

arrangement by providing that the salary which formerly covered a fixed workweek of 40 hours now covers a variable workweek up to 40 hours. If this is the new agreement, the employee receives \$200 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. His rate thus varies from week to week, but in weeks of 40 hours or over, it is \$5 per hour (since the agreement of the parties is that the salary covers up to 40 hours and no more) and his overtime rate, for hours in excess of 40, thus remains \$7.50 per hour. Such a salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his full salary if he worked only 25 or 30 hours. No deductions for hours not worked in short workweeks would be made. (For a discussion of the effect of deductions on the regular rate, see §§ 778.304 to 778.307.)

[46 FR 7316, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

**§ 778.324 Effect on hourly rate employees.**

A similar situation is presented where employees have been hired at an hourly rate of pay and have customarily worked a fixed workweek. If the workweek is reduced from 40 to 35 hours without reduction in total pay, the average hourly rate is thereby increased as in § 778.322. If the reduction in work schedule is accompanied by a new agreement altering the mode of compensation from an hourly rate basis to a fixed salary for a variable workweek up to 40 hours, the results described in § 778.323 follow.

**§ 778.325 Effect on salary covering more than 40 hours' pay.**

The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of \$275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of \$2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of \$7.50 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to

50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains \$5 per hour and he is due, in addition to his salary, extra compensation of \$2.50 for each hour over 40 but not over 55 and full time and one-half, or \$7.50, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is \$5.50 per hour in all weeks. This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of \$5.50 per hour for the hours not worked.

[46 FR 7316, Jan. 23, 1981]

**§ 778.326 Reduction of regular overtime workweek without reduction of take-home pay.**

The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earnings at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of \$5 an hour and regularly worked 50 hours, earning \$275 as his total straight time and overtime compensation, and the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from \$5 per hour to \$6 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be \$285. The parties cannot, however, agree that the employee is to receive exactly \$285 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer