (E.D. Cal. May 22, 2015) (cash payments in lieu of health payments not excludable because employee must be working to qualify for reimbursement, meaning payment is tied to employees’ hours of work). [↑](#footnote-ref-268)
269. *Interstate Brands Corp.*, 57 F.3d at 578(explaining payments “akin to premium wages for working weekends, or the night shift, or in noisy plants”). [↑](#footnote-ref-269)
270. Local 246, Utility Workers Union of Am. v. Southern Cal. Edison Co., 83 F.3d 292, 296, 3 WH Cases2d 449, 451 (9th Cir. 1996). [↑](#footnote-ref-270)
271. *Flores*, 824 F.3d at 900. [↑](#footnote-ref-271)
272. WH Op., 1999 WL 33210905 (Nov. 23, 1999). [↑](#footnote-ref-272)
273. *Id.* at \*2. [↑](#footnote-ref-273)
274. 29 U.S.C. §207(e)(3)(c). [↑](#footnote-ref-274)
275. 29 C.F.R. §§550.1, 550.2; *see also* Mitchell v. Kickapoo Prairie Broad. Co., 182 F. Supp. 578, 582, 14 WH Cases 554 (W.D. Mo. 1960), *aff’d in part, rev’d in part*, 288 F.2d 778 (8th Cir. 1961) (using definition of “talent fee” in 29 C.F.R. §550.2). [↑](#footnote-ref-275)
276. 29 U.S.C. §207(h). [↑](#footnote-ref-276)
277. Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 425, 5 WH Cases 367 (1945). [↑](#footnote-ref-277)
278. *Id*. [↑](#footnote-ref-278)
279. 29 C.F.R. §778.109; *see also* Zimmerli v. City of Kansas City, 996 F.3d 857, 863–64 (8th Cir. 2021) (finding CBA-based payment structure complied with FLSA where employees’ regular rate was calculated based on annual scheduled hours and seniority-based monthly compensation, which was then paid for first 40 hours of work and paid at greater than one-and-one-half that rate for hours over 40, citing §778.109); Aaron v. City of Wichita, 54 F.3d 652, 655, 2 WH Cases2d 1159 (10th Cir. 1995) (determining that regular rate of pay is hourly rate actually paid); Frank v. McQuigg, 950 F.2d 590, 591 (9th Cir. 1991) (finding regular rate always hourly rate). [↑](#footnote-ref-279)
280. 29 C.F.R. §778.109; *see also* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580 n.16, 2 WH Cases 47 (1942); *Frank*, 950 F.2d at 591 (recognizing mathematical formula provided in 29 C.F.R. §778.109); Amador v. City of Ceres, 2017 WL 3009186, 2017 U.S. Dist. LEXIS 109879, at \*10 (E.D. Cal. July 14, 2017) (rejecting plaintiffs’ argument that regular rate should be calculated based on scheduled hours, rather than actual hours). See Chapter 8, Compensable Hours, for a discussion of how to determine the number of hours worked. [↑](#footnote-ref-280)
281. 29 C.F.R. §778.109. [↑](#footnote-ref-281)
282. *Id*. §778.110. [↑](#footnote-ref-282)
283. *Id*. §778.115. *See also*

     *Second Circuit:* Gorman v. Consolidated Edison Corp., 488 F.3d 586, 596 (2d Cir. 2007) (using weighted average to determine regular rate for employees with basic rate and multiple shift differentials under CBA); Brock v. Wilamowsky, 833 F.2d 11, 14, 16–17, 28 WH Cases 808 (2d Cir. 1987) (approving use of weighted average method to calculate regular rates); Scott v. City of N.Y., 604 F. Supp. 2d 602, 605 (S.D.N.Y. 2009) (adding payments to canine handlers for canine care outside regular hours to salary and dividing that number by number of non-overtime hours in work period).

     *Third Circuit:* Gonzalez v. Bustleton Servs., Inc., 2010 WL 1813487, at \*4 (E.D. Pa. Mar. 5, 2010) (finding workers entitled to one and one-half times weighted average pay for all jobs performed and rejecting employer’s argument that no overtime pay owed because elevated prevailing wage rate for different job more than double workers’ base-wage rate).

     *Ninth Circuit:* Parth v. Pomona Valley Hosp. Med. Ctr., 630 F.3d 794, 804 (9th Cir. 2010) (employing “weighted average” method of determining regular rate acceptable for nurses paid at different rates for different shifts).

     *Eleventh Circuit:*Allen v. Board of Pub. Ed. For Bibb Cnty., 495 F.3d 1306, 1312–13 (11th Cir. 2007) (paying different rates for different routes allowed; no requirement that work be different).

     *Opinion Letters:* WH Op. FLSA2002-6, 2002 WL 32406596, at \*2 (Aug. 13, 2002) (approving city’s plan to pay weighted average overtime rate to noncareer firefighters where they were paid one hourly rate for principal job and another hourly rate to serve as part-time firefighters). [↑](#footnote-ref-283)
284. *See Allen*, 495 F.3d at 1312–13 (reasoning that DOL interpretive bulletin did not mandate that work must be different to be at different rates); *see also Parth*, 630 F.3d at 801–02 (rejecting argument that employees cannot be paid different rates for different shifts); *Gonzalez*, 2010 WL 1813487, at \*4 (rejecting argument that work be of different types, citing cases where average was used based on different shifts) (citing *Allen* and Parth v. Pomona Valley Hosp. Med Ctr., 584 F.3d 794 (9th Cir. 2009)). [↑](#footnote-ref-284)
285. 29 U.S.C. §207(g). [↑](#footnote-ref-285)
286. The method for computing wages for pieceworkers is detailed in 29 C.F.R. §778.111. For an alternative method of complying with overtime wages for pieceworkers, see 29 C.F.R. §778.418. *See* Zumerling v. Devine, 769 F.2d 745, 751–53, 27 WH Cases 521 (Fed. Cir. 1985) (illustrating different methods of computation). These issues are addressed in detail in §VI.C.2 [Exceptions From the Regular Rate Principles; Computing Overtime Pay With the Rate Applicable to the Type of Work Performed in Overtime Hours; Piecework] of this chapter. [↑](#footnote-ref-286)
287. 29 C.F.R. §778.111(a).

     *See*

     *Second Circuit:* Pest v. Bridal Works of N.Y., Inc., 268 F. Supp. 3d 413, 429–30 (E.D.N.Y. 2017) (finding that employee’s regular rate for piecework would be determined based on 40 hours per week, because the testimony established that the parties expected that is the number of hours her piece-rate work would take).

     *Fourth Circuit:* Alston v. DirecTV, Inc., 254 F. Supp. 3d 765, 795 (D.S.C. 2017) (finding that method of calculating regular rate and overtime where employee was paid on piece-rate basis was consistent with *Walling v*. *Youngerman-Reynolds Hardwood Co*., 325 U.S. 419 (1945), and DOL guidance).

     *Fifth Circuit:* Avila v. A Healthy Living Home Health Inc.*,* 2017 WL 5022542,   
     2017 U.S. Dist. LEXIS 182510, at \*4 (S.D. Tex. Nov. 3, 2017) (applying piece-rate calculation of regular rate to per-visit flat rate payment plan for home health care nurses).

     *Eleventh Circuit:* Hernandez v. Tadala’s Nursery, Inc., 34 F. Supp. 3d 1229 (S.D. Fla. 2014) (calculating hourly rate for work paid hourly and at piece rate). [↑](#footnote-ref-287)
288. 29 C.F.R. §778.111(a); *see also Avila*, 2017 U.S. Dist. LEXIS 182510, at \*4 (overtime premium for piece-rate is half-time for hours over 40); Amador v. Guardian Installed Servs., Inc., 575 F. Supp. 2d 924, 929 (N.D. Ill. 2008) (holding regular rate correctly computed at half time where insulation installers paid under commission-based piecework system that provided for certain rates per square foot of material installed). [↑](#footnote-ref-288)
289. 29 C.F.R. §778.111(a). [↑](#footnote-ref-289)
290. *Id*. §778.318(a), (c); Lockhart v. Republic Servs., Inc., 2020 BL 173690, 2020 WL 2308438, at \*22 (W.D. Tex. May 8, 2020) (finding that employer properly calculated regular rate by including productive and nonproductive time where it divided total piece payments (“can pay”) by all time worked); Serrano v. Republic Servs. Inc., 2017 WL 2531918, 2017 U.S. Dist. LEXIS 89551, at \*160–66, 192 (S.D. Tex. June 12, 2017) (finding that employer could not calculate regular rate using non-productive time where there was not agreement; instead, piece rate would be divided only by productive time, and nonproductive time regular rate would have to be calculated separately); Alston v. DirecTV, Inc., 254 F. Supp. 3d 765, 796 (D.S.C. 2017) (emphasizing that subsection (c) applies only if there is agreement between parties that piece rate compensates for productive and nonproductive hours, and finding issue of material fact as to issue of agreement). [↑](#footnote-ref-290)
291. WH Op. FLSA2020-17 (Nov. 30, 2020); *see Lockhart*, 2020 WL 2308438, at \*24 (inferring from employee’s conduct that he had agreed and understood that the piece rate covered his productive and nonproductive work, despite his protestation that he did not understand it, including because he and other workers did not separate kinds of time on their route sheets, and he was paid and accepted paychecks for years under that system). [↑](#footnote-ref-291)
292. 29 C.F.R. §778.111(a); *see also* WH Op. FLSA2001-12, 2001 WL 1592792, at \*1–2 (May 1, 2001) (rejecting use of higher number of hours than worked to determine regular rate for pieceworkers). [↑](#footnote-ref-292)
293. 29 C.F.R. §778.111(b). [↑](#footnote-ref-293)
294. *Id.* [↑](#footnote-ref-294)
295. *Id.* [↑](#footnote-ref-295)
296. *Id.* [↑](#footnote-ref-296)
297. 29 C.F.R. §778.112 (detailing method for computing wages for day and job rates); *see also*

     *Second Circuit:* Hernandez v. NJK Contractors, Inc., 2015 WL 1966355 (E.D.N.Y. May 1, 2015) (excluding uncompensated preliminary and postliminary time for work done at shop from calculation of regular rate because employer never intended to compensate employees for such time in setting the day rate).

     *Third Circuit:* Walsh v. Fusion Japanese Steakhouse, Inc., 548 F. Supp. 3d 513, 525 (W.D. Pa. 2021) (“day rate” calculation for teriyaki chef did not provide for premium pay at 1.5 times regular rate and violated FLSA, regardless of fact that rate compensated chef above minimum wage for straight time hours).

     *Fourth Circuit:* Lee v. Vance Exec. Prot., Inc., 7 F. App’x 160, 163 (4th Cir. 2001) (finding that security guards paid “day rate” where paid flat amount per day regardless of hours worked, rejecting employer’s “artificial” division of workday into four hours of straight time and eight hours of overtime; thus, employer could not exclude “extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked … in excess of the employee’s normal working hours or regular working hours” under 29 C.F.R. §788.202(c)); Guillen v. Armour Home Improvement, Inc., 2023 BL 193116, 2023 WL 3819295, 2023 U.S. Dist. LEXIS 98760 (D. Md. June 5, 2023) (finding that employee was paid by the hour and not by the job where he submitted hours worked bi-weekly, and not records based on a job completed).

     *Fifth Circuit:* Serrano v. Republic Servs., Inc., 227 F. Supp. 3d 768, 770–72 (S.D. Tex. 2017) (finding that plaintiffs’ payment consisting of job/day rates, piece rates, and hourly rates was consistent with FLSA; rejecting argument that day rate payment plan cannot be combined with other forms of compensation).

     *Eighth Circuit:* Dole v. Trusty, 707 F. Supp. 1074, 1076, 29 WH Cases 315 (W.D. Ark. 1989) (explaining that, regarding truck driver whose wages were paid with intent to compensate at flat trip rate, regular rate must be computed according to job rate method under 29 C.F.R. §778.112, as opposed to fluctuating workweek (FWW) method for salaries under 29 C.F.R. §778.114).

     *But see* Dufrene v. Browning-Ferris, Inc., 207 F.3d 264, 268–69, 5 WH Cases2d 1697 (5th Cir. 2000) (rejecting plaintiffs’ argument that employer’s provision of sick-day pay, paid vacation, and other fringe benefits precluded resort to day-rate method). [↑](#footnote-ref-297)
298. 29 C.F.R. §778.112. [↑](#footnote-ref-298)
299. *See, e.g*., 29 C.F.R. §778.114(c) (relating to payment on FWW basis). [↑](#footnote-ref-299)
300. 29 C.F.R. §778.112; *see also* *Dufrene*, 207 F.3d at 268 (rejecting argument that there must be an understanding for day rate plan); Hartsell v. Dr. Pepper Bottling Co., 207 F.3d 269, 273, 5 WH Cases2d 1700 (5th Cir. 2000) (same); Powell v. Carey Int’l, 514 F. Supp. 2d 1302, 1312, 12 WH Cases2d 1253 (S.D. Fla. 2007) (holding §778.112 does not require agreement for job rate). [↑](#footnote-ref-300)
301. 29 C.F.R. §778.113(a) (detailing conversion of weekly salary to regular rate); *see also* Newmark v. Triangle Alum. Indus., Inc., 277 F. Supp. 480, 482, 18 WH Cases 406 (N.D. Ga. 1967) (determining overtime is calculated after dividing agreed-upon hours of work into wage rather than actual number of hours worked). See Chapter 16, Litigation Issues, §IX.B.1 [Remedies; Monetary Damages for Unpaid Minimum Wages and Overtime; Computation: Generally], for a discussion of how to calculate damages where an employee is paid on a salaried basis. [↑](#footnote-ref-301)
302. 29 C.F.R. §778.113(a) (Apr. 5, 2011); *see also* Baltimore City Lodge No. 3 v. Baltimore Police Dep’t, 2017 WL 3216775, 2017 U.S. Dist. LEXIS 118717, at \*20 (D. Md. July 28, 2017) (where employees were paid annual salary, regular rate would be determined based on hours salary was intended to compensate, and that could be all hours worked, depending on the “applicable contract and other relevant evidence”). [↑](#footnote-ref-302)
303. 29 C.F.R. §778.113(a). [↑](#footnote-ref-303)
304. *Id.* §778.113(b) (detailing conversion of salaries for periods other than workweek). [↑](#footnote-ref-304)
305. *Id.*; Wethington v. City of Montgomery, 935 F.2d 222, 227, 30 WH Cases 667 (11th Cir. 1991) (explaining regular rate of pay in salaried system is determined by converting pay to its hourly equivalent); *see also* Lee v. Coahoma Cnty., 937 F.2d 220, 225, 30 WH Cases 764 (5th Cir. 1991). [↑](#footnote-ref-305)
306. 29 C.F.R. §778.113(b). [↑](#footnote-ref-306)
307. *Id.* §778.113(a). [↑](#footnote-ref-307)
308. *Id*. §778.113(b). [↑](#footnote-ref-308)
309. Some states, such as California, do not allow use of the FWW method. For a treatment of state wage and hour laws, see Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-309)
310. *Id*. §778.114. *See* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 579–81, 2 WH Cases 47 (1942) (determining that where employment contract is for fixed weekly wage and fluctuating hours of work, “regular rate” is quotient of amount paid per week divided by number of hours worked in that week). [↑](#footnote-ref-310)
311. 85 Fed. Reg. 84970 (June 8, 2020). [↑](#footnote-ref-311)
312. *See* Arnold v. Kelly’s Café Am., Inc., 2005 WL 1950238, at \*2 (W.D. Wash. Aug. 12, 2005) (rejecting FWW method in part because employee’s average hourly earnings under method less than required minimum wage in 19 of first 20 weeks). *But see* Aiken v. County of Hampton, 172 F.3d 43, 1998 WL 957458, at \*5, 6 WH Cases2d 896 (4th Cir. 1998) (table) (finding employer’s limited use of minimum wage adjustment did not indicate noncompliance with minimum wage requirements for use of FWW method, relying on two 1969 DOL opinion letters that permitted adjustments in as many as five and 27 weeks in one year, which also reasoned that salary must be “reasonably calculated” to provide average hourly wage above minimum); Cash v. Conn Appliances, 2 F. Supp. 2d 884, 894–95, 4 WH Cases2d 941 (E.D. Tex. 1998) (deeming evidence of isolated instances when regular rate fell below minimum wage for individual employees insufficient to preclude use of FWW method, provided that shortfall was cured, and relying on same opinion letters as in *Aiken*). [↑](#footnote-ref-312)
313. 85 Fed. Reg. 84970, 84992 (June 8, 2020). [↑](#footnote-ref-313)
314. 29 C.F.R. §778.114(a)(5). *Cf.* Walsh v. KDE Equine, LLC, 56 F.4th 409, 413–14 (6th Cir. 2022) (employer who kept inaccurate and vague time sheets and notes and did not track actual hours worked could not rely on FWW method because it could not calculate overtime premiums from records available). [↑](#footnote-ref-314)
315. 29 C.F.R. §778.114(a)(5). *See also*

     *First Circuit:* Parisi v. Town of Salem, 1997 WL 228509, at \*3, 3 WH Cases2d 1460 (D.N.H. Feb. 20, 1997) (finding that where there is valid fluctuating hours arrangement, regular rate determined by dividing total base pay by hours actually worked, or adding any bonus payments and dividing revised amount by total hours worked).

     *Second Circuit:* Adams v. Department of Juvenile Justice, 143 F.3d 61, 67–68, 4 WH Cases2d 932, 936 (2d Cir. 1998) (finding regular rate determined based on actual hours worked); Ramos v. Telgian Corp., 176 F. Supp. 3d 181 (E.D.N.Y. 2016) (analyzing FWW elements and denying summary judgment because there was evidence that plaintiffs were not paid fixed salary every week and defendants had not shown clear understanding that plaintiffs’ salaries were intended to compensate them for all hours worked); Yourman v. Dinkins, 865 F. Supp. 154, 163–65, 2 WH Cases2d 686 (S.D.N.Y. 1994) (explaining application of FWW method of overtime compensation), *aff’d*, 84 F.3d 655, 3 WH Cases2d 524 (2d Cir. 1996).

     *Third Circuit:* Rau v. Darling’s Drug Store, Inc., 388 F. Supp. 877, 883–84, 22 WH Cases 182 (W.D. Pa. 1975) (determining that where employee’s salary compensates for all hours worked, hourly rate is multiplied by one half because employee has already been compensated on straight-time basis for overtime hours).

     *Fifth Circuit:* Ransom v. M. Patel Enters., 734 F.3d 377, 384–86 (5th Cir. 2013) (holding that magistrate judge should have used FWW method and calculated overtime damages using half-time premium based on all hours worked, following prior Fifth and Seventh Circuit decisions on similar facts where employer and employee agreed to fixed salary for fluctuating hours); Blackmon v. Brookshire Grocery Co., 835 F.2d 1135, 1138–39, 28 WH Cases 718 (5th Cir. 1988) (finding that when employer and employee have agreed on fixed salary for varying hours, method of computation calls for dividing actual hours worked each workweek into fixed salary); Yadav v. Coleman Oldsmobile, Inc., 538 F.2d 1206, 1207–08, 22 WH Cases 1260 (5th Cir. 1976) (affirming use of FWW formula); Allen v. Entergy Operations, Inc., 163 F. Supp. 3d 324, 334–35 (E.D. La. 2016) (analyzing FWW elements and *Ransom* in determining if FWW should be applied to each plaintiff). *But see* Dacar v. Saybolt, L.P., 914 F.3d 917 (5th Cir. 2018) (holding, in a matter of first impression, regarding the proper method of calculating unpaid overtime damages where an employer paid its nonexempt employees using the FWW method that did not satisfy the requirements of the interpretive bulletin at 29 C.F.R. §778.114, that the proper method was to divide the weekly pay by all hours worked to determine the applicable regular rate, and then multiply that rate by 1.5 times overtime hours worked rather than by .5).

     *Eighth Circuit:* Marshall v. Hamburg Shirt Corp., 577 F.2d 444, 445 n.2, 23 WH Cases 889 (8th Cir. 1978) (applying interpretive bulletin governing overtime pay for employees with FWW to employee and finding contract and method of payment plan offered to employees not valid).

     *Ninth Circuit:* Huyck v. Limitless, LLC, 2016 WL 5402219, at \*4–5 (D. Or. Sept. 26, 2016) (holding that FWW exception did not apply because overtime pay must be paid contemporaneously with regular pay and defendant paid flat daily or weekly rate with no overtime premiums).

     *Eleventh Circuit:* Hernandez v. Plastipak Packaging, Inc., 15 F.4th 1321, 1328 (11th Cir. 2021) (holding that employer complied with FWW method by paying fixed salary for fluctuating hours and at least half-time pay for all hours over 40; payment of additional night shift premiums and holiday bonuses did not preclude application of FWW method because salary was fixed and FLSA only requires minimum of half-time pay but does not preclude paying more).

     *Cf.* Black v. Settlepou, P.C., 732 F.3d 492, 496–501 (5th Cir. 2013) (holding that damages should not have been calculated based on half-time formula for fluctuating hours where evidence showed no agreement by employee to work for fixed salary for fluctuating hours). [↑](#footnote-ref-315)
316. *See*

     *Supreme Court:* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 579–80 (1942).

     *First Circuit:* Valerio v. Putnam Assoc., Inc., 173 F.3d 35, 39–40 (1st Cir. 1999).

     *Fifth Circuit:* *Blackmon*, 835 F.2d at 1137.

     *Sixth Circuit:* Fegley v. Higgins, 19 F.3d 1126, 1130 (6th Cir. 1994).

     *Seventh Circuit:* Zoltek v. Safelite Glass Corp., 884 F. Supp. 283, 286 (N.D. Ill. 1995).

     *Eighth Circuit:* Yellow Transit Freight Lines, Inc. v. Balven, 320 F.2d 495, 499–500 (8th Cir. 1963).

     *Ninth Circuit:* Brennan v. Valley Towing Co., Inc., 515 F.2d 100, 110 (9th Cir. 1975).

     *Eleventh Circuit:* *Hernandez*, 15 F.4th at 1326;Torres v. Bacardi Global Brands Promotions, Inc., 482 F. Supp. 2d 1379, 1381–82 (S.D. Fla. 2007). [↑](#footnote-ref-316)
317. *See, e.g.,* Condo v. Sysco Corp., 1 F.3d 599, 601–02 (7th Cir. 1993). [↑](#footnote-ref-317)
318. *Condo*, 1 F.3d at 601–02 (holding that fact that “under the system that is enumerated in §778.114 the greater number of hours an employee works, the lower his regular rate will be and the less he will receive per overtime hour” does not render it unlawful); Highlander v. K.F.C. Nat’l Mgmt. Co., 805 F.2d 644, 647–48, 27 WH Cases 1524 (6th Cir. 1986) (holding that use of FWW, which resulted in lower earnings per hour as number of hours per week increased, did not violate FLSA). [↑](#footnote-ref-318)
319. 29 C.F.R. §778.114(b) (Aug. 7, 2020) (prior example in this section was updated with different salary levels and different hours of work in 2020); *see also* Secretary v. Daylight Dairy Prods., 779 F.2d 784, 788 & n.3, 27 WH Cases 766 (1st Cir. 1985) (recognizing and applying example in 29 C.F.R. §778.114(b)). The example in the interpretive bulletin was updated in 2011 as part of an effort to modify outdated examples. The DOL inserted 37.5 hours in place of the prior 44 hours “so that there would be an exact regular rate calculation in each instance, thereby eliminating the need to use ‘approximately.’” 76 Fed. Reg. 18,832, 18,849 (Apr. 5, 2011). [↑](#footnote-ref-319)
320. 29 C.F.R. §778.114(b). [↑](#footnote-ref-320)
321. *Id.* §778.114(c); WH. Op., 1966 DOLWH Lexis 374 (Mar. 10, 1966); *see also* Hall v. Plastipak Holdings, Inc., 726 F. App’x 318, 322 (6th Cir. Feb. 28, 2018) (holding that payment of full hourly rate, rather than half-time rate, for overtime hours did not violate the FWW). The DOL opinion letter does not address whether the effect of paying “more than what is required” is compatible with the FWW method. [↑](#footnote-ref-321)
322. 29 C.F.R. §778.114(a)(1). [↑](#footnote-ref-322)
323. Cash v. Conn Appliances, 2 F. Supp. 2d 884, 904–06, 4 WH Cases2d 941 (E.D. Tex. 1998) (rejecting use of salary basis regulation from 29 C.F.R. §541.118 to analyze issue of compliance with FWW method under §778.114). *But see* Dooley v. Liberty Mut. Ins. Co., 369 F. Supp. 2d 81, 85–86 (D. Mass. 2005) (finding payment of additional compensation for Saturday work (“premium pay”), which was not “overtime pay,” precluded application of FWW method). Although not directly considered by the court, this result may be viewed as inconsistent with the DOL’s acceptance that payments made in addition to salary (e.g., overtime premiums) will not destroy the salary basis of payment in the context of white-collar exemption analyses. [↑](#footnote-ref-323)
324. 29 C.F.R. §778.114(c); *see also* Kim v. Capital Dental Tech. Lab., Inc., 279 F. Supp. 3d 765, 774 (N.D. Ill. 2017) (denying summary judgment where evidence showed that salary was reduced for partial-day absences or lack of work); Ramos v. Telgian Corp., 176 F. Supp. 3d 181, 196–97 (E.D.N.Y. 2016) (denying summary judgment because of evidence that plaintiffs were not paid fixed salary every week); Yourman v. Dinkins, 865 F. Supp. 154, 163–65, 2 WH Cases2d 686 (S.D.N.Y. 1994) (refusing to apply FWW method of overtime compensation because employer reduced employees’ pay for working fewer than minimum number of hours), *aff’d*, 84 F.3d 655, 3 WH Cases2d 524 (2d Cir. 1996); 29 C.F.R. §§778.306(b), 778.323. [↑](#footnote-ref-324)
325. 29 C.F.R. §778.114(a)(2); *see* Thomas v. Bed, Bath & Beyond Inc., 961 F.3d 598, 607 (2d Cir. 2020) (explaining that “a fixed weekly wage guarantee for straight time pay [is] a core prerequisite for the FWW method”). [↑](#footnote-ref-325)
326. WH Op. FLSA2006-15, 2006 WL 1488849, at \*1 (May 12, 2006) (referencing older letters). [↑](#footnote-ref-326)
327. *Id*. *But see Thomas*, 961 F.3d at 608–09 (affirming summary judgment that employer “generally [paid] appellants guaranteed weekly wages” and satisfied FWW’s fixed salary requirement where employer paid full weekly salary for all but six weeks out of more than 1,500 workweeks, four of which were corrected payroll errors, one of which was arrangement to take prehire scheduled vacation, and last of which was a day of FMLA leave, regardless of whether employer complied with FMLA regulation); Samson v. Apollo Res., Inc., 242 F.3d 629, 638–39 (5th Cir. 2001) (holding even defendant’s “deductions for tardiness” for willful absences did not defeat use of FWW method because “central feature” of method is fixed salary for all hours employee “called upon to work,” not to require full salary “even though the employee decides not to work all the hours that he is called upon to work,” because latter would invite abuse). [↑](#footnote-ref-327)
328. 29 C.F.R. §778.114(d) (Aug. 7, 2020); WH Op. FLSA2006-15, 2006 WL 1488849, at \*1 (May 12, 2006) (permitting deductions for “willful absences or tardiness or for infractions of major work rules” and citing favorably *Samson v. Apollo Res., Inc*., 242 F.3d 629, 638–39 (5th Cir. 2001)). *See also* FOH §32b04b(b). *But see* Mitchell v. Abercrombie & Fitch Co., 428 F. Supp. 2d 725, 11 WH Cases2d 737 (S.D. Ohio 2006) (rejecting argument that pay was not fixed salary because employees subject to discipline if their work time and benefit (e.g., vacation) time did not add up to 40 hours a week). For a further discussion of disciplinary deductions, see §V.C.5 [Special Problems Concerning the Regular Rate; Deductions From Wages; Deductions for Disciplinary Reasons] of this chapter. [↑](#footnote-ref-328)
329. *See*

