Case No. 18-55682

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARISHA RUSSELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California
The Honorable Janis L. Sammartino, Presiding
United States District Court Case No. 3:17-cv-00672-JLS-WVG

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TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION 1

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 2

III. STATEMENT OF THE CASE 2

A. Relevant Facts 2

B. Procedural History 5

IV. SUMMARY OF THE ARGUMENT 6

The Cash Payments 6

The Trust Contributions 8

V. ARGUMENT 9

1. *DE NOVO* REVIEW APPLIES 9

2. THE DISTRICT COURT ERRED IN FINDING THAT CASH PAYMENTS ARE VALID PERCENTAGE BONUSES MEETING THE REQUIREMENTS OF THE FEDERAL REGULATIONS 10

A. Legal Framework for Payment 10

B. The District Court Improperly Adopted GEICO's Use of a Truncated Earnings Period When Calculating Its Cash Payments 18

C. The District Court Gave Insufficient Weight to Additional Authorities Supporting Appellant's Interpretation 25

D. Separately, the District Court Also Erred in Finding that GEICO Was Not Required to Include the Trust Contributions when Calculating Russell's Regular Rate of Pay 29

E. The District Court Incorrectly Concluded That Trust Contributions Satisfy 29 C.F.R. Section 778.215's "Benefit Plan" Requirements....29

F. Once Again, Exclusions from the Regular Rate Are Interpreted Narrowly 32

VI. CONCLUSION 33

STATEMENT OF RELATED CASES....35

CERTIFICATE OF COMPLIANCE 36

ADDENDUM TO PLAINTIFF-APPELLEE'S ANSWERING BRIEF STATUTES AND REGULATIONS (CIRCUIT RULE 28-2.7)....37

TABLE OF AUTHORITIES

Cases

Brock v. Two R Drilling Co., Inc.
789 F.2d 1177 (5th Cir.) 25, 26

Brunozzi v. Cable Commc'ns, Inc.
851 F. 3d 990, 995 11

Cook v. Brewer
637 F.3d 1002, 1004 9

Edwards v. Marin Park, Inc.
356 F.3d 1058, 1065 1

Found. V. Secretary of Labor
471 U.S. 290, 296...11

Huntington Mem'l Hosp. v. Superior Court
131 Cal. App. 4th 893, 902 11

Jacksonville Paper Co., v. McComb
167 F. 2d 448, 449 (5th Cir.) 26

McComb v. Jacksonville Paper Co.
336 U.S. 187, 194095.. 26, 27

Prachasaisoradej v. Ralphs Grocery Co.
42 Cal. 4th 217, 242 n.14 11

Walling v. Youngerman-Reynolds Hardwood Co.
325 U.S. 419, 424 11

White v. Publix Super Markets, Inc.
No. 3:14-CV-1189, 2015 WL 4949837, at *2 32

Statutes

28 USC § 1441(a) and 29 USC § 216(b) 1
29 U.S.C. § 207(a)(1)... 6
29 U.S.C. § 207(a); Cal. Lab. Code § 510 10
29 U.S.C. § 207(e) 2, 6
29 USC §§ 206 and 207 1
Cal. Labor Code § 510 6
Federal Rule of Civil Procedure 12(b)(6) 9

Regulations

29 C.F.R. § 778.200(c).. 32
29 C.F.R. § 778.209 .... 2, 6, 7, 8, 10, 12, 14, 15, 17, 18, 20, 22, 24, 25
29 C.F.R. § 778.210 .... 2, 7, 8, 10, 13, 14, 15, 18, 22, 25
29 C.F.R. § 778.215 .... 2, 8, 9,29, 30, 31
29 C.F.R. § 778.503 .... 2, 10, 15, 25, 26

Other Authorities

U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA 2005-22 (the "2005 Letter 24

I. STATEMENT OF JURISDICTION

This case was removed to the District Court by Defendant-Appellee Government Employees Insurance Company ("GEICO") pursuant to 28 USC § 1441(a) and 29 USC § 216(b) of the Fair Labor Standards Act (the "FLSA"), which confers subject matter jurisdiction on a District Court over any action alleging violations of 29 USC §§ 206 and 207. [Excerpts of Record ("ER") 184-190.]

The judgment and orders appealed from include the District Court's order granting GEICO's Motion to Dismiss Ms. Russell's Second Amended Complaint ("SAC") [ER 007-022]. Plaintiff filed a written notice of intent not to amend the complaint [ER 005-006], exercising her right to stand on the pleadings and take up an appeal. *See e.g. Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004).

There has been a final judgment within the meaning of Federal Rule of Civil Procedure 54(b) in that the District Court has issued a judgment dismissing this action and all claims of all parties in this action. Pursuant to 28 USC 1291, this Court has jurisdiction to hear this appeal from the District Court, as the judgment and orders appealed from are final decisions of the District Court.

The District Court entered judgment on April 26, 2018 [ER 002-004]. Appellant timely filed her notice of appeal on May 5, 2018 [ER 001].

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the District Court correctly determined that GEICO's non-exempt employees received proper overtime pay, including overtime pay accounting for GEICO's annual lump sum bonuses, as required by 29 C.F.R. sections 778.209, 778.210, and 778.503;

(2) Whether the District Court correctly determined that GEICO's discretionary trust fund contributions to an employee benefit plan are exempt from inclusion in the "regular rate of pay" and, thus, overtime pay, under 29 U.S.C. 207(e)(4) and its interpreting regulation at 29 C.F.R. 778.215; and

(3) Whether the District Court properly dismissed Ms. Russell's Second Amended Complaint ("SAC") pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) for failing to state a claim for unpaid overtime and derivative employment claims based on the foregoing two findings.

III. STATEMENT OF THE CASE

A. Relevant Facts

This case is about proper payment of overtime. [ER 046-077.] Overtime is a multiple of an employee's "regular rate of pay." The regular rate of pay- which then gets multiplied when overtime hours are worked - is supposed to include *all* remuneration an employee receives, less amounts fitting within limited exceptions that GEICO admits do not apply here. *See* 29 U.S.C. § 207(e); [ER 165].

Calculating the overtime pay rate is usually straightforward when the regular rate of pay is fixed - you typically just multiply that regular rate by 1.5. But sometimes the regular rate of pay is *not* fixed. Such is the case here.

Here, GEICO often paid employees like Appellant Marisha Russell additional amounts, like bonuses and added retirement benefits, for work that was done long ago. This raises two primary issues on this appeal: (1) does the additional remuneration increase the GEICO employee's regular rate triggering a related increase in overtime pay, or is the remuneration exempt from the regular rate; and (2) if the remuneration is not exempt, how must GEICO recalculate the regular rate of pay so that the employee receives *all* owed overtime pay?

More specifically, each year GEICO provides company contributions, or bonuses, to its employees as additional remuneration. [ER 103.] GEICO pays out its bonuses in two forms: (1) cash bonuses; and (2) trust fund contributions. [ER 078-145; ER 061-066 and 146-147.] (providing an example of a PSP award split between cash and trust contributions).] Each are explained further below.

<u>The cash bonuses</u> are determined as follows: Under GEICO's profit sharing plan ("PSP"), GEICO's Board of Directors funds the plan from the company's annual net profits. [ER 103.] Once GEICO makes the annual funding determination, the PSP allocates the funds pursuant to a set formula to determine how much each participating employee receives. [ER 103-104.]

From there, GEICO calculates each individual employee's share as a percentage of the employee's earnings in the 12-month *calendar year*. [ER 103-106.] However, to receive the cash bonus, the employee must remain employed until a payout date in February of the following year. Thus, an individual employed as of January 1, 2017 receives his or her cash bonus for the 2017 calendar year only if he or she is still employed as of the February 2018 payout date. If the employee leaves during this roughly 14-month period—including in January or February of the year following the calendar year upon which the bonuses are calculated—the cash bonus is forfeited. In summary, the earnings period for Cash Payments is 14 months whereas the payment is exclusively based on 12 months' wages, which violates the regulations. [*See* ER 064-065; and 103-106.]

<u>The trust fund contributions</u> are "designed to encourage employee savings and to provide out of [GEICO's] profits . . . benefits for [employees] upon their retirement, disability, or termination of service and for their beneficiaries in the event of their death." [ER 083.] GEICO has complete discretion as to the amount to fund or not fund the PSP, and in turn, employee Trust Contributions. Once funded, the amount of Trust Contributions follows an allocation formula. [ER 103-106.]

Importantly, GEICO does *not* go back and re-compute or raise employees' regular rates of pay to incorporate the Cash Bonuses or Trust Contributions for purposes of figuring overtime pay. Thus, an employee who works overtime during

the bonus earnings period (the roughly 14 months beginning in January of Year 1, into February of Year 2) receives no extra overtime pay to account for the bonuses. [ER 069.] At bottom, Ms. Russell contends that, by refusing to factor the bonuses and trust contributions into the regular rate of pay, GEICO is systematically underpaying employee overtime.

B. Procedural History

Ms. Russell filed her original complaint on December 23, 2015 in the Superior Court of California – County of San Diego, asserting various wage and hour claims under California law. [ER 191-232.] After Ms. Russell added an FLSA claim, GEICO removed the action to the District Court. [ER 184-190, and ER 233-324.] GEICO then filed a Motion to Dismiss under FRCP Rule 12(b)(6). [ER 166-183.] The District Court granted the Motion, with leave to amend. [ER 148-164.] Russell filed her Second Amended Complaint ("SAC") on July 21, 2017. The SAC again asserted claims for unpaid overtime pursuant to the FLSA as well as related state law claims based on GEICO's failure to include the Cash Payments and Trust Contributions in Ms. Russell's overtime calculations. [ER 046-077.] GEICO filed a Motion to Dismiss the SAC under FRCP 12(b)(6). [ER 023-045.] On March 8, 2018, the District Court entered an order granting the Motion, finding that GEICO had properly accounted for the Cash Payments and Trust Contributions in calculating Ms. Russell's regular rate of pay. [ER 007-022.]

Following Plaintiff's notice of intent not to amend the complaint [ER 005-006], on April 25, 2018, the Clerk entered a Judgment dismissing the case. [ER 002-003.] Ms. Russell timely filed her Notice of Appeal. [ER 001.]

IV. SUMMARY OF THE ARGUMENT

Ms. Russell's SAC adequately alleged violations of the FLSA and related state laws stemming from GEICO's failure to pay Russell and other similarly situated employees all overtime compensation due. *See* 29 U.S.C. § 207(a)(1) and Cal. Labor Code § 510 (requiring employers to pay overtime at not less than one and one-half times the employee's "regular rate" of pay.); and *see* 29 U.S.C. § 207(e) (defining "regular rate" very broadly "to include *all remuneration* for employment paid to, or on behalf of, the employee, [unless specifically excluded].").

The Cash Payments

GEICO pays lump sum annual Cash Payments to non-exempt employees each year. These payments are not exempt from the regular rate and must be included in determining GEICO's overtime obligation. GEICO failed to properly pay overtime on these sums.

When paying a non-exempt cash bonus, an employer may calculate overtime to include that bonus. Federal regulations mandate that the employer go back and re-compute the past "regular rate" of pay according to 29 C.F.R. 778.209 (sometimes referred to as "CFR 209"). In short, the bonus payment must be "apportioned back

over the workweeks **of the period during which it [was] earned**," increasing the regular rate and corresponding premium pay due on overtime hours. *See* 29 C.F.R. § 778.209(a) (emphasis added).

The federal regulations also recognize, however, that as a matter of logic, if an employer provides a true **mathematically equivalent** "percentage bonus" at the end of the year, then, as confirmed in 29 C.F.R. 778.210, no such re-computation is necessary. This applies to a true "percentage bonus," i.e. a percentage paid as a percentage of straight and overtime hours over the earnings period that effectively allocates and proportionally increases overtime earnings at the same time as regular wages. *See* 29 C.F.R. § 778.210 (sometimes referred to as "CFR 210"). If done properly, the percentage bonus results in an overtime payment that is **identical** to what would be paid under technical recomputation method in CFR 209, because the bonus is calculated as a percentage of **all wages** earned during the applicable period, **including overtime**. As CFR 210 explains, this percentage payment "satisfy[ies] in full the overtime provisions of the [FLSA] and [therefore] no recomputation will be required."

Furthermore, structured in this way, the GEICO cash bonus functions like a retention or "longevity" bonus because even though the bonus-earning work ends at the end of the twelfth month, the employee has to stay an extra two months to receive that bonus. Such longevity bonuses are always supposed to be included in the

regular rate of pay. 29 C.F.R. 778.211(c) (noting that bonuses like longevity bonuses or "bonuses contingent upon the employee's continuing in employment until the payment is to be made" must be included in the regular rate of pay.)

GEICO contends the Cash Payments were valid percentage bonuses exempted from the requirement of recomputation. They were not. The Cash Payments fail to satisfy 29 C.F.R. sections 778.209 and 778.210 because, primarily, GEICO calculated the Cash Payments using an incorrect "earnings period." Section 209 requires that the bonus be apportioned over the workweeks "during which it [the bonus] may be said to have been earned." The GEICO bonuses were only earned if the employee worked about 14 months (i.e. through the date the bonuses were actually paid - usually in February of the following year). But the bonus amount GEICO *actually* paid was only a percentage of 12-months. As a result, the percentage bonus method failed to properly adjust the regular rate of pay, such that it was *not* the mathematical equivalent of the "recomputation" method described in CFR 209. As a result, GEICO did not satisfy mandatory overtime requirements. In the end, Russell and other employees were paid less overtime than owed under either method.

The Trust Contributions

In addition, Russell validly states claims under the FLSA and related state law based on her allegation that GEICO failed to include the Trust Contributions when

calculating her regular rate of pay for purposes of paying overtime. Contrary to the District Court's holding, these payments are not exempt from the regular rate under the interpreting regulations. [ER 017-021.]

Pursuant to 29 U.S.C 207(e)(4), an employer may exclude contributions validly made to a trustee or third person pursuant to a bona fide plan providing for old-age, retirement, life, accident, or health insurance or similar benefits for employees. 29 C.F.R. 778.215(a) sets forth mandatory requirements a benefit plan must meet to be exempt from the regular rate. Section 778.215(a)(3) requires that an exempt benefit plan have a formula for: (1) the total amount to be contributed to the plan and (2) the allocation of payments to employees.

GEICO's plan has a formula for allocation to employees, but the amount of contribution is entirely discretionary and not subject to any formula. [ER 103.] Based on the plain language of section 778.215, therefore, and the rule that courts must interpret exclusions from the regular rate narrowly, GEICO's Trust Contributions fail to meet the exception in 29 U.S.C 207(e)(4).

V. ARGUMENT

1. *DE NOVO* REVIEW APPLIES

Here we review the District Court's granting of a Motion to Dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), which is a *de novo* review. *Cook v. Brewer,* 637 F.3d 1002, 1004 (9th Cir. 2011).

2. THE DISTRICT COURT ERRED IN FINDING THAT CASH PAYMENTS ARE VALID PERCENTAGE BONUSES MEETING THE REQUIREMENTS OF THE FEDERAL REGULATIONS

The District Court held that GEICO's method of paying Cash Payments – as a percentage of the employees' 12-month calendar year's earnings – satisfies the overtime requirements. [ER 011-014.] The regulations at issue and GEICO's Cash Payments reveal that these payments are not appropriately apportioned back over the 14-month period during which they were earned and therefore fail to sufficiently provide overtime pay. *See* 29 C.F.R. §§ 778.209, 778.210, 778.503. Ultimately, GEICO's use of a truncated 12-month earnings period resulted in an under-calculation of the regular rate of pay. GEICO shortchanged employees on their overtime pay.

Because the Cash Payments do not comply with governing overtime regulations and related authorities, Plaintiff properly states causes of action for the overtime and derivative violations set out in her SAC. [ER 046-077.]

A. Legal Framework for Payment

Both the FLSA and California law require employers to compensate employees with overtime pay "at a rate not less than one and one-half times" the employee's regular rate for hours worked in excess of forty in a week. 29 U.S.C. § 207(a); Cal. Lab. Code § 510 (articulating same and additionally requiring overtime pay for "work in excess of eight hours in one workday). Absent controlling or

conflicting California law, "California follows the federal standard for purposes of determining, under the Labor Code, what constitutes an employee's regular rate of pay subject to an overtime rate." *Prachasaisoradej v. Ralphs Grocery Co.,* 42 Cal. 4th 217, 242 n.14 (2007) (citing *Huntington Mem'l Hosp. v. Superior Court,* 131 Cal. App. 4th 893, 902 (2005)).

Courts interpret wage laws "liberally to apply to the furthest reaches consistent with congressional direction" because "broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency." *Tony & Susan Alamo Found. V. Secretary of Labor,* 471 U.S. 290, 296 (1985). Broad coverage and narrow exclusions bolster the specific purpose behind overtime requirements: "compensating the employees for the burden of a long workweek" and "avoiding the evil of … underpay." *See e.g. Walling v. Youngerman-Reynolds Hardwood Co.,*325 U.S. 419, 424 (1945); *Brunozzi v. Cable Commc'ns, Inc.,* 851 F. 3d 990, 995 (9th Cir. 2017). Confirming the broad application and protections of the wage laws and regulations, this Court recently explained that in order to "effectuate the [overtime] statutory purposes… [courts] must look not to the contract nomenclature but to all payments, wages, piece work rates, **bonuses or things of value.** *Id. at 995* (internal citations omitted).

Moreover, it has long been recognized that longevity bonuses such as the Cash Payments at issue here must be included in the calculation of an employee's regular rate of pay. *See* 29 C.F.R. 778.211. GEICO does not contend that the Cash Payments fall within recognized exception to this rule. [ER 180.] ("GEICO is not relying on any of those statutory exemptions to avoid paying overtime")]. Rather, GEICO claims, and the District Court incorrectly held, that, by using a true "percentage bonus" method, GEICO already included all applicable overtime in the Cash Payments such that they did not have to be reapportioned into Ms. Russell's regular rate of pay. [ER 011-014.] Not so.

1. *How to Calculate Overtime When There Are Year-End Bonuses*

Where, as here, a lump sum bonus does not fall within one of the eight statutory exceptions set forth in 29 U.S.C. section 207(e), the Code of Federal Regulations requires a re-computation, i.e. for employers like GEICO to go back and factor the bonus back into the regular rate of pay already paid to the employee over the prior months. 29 C.F.R. 778.209.

Under this method, a company must first allocate the bonus to the applicable period during which it was earned, and then recompute overtime as a result of the payment of the bonus:

> [Once] the amount of the bonus can be ascertained, it must be ***apportioned back over the workweeks of the period during which it may be said to have been earned***. The employee must then receive an

> additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory hours worked during the week.

See id. (emphasis supplied). In other words, in addition to paying the bonus, the employer makes a reconciliation payment to account for the additional overtime owed as a result of increased regular rate stemming from the bonus. *See id.* As explained further in Section 32c03(b) of the Department of Labor Field Operations Handbook, Modernization Revision 729, published 11/17/16 ("DOH FOH"), this apportioning occurs "so that the employee will receive an additional amount of compensation for each week in which he/she worked overtime **during the period [over which the bonus may be said to have been earned]**."