     *Second Circuit:* Ramos v. Telgian Corp., 176 F. Supp. 3d 181, 196 (E.D.N.Y. 2016) (denying summary judgment to employer where there was no evidence “that salary was being pro-rated as a result of company holidays, [p]laintiffs’ own personal or medical leave, [p]laintiffs’ departure from Telgian, or for any other reason consistent with the FWW scheme”).

     *Fourth Circuit:* Aiken v. County of Hampton, 172 F.3d 43, 6 WH Cases2d 896, 1998 WL 957458, at \*4 (4th Cir. Sept. 22, 1998) (table).

     *Sixth Circuit:* Hall v. Plastipak Holdings, Inc., 726 F. App’x 318, 322 (6th Cir. 2018) (appropriate to deduct leave from vacation pay bank for scheduled vacation; this is not a deduction from salary that is inconsistent with FWW). [↑](#footnote-ref-329)
330. FOH §32b04b(c). [↑](#footnote-ref-330)
331. *See*

     *First Circuit:* O’Brien v. Town of Agawam, 350 F.3d 279, 288–89 (1st Cir. 2003) ($10 shift differential precluded use of FWW method); Dooley v. Liberty Mut. Ins. Co., 369 F. Supp. 2d 81, 86 (D. Mass. 2005) (Saturday shift premium precluded use of FWW method).

     *Second Circuit: Thomas*, 961 F.3d at 611–12 (providing an alternative paid day off to compensate employee for working holiday or scheduled day off is not additional compensation for hours worked, i.e., not an hours-based bonus, and, thus, is permissible under FWW); Ayers v. SGS Control Servs., Inc., 2007 WL 646326, at \*9–10 (S.D.N.Y. Feb. 27, 2007) (payment of sea-duty pay and day-off pay inconsistent with using FWW method).

     *Sixth Circuit:* Bacon v. Eaton Aeroquip LLC, 2014 WL 5090825 (E.D. Mich. Oct. 9, 2014) (finding shift differentials inconsistent with FWW method).

     *But see* Lalli v. General Nutrition Ctrs., Inc., 814 F.3d 1 (1st Cir. 2016) (affirming lower court’s decision granting motion to dismiss, finding that company can use FWW pay model when it factors sales commission into regular weekly rate). [↑](#footnote-ref-331)
332. *See* Perez v. Radioshack Corp., 2005 WL 3750320, at \*5, 11 WH Cases2d 163 (N.D. Ill. Dec. 14, 2005); Lance v. The Scotts Co., 2005 WL 1785315, at \*6 (N.D. Ill. July 21, 2005) (evaluating both FWW regulation and commission-payment regulation, §778.118, concluding plan met FWW requirements); Parisi v. Town of Salem, 1997 WL 228509, at \*3, 3 WH Cases2d 1460 (D.N.H. Feb. 20, 1997) (finding that where there is valid fluctuating hours arrangement, regular rate is determined by dividing total base pay by hours actually worked, or adding any bonus payments and dividing revised amount by total hours worked). *Cf.* Brown v. Nipper Auto Parts & Supplies, Inc., 2009 WL 1437836, at \*6 n.6 (W.D. Va. May 21, 2009) (finding fixed salary requirement met even though quarterly bonus paid). [↑](#footnote-ref-332)
333. 316 U.S. 572 (1942). [↑](#footnote-ref-333)
334. 73 Fed. Reg. 43,654, 43,662 (July 28, 2008); 76 Fed. Reg. 18,831, 18,849 (Apr. 5, 2011) (explaining its view from 2008). [↑](#footnote-ref-334)
335. 76 Fed. Reg. at 18,850 (“While the Department continues to believe that the payment of bonus and premium payments can be beneficial for employees in many other contexts, we have concluded that unless such payments are overtime premiums, they are incompatible with the fluctuating workweek method of computing overtime under section 778.114.”); *see also* Speer v. Cerner Corp., 2016 WL 5395268, at \*7–8 (W.D. Mo. Sept. 26, 2016) (holding that §778.114 is entitled to heightened degree of deference because it went through notice and comment rulemaking and did not change; concluding “that if additional pay … was tied to hours worked, such pay could negate the FWW model of overtime pay”); Sisson v. Radioshack Corp., 2013 WL 945372, at \*6 (N.D. Ohio Mar. 11, 2013) (deferring to 2011 rule for post-rule date analysis, and refusing to dismiss claim of failure to pay overtime where company used FWW method plus bonuses); Switzer v. Wachovia Corp., 2012 WL 3685978, at \*4–5 (S.D. Tex. Aug. 24, 2012) (holding that nondiscretionary bonuses paid no later than 2009 did not violate FWW, citing DOL’s 2008 statement acknowledging same, a 2009 opinion letter later withdrawn, and plain language of interpretive bulletin, but acknowledging DOL’s change in position). [↑](#footnote-ref-335)
336. 76 Fed. Reg. at 18,850. [↑](#footnote-ref-336)
337. *Id.* [↑](#footnote-ref-337)
338. *See* Willis v. RadioShack Corp., 981 F. Supp. 2d 245, 262 (S.D.N.Y. 2013) (evaluating DOL’s history on proposed rule and withdrawal of rule and distinguishing between performance bonuses and hours bonuses); *see also* Lalli v. General Nutrition Ctrs., Inc., 814 F.3d 1 (1st Cir. 2016) (affirming lower court’s decision that performance-based commissions may be included in calculation of regular rate under FWW method); *Switzer,* 2012 WL 3685978, at \*3 (reasoning that performance-based bonuses permissible along with FWW pay plan). [↑](#footnote-ref-338)
339. 85 Fed. Reg. 34,970 (June 8, 2020). The final rule became effective August 7, 2020. [↑](#footnote-ref-339)
340. *Id.* at 34,970. [↑](#footnote-ref-340)
341. *Id.* at 34,970–71. [↑](#footnote-ref-341)
342. *Id.* at 34,971. [↑](#footnote-ref-342)
343. 15 F.4th 1321 (11th Cir. 2021). [↑](#footnote-ref-343)
344. *Id.* at 1329. [↑](#footnote-ref-344)
345. *Id.* (finding that this interpretation was consistent with *Missel* and First Circuit decision, Lalli v. Gen. Nutrition Ctrs., Inc., 814 F.3d 1, 4 (1st Cir. 2016)). [↑](#footnote-ref-345)
346. Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018). [↑](#footnote-ref-346)
347. *Hernandez,* 15 F.4th at 1329–30. [↑](#footnote-ref-347)
348. *Id.* at 1330. [↑](#footnote-ref-348)
349. *Id.* at 1330–31 (disagreeing on this point with *Lalli* and Fifth Circuit case, Dacar v. Saybolt, LP, 914 F.3d 917, 926 (5th Cir. 2018)). [↑](#footnote-ref-349)
350. 29 C.F.R. §778.114(a)(3); Ramos v. Telgian Corp., 176 F. Supp. 3d 181, 197–98 (E.D.N.Y. 2016) (salary covered minimum wage). [↑](#footnote-ref-350)
351. Gomez v. Crescent Servs. LLC, 25 F. Supp. 3d 965 (S.D. Tex. 2014) (finding regular subminimum wage workweeks could preclude use of FWW method); Martinez v. China Boy, Inc., 2016 WL 7480264, at \*2 (D.D.C. Dec. 29, 2016) (same); Arnold v. Kelly’s Café Am., Inc., 2005 WL 1950238, at \*2 (W.D. Wash. Aug. 12, 2005). [↑](#footnote-ref-351)
352. Aiken v. County of Hampton, 172 F.3d 43, 6 WH Cases2d 896, 1998 WL 957458, at \*4 (4th Cir. Sept. 22, 1998) (table); Cash v. Conn Appliances, 2 F. Supp. 2d 884, 894–95, 4 WH Cases2d 941 (E.D. Tex. 1998). [↑](#footnote-ref-352)
353. 29 C.F.R. §778.114(a)(4); Hall v. Plastipak Holdings, Inc., 254 F. Supp. 3d 961, 968 (E.D. Mich. 2017) (finding that employer satisfied clear mutual understanding requirement, recognizing that plaintiffs need not “be experts at calculating the fluctuating workweek formula,” but instead that “the parties must understand that the employee will not be docked pay for working less than 40 hours in a week” and that employees do not need to know how overtime is calculated (citing DOL opinion letter)); *Ramos*, 176 F. Supp. 3d at198–99 (conflicting statements in manual and by supervisors about whether salary covered all hours worked and payment of overtime premium precluded summary judgment for employer on finding that there was clear mutual understanding); Allen v. Entergy Operations, Inc., 163 F. Supp. 3d 324, 334–35 (E.D. La. 2016) (finding that clear mutual understanding existed where evidence showed that plaintiffs agreed to work fluctuating hours, even if they found overtime hours excessive). [↑](#footnote-ref-353)
354. Bailey v. County of Georgetown, 94 F.3d 152, 156–57, 3 WH Cases2d 776 (4th Cir. 1996). [↑](#footnote-ref-354)
355. Griffin v. Wake Cnty., 142 F.3d 712, 716, 4 WH Cases2d 929 (4th Cir. 1998) (explaining §778.114 does not require employer to explain precise details of administration of fluctuating hours plan and relying on its prior decision in *Bailey*).

     *See also*

     *First Circuit:* Valerio v. Putnam Assocs., Inc., 173 F.3d 35, 39–40, 5 WH Cases2d 389 (requiring clear mutual understanding at time of hiring that plaintiff’s weekly hours would fluctuate and that fixed salary provided straight-time compensation for all hours worked, and finding clear mutual understanding because plaintiff knew hours would fluctuate, even though employer did not provide overtime at outset), *amended and reh’g denied*, 5 WH Cases2d 1024 (1st Cir. 1999).

     *Second Circuit:* Banford v. Entergy Nuclear Operations, 649 F. App’x 89, 91 (2d Cir. 2016) (reversing lower court’s granting judgment as matter of law in favor of defendant on plaintiffs’ claims, where sufficient evidence existed for reasonable juror to conclude that there was not agreement to work unlimited hours for same fixed salary).

     *Fourth Circuit:* Turner v. BFI Waste Servs., LLC, 268 F. Supp. 3d 831, 838–39 (D.S.C. 2017) (no clear mutual understanding present to establish FWW method where evidence shows that employee did not understand salary to compensate for all hours worked rather than for a fixed set of hours).

     *Fifth Circuit:* Fraser v. Patrick O’Connor & Assocs., L.P., 954 F.3d 742, 749 (5th Cir. 2020) (upholding district court’s judgment, on a preponderance of the evidence, that there was no “clear mutual understanding” of payment of fixed salary regardless of hours worked); Samson v. Apollo Res., Inc., 242 F.3d 629, 637 (5th Cir. 2001) (finding employer properly calculated overtime owed by using FWW method in 29 C.F.R. §778.114, and imposing burden of proving noncompliance on employee); Sanders v. Walkingspree USA, Ltd., 2017 WL 1968860, at \*6 (W.D. Tex. Feb. 17, 2017) (holding that FWW method did not apply because initial agreement reflected parties’ expectation that plaintiff’s salary covered 40 hours per week); Hopkins v. Texas Mast Climbers, L.L.C., 2005 WL 3435033, at \*7 (S.D. Tex. Dec. 14, 2005) (holding plaintiff met burden of showing no clear mutual understanding by virtue of uncontradicted testimony that his supervisor told him he would be paid salary based on 40-hour workweek).

     *Sixth Circuit:* Hall v. Plastipak Holdings, Inc., 726 F. App’x 318, 322 (6th Cir. Feb. 28, 2018) (finding clear mutual understanding where employees signed agreement stating they would be paid pursuant to FWW method); Cowan v. Treetop Enters., Inc., 163 F. Supp. 2d 930, 940 (M.D. Tenn. 2001) (holding that employer failed to demonstrate that employees who were misclassified as exempt had clear mutual understanding that salary was intended to cover all hours worked rather than fixed schedule, so FWW method did not apply).

     *Seventh Circuit:* Heder v. City of Two Rivers, 295 F.3d 777, 780, 7 WH Cases2d 1665 (7th Cir. 2002) (CBA providing for overtime pay for every hour worked beyond stated maximum “incompatible with treating the base wage as covering any number of hours at straight time”); Kim v. Capital Dental Tech. Lab., Inc., 279 F. Supp. 3d 765, 774–75 (N.D. Ill. 2017) (denying summary judgment where employees asserted they were not paid a fixed amount, employer offered only pay stubs showing “most of the plaintiffs’ paychecks were for the same amount,” and deposition testimony of employees showed that their understanding of compensation was “less than clear,” where one plaintiff testified he was an hourly employee and also that he got a salary for all hours worked); Lance v. Scotts Co., 2005 WL 1785315, at \*7–8 (N.D. Ill. July 21, 2005) (finding plaintiff had clear mutual understanding because he knew he would receive fixed minimum salary covering straight time, plus commissions, and his hours would fluctuate; he did not need to know exactly how it would be calculated).

     *Ninth Circuit:* Tumulty v. FedEx Ground Package Sys., Inc., 2005 WL 1979104, at \*4–5 (W.D. Wash. Aug. 16, 2005) (entering summary judgment for defendant, holding that only relevant consideration as to whether “clear mutual understanding” existed for purposes of FWW method is whether parties agreed salary would be paid for all hours worked, regardless of how many).

     *Tenth Circuit:*Burris v. Dresser-Rand Co., 222 F. Supp. 3d 1067, 1076 (N.D. Okla. 2016) (holding that FWW applied in misclassification case where plaintiff understood that she would receive flat salary no matter number of hours she worked).

     *Eleventh Circuit:* Garcia v. Yachting Promotion, Inc., 662 F. App’x 795, 797–98 (11th Cir. 2016) (recognizing that “employee does not have to understand every contour of how the fluctuating workweek method is used to calculate salary, so long as the employee understands that his base salary is fixed regardless of the hours worked,” and affirming application of FWW to Spanish-speaking employee despite signing untranslated agreement where there was extraneous evidence of understanding that he was paid flat salary); Garcia v. Port Royale Trading Co., 198 F. App’x 845, 846 (11th Cir. 2006) (deeming it sufficient that plaintiff understood how much he was paid, that he was paid in form of salary, that his hours fluctuated, and that he was paid under FWW method for three years, even if he did not understand English); Teblum v. Eckerd Corp. of Fla., 2006 WL 288932, at \*4–5, 11 WH Cases2d 382 (M.D. Fla. Feb. 7, 2006) (rejecting argument that “mutual understanding” could not exist when employees did not know maximum hours they would be required to work). [↑](#footnote-ref-355)
356. *See, e.g.,*

     *Second Circuit:* Thomas v. Bed Bath & Beyond Inc., 309 F. Supp. 3d 121, 138 (S.D.N.Y. 2018) (no requirement that employee actually understands “how the FWW method works or that overtime will be paid according to this method,” and finding clear mutual understanding where forms showed employees they would be paid a fixed weekly salary regardless of hours worked and overtime for hours greater than 40 in a workweek).

     *Fourth Circuit: Griffin*, 142 F.3d at 716.

     *Ninth Circuit: Tumulty,* 2005 WL 1979104, at \*5.

     *Cf.* Hunter v. Sprint Corp., 453 F. Supp. 2d 44, 60–61 (D.D.C. 2006) (concluding FWW method should not “be used as a fall-back whenever employers mistakenly classify employees as FLSA-exempt,” and employee did not have clear mutual understanding, especially where he only knew he had to work minimum number of 40 hours to get his full salary, not that he could get it if he dropped below minimum of 40). [↑](#footnote-ref-356)
357. *Griffin*, 142 F.3d at 717. [↑](#footnote-ref-357)
358. 29 C.F.R. §778.114(a)(1). [↑](#footnote-ref-358)
359. *See* WH Op. FLSA 2020-14 (Aug. 31, 2020).

     *See also*

     *Second Circuit:* Thomas v. Bed, Bath & Beyond Inc., 961 F.3d 598, 610 (2d Cir. 2010) (“Nothing in [the statute, Supreme Court cases, or regulations] compels fluctuation in weekly schedules above and below 40 hours.”); Ramos v. Telgian Corp., 176 F. Supp. 3d 181,195–96 (E.D.N.Y. 2016)(holding that FWW does not require hours fluctuate above and below 40 each week for FWW to be used, only that it vary).

     *Fourth Circuit:* Aiken v. County ofHampton, 172 F.3d 43, 6 WH Cases2d 896, 1998 WL 957458, at \*3 (4th Cir. 1998) (following *Condo*).

     *Fifth Circuit:* Sanders v. Walkingspree USA, Ltd., 2017 WL 1968860, at \*6 (W.D. Tex. Feb. 17, 2017) (holding that FWW method did not apply in misclassification case after concluding that although plaintiff’s hours fluctuated significantly, parties’ initial agreement controlled and testimony established that expectation was that her salary covered 40 hours per week).

     *Sixth Circuit:* Mitchell v. Abercrombie & Fitch Co., 428 F. Supp. 2d 725, 734–35, 11 WH Cases2d 737 (S.D. Ohio 2006) (rejecting argument that hours must fall below 40, and citing pre-2011 interpretive bulletin example that had hours of 40, 44, 48, and 50).

     *Seventh Circuit*: Condo v. Sysco Corp., 1 F.3d 599, 602, 1 WH Cases2d 904 (7th Cir. 1993) (noting that plaintiff’s hours never dropped below 40 but that they varied, and that FWW method was satisfied).

     *Eighth Circuit:* Speer v. Cerner Co., 2015 WL 3541065 (W.D. Mo. June 3, 2015) (holding that plaintiffs’ work hours did not have to fluctuate above and below 40 hours for FWW to apply).

     *Eleventh Circuit:* Teblum v. Eckerd Corp., 2006 WL 288932, at \*5 (M.D. Fla. Feb. 7, 2006) (rejecting claim that hours must fluctuate below 40 for FWW to apply, where employer had requirement that employees work at least 50 hours per week).

     The court in *Mitchell* relied on the pre-2011 interpretive bulletin, and the 2011 amendments to that bulletin changed one of the hours examples from 44 to 37.5. The preamble to the final rule, however, does not suggest that this change was intended to modify the view that hours need not fluctuate below 40 for the FWW to apply. Rather, the preamble states that the change was made at the suggestion of an individual commenter, “so that there would be an exact regular rate calculation in each instance, thereby eliminating the need to use ‘approximately.’” 76 Fed. Reg. 18,832, 18,849 (Apr. 5, 2011). *But cf*. Hasan v. GPM Invs., LLC, 896 F. Supp. 2d 145, 150 (D. Conn. 2012) (noting in dicta in exemption misclassification case that hours should fluctuate above and below 40 in a workweek for pay plan to qualify under 29 C.F.R. §778.114); Blotzer v. L-3 Commc’ns Corp., 2012 WL 6086931, at \*12 (D. Ariz. Dec. 6, 2012) (following *Hasan* and noting same). [↑](#footnote-ref-359)
360. Flood v. New Hanover Cnty., 125 F.3d 249, 252–53, 4 WH Cases2d 139 (4th Cir. 1997) (rejecting contention that term “fluctuate” in 29 C.F.R. §778.114 included requirement of “utter unpredictability” and relying in part on 1966 DOL opinion letter that sanctioned FWW method for alternating 43- and 51-hour weekly fixed schedule). [↑](#footnote-ref-360)
361. *Id.*; *see also* Griffin v. Wake Cnty., 142 F.3d 712, 715, 4 WH Cases2d 929 (4th Cir. 1998). [↑](#footnote-ref-361)
362. *Aiken*,172 F.3d 43 (table), 1998 WL 957458, at \*3 (applying FWW even though plaintiffs claimed they were always scheduled to work at least 40 or 43 hours per week); *see also Condo*, 1 F.3d at 602–03. [↑](#footnote-ref-362)
363. 29 C.F.R. §778.117. [↑](#footnote-ref-363)
364. *Id*.; Diggs v. Ovation Credit Servs., Inc., 449 F. Supp. 3d 1280, 1292–93 (M.D. Fla. 2020) (granting partial summary judgment to plaintiffs where undisputed payroll evidence showed defendants failed to include commissions in calculating regular rate in weeks where plaintiffs worked overtime); Reinig v. RBS Citizens NA, 2017 WL 8941217 (W.D. Pa. Aug. 2, 2017) (“gross commissions” were not earned compensation, based on commission plan, and so did not need to be used as basis for calculating regular rate; only after appropriate deductions/reconciliation made were commissions earned and required to be included; no dispute that employer calculated “paid commissions” in accordance with DOL interpretive bulletin). Section 778.122 provides that, for employees who are paid wholly or partly on a commission basis, the employer may compute overtime wages on a “basic” rate. *See* 29 C.F.R. §778.400; *id*. pt. 548. For a more detailed discussion of this issue, see §VI.A.2.a [Exceptions From the Regular Rate Principles; Using Basic Rates for Regular Rates; Methods for Calculating Basic Rates; Averaging Salary] of this chapter. [↑](#footnote-ref-364)
365. Olson v. Superior Pontiac-GMC, Inc., 765 F.2d 1570, 1575, 27 WH Cases 393, *modified*, 776 F.2d 265, 27 WH Cases 691 (11th Cir. 1985) (holding employer bears burden of proving duration of pay period in excess of one week); *see also* Mogilevsky v. Bally Total Fitness Corp., 263 F. Supp. 2d 164, 168–69 (D. Mass. 2003) (including quarterly commissions in calculation of regular rate to determine unpaid overtime due, and adjusting them based on fact that commissions varied by quarter). [↑](#footnote-ref-365)
366. *See* 29 C.F.R. §778.118 (detailing calculation of regular rate for commissions paid weekly); *cf. Mogilevsky*, 263 F. Supp. 2d at 168–69 (including quarterly commissions in regular rate of pay). [↑](#footnote-ref-366)
367. 29 C.F.R. §778.118; *see also* Kornbau v. Frito-Lay N. Am., Inc., 2012 WL 3778977, at \*4, 19 WH Cases2d 1165 (N.D. Ohio Aug. 30, 2012) (dismissing claim challenging employer’s payment of half-time rate on overtime for salary plus commission sales reps, finding that it complied with §778.118, even though modeled after FWW method in §778.114; proper calculation was half-time premium on all hours worked over 40); Kaiser v. At the Beach, Inc., 2011 WL 6826577, at \*28–29 (N.D. Okla. Dec. 28, 2011) (finding that overtime damages owed to employees who were paid salary plus commissions, bonuses, and call-in shift premiums, but no overtime, were to be calculated using half-time method under §778.118 in weeks where such extra compensation earned). *But see* Parks v. Eastwood Ins. Servs., 2004 WL 5506690, at \*2 (C.D. Cal. Mar. 11, 2004) (bifurcating salary and commission damages, holding that half-time method under §778.118 would apply to calculation of overtime damages for commission portion of pay, and time-and-one-half calculation would apply to salary portion of pay). [↑](#footnote-ref-367)
368. 29 C.F.R. §778.119. [↑](#footnote-ref-368)
369. *Id*. [↑](#footnote-ref-369)
370. *Id*. [↑](#footnote-ref-370)
371. *Id*. §778.120; *see also* Brennan v. Lauderdale Yacht Basin, Inc., 493 F.2d 188, 191, 21 WH Cases 713 (5th Cir. 1974) (holding individual facts determine what constitutes reasonable and equitable method of allocating commission payments to different pay periods); Clyde v. My Buddy the Plumber Heating & Air, LLC, 2021 BL 72297, 2021 WL 778533, at \*4 (D. Utah Mar. 1, 2021) (in case addressing applicability of §207(i) exemption, finding that it was “reasonable and equitable” to annualize plaintiff’s deferred commissions earned and average them evenly across workweeks because they were earned only when fully paid, resulting in uneven patterns of payment). [↑](#footnote-ref-371)
372. 29 C.F.R. §778.120(a);*see* Vazquez v. TWC Admin., Inc., 2015 WL 2084486 (C.D. Cal. May 4, 2015) (finding that employer properly allocated deferred commissions by using method expressly approved by §778.120(a)). [↑](#footnote-ref-372)
373. *Id*. §778.120(a)(1). [↑](#footnote-ref-373)
374. See §IV.C [The “Regular Rate”; Statutory Exclusions From the Regular Rate and Payments Creditable to Overtime] of this chapter for additional illustrations. [↑](#footnote-ref-374)
375. 29 C.F.R. §778.120(a)(2) (Jan. 23, 1981). [↑](#footnote-ref-375)
376. *Id*. [↑](#footnote-ref-376)
377. *Id.* [↑](#footnote-ref-377)
378. *Id*. §778.120(a)(2)(i). [↑](#footnote-ref-378)
379. *Id*. §778.120(a)(2)(ii). [↑](#footnote-ref-379)
380. 29 C.F.R. §778.120(b). [↑](#footnote-ref-380)
381. *Id*. [↑](#footnote-ref-381)
382. *Id*. [↑](#footnote-ref-382)
383. *Id*. [↑](#footnote-ref-383)
384. *Id*. §778.121. [↑](#footnote-ref-384)
385. 29 C.F.R. §778.121. [↑](#footnote-ref-385)
386. *Id.* §778.208; WH Op. FLSA 2018-5, 2018 WL 5393304, at \*3 (Jan. 5, 2018) (annual bonus that was included in regular rate for overtime hours of alarm operators satisfied FLSA, even though bonus was not included in regular rate for non-overtime hours, because “[t]he FLSA does not dictate the method of regular rate calculation for non-overtime hours so long as the minimum wage is met for all hours”). [↑](#footnote-ref-386)
387. *Id*. §778.209(a); WH Op. FLSA 2019-7, 2019 WL 2914103, at \*3 (July 1, 2019) (annual bonus based on journey straight-time rate and calculated using 2,080 hours required that the employer recalculate the regular rate for each workweek and account for the annual bonus); WH Op. FLSA2009-21, 2009 WL 649023, at \*1 (Jan. 16, 2009) (opining that safety bonus that includes payment of overtime premium meets overtime requirement of FLSA). [↑](#footnote-ref-387)
388. 29 C.F.R. §778.209(b); Vazquez v. TWC Admin., Inc., 2015 WL 2084486 (C.D. Cal. May 4, 2015) (approving employer’s allocation of bonuses equally among workweeks as permitted by §778.209, where reasonable and equitable); WH Op. FLSA 2020-1, 2020 WL 122922 (Jan. 7, 2020) (bonus paid for completion of 10-week training program appropriately allocated across 10 weeks equally; it was not identifiable with one week, and there was nothing to suggest even allocation was inappropriate). [↑](#footnote-ref-388)
389. 29 C.F.R. §778.209(b); WH Op. FLSA 2019-7, 2019 WL 2914103, at \*3 (July 1, 2019) (recalculation of regular rate to account for annual bonus could be delayed until the end of the bonus period). [↑](#footnote-ref-389)
390. 29 C.F.R.§778.210.