The next regulation in the Code - 29 C.F.R. 778.210 - further explains the bonus re-calculation and describes how a ***logically and mathematically equivalent*** "percentage bonus method" would equally satisfy CFR 209 and the FLSA overtime requirements. Specifically, CFR 210 recognizes that some bonus plans, "[i]n some instances," "may" be able to use a percentage of earnings to satisfy overtime obligations and avoid recomputation. *Cf.* 29 C.F.R. 778.210. However, this is only true where the percentage "payment is used as a device to . . . provide actual overtime compensation," i.e. when the result would be the same overtime pay under technical recomputation. *Id.*

Under the percentage bonus method, the employer calculates the total bonus as a percentage of all earnings during the bonus period, including straight time and overtime. The rationale for this alternative calculation method is that "[i]f an employer grants a bonus to [an] employee as a percentage of **total pay,** the employer increased both the regular rate of pay *and* the bonus pay by the same percentage." *Chavez v. Converse, Inc.,* No. 15-CV-03746 NC, 2016 WL 4398374, at *2 (N.D. Cal. Aug. 18, 2016). Despite failing to faithfully apply these principals, the District Court correctly stated that "a **'percentage bonus' provides** employees—in one payment—with both a bonus and accrued overtime stemming from **what would otherwise derive from the bonus-based recomputation,**". [ER 154.] In other words, the math ensures that the employee's regular rate of pay is automatically adjusted as part of the bonus calculation.

2. *Additional Authorities Support Appellant's Interpretation of the Percentage Bonus Rule Requiring Mathematical Equivalency.*

In addition to the plain language of CFR Sections 209 and 210, the Dept. of Labor supports Appellant's view that technical recomputation and percentage bonuses must accomplish the same end. In addressing "distribution of bonuses as a percentage of total earnings," the DOL FOH, Chapter 32, Section 32c04(a) states:

> Whether a bonus may be distributed as a percentage of total earnings of each participating employee [section CFR 778.210], or by the boosted hour method [under section 778.209], to achieve [overtime] compliance . . . depends on whether the

> additional money to be paid is a true bonus. . . . **[I]f** the additional money to be paid is a **true bonus**, it may be **distributed in proportion to the total earnings** (exclusive of the bonus) of each participating employee properly computed to include time and one-half for the overtime hours or in proportion to the boosted hours worked **during the bonus period**."[1]

(available at: https://www.dol.gov/whd/FOH/FOH_Ch32.pdf.) The DOL highlights the parallel aims of CFR 209 and 210 – distributing a bonus over the proper period.

Another federal regulation further supports Appellant's view. Specifically, 29 C.F.R. section 778.503 addresses "pseudo percentage bonuses." It tells us what is a "true [i.e. bona fide] bonus based on a percentage" – which need not be factored further into overtime:

> As explained in [section] 778.210 of this part, a true bonus based on a percentage of total wages—both straight time and overtime wages—satisfies the Act's overtime requirements, if it is **paid unconditionally**. . . . 29 C.F.R. § 778.503 (emphasis added).

Read as a whole, 29 C.F.R. sections 778.209, 778.210, and 778.503 show the distinction between a "true percentage bonus" – one paid *un*conditionally and intended to reallocate overtime compensation over the period during which the bonus was earned; and a "pseudo percentage bonus" – one paid conditionally and

[1] Again, CFR 209 makes clear the "bonus period" is the "**period during which [the bonus] may be said to have been earned**."

used to accomplish some other end, such as incentivizing longevity or future conduct by the employee or deferring owed compensation.

3. *Whether the Technical Recomputation Method or the Percentage Bonus Method Is Used, the Result to the Employee Should Be the Same*

When done properly, the *bona fide* or "true" percentage bonus necessarily and automatically provides the same overtime compensation that would otherwise be provided under the technical recomputation method. [*See* DOL FOH, Section 32c05a (noting that, if applied properly, "the bonus mathematically will include both straight-time and overtime, and payment will be in compliance with the FLSA and PCA")]. Indeed, GEICO itself recognized this principle in its Motion to Dismiss the First Amended Complaint when noting the matter of simple "arithmetic" that "under either method of calculation, Russell [purportedly] receives exactly the same wages for exactly the same hours of work." [ER 177].[2]

The following hypothetical, adapted from one provided by GEICO on page 5 of its Motion to Dismiss the First Amended Complaint, further illustrates how the two methods should yield identical outcomes:

First, assume an employee works 100 regular hours per month plus 10 overtime hours per month during a 14-month bonus earnings period (which the

[2] Unfortunately, GEICO ignores the fact that in the case of Russell and its other employees, the "simple arithmetic" does not add up.

employee must work through in order to get his or her bonus – just like at GEICO). Thus, the employee works 1,540 total hours. The employee, thus, gets total straight-time pay of $15,400, and receives additional overtime premium pay of $700 (140 overtime hours x $5 in extra overtime premium pay), for total pay of $16,100. A 10% "percentage bonus" on that amount would be, thus, $1610.00

We would get the same number - $1610 - under a recomputation as contemplated by 29 C.F.R. 778.209, *but only if we again used the same 14-month earnings period.* The math is as follows:

- 10% bonus on regular earnings = $ 1,540 ($15,400 x 10%)
- Bonus Overtime Rate of Pay = $1/hr ($1,540/1540 total hours)
- Additional overtime rate that must be multiplied across all overtime hours = $0.50 (the $1 plus a half).
- Additional net Overtime Owed = $ 70 ($0.50 x 140 overtime hours)
- **Total Additional Pay = $1,610** ($1540 + $70).

Under either method, the employee receives the same amount, but that is only if the same 14 months are used in the calculation. The two methods are mathematically equivalent.

Indeed, the District Court recognized the need for mathematical equivalency when it granted GEICO's first Motion to Dismiss, noting that "a 'percentage bonus' provides employees – in one payment – with both a bonus *and* accrued overtime

stemming from what would otherwise derive from the bonus-based recomputation." [*See* July 11, 2017 Order Granting Defendants' MTD the FAC, 7:20-22].

Thus, while an employer is not required to actually *perform* a week-by-week recomputation if it pays a true percentage bonus as set forth in 29 C.F.R. 778.210, the same *bonus period* as mentioned in 29 C.F.R. 778.209 must also apply to such payments to achieve the required mathematical equivalency. Said another way, to be valid, a percentage bonus must capture earned overtime for ***all workweeks*** in the period during which the bonus may be said to have been "earned." 29 C.F.R. 778.209.

B. The District Court Improperly Adopted GEICO's Use of a Truncated Earnings Period When Calculating Its Cash Payments

As noted above, the District Court correctly recognized the interrelated nature of 29 C.F.R. 778.209 and 20 C.F.R. 228.210 and that, when applied properly, the percentage bonus method and the recomputation method are mathematically equivalent. [ER 154] Nonetheless, the District Court failed to properly apply this principle here, and erroneously endorsed GEICO's use of a truncated earnings period to calculate its Cash Payments.