     *See*

     *Second Circuit:* Siomkin v. Fairchild Camera & Instrument Corp., 174 F.2d 289, 292–94 (2d Cir. 1949) (recognizing percentage bonus method).

     *Fifth Circuit:* Brock v. Two “R” Drilling Co., 789 F.2d 1177, 1179–80, 27 WH Cases 1254, 1255–56 (5th Cir. 1986) (recognizing percentage bonus method, but remanding for evaluation by district court because of lack of finding on how weeks with excess hours addressed).

     *Sixth Circuit:* Adam v. Macklin, 69 F. Supp. 262, 267 (E.D. Mich. 1946) (approving bonus that included 1.5 times base rate and fluctuating incentive), *aff’d sub nom.* DeWaters v. Macklin, 167 F.2d 694 (6th Cir. 1948).

     *Ninth Circuit:* Russell v. Government Emps. Ins. Co., 2017 WL 2959348 (S.D. Cal. July 11, 2017) (finding profit-sharing plan bonus, a percentage bonus based on all earnings, and that the fact that employee had to be incumbent on date of payment and argued that she did not receive sufficient notice of terms were not legitimate bases for finding plan invalid) (citing and deferring to WH Op., 1985 WL 1087350 (Nov. 8, 1985) (upholding use of longevity bonuses under 29 C.F.R. §778.210)); *see also* Russell v. Government Emps. Ins. Co., 2018 WL 1210763, 2018 U.S. Dist. LEXIS 38425, at \*11­­­–13 (S.D. Cal. Mar. 8, 2018) (holding that bonus paid in February of year following end of calendar year did not have to include earnings in the two months after the end of the prior year to qualify under 29 C.F.R. §778.210 where the bonus is based on earnings from the prior year) (citing WH Op. FLSA2005-22, 2005 WL 3308593 (Aug. 26, 2005)).

     *Opinion Letters:* WH Op. FLSA 2019-7, 2019 WL 2914103, at \*3 (July 1, 2019) (opining that a quarterly percentage bonus based on straight and overtime wages did not require recalculation of the regular rate because the bonus already accounted for the overtime as a percentage formula); WH Op. FLSA2018-9, 2018 WL 5393308, at \*1–2 (Jan. 5, 2018) (explaining that a year-end percentage bonus, that includes all straight-time and overtime earnings, but excludes from the calculation payments that are properly excluded under §207(e), “such as travel expenses and discretionary bonuses,” satisfies the requirements of §778.210, and rescinding a statement from a November 26, 1973, opinion letter, WH-241, which stated that even remuneration properly excluded under §207(e) must be included in a bonus to satisfy §778.210). [↑](#footnote-ref-390)
391. *Two “R” Drilling*, 789 F.2d at 1180; 29 C.F.R. §778.210. [↑](#footnote-ref-391)
392. 29 C.F.R. §§778.210, 778.503. [↑](#footnote-ref-392)
393. *Id*. §778.312(a). [↑](#footnote-ref-393)
394. *Id*. [↑](#footnote-ref-394)
395. *Id*. §778.312(c). [↑](#footnote-ref-395)
396. *Id*. §778.312(b). [↑](#footnote-ref-396)
397. *See* 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 208, 6 WH Cases 846, *modified*, 331 U.S. 795 (1947) (finding certain wage agreement not in conformity with FLSA); Wethington v. City of Montgomery, 935 F.2d 222, 227, 30 WH Cases 667 (11th Cir. 1991) (holding “regular rate” of wages paid must be calculated from actual hours worked); *see also* Kohlheim v. Glynn Cnty., 915 F.2d 1473, 1480, 29 WH Cases 1673 (11th Cir. 1990) (determining FLSA only required overtime compensation be computed on basis of hourly rate with reference to stipulated salary figure). [↑](#footnote-ref-397)
398. 29 C.F.R. §778.313(a) (1981). [↑](#footnote-ref-398)
399. *Id*. [↑](#footnote-ref-399)
400. *Id*. §778.313(b). [↑](#footnote-ref-400)
401. *Id.* §778.314. [↑](#footnote-ref-401)
402. *Id.*; *see also id.* §§778.415–.421. [↑](#footnote-ref-402)
403. 29 C.F.R. §531.60. [↑](#footnote-ref-403)
404. *Id*.; *see also* Ellis v. Commonwealth Worldwide Chauffeured Transp., 2012 WL 1004848, at \*4–5 (E.D.N.Y. Mar. 23, 2012) (relying on DOL regulation and granting summary judgment to employer that paid discretionary tips but did not include them in regular rate). See discussion of tip credits in Chapter 9, Minimum Wage Requirements, §IV [Payment of Wages to Tipped Employees]. [↑](#footnote-ref-404)
405. 29 C.F.R. 531.55(b); Compere v. Nusret Miami, LLC, 28 F.4th 1180, 1182 (11th Cir. 2022) (explaining that mandatory service charge is not tip and can be used to offset employer’s FLSA obligations); Nelson v MLB Hotel Manager, LLC, 2022 BL 242208, 2022 WL 2733720 (11th Cir. July 13, 2022) (following *Nusret Miami*); DOL Op. Ltr. FLSA 2021-5 (Jan. 15, 2021) (service charges are not tips and are included in regular rate and count toward minimum wage). [↑](#footnote-ref-405)
406. 29 C.F.R. §§778.105, 778.301; *see also* Abshire v. Redland Energy Servs., LLC, 695 F.3d 792, 795–96 (8th Cir. 2012); Rogers v. City of Troy, 148 F.3d 52, 57–58, 4 WH Cases2d 1089 (2d Cir. 1998). [↑](#footnote-ref-406)
407. 29 C.F.R. §§778.105, 778.301. [↑](#footnote-ref-407)
408. *Abshire*, 695 F.3d at 796 (citing 29 C.F.R. §§778.301–.302, which describe how to compute overtime when permanent change results in “overlapping” hours that fall within both old and new workweeks). [↑](#footnote-ref-408)
409. *See id*. at 794–96 (collecting cases for proposition that initial workweek can be structured to avoid overtime and reasoning that DOL has never explained what is meant by term “evade”). [↑](#footnote-ref-409)
410. *Id.*  [↑](#footnote-ref-410)
411. 29 C.F.R. §778.301. [↑](#footnote-ref-411)
412. *Id*. [↑](#footnote-ref-412)
413. *Id*. §778.302(a) (Jan. 23, 1981). [↑](#footnote-ref-413)
414. *Id*. §778.302(b). [↑](#footnote-ref-414)
415. *Id*. §778.303. [↑](#footnote-ref-415)
416. 29 C.F.R. §778.303. [↑](#footnote-ref-416)
417. *Id*. [↑](#footnote-ref-417)
418. *Id*. [↑](#footnote-ref-418)
419. *Id.* §778.304(a). [↑](#footnote-ref-419)
420. *Id.* §778.304(b). [↑](#footnote-ref-420)
421. 29 C.F.R. §778.305. State laws often govern the impact of making deductions from wages even when those deductions do not impact the federal or other minimum wage. *See generally* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-421)
422. *Id*. §778.304(a)(1). See Chapter 9, Minimum Wage Requirements, for an extensive discussion of §203(m). [↑](#footnote-ref-422)
423. 29 C.F.R. §778.305; *see* Pineda v. JTCH Apartments, LLC, 2015 WL 5052241, at \*5 (N.D. Tex. Aug. 26, 2015) (holding that cost of lodging—in this case, reduced rent—is available only to satisfy minimum wage and determine regular rate; it cannot be used as setoff to overtime obligations). [↑](#footnote-ref-423)
424. *Id*. §778.304(a)(2). [↑](#footnote-ref-424)
425. *Id*. [↑](#footnote-ref-425)
426. *Id*. §778.305. [↑](#footnote-ref-426)
427. *Id*. §778.307; *see* Djurdjevich v. Flat Rater Movers Ltd., 2018 WL 1478132, 2018 U.S. Dist. LEXIS 48513, at \*10–13 (S.D.N.Y. Mar. 23, 2018) (finding plaintiff stated a claim for failure to pay overtime where complaint alleged employer charged employees expenses for gasoline, parking tickets, and moving materials, which reduced overtime wages). [↑](#footnote-ref-427)
428. 29 C.F.R. §778.304(a)(3). [↑](#footnote-ref-428)
429. *Id*. §778.305. [↑](#footnote-ref-429)
430. *Id*. §778.304(a)(4). [↑](#footnote-ref-430)
431. 29 C.F.R. §778.306(a) (1981). [↑](#footnote-ref-431)
432. *Id*. [↑](#footnote-ref-432)
433. *Id.* §778.306(b). [↑](#footnote-ref-433)
434. *Id.* [↑](#footnote-ref-434)
435. WH Op., 1978 WL 388412, at \*1 (Dec. 29, 1978) (permitting such deductions for employee subject to FWW method); FOH §32b04b(b). [↑](#footnote-ref-435)
436. 29 C.F.R. §778.307. [↑](#footnote-ref-436)
437. *Id*. [↑](#footnote-ref-437)
438. *Id*. [↑](#footnote-ref-438)
439. *Id*. §778.308(a). [↑](#footnote-ref-439)
440. *Id*. [↑](#footnote-ref-440)
441. 29 C.F.R. §778.308(a); *see also* 29 U.S.C. §207(e)(5)–(7). [↑](#footnote-ref-441)
442. 29 C.F.R. §778.309; *see also* Adams v. Department of Juvenile Justice, 143 F.3d 61, 67, 4 WH Cases2d 932 (2d Cir. 1998) (“Where, as here, an employee regularly works the same amount of overtime, ‘it is, of course, proper to pay him, in addition to his compensation for nonovertime hours, a fixed sum in any such week for his overtime work, determined by multiplying his overtime rate by the number of overtime hours regularly worked.’”) (quoting interpretive bulletin); Acosta v. KDE Equine, LLC, 2018 WL 1573230, 2018 U.S. Dist. LEXIS 53923, at \*17–23 (W.D. Ky. Mar. 29, 2018) (fixed sum for constant overtime is permissible, citing interpretive bulletin, if employee works “regular fixed amount of overtime each workweek” and has agreed to the pay plan, though there need not be a written employment contract). *But see* Walsh v. KDE Equine, LLC, 56 F.4th 409, 413 (6th Cir. 2022) (employer could not rely on fixed sum for overtime because employees worked varying hours each week based on differing arrival and departure times and whether they worked on race days or performed other duties); DOL v. Fire & Safety Investigation Consulting Servs., LLC, 915 F.3d 277, 280–83 (4th Cir. 2019) (employer could not use fixed sum for overtime where employees worked hitches of two weeks but sometimes worked fewer days or less or more hours than the hours on which the fixed overtime calculation was based). [↑](#footnote-ref-442)
443. 29 C.F.R. §778.309. [↑](#footnote-ref-443)
444. *Id.* [↑](#footnote-ref-444)
445. *Id.* §778.310; *see, e.g*.,