4. *The Cash Payments are Not the Equivalent of Technical Recomputation Here, Because GEICO Failed to Use the Appropriate Earnings Period*

GEICO calculates its Cash Payments as a percentage of employee earnings *for the calendar year only* (i.e. from January 1 through December 31). However, as in the hypothetical set forth in Section A(3) above, employees earn Cash Payments only if they remain employed *through the payout date,* typically in mid-February of the following calendar year. The Cash Payment is forfeited if the employee leaves before then. [ER 048.]

Thus, because an employee is required to remain employed through the pay-out date to earn the Cash Payment, it is a bonus that is earned from the period of January 1 of Year 1 through the payout date of mid-February in Year 2. [*Id.* and *see e.g.* ER 146-147.] This is the appropriate "earnings period" - about 14 months - that must be used to calculate the Cash Payments. Because GEICO failed to use this earnings period, the percentage bonus fails under 20 C.F.R. 228.210 as it does not provide overtime compensation that would result from technical recomputation.

GEICO's error becomes clearer when revisiting the hypothetical set forth above. Assume that all facts remain the same, except that instead of calculating the percentage bonus on total pay of $16,100, the employer, like GEICO, calculates the percentage bonus using total pay in Year 1 only. Because the employee's total pay in Year 1 was $13,800 (12 months of work and not 14 months), the percentage bonus

paid will be $1,380, rather than the $1,610 that would have otherwise been paid if the employer used technical recomputation. This hypothetical employer, like GEICO, has shortchanged its employees.

GEICO's error becomes apparent again when comparing the overtime Russell would have earned from technical recomputation to that which she actually received from the purported percentage bonus. As set forth in Exhibit B to the SAC [ER 146-147], GEICO granted Russell a 10.9% Cash Payment based on her earnings from January 1 through December 31, 2012. However, Russell *actually* earned this bonus during the period of January 1, 2012 through February 22, 2013. If GEICO had done a proper technical recomputation, it would have had to apportion the bonus to all workweeks *through the pay-out date of February 22, 2013,* because of the clear requirement that Russell remain employed to earn the bonus. Indeed, GEICO could not seriously contend that it could limit reapportionment to the workweeks in 2012 only – to do so would clearly violate 29 C.F.R. 778.209 ("When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned"). Yet, GEICO failed to account for this entire period when calculating the percentage bonus, rendering it mathematically insufficient.

5. *The District Court Incorrectly Found that GEICO's Earning Period Was Proper*

Notably, the District Court acknowledges that a percentage bonus must be based on the appropriate earnings period. [ER 160.] It did so in the context of analyzing the following hypothetical Russell proposed in opposition to GEICO's Motion to Dismiss the First Amended Complaint:

> Assume a hotel in Alaska is willing to pay an annual bonus to incentivize continued bell hop employment. Assume bell hops make roughly $3,000 (inclusive of regular wages and overtime) in a slower month, such as January (because few people visit Alaska in January). To accomplish its goals of incentivizing continued employment and reducing overtime obligations, the hotel offers a 100% bonus on January's earnings (an extra $3,000), but *only* if the employee works through December. If GEICO's interpretation is the correct one, the hotel could exempt this bonus from the regular rate merely because it is based, in part, on a percentage of January's earnings. To get that bonus, though, those bell hops had to work all of the other months – and had to work especially hard in the very busy summer months that required much more overtime – so they could keep the bonus they had accrued through their January work. The bonus, in short, incentivizes further bell hop work without having to pay for the extra work that it engendered. (Opposition to Motion to Dismiss FAC at p. 10 l. 1-16)

The District Court analyzed the hypothetical as follows:

In [Ms. Russell's] second hypothetical, a hotel pays an annual bonus to 'incentivize continued employment and reduce overtime obligations.' The 'annual bonus' is 'a 100% bonus on January's earnings (an extra $3,000), but only if the employee works through December.' [Russell] argues that 'if GEICO's interpretation is a correct one, the hotel could exempt this bonus from the regular rate merely because it is based, in part, on a percentage of January's earnings. However, this hypothetical is not instructive because, unlike [GEICO's] PSP bonus, **the hypothetical's annual bonus only includes the hypothetical employee's January earnings and therefore is not based upon a percentage of the employee's total earnings.**

[ER 160.]

Unfortunately, the District Court failed to apply the above logic to GEICO's Cash Payments. The Cash Payments fail as a percentage bonus for the very same reason as in the above hypothetical: they are not based on Ms. Russell's total earnings from January of Year 1 to payout in February of Year 2, but rather only on the truncated earnings period of January to December of Year 1.

The District Court further erred by holding that "[20 C.F.R. section 228.210] is an alternative to [29 C.F.R. section 778.209] and [GEICO] need only fit under one of the two sections." [March 8, 2018 Order granting MTD the SAC, 6:22-24]. Respectfully, the District Court misses the point. As discussed above, the two methods – technical reapportionment and percentage bonus – should yield the same result: allocating the bonus proportionally to provide additional overtime pay resulting from the addition to the regular rate. To accomplish this, when an employer chooses to account for overtime through a percentage bonus under 29 C.F.R. 778.210, the earnings period used to calculate the bonus must be identical to that which would have otherwise been used under 29 C.F.R. section 778.209. [*See* 29 C.F.R. § 778.209, noting that bonuses must be apportioned "back over the workweeks of the period during which [they] may be said to have been earned."] They were and are not identical here.

The District Court also incorrectly found that "Plaintiff's argument that she must earn the bonus over fourteen months overlooks the fact that an employee

working in January and February of year two is earning a bonus for year two." [ER 014.] This reasoning is flawed. First, there is no reason – and certainly nothing described in the four corners of the complaint - why Russell could not be working towards multiple bonuses during the same earnings period – indeed, this is exactly what GEICO's PSP sets in place and therefore is exactly what she was doing. That is, she earned her Year 1 bonus by working in January of Year 1 through February of Year 2; she earned her Year 2 bonus by working January of Year 2 to February of Year 3. Additionally, the District Court's logic presumes that an employee will stay indefinitely through the following year's payout date. But consider an employee who leaves employment with GEICO sometime after the bonus payout in February of year two. Because GEICO calculates the bonus as a percentage of calendar year earnings, that employee would receive her additional overtime pay earned from January of year one to December of year one. However, the employee would be deprived of her owed additional overtime pay for the "longevity" portion of the bonus period – i.e., the period from January 1 of year two through the February of year two. In this scenario—contrary to the District Court's reasoning—the employee working in January and February of year two is *not*, in fact, earning a bonus for year two.

Finally, the Court incorrectly relied on an August 2005 DOL Opinion Letter in which the DOL found that a percentage bonus paid in February of Year 3 does

not need to include in its calculations a percentage bonus paid in February of Year 2. [ER 014.] (citing U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA 2005-22 (the "2005 Letter")]. The facts on which the 2005 Letter were based are completely distinguishable for one clear reason: the employees were not *required* to remain employed through February of Year 2 to earn their percentage bonus. Those employees did not "earn" their bonus by having to work in January and February in Year 2 like the GEICO employees did. Thus, the sole basis for the DOL opinion was that, although *paid* in Year 2, the bonus was *earned* as a result of service in Year 1 *only*. In clear contrast, GEICO employees must remain employed through the pay-out date in February of Year 2 – the bonus is *earned* as a result of service in both Year 1 *and* Year 2. This extra two months (approx.) of required work must be factored in.

In short, while the District Court properly recognized the principle that the earnings period used for calculating a percentage bonus must be the same as that which would be used for technical recomputation, it failed to properly apply the principle to this case. Because the Cash Payments were calculated on a shortened earnings period, they necessarily fail as valid percentage bonuses under 20 C.F.R. section 228.210. GEICO was required to include the Cash Payments in its calculation of Ms. Russell's regular rate of pay, pursuant to 29 C.F.R. 778.209.

C. The District Court Gave Insufficient Weight to Additional Authorities Supporting Appellant's Interpretation

Aside from the plain language and logical application of 29 C.F.R. sections 778.209 and 778.210, additional authorities support Appellant's position that a percentage-based bonus must mirror technical recomputation to be a bona fide percentage bonus as contemplated by the regulations. The District Court should have given these more weight.

First, 29 C.F.R 778.503 provides: "a true bonus based on a percentage of total wages – both straight time and overtime wages – satisfies the Act's overtime requirements, **if it is paid unconditionally."** Here, GEICO's bonuses violate the express prohibition against "conditional" bonuses in section 778.503. In order to be earned, an employee must remain employed until the pay-out date in February of the following year. Thus, GEICO's bonus program, as applied, cannot constitute a bona fide unconditional "percentage bonus" under 29 CFR 778.503.

Remarkably, GEICO acknowledges that "at first blush," Ms. Russell's argument that CFR 503 "puts to rest any notion that GEICO's conditioning of the bonuses might pass muster" is "convincing." (see MTD the FAC, 8:6-10) Then GEICO then attempts to sidestep this "convincing" argument with a flawed citation to *Brock v. Two R Drilling Co., Inc.* 789 F.2d 1177 (5th Cir. 1986).

Unlike here, *Brock* addressed an alleged percentage bonus that included conditions required to be satisfied *prior to and during the same workweek* the bonus

was earned. *Id.* At 1179. *Brock* ultimately found such conditions *precedent* did not invalidate an otherwise-valid percentage bonus. *Id.* at 1180.

But Russell does not claim that GEICO improperly imposed conditions *precedent* on eligibility for bonus. Nor could she, as such conditions precedent (e.g., meeting performance targets) are common when employers award bonuses. Rather, Russell takes issue with imposition of a conditions *subsequent*—namely, the requirement that she must remain employed until the payout to receive the bonus. Such conditions subsequent render the bonus invalid under section 778.503 under the same logic as discussed above: when an employee must remain employed for a period *longer* than the earnings period which is used to calculate the percentage bonus, the "simple arithmetic" on which the percentage bonus is based no longer adds up. A percentage bonus based on *conditions subsequent* is no longer compatible with technical recomputation.

Second, this Court should also consider *Jacksonville Paper Co., v. McComb,* 167 F. 2d 448, 449 (5th Cir. 1948) *reversed on other grounds in McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 194095 (1949). In *Jacksonville Paper,* at the end of the year the employer gave "a bonus to some classes of employees based on a percentage of their total pay the preceding year… but not payable at once and unconditionally." *Id.* at 450. Much like GEICO's plan, the bonus was paid in

installments over the course of the "succeeding year *if the employee was still working for the corporation." Id.*

The appellate court found that despite the "percentage" nature of the bonus, "it seems to us that by continuing to work the employee could enforce payment each month, and that he was working for it [the bonus] as well as for his other wages, so that it became part of his regular compensation… and would have to be considered as such in computing any overtime." *Id.* In other words, the *Jacksonville Paper* court held that if an employee's receipt of a percentage bonus is conditioned upon him continuing to work for the employer, the subsequent work period must also be factored into the regular rate of pay for purposes of paying overtime.

The District Court failed to properly consider the holding of *Jacksonville Paper*. Instead, it adopted GEICO's attempts to distinguish *Jacksonville Paper* on the basis that it was decided "a year before Judge Learned Hand articulated the mathematical basis for the modern percentage bonus rule." [*See* Reply to Opposition to MTD the FAC, 6:23-7:8]. Yet GEICO and the District Court forget that this "mathematical basis" does not work here – as discussed above, the percentage bonus paid by GEICO is not mathematically consistent with technical recomputation of the regular rate of pay.

Neither CFR 210 nor Judge Hand's holding invalidate the principle which was first set forth in *Jacksonville Paper.* To the contrary, *Jacksonville Paper,* CFR

210, and Judge Hand's ruling provide separate, but complimentary, guidance on when a percentage bonus may be excluded: a *properly calculated* percentage bonus which is *not* conditioned on continued employment can be excluded from the regular rate, because all overtime due has already been calculated and paid within the bonus itself.

Next, Appellant Marsha Ms. Russell's interpretation is the one that is most consistent with the rule that employment laws, as remedial statutes and regulations, must be read expansively in order to protect employees. *Cf. Tony,* 471 U.S. at 296; *Walling,*325 U.S. at 424. GEICO's interpretation shortchanges employees.

Finally, Ms. Ms. Russell's interpretation is also most consistent with the plain language of yet another regulation – 29 C.F.R. 778.211- which notes that, as a general matter, longevity bonuses and any other "bonuses contingent upon the employee's continuing employment until the time the payment is to be made" must always be included in the regular rate. GEICO's contrary interpretation – adopted by the District Court and which fails to account for the longevity component of GEICO's system– is also unreasonable because it fails to honor these basic principles.

D. Separately, the District Court Also Erred in Finding that GEICO Was Not Required to Include the Trust Contributions when Calculating Russell's Regular Rate of Pay

The District Court held that Trust Contributions are exempt from the regular rate because, as "benefit plans" pursuant to 29 U.S.C. 207(e)(4), these payments comply with the requirements of interpreting regulations 29 C.F.R. section 778.215. [ER 015-020.] In so ruling, the District Court erred in interpreting the plain language of 29 C.F.R. section 778.215(a)(3) and, to the extent there was ambiguity in this language, failed to construe this exclusion from the regular rate narrowly as courts must.