     *Second Circuit:* McLean v. Garage Mgmt. Corp., 819 F. Supp. 2d 332, 339–40 (S.D.N.Y. 2011) (monthly lump-sum bonus that did not fluctuate based on number of overtime hours worked could not be considered overtime premium).

     *Eighth Circuit:* Dole v. Trusty, 707 F. Supp. 1074, 1075–76, 29 WH Cases 315 (W.D. Ark. 1989) (holding that paying drivers fixed sum regardless of hours spent on trips violated FLSA).

     *Opinion Letters:* WH Op. FLSA2004-16NA, 2004 WL 5303044, at \*1 (Sept. 28, 2004) (finding lump-sum weekly overtime premium based on delivery volume for week paid to incent delivery drivers to work more than 40-hour regular workweek not excludable from regular rate or creditable against overtime due, even though amount of money may have been equal to or greater than amount owed on per-hour basis) [↑](#footnote-ref-445)
446. 29 C.F.R. §778.310 (Jan. 23, 1981). [↑](#footnote-ref-446)
447. *Id*. [↑](#footnote-ref-447)
448. *Id*. [↑](#footnote-ref-448)
449. *Id*. §778.311(a); *see also* Acosta v. KDE Equine, LLC, 2018 WL 1573230, 2018 U.S. Dist. LEXIS 53923, at \*28 (W.D. Ky. Mar. 29, 2018) (“Under the guidance of the [*Field Operations Handbook*, §32j06], lump sum payments for extra job duties are not per se violations of the FLSA. However, the FOH is clear that, not only must there be an understanding between the employer and the employee regarding the payment arrangement of lump sums, but the flat fee must equal or exceed the proper overtime payment due.”), *aff’d*, 56 F.4th 409, 414 (6th Cir. 2022). [↑](#footnote-ref-449)
450. 29 C.F.R. §778.311(b) (1981). [↑](#footnote-ref-450)
451. 29 C.F.R. §778.109. [↑](#footnote-ref-451)
452. *Id*. §778.321. [↑](#footnote-ref-452)
453. *Id*. §778.324. [↑](#footnote-ref-453)
454. *Id*. §778.323. [↑](#footnote-ref-454)
455. *Id*. §778.322. [↑](#footnote-ref-455)
456. 29 C.F.R. §778.322. [↑](#footnote-ref-456)
457. *Id*. §778.327. [↑](#footnote-ref-457)
458. *Id*. §778.322 (1981). [↑](#footnote-ref-458)
459. *Id*. [↑](#footnote-ref-459)
460. 29 U.S.C. §207(a). [↑](#footnote-ref-460)
461. 29 C.F.R. §778.113. [↑](#footnote-ref-461)
462. *Id*. §778.322. See §V.F [Special Problems Concerning the Regular Rate; Gap Time] of this chapter for a discussion of “gap time.” [↑](#footnote-ref-462)
463. 29 C.F.R. §778.323. [↑](#footnote-ref-463)
464. *Id*. [↑](#footnote-ref-464)
465. *Id*. §778.322. [↑](#footnote-ref-465)
466. *Id*. §778.326. [↑](#footnote-ref-466)
467. *Id.* See §§IV.D.1 [The “Regular Rate”; Calculating Regular Rate and Overtime Under Various Methods of Payment; Payment of Wages Based on an Hourly Rate] and IV.D.2 [The “Regular Rate”; Calculating Regular Rate and Overtime Under Various Methods of Payment; Payment of Wages Based on a Nonhourly Rate] of this chapter. [↑](#footnote-ref-467)
468. *See* 29 C.F.R. §778.327(a) (“It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his straight time rate no matter how many hours he worked.”); *id.* §778.327(b) (“It seems clear that where different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee—the longer he works the lower the rate—the device is evasive and the rate actually paid in the shorter or nonovertime week is his regular rate for overtime purposes in all weeks.”). [↑](#footnote-ref-468)
469. *See, e.g*., Thompson v. Regions Sec. Servs., Inc., 67 F.4th 1301, 1309 (11th Cir. 2023) (reversing judgment on the pleadings and finding that plaintiff had plausibly alleged that the employer used a lower regular rate in the year he worked significant overtime, and that this could violate DOL’s “non-circumvention rule,” which “prevents an employer from playing with an employee's hours and rates to effectively avoid paying time-and-a-half for an employee's overtime hours”); Nabob Oil Co. v. United States, 190 F.2d 478, 479, 10 WH Cases 318 (10th Cir. 1951) (using sliding scale scheme of paying 15 cents per hour extra for “any overtime employees might work”); Walling v. Green Head Bit & Supply Co., 138 F.2d 453, 455, 3 WH Cases 701 (10th Cir. 1943) (concluding provision that stated that when overtime was worked regular rate would be lowered did not comply with FLSA). [↑](#footnote-ref-469)
470. 29 C.F.R. §778.327(b). [↑](#footnote-ref-470)
471. *Id*. [↑](#footnote-ref-471)
472. *See, e.g.,* WH Op. FLSA2004-14, 2004 WL 3177880, at \*1 (Oct. 8, 2004) (describing hours between 35 and 40 as “gap time”). [↑](#footnote-ref-472)
473. These issues arise in cases where public employees are paid under a §207(k) plan. See Chapter 11, Government Employment, §V.B [Special Provisions That Apply to Fire Protection and Law Enforcement Employees; The Section 207(k) Exemption]. However, these issues also arise in the private sector where, for example, employees are paid a salary based on a 35-hour workweek or employees are paid hourly but work a regular schedule of less than 40 hours in a workweek. *See, e.g*., Barvinchak v. Indiana Reg’l Med. Ctr., 2007 WL 2903911, at \*4–8 (W.D. Pa. Sept. 28, 2007). Some state laws may recognize gap time as compensable. *See* Wage and Hour Laws: A State-by-State Survey (Gregory K. McGillivary, ed., Bloomberg L., 3d ed. 2016 & Supp.). [↑](#footnote-ref-473)
474. 29 C.F.R. §778.315. [↑](#footnote-ref-474)
475. *Id*.; *see also* WH Op. FLSA2004-14, 2004 WL 3177880, at \*1 (Oct. 8, 2004). [↑](#footnote-ref-475)
476. WH Op. FLSA2004-14, 2004 WL 3177880, at \*1 (Oct. 8, 2004); *see also* 29 C.F.R. §778.322. [↑](#footnote-ref-476)
477. 95 F.3d 1263, 3 WH Cases2d 806 (4th Cir. 1996). [↑](#footnote-ref-477)
478. 95 F.3d at 1265. [↑](#footnote-ref-478)
479. *Id*. at 1266. [↑](#footnote-ref-479)
480. *Id*. at 1284; *see also*

     *Fifth Circuit:* Serrano v. Republic Servs. Inc., 2017 WL 2531918, 2017 U.S. Dist. LEXIS 89551, at \*154–55 (S.D. Tex. June 12, 2017) (finding that FLSA does not provide for recovery for straight time or “gap time” unless pay falls below minimum wage).

     *Seventh Circuit:* Ladegaard v. Hard Rock Concrete Cutters, Inc., 2004 WL 1882449, at \*5 (N.D. Ill., Aug. 18, 2004) (collecting cases); Braddock v. Madison Cnty., 34 F. Supp. 2d 1098, 1112 (S.D. Ind. 1998) (holding that where employees worked in excess of agreed-upon hourly requirements but still below overtime threshold of 40 hours, FLSA did not require payment of gap time as long as employees’ salaries exceeded FLSA’s minimum wage requirements when applied to actual hours worked).

     *Ninth Circuit:* Young v. Beard, 2015 WL 1021278 (E.D. Cal. Mar. 9, 2015) (adopting “majority position” that FLSA does not create cause of action for unpaid hours below overtime threshold); Perez v. Wells Fargo & Co., 75 F. Supp. 3d 1184 (N.D. Cal. 2014) (noting split in federal courts regarding viability of overtime gap claims and holding that there is no FLSA liability for pure gap-time claims). [↑](#footnote-ref-480)
481. *Monahan*, 95 F.3d at 1273. [↑](#footnote-ref-481)
482. 22 F.4th 412 (4th Cir. 2022). [↑](#footnote-ref-482)
483. *Id.* at 425–26 (disagreeing with the Second Circuit in Lundy v. Catholic Health Sys. of Long Island Inc., 711 F.3d 106, 116 (2d Cir. 2013)). [↑](#footnote-ref-483)
484. *Id.* at 427. [↑](#footnote-ref-484)
485. Barvinchak v. Indiana Reg’l Med. Ctr., 2007 WL 2903911, at \*9 (W.D. Pa. Sept. 28, 2007); Reich v. Midwest Body Corp., 843 F. Supp. 1249, 1252 (N.D. Ill. 1994); *see also* Donovan v. Crisostomo, 689 F.2d 869, 876 (9th Cir. 1982) (seeking restitution for kickbacks from straight-time wages as overtime compensation for weeks in which overtime worked); Lamon v. City of Shawnee, 754 F. Supp. 1518, 1521 n.1 (D. Kan. 1991), *aff’d in relevant part*, 972 F.2d 1145, 1155 (10th Cir. 1992). [↑](#footnote-ref-485)
486. 843 F. Supp. 1249. [↑](#footnote-ref-486)
487. *Id.* at 1251–52. [↑](#footnote-ref-487)
488. 711 F.3d 106 (2d Cir. 2013); *see also* Nakahata v. New York-Presbyterian Health Care Sys., Inc., 723 F.3d 192, 201–02 (2d Cir. 2013) (following and reaffirming *Lundy*, and dismissing “gap time” claims, explaining that “[t]he FLSA statute requires payment of minimum wages and overtime wages only; therefore, the FLSA is unavailing where wages do not rise above the overtime threshold. The FLSA is unavailing even when an employee works over 40 hours per week and claims gap-time wages for those hours worked under 40 per week, unless the wages fall below the minimum threshold. This is because the statutory language simply does not contemplate a claim for wages other than minimum or overtime wages.”); Gonzalez v. Dom’s Lawnmaker, Inc., 2022 BL 437146 (E.D.N.Y. Dec. 7, 2022) (granting summary judgment on plaintiffs’ FLSA gap time claims under *Lundy*, but noting that New York law might not recognize them). [↑](#footnote-ref-488)
489. *Lundy*, 711 F.3d at 116. [↑](#footnote-ref-489)
490. *Id*. at 116–17; *see*

     *First Circuit:* Gould v. First Student Mgmt., LLC*,* 2017 WL 3731025, 2017 U.S. Dist. LEXIS 138666, at \*8–10 (D.N.H. Aug. 29, 2017) (rejecting gap-time claims, following *Lundy*).

     *Fifth Circuit:* Banks v. First Student Mgmt., LLC, 237 F. Supp. 3d 397, 404 (E.D. La. 2017) (declining to recognize claim for “overtime gap time” under FLSA, finding it unsupported in statute’s text) (surveying cases).

     *Sixth Circuit:* Murphy v. First Student Mgmt. LLC, 2017 WL 346977, at \*3–4 (N.D. Ohio Jan. 24, 2017) (same).