E. The District Court Incorrectly Concluded That Trust Contributions Satisfy 29 C.F.R. Section 778.215's "Benefit Plan" Requirements

The District Court and both parties agree that to be exempt from the regular rate, GEICO's Trust Contributions must fit under 29 U.S.C. section 207(e)(4)'s qualifying "benefits plans" exception, and also satisfy the 5 conditions set out in interpreting regulation 29 C.F.R. 778.215(a). [ER 017-020.] The District Court concluded that the PSP's method of allocating payments to specific employees, once GEICO decides how much to contribute to the PSP, satisfies the requirement at section 778.215(a)(3). [ER 017-021] ("Paragraph 5.2 describes the PSP's allocation formula [and satisfies section 778.215(a)(3)]").] In relying on the existence of a formula, the District Court overlooks the *type* of formula*s* required by the plain

language of section 778.215(a)(3) and the fact that GEICO's PSP fails to contain a necessary *contribution* formula.

778.215(a)(3) requires either[3]:

> (ii) There must be both a definite **formula for determining the amount to be contributed** by the employer **and** a definite **formula for determining the benefits for each of the employees** participating in the plan; or
> (iii) There must be both a **formula for determining the amount to be contributed** by the employer **and** a **provision for determining the individual benefits**. . . .

(emphasis added). Under either option, a properly exempt benefit plan under the interpreting regulations must have formulas for determining: (1) the amount of contribution to the benefit plan; and (2) the individual employee's distribution of benefits. GEICO's PSP lacks a contribution formula.

Here, GEICO's Board has sole discretion over the amount to contribute (or not contribute) to the PSP to fund Trust Contributions from GEICO's net profits. [ER103] ("Following the end of each Plan Year . . . [GEICO] will contribute to the [PSP] from [its] net profit such amount **as will be determined by the Board in its sole discretion**.") (emphasis added).] Because of this sole discretion, there is no

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[3] GEICO and the District Court do not contend benefits are determined on an actuarial basis under sub (i). [ER 017-020.]

formula for determining **the amount to be contributed** as required by section 778.215(a)(3) and the PSP and Trust Contributions flowing therefrom cannot be exempt from the regular rate under 29 U.S.C. section 207(e)(4).

Appellant acknowledges that, once GEICO selects the amount to contribute, the PSP has a multi-step formula or process that determines each individual employee's share of the contribution. [ER103-104.] The allocation process depends on, among other things, the earnings of the "Planning Center" where the employee works and the rank assigned to that center by GEICO. [ER 103-104.] This satisfies the employee distribution formula element of section 778.215(a)(3), but it cannot also meet **the contribution** formula requirement.

In short, GEICO does not have a formula for determining the amount contributed to the PSP because the amount, if anything, is entirely discretionary. GEICO can deem it to be zero if it wants to. As such, it cannot be an exempt benefit plan under the requirements of section 778.215(a)(3). The District Court's focus on the formula for determining allocation to specific employees *after* the initial contribution decision ignores the *dual* formula requirement for contribution and distribution under this regulation.

Because the Trust Contributions are not exempt, they must be included in the regular rate. GEICO failed to do this and, as such, Plaintiff states a proper

claim for relief for failure to pay overtime in the Second Amended Complaint. This alone warrants overturning the District Court's ruling.

F. Once Again, Exclusions from the Regular Rate Are Interpreted Narrowly

Again, the federal and state legislatures define "regular rate" very broadly "to include *all remuneration* for employment paid to, or on behalf of, the employee, [unless specifically excluded]." *See* 29 U.S.C. § 207(e) (emphasis added).[4] Unless the remuneration falls within a limited statutory exception, it "must be added into the total compensation received by the employee before his regular hourly rate of pay is determined [for purposes of determining overtime compensation due]." 29 C.F.R. § 778.200(c) ("all remuneration for employment paid to employees which does not fall within one of [] seven exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is determined").

Courts "interpret[] [exceptions to inclusion in the regular rate] *narrowly* against the employer, and *the employer* bears the burden of showing that an exception applies." *White v. Publix Super Markets, Inc.*, No. 3:14-CV-1189, 2015 WL 4949837, at *2 (M.D. Tenn. Aug. 19, 2015) (emphasis added).

[4] *See also* California's Division of Labor Standards Enforcement ("DLSE") Enforcement Policies and Interpretations Manual (2002), § 49.1.2 (adopting the definition of "regular rate" from the FLSA under the California Labor Code).

With these principles back in mind, another way to state Appellant's position is that the District Court's, and GEICO's, interpretation is too expansive. It allows an employer to set the fact of a contribution, and its initial amount, on a whim, so long as once that whim is satisfied, the distribution of the whimsical amount is according to some kind of "formula." But the exclusion from the regular rate set out in section 778.215(a) must be construed *narrowly* against GEICO, i.e. to eliminate that reliance on the whim. Appellant's interpretation, not GEICO's does just that. As the narrower interpretation, this Honorable Court must adopt Appellant's.

VI. CONCLUSION

For all of the foregoing reasons, the District Court's Order Granting GEICO's Motion to Dismiss Plaintiff's Second Amended Complaint for failure to state a claim for relief under the FLSA and related state statutes [ER 007-022] should be reversed along with the Judgment dismissing the SAC [ER 002-003], and this case should be remanded with instructions that the District Court deem Ms. Russell's Second Amended Complaint sufficient to state a claim.

Dated: August 23, 2018

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STATEMENT OF RELATED CASES

Plaintiff-Appellant is not aware of any related case pending in this Court under Ninth Circuit Rule 28-2.6.

Dated: August 23, 2018

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 31(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Answering Brief is proportionately spaced, has a typeface of 14 points or more in Times New Roman font, and contains 7657 words.

Dated: August 23, 2018

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ADDENDUM TO PLAINTIFF-APPELLEE'S ANSWERING BRIEF STATUTES AND REGULATIONS (CIRCUIT RULE 28-2.7)

FEDERAL STATUTES **Page**

29 U.S.C. § 206……………………………………………………………1

29 U.S.C. § 207…………………………………………………….2, 6, 10, 32

29 U.S.C. § 216……………………………………………………………1

FEDERAL REGULATIONS **Page**

29 C.F.R. § 778.209……………..…2, 6, 7, 8, 10, 12, 14, 15, 17, 18, 20, 22, 24, 25

29 C.F.R. § 778.210………………………………2, 7, 8, 10, 13, 14, 15, 18, 22, 25

29 C.F.R. § 778.215…………..……………………………...2, 8, 9, 29, 30, 31

29 C.F.R. § 778.503.…………………………………….… 2, 10, 15, 25, 26

STATUTES

29 U.S.C. § 206. Minimum Wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than--

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the

conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(4) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(5) Redesignated (4)

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

(c) Repealed. Pub.L. 104-188, [Title II], § 2104(c), Aug. 20, 1996, 110 Stat. 1929

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of

which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States

(1) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by chapter 67 of Title 41 or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof) and the provisions of chapter 67 of Title 41, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of

his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Employees in domestic service

Any employee--

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act constitute wages for the purposes of title II of such Act, or

(2) who in any workweek--

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b).

(g) Newly hired employees who are less than 20 years old

(1) In lieu of the rate prescribed by subsection (a)(1), any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour.

(2) In lieu of the rate prescribed by subsection (a)(1), the Governor of Puerto Rico, subject to the approval of the Financial Oversight and Management Board established pursuant to section 2121 of Title 48, may designate a time period not to exceed four years during which employers in Puerto Rico may pay employees who are initially employed after June 30, 2016, a wage which is not less than the wage described in paragraph (1). Notwithstanding the time period designated, such wage

shall not continue in effect after such Board terminates in accordance with section 2149 of Title 48.

(3) No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1) or (2).

(4) Any employer who violates this subsection shall be considered to have violated section 215(a)(3) of this title.

(5) This subsection shall only apply to an employee who has not attained the age of 20 years, except in the case of the wage applicable in Puerto Rico, 25 years, until such time as the Board described in paragraph (2) terminates in accordance with section 2149 of Title 48.

29 U.S.C. § 207. Maximum Hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) “Regular rate” defined

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) Sums1 paid in recognition of services performed during a given period if either, (a) 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; 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 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 and delimited 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 third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for 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) 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),2 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.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) 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 rate 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.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) 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 employee 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; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's

average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) 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.

(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) 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) shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen

consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

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

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in

excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee--

(1) is employed by such employer--

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed. An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such

employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,whichever is higher

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if--

(A) such employee is paid at a per-page rate which is not less than--

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection--

(A) the term “overtime compensation” means the compensation required by subsection (a), and

(B) the terms “compensatory time” and “compensatory time off” mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and

independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r) Reasonable break time for nursing mothers

(1) An employer shall provide--

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

29 U.S.C. § 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be

imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action. The authority and requirements described in this subsection shall apply with respect to a violation of section 203(m)(2)(B) of this title, as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips

unlawfully kept by the employer, and an additional equal amount as liquidated damages.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

(1)(A) Any person who violates the provisions of sections1 212 or 213(c) of this title, relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed--

(i) $11,000 for each employee who was the subject of such a violation; or

(ii) $50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term "serious injury" means--

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 206 or 207 of this title, relating to wages, shall be subject to a civil penalty not to exceed $1,100 for each such violation. Any person who violates section 203(m)(2)(B) of this title shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be--

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5 and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

REGULATIONS

29 C.F.R. § 778.209. Method of Inclusion of Bonus in Regular Rate

(a) General rules. Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked. Under many bonus plans, however, calculations of the bonus may necessarily be deferred over a period of time longer than a workweek. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the hourly rate paid by the employee, exclusive of the bonus. When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.

(b) Allocation of bonus where bonus earnings cannot be identified with particular workweeks. If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee

earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase.

29 C.F.R. § 778.210. Percentage of total earnings as bonus.

In some instances the contract or plan for the payment of a bonus may also provide for the simultaneous payment of overtime compensation due on the bonus. For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. In such instances, of course, payments according to the contract will satisfy in full the overtime provisions of the Act and no recomputation will be required. This is not true, however, 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, as described in §§ 778.502 and 778.503.

29 C.F.R. § 778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).

(a) General rules. In order for an employer's contribution to qualify for exclusion from the regular rate under section 7(e)(4) of the Act the following conditions must be met:

(1) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.

(3) In a plan or trust, either:

(i) The benefits must be specified or definitely determinable on an actuarial basis; or

(ii) There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

(iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under section 7(e)(4) of the Act.

(iv) Note: The requirements in paragraphs (a)(3)(ii) and (iii) of this section for a formula for determining the amount to be contributed by the employer may be met by a formula which requires a specific and substantial minimum contribution and which provides that the employer may add somewhat to that amount within specified limits; provided, however, that there is a reasonable relationship between the specified minimum and maximum contributions. Thus, formulas providing for a minimum contribution of 10 percent of profits and giving the employer discretion to add to that amount up to 20 percent of profits, or for a minimum contribution of 5 percent of compensation and discretion to increase up to a maximum of 15 percent of compensation, would meet the requirement. However, a plan which provides for insignificant minimum contributions and permits a variation so great that, for all practical purposes, the formula becomes meaningless as a measure of contributions, would not meet the requirements.

(4) The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the Act may result if the employee contributions cut into the required minimum or overtime rates. See part 531 of this chapter.) Although an employer's

contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of marking payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the employer. In such a case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

(5) The 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 contributions in cash instead of the benefits under the plan: Provided, however, 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 relation 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.

(b) Plans under section 401(a) of the Internal Revenue Code. Where the benefit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(a) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in paragraphs (a)(1), (4), and (5) of this section.

29 C.F.R. § 778.503 Pseudo "percentage bonuses."

As explained in § 778.210 of this part, a true bonus based on a percentage of total wages—both straight time and overtime wages—satisfies the Act's overtime requirements, if it is paid unconditionally. Such a bonus increases both straight time and overtime wages by the same percentage, and thereby includes proper overtime compensation as an arithmetic fact. Some bonuses, however, although expressed as a percentage of both straight time and overtime wages, are in fact a sham. Such bonuses, like the bonuses described in § 778.502 of this part, 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. The hourly rate purportedly paid under such a scheme is artificially low, and the difference between the wages paid at the hourly rate and the fixed weekly compensation is labeled a percentage of wage "bonus."

Example: An employer's wage records show an hourly rate of $5.62 per hour, and an overtime rate of one and one-half times that amount, or $8.43 per hour. In addition, the employer pays an alleged percentage of wage bonus on which no additional overtime compensation is paid:

Week 1–40 hours worked:

40 hours at $5.62 per hour	$224.80
Percentage of total earnings bonus at 33.45% of $224.80	75.20
Total	300.00

Week 2–43 hours worked:

40 hours at $5.62 per hour	224.80
3 hours at $8.43 per hour	25.29
Subtotal	250.09
Percentage of total earnings bonus at 19.96% of $250.09	49.91
Total	300.00

Week 3–48 hours worked:

40 hours at $5.62 per hour	224.80

8 hours at $8.43 per hour	67.44
Subtotal	292.24
Percentage of total earnings bonus at 2.66% of $292.24	7.76
Total	300.00

This employee is in fact being paid no overtime compensation at all. The records in fact reveal that the employer pays exactly $300 per week, no matter how many hours the employee works. The employee's regular rate is $300 divided by the number of hours worked in the particular week, and his overtime compensation due must be computed as shown in § 778.114.

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: August 23, 2018

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