     *Ninth Circuit:* Sargent v. HG Staffing, LLC, 171 F. Supp. 3d 1063, 1078–79 (D. Nev. 2016) (following *Lundy* and collecting Ninth Circuit district court cases); Gomley v. Crossmark, Inc., 2015 WL 1825481 (D. Idaho Apr. 22, 2015) (following *Lundy*). [↑](#footnote-ref-490)
491. Davis v. Abington Mem’l Hosp., 765 F.3d 236 (3d Cir. 2014) (finding it unnecessary to decide whether plaintiffs had viable “overtime gap time” claims because plaintiffs had not plausibly alleged that they had worked overtime). [↑](#footnote-ref-491)
492. 29 U.S.C. §207(g)(3); *see also* Barragan v. Home Depot U.S.A., Inc., 2021 BL 310192, 2021 WL 3634851, at \*8 (S.D. Cal. Aug. 17, 2021) (explaining that §207(g)(3) is an exception to calculating overtime at regular rate, and, thus, “basic rate” is “necessarily different from the straight time hourly rate”). [↑](#footnote-ref-492)
493. 29 C.F.R. §548.100(a). [↑](#footnote-ref-493)
494. *Id*. §§548.1–.3, 548.100–.502. [↑](#footnote-ref-494)
495. *Id*. §548.2(a); *see also Barragan*, 2021 BL 310192, 2021 WL 3634851, at \*8 (finding that basic rate regulation did not apply because employer provided no evidence of agreement to “basic rate” or understanding that bonus would be excluded from overtime pay calculations). [↑](#footnote-ref-495)
496. 29 C.F.R. §548.200(a). [↑](#footnote-ref-496)
497. *Id.* [↑](#footnote-ref-497)
498. McCrary v. Weyerhaeuser Co., 457 F.2d 862, 864–65, 20 WH Cases 524 (9th Cir. 1972). [↑](#footnote-ref-498)
499. 29 C.F.R. §548.2(c). [↑](#footnote-ref-499)
500. *Id*. §§548.2(d), 548.200(c). [↑](#footnote-ref-500)
501. *Id*. §§548.3, 548.301–.306. [↑](#footnote-ref-501)
502. *Id.* §§548.2, 548.4. [↑](#footnote-ref-502)
503. Authorization of a basic rate by the Administrator is the topic of §VI.A.3 [Exceptions From the Regular Rate Principles; Using Basic Rates for Regular Rates; Rates Authorized on Application] of this chapter. [↑](#footnote-ref-503)
504. 29 C.F.R. §548.2(e). [↑](#footnote-ref-504)
505. *Id*. §548.300. [↑](#footnote-ref-505)
506. *Id*. §§548.2(i), 548.200(c). [↑](#footnote-ref-506)
507. *Id.* §548.2(f). [↑](#footnote-ref-507)
508. *Id*. §548.2(j). [↑](#footnote-ref-508)
509. 29 C.F.R. §§548.3(a), 548.301(a). [↑](#footnote-ref-509)
510. *Id*. §548.301(b). [↑](#footnote-ref-510)
511. *Id*. §§548.3(b), 548.302(a). [↑](#footnote-ref-511)
512. *Id*. §548.302(b)(1). [↑](#footnote-ref-512)
513. *Id*. §548.302(a). [↑](#footnote-ref-513)
514. 219 F.3d 1063, 6 WH Cases2d 371 (9th Cir. 2000). [↑](#footnote-ref-514)
515. 219 F.3d at 1068, 6 WH Cases2d at 373 (discussing formula). [↑](#footnote-ref-515)
516. *Id.* [↑](#footnote-ref-516)
517. *Id*. [↑](#footnote-ref-517)
518. *Id.* [↑](#footnote-ref-518)
519. 29 C.F.R. §§548.3(c), 548.303(a). [↑](#footnote-ref-519)
520. *Id*. [↑](#footnote-ref-520)
521. Based on the example in 29 C.F.R. §548.303(b), using updated hourly rates. [↑](#footnote-ref-521)
522. *Id*. §§548.3(d), 548.304(a). [↑](#footnote-ref-522)
523. *Id.* [↑](#footnote-ref-523)
524. *Id*. §548.304(b). [↑](#footnote-ref-524)
525. 29 C.F.R. §548.304(b). [↑](#footnote-ref-525)
526. *Id*. §§548.3(e), 548.305(b). [↑](#footnote-ref-526)
527. *Id*. §548.305(a). [↑](#footnote-ref-527)
528. *Id.* §§548.3, 548.305, 548.400 (2019); *see also* 84 Fed. Reg. 68,736, 68,763 (Dec. 16, 2019). [↑](#footnote-ref-528)
529. *Id*. §548.3(e); 84 Fed. Reg. 68,763. [↑](#footnote-ref-529)
530. 29 C.F.R. §548.305(b). [↑](#footnote-ref-530)
531. *Id.* §548. [↑](#footnote-ref-531)
532. *Id.* §548.305(c), (d), (f). Section 548.305(e) was also updated to fix a typographical error by changing the phrase “would not exceed” to “would exceed.” *Id.* §548.305(e); 84 Fed. Reg. 68,764. [↑](#footnote-ref-532)
533. 29 C.F.R. §§548.3(f)(1), 548.306(a). [↑](#footnote-ref-533)
534. *Id*. §548.306(f). [↑](#footnote-ref-534)
535. *Id*. §548.306(c)(1). [↑](#footnote-ref-535)
536. *Id.* [↑](#footnote-ref-536)
537. *Id.* §548.306(d). [↑](#footnote-ref-537)
538. *Id.* [↑](#footnote-ref-538)
539. 29 C.F.R. §548.306(e). [↑](#footnote-ref-539)
540. *Id.* §§548.4(a), 548.400(a). [↑](#footnote-ref-540)
541. *Id*. §548.400(b). [↑](#footnote-ref-541)
542. *Id.* §548.400(b). [↑](#footnote-ref-542)
543. *Id*. §548.400(a). [↑](#footnote-ref-543)
544. *Id*. §§548.4(b), 548.400(a). [↑](#footnote-ref-544)
545. 29 C.F.R. §548.4(b)(1). [↑](#footnote-ref-545)
546. *Id*. §548.4(b)(2). [↑](#footnote-ref-546)
547. *Id.* §548.4(b)(3). [↑](#footnote-ref-547)
548. *Id*. §548.404. [↑](#footnote-ref-548)
549. *Id*. §548.4(b)(4). [↑](#footnote-ref-549)
550. *Id*. §548.4(b)(5). [↑](#footnote-ref-550)
551. 29 C.F.R. §548.4(c). [↑](#footnote-ref-551)
552. *Id*. [↑](#footnote-ref-552)
553. *Id*. §548.4(d). [↑](#footnote-ref-553)
554. *Id*. §548.4(e). [↑](#footnote-ref-554)
555. *Id*. [↑](#footnote-ref-555)
556. *Id.* §548.500. [↑](#footnote-ref-556)
557. 29 C.F.R. §548.502. [↑](#footnote-ref-557)
558. 29 U.S.C. §207(f). [↑](#footnote-ref-558)
559. *Id.* [↑](#footnote-ref-559)
560. 316 U.S. 624 (1942); *see also* Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 6 WH Cases 799 (1942) (refusing to depart from decision in *Belo*). The *Belo* exemption was codified in 1949, 63 Stat. 915, as §207(e) of the FLSA, and then renumbered as §207(f) in the 1966 Amendments to the Act, Pub. L. No. 89-601, §204(d) (1966). [↑](#footnote-ref-560)
561. 316 U.S. at 627. [↑](#footnote-ref-561)
562. *Id.* at 628–29. [↑](#footnote-ref-562)
563. *Id.* [↑](#footnote-ref-563)
564. *Id.* at 631. [↑](#footnote-ref-564)
565. *Id.* [↑](#footnote-ref-565)
566. *Id.* at 631–34. [↑](#footnote-ref-566)
567. 29 U.S.C. §207(f); *see also* 29 C.F.R. §§778.401–.414. [↑](#footnote-ref-567)
568. 29 U.S.C. §207(f). [↑](#footnote-ref-568)
569. *Id.* [↑](#footnote-ref-569)
570. *Id.* [↑](#footnote-ref-570)
571. *Id*.; *see also* 29 C.F.R. §§778.402–.414. [↑](#footnote-ref-571)
572. Marshall v. Hamburg Shirt Corp., 577 F.2d 444, 446–47, 23 WH Cases 889 (8th Cir. 1978) (reviewing *Belo* requirements, finding noncompliance, and directing that overtime owed should be calculated by dividing weekly salary by all hours worked and multiplying hours over 40 by one half the resulting rate, in reliance on *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942)); Szabo v. Muncy Indus., LLC, 661 F. Supp. 3d 337, 345–46 (M.D. Pa. 2023) (rejecting application of *Belo* exception where employer could not show all requirements were met); *see also* 29 C.F.R. §778.403 (“Unless the pay arrangements in a particular situation meet the requirements of section 207(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act.”). [↑](#footnote-ref-572)
573. 29 C.F.R. §778.406; *see also*

     *Third Circuit: Szabo*, 661 F. Supp. 3d at 345 (finding lack of evidence employee worked less than 40 hours as precluding *Belo* exception, which requires variation “above and below the forty-hour mark”);

     *Fifth Circuit:* Donovan v. Brown Equip. & Serv. Tools., Inc., 666 F.2d 148, 154, 25 WH Cases 306 (5th Cir. 1982) (“For hours to be considered irregular within the meaning of section 207(f), they must, in a significant number of weeks, fluctuate both below forty hours per week as well as above, and the fluctuations below forty must result from work requirements, not vacations, holidays, illness or reasons personal to the employee.”);

     *Seventh Circuit:* Schweninger v. Advanced Vision Tech., Inc., 273 F. Supp. 3d 946, 953 (N.D. Ill. Mar. 31, 2017) (finding that hours fluctuated significantly in “significant number of workweeks” where plaintiff worked 35 hours or fewer in 17.4% of workweeks and 45 hours or more in 45.9% of workweeks, noting that Supreme Court had found “significant” fluctuation where plaintiff worked fewer than 40 hours in just 13% of workweeks);

     *Eighth Circuit:* Saunders v. Ace Mortg. Funding, Inc., 2007 WL 1190985, at \*8, 12 WH Cases2d 937 (D. Minn. Apr. 16, 2007) (recognizing hours must fluctuate above and below 40 to be irregular hours under §207(f)). [↑](#footnote-ref-573)
574. 29 C.F.R. §778.406; *Brown Equip.*, 666 F.2d at 154; *Schweninger*, 273 F. Supp. 3d at 953 (concluding that employer had carried its burden of showing that plaintiff’s job duties necessitated irregular hours; rejecting “decidedly higher standard” advocated by plaintiff that evidence is required to show that his job duties necessitated irregular hours that “could not be controlled or reasonably anticipated” by his employer); Escobar v. Rental Xpress, LLC, 2015 WL 3408115 (W.D. Tex. May 26, 2015) (finding hours not irregular where evidence showed employees’ hours did not fluctuate below 40 in significant number of workweeks). [↑](#footnote-ref-574)
575. Jones v. Producers Servs. Corp., 95 F.4th 445, 452 (6th Cir. 2024) (reversing summary judgment for employees and finding an issue of material fact whether fluctuations caused by demand for work could support the irregular hour prong of the test). [↑](#footnote-ref-575)
576. *Id*. §778.405; *see also* Mascol v. E & L Transp., Inc., 387 F. Supp. 2d 87, 103–04 (E.D.N.Y. 2005) (holding employer could not use §207(f) provision where drivers worked predetermined schedule of 12-hour days, most for 60 hours per week, because it was not irregular hours; in addition evidence showed at least one plaintiff not paid guaranteed amount in week in which he did not work full 60 hours). [↑](#footnote-ref-576)
577. *See*

     *First Circuit:* Mitchell v. Brandtjen Kluge, Inc., 228 F.2d 291, 298, 12 WH Cases 715 (1st Cir. 1955).

     *Second Circuit:* Mitchell v. Hartford Steam Boiler Inspection & Ins. Co., 235 F.2d 942, 946, 12 WH Cases 930 (2d Cir. 1956).

     *Eighth Circuit:* Tobin v. Little Rock Packing Co., 202 F.2d 234, 236–37 (8th Cir. 1953). [↑](#footnote-ref-577)
578. 29 C.F.R. §778.407; Tobin v. Keystone Mfg. Co., 143 F. Supp. 231, 237, 10 WH Cases 636 (W.D. Ark. 1952) (holding exact compliance required and specific agreement must be entered). *See also* *Schweninger*, 273 F. Supp. 3d at 951–52 (denying plaintiff’s argument that contract lacked element of “good faith” and concluding that employer had carried its burden of showing bona fide individual agreement where it had provided explanation of business reasons for its use of *Belo* contract; rejecting plaintiff’s contentions that it was in bad faith because he did not like its terms and it was offered on take-it-or-leave-it basis). [↑](#footnote-ref-578)
579. 29 C.F.R. §778.407. [↑](#footnote-ref-579)
580. Nunn’s Battery & Elec. Co. v. Goldberg, 298 F.2d 516, 520, 15 WH Cases 313 (5th Cir. 1962) (holding that with oral agreement there was no explicit understanding of regular rate); Berg v. Ferguson, 1979 WL 1987, at \*2, 24 WH Cases 306 (D. Or. 1979) (finding oral agreement did not specify regular rate or hours). [↑](#footnote-ref-580)
581. Craig v. Far W. Eng’g Co., 265 F.2d 251, 257–58, 14 WH Cases 131 (9th Cir. 1959) (finding employer had not shown existence of guarantee and could not raise §207(f) defense). [↑](#footnote-ref-581)
582. 29 C.F.R. §§778.408(a), 778.412; *see also*

     *Supreme Court:* Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 426, 5 WH Cases 367 (1945) (concluding *Belo* not authority for fixing by contract regular rate unrelated to payments that employees actually and normally receive).

     *Fifth Circuit:* Escobar v. Rental Xpress, LLC, 2015 WL 3408115 (W.D. Tex. May 26, 2015) (finding that employer failed to set specified regular rate or formula to calculate rate in advance).

     *Ninth Circuit*: Huyck v. Limitless, LLC, 2016 WL 5402219, at \*3–4 (D. Or. Sept. 26, 2016) (holding that irregular hours exception did not apply where employer failed to set specified regular rate in advance).

     *Tenth Circuit:* McComb v. Sterling Ice & Cold Storage Co., 165 F.2d 265, 269, 7 WH Cases 576 (10th Cir. 1947) (holding that hourly rates “must have been intended to determine the weekly wages which it was contemplated would be paid for both regular and for overtime work, at not less than one and one-half times the amount thereof”). [↑](#footnote-ref-582)
583. 29 C.F.R. §778.408(c); Saunders v. Ace Mortg. Funding, Inc., 2007 WL 1190985, at \*9 (D. Minn. Apr. 16, 2007) (relying on interpretive bulletin and finding compensation plan not valid *Belo* plan where it did not pay loan officers at specified regular rate; loan officers received commissions in excess of guaranteed amount and computed regular rate of pay was based only on guaranteed amount). [↑](#footnote-ref-583)
584. 29 C.F.R. §778.408(d). [↑](#footnote-ref-584)
585. *Id.* §778.409; *see also* Martin v. David T. Saunders Constr. Co., 813 F. Supp. 893, 897–98, 1 WH Cases2d 427 (D. Mass. 1992) (holding that payment of one and one-half times regular rate for hours over 50 in workweek when employee averages more than 50 hours does not satisfy *Belo* requirement). [↑](#footnote-ref-585)
586. 29 C.F.R. §778.409 (can be, for example, double time); *see also* Mitchell v. Feinberg, 236 F.2d 9, 10, 13 WH Cases 11 (2d Cir. 1956) (holding that crediting employees with daily overtime under bargaining agreement, although they work fewer than 40 hours during workweek, does not invalidate *Belo* contract). [↑](#footnote-ref-586)
587. 29 C.F.R. §778.410(a); *see also* Mascol v. E & L Transp., Inc., 387 F. Supp. 2d 87, 104 (E.D.N.Y. 2005) (employer that prorated pay based on short workweeks could not use §207(f) because employers may not take deductions for sickness, vacations, holidays, or other such reasons for lost work time, relying on DOL interpretation). [↑](#footnote-ref-587)
588. 29 C.F.R. §778.410(c). [↑](#footnote-ref-588)
589. *Id*. §778.411. [↑](#footnote-ref-589)
590. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–50 (1990) (stating that courts do not owe DOL deference when interpreting §207 of FLSA); Reich v. Interstate Brands Corp., 57 F.3d 574, 576, 2 WH Cases2d 1281 (7th Cir. 1995) (“Congress has not delegated to the Secretary of Labor the power to interpret §7 of the FLSA.”); *see generally* Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1348–49, 27 WH Cases 1343 (10th Cir. 1986) (evaluating availability of §207(f) exception); Donovan v. Tierra Vista, Inc., 796 F.2d 1259, 1260, 27 WH Cases 1222 (10th Cir. 1986) (same). [↑](#footnote-ref-590)
591. 29 C.F.R. §778.414(a). [↑](#footnote-ref-591)
592. *Id*. §778.414(b). [↑](#footnote-ref-592)
593. 29 U.S.C. §207(g)(1), (2); 29 C.F.R. §778.415. [↑](#footnote-ref-593)
594. 29 C.F.R. §778.416. [↑](#footnote-ref-594)
595. *Id.* §778.417. [↑](#footnote-ref-595)
596. *Id*. §778.417(a). [↑](#footnote-ref-596)
597. *Id*. §778.417(b). [↑](#footnote-ref-597)
598. *Id.* §778.420; *see also* 29 C.F.R. §§778.418 (piece rates), 778.419 (two or more hourly rates). [↑](#footnote-ref-598)
599. 29 U.S.C. §207(g)(1); 29 C.F.R. §778.418(a). [↑](#footnote-ref-599)
600. 29 U.S.C. §207(g)(1); 29 C.F.R. §778.418(a). [↑](#footnote-ref-600)
601. 29 C.F.R. §778.418(a)(1). [↑](#footnote-ref-601)
602. *Id*. §778.418(a)(2). For extended treatment of hours that constitute overtime under the FLSA, see §IV.C [The “Regular Rate”; Statutory Exclusions From the Regular Rate and Payments Creditable to Overtime] of this chapter. [↑](#footnote-ref-602)
603. 29 C.F.R. §778.418(a)(3). [↑](#footnote-ref-603)
604. *Id*. §778.418(a)(4). [↑](#footnote-ref-604)
605. 29 U.S.C. §207(g)(2); 29 C.F.R. §778.419(a); WH Op. FLSA2006-10, 2006 WL 1026417, at \*1 (Mar. 10, 2006) (permitting payment of two different rates for police officers performing canine work and normal police work; reiterating statement from August 11, 1993, opinion letter); *see also* Ayers v. SGS Control Servs., Inc., 2007 WL 646326, at \*8 (S.D.N.Y. Feb. 27, 2007) (holding that paying lower bonus rate for cars inspected in hours after 40 than for those inspected in first 40 hours conflicted with §207(g)(2)’s requirement). [↑](#footnote-ref-605)
606. 29 U.S.C. §207(g)(2); 29 C.F.R. §778.419(a). [↑](#footnote-ref-606)
607. 29 U.S.C. §207(g)(2); 29 C.F.R. §778.419(a); *see also* Featsent v. City of Youngstown, 859 F. Supp. 1134, 1136, 2 WH Cases2d 475 (N.D. Ohio 1993), *aff’d in part, rev’d in part*, 70 F.3d 900, 2 WH Cases2d 1697 (6th Cir. 1995) (discussing inclusion of shift differentials and hazardous pay for police officers). *But see* Pennington v. G.H. Herrmann Funeral Homes, Inc., 2010 WL 3326815 (S.D. Ind. Aug. 23, 2010) (articulating four §207(g)(2) requirements: (1) employee performed two or more different kinds of work; (2) bona fide hourly rates for different kinds of work; (3) paid pursuant to agreement or understanding in advance of performance of work; and (4) overtime rates computed at rate not less than one and one-half time normal applicable rate for same work when performed during non-overtime hours); Hodgson v. Penn Packing Co., 335 F. Supp. 1015, 1021–25, 20 WH Cases 384 (E.D. Pa. 1971) (illustrating availability of exception at 29 U.S.C. §207(g)(2), which permits overtime to be based on separate wage for work unrelated to type of work conducted during first 40 hours). [↑](#footnote-ref-607)
608. 29 C.F.R. §778.419(a); *see also* *id*. §778.314. [↑](#footnote-ref-608)
609. WH Op. FLSA2006-10, 2006 WL 1026417, at \*1 (Mar. 10, 2006). [↑](#footnote-ref-609)
610. However, note that there may be a state or local statute that mandates overtime for long workdays, payment may be required under a contract, or the employee may be working on a holiday or other “special day.” [↑](#footnote-ref-610)
611. 29 C.F.R. §778.421. [↑](#footnote-ref-611)
612. *Id.* §§778.500–.503. [↑](#footnote-ref-612)
613. *Id*. §778.500(a). [↑](#footnote-ref-613)
614. 325 U.S. 419, 5 WH Cases 367 (1945). [↑](#footnote-ref-614)
615. 325 U.S. at 421. [↑](#footnote-ref-615)
616. *Id*. at 425–26. [↑](#footnote-ref-616)
617. Thompson v. Regions Sec. Servs., Inc., 67 F.4th 1301, 1303 (11th Cir. 2023). [↑](#footnote-ref-617)
618. 851 F.3d 990 (9th Cir. 2017), *cert*. *denied*, 138 S. Ct. 167 (2017). [↑](#footnote-ref-618)
619. 851 F.3d at 997–98 (citing 29 C.F.R. §§778.316, 778.500, 778.502). [↑](#footnote-ref-619)
620. 630 F.3d 794 (9th Cir. 2010). [↑](#footnote-ref-620)
621. *Id.* at 803 (quoting DOL’s amicus brief). [↑](#footnote-ref-621)
622. *Id.* at 803–04. [↑](#footnote-ref-622)
623. *Id*. at 799. [↑](#footnote-ref-623)
624. 29 C.F.R. §778.501(a). [↑](#footnote-ref-624)
625. *Id.* [↑](#footnote-ref-625)
626. *Id*. [↑](#footnote-ref-626)
627. *Id*. [↑](#footnote-ref-627)
628. *Id.* §778.501(b). [↑](#footnote-ref-628)
629. Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 40–41 (1944); *see also* Lopez v.Genter’s Detailing, Inc., 511 F. App’x 374, 376–77 (5th Cir. 2013) (holding that “blended hourly rates” were simply regular rate and did not include overtime, where rates were the same regardless of whether employee worked overtime during week or not). [↑](#footnote-ref-629)
630. 29 C.F.R. §778.502. [↑](#footnote-ref-630)
631. *Id.* §778.502(b). [↑](#footnote-ref-631)
632. *Id*. §778.502(d). *See*Tomeo v. W&E Commc’ns, Inc., 2016 WL 8711483, at \*8–11 (N.D. Ill. Sept. 30, 2016) (holding that production bonus pay method used by defendant miscalculated regular rate, which resulted in plaintiffs being paid less overtime compensation than required). [↑](#footnote-ref-632)
633. *Id.*; *see also* Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 425, 5 WH Cases 367 (1945). [↑](#footnote-ref-633)
634. 29 C.F.R. §778.502(e). [↑](#footnote-ref-634)
635. *Id.* §778.503. [↑](#footnote-ref-635)
636. 29 C.F.R. §778.503. [↑](#footnote-ref-636)
637. 607 F.3d 1036 (5th Cir. 2010). [↑](#footnote-ref-637)
638. *Id.* at 1041–42. [↑](#footnote-ref-638)
639. 7 F. App’x 160 (4th Cir. 2001). [↑](#footnote-ref-639)
640. *Id*. at 164 (quoting 29 C.F.R. §778.202(c)). [↑](#footnote-ref-640)
641. 29 C.F.R. §778.600. [↑](#footnote-ref-641)
642. 29 U.S.C. §207(j). [↑](#footnote-ref-642)
643. *Id*. [↑](#footnote-ref-643)
644. *Id*. [↑](#footnote-ref-644)
645. 29 C.F.R. §778.601(b); *see* Duff-Brown v. City & Cnty. of S.F., 2014 WL 2514555 (N.D. Cal. June 4, 2014) (finding that employees’ union and employer reached binding agreement based on union and city representatives’ testimony that they agreed on 80-hour, 14-day period). [↑](#footnote-ref-645)
646. *Id*. [↑](#footnote-ref-646)
647. *Id*. §778.601(d). [↑](#footnote-ref-647)
648. *Id*. §778.601(e). [↑](#footnote-ref-648)
649. WH Op., 2000 WL 34444348 (Sept. 14, 2000). [↑](#footnote-ref-649)
650. *Id.* at \*1. [↑](#footnote-ref-650)
651. *Id.* [↑](#footnote-ref-651)
652. *Id.* at \*2. [↑](#footnote-ref-652)
653. *Id*. [↑](#footnote-ref-653)
654. WH Op. FLSA2001-17, 2001 WL 1870160 (June 1, 2001). [↑](#footnote-ref-654)
655. 29 U.S.C. §207(q). [↑](#footnote-ref-655)
656. 29 C.F.R. §778.603. [↑](#footnote-ref-656)
657. *Id*. [↑](#footnote-ref-657)
658. *Id*. [↑](#footnote-ref-658)