No. 13-4661

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAIME WILLS,

Plaintiff-Appellant,

v.

RADIOSHACK CORPORATION,

Defendant-Appellee.

On Appeal from the
United States District Court for the Southern District of New York
Paul A. Engelmayer, U.S. District Judge
District Court Case No. 13-cv-2733

Brief of the Chamber of Commerce of the United States of America and the National Federation of Independent Business as *Amici Curiae* Supporting the Appellee and Urging Affirmance of the Judgment Below

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DISCLOSURE STATEMENT

Pursuant to FED.R.APP.P. 29(c)(1), *amici curiae* provide the following disclosures:

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The National Federation of Independent Business ("NFIB") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The NFIB has no parent corporation, and no publicly held company has 10% or greater ownership in the NFIB.

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INTEREST OF *AMICI CURIAE*[1]

This *amici curiae* brief is being filed on behalf of the Chamber of Commerce of the United States of America (the "Chamber") and the National Federation of Independent Business ("NFIB").

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The NFIB is the nation's leading association of small businesses, representing members in all 50 states and the District of Columbia. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB

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[1] Pursuant to Rule 29(c)(5) and Local Rule 29.1, *amici curiae* state that: (A) no counsel for any party authored this brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (C) no person, other than *amici curiae*, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The typical NFIB member has ten employees and reports gross annual sales of approximately $500,000 per year (and, thus, is covered by the Fair Labor Standards Act).

The members of the Chamber and NFIB have a significant interest in the interpretation of the overtime provision of the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207, and its state-law counterparts such as New York Labor Law ("NYLL") Article 19, § 142-2.2. In enacting section 207, Congress required that non-exempt employees receive one and one-half times their regular rate of compensation for overtime hours worked, but it granted employers the flexibility to determine the compensation arrangements upon which the regular rate would be determined. Employers throughout the United States depend on that flexibility to design compensation plans that incentivize and reward employees in a manner consistent with the employers' business needs.

That flexibility is threatened by the incorrect view (espoused by Plaintiff-Appellant Jaime Wills) that when an employer pays an employee a fixed salary for variable hours, the FLSA and NYLL prohibit the employer from also providing bonus compensation to that employee. *Amici curiae* wish to make clear that their members are deeply concerned about this attack on their ability to design

compensation plans that incentivize and reward their employees.

In its opinion, the district court upheld the "performance-based" bonus paid by RadioShack Corporation as part of a lawful "fluctuating workweek" compensation plan under 29 C.F.R. § 778.114. In doing so, the district court distinguished RadioShack's bonus from certain "hours-based" bonuses that other courts previously held violated the "fixed salary" contemplated by section 778.114. *Amici curiae* respectfully submit that this Court will benefit from the perspective offered by this brief, which supports affirmance of the district court for a different reason than the one articulated by the district court or in RadioShack's appellee brief. Specifically, when an employer pays an employee a fixed salary for variable hours, it is also permitted to pay the employee a bonus (whether based on hours, performance, or any other metric). The standard method for calculating overtime applies even when such a bonus is paid: (a) total wages divided by the total number of hours compensated by those wages equals the regular rate; and (b) one-half of the regular rate must be paid as the statutorily required overtime premium for all hours worked in excess of 40 in a workweek.

ARGUMENT

The Supreme Court of the United States has long recognized that employers retain the flexibility to develop compensation arrangements that meet the needs of their businesses. Generally speaking, the FLSA imposes only two requirements on

those arrangements. First, the employer must pay at least the statutory minimum wage (currently $7.25) for all hours worked. 29 U.S.C. § 206(a). Second, the employer must pay at a rate of at least one and one-half times the "regular rate" for all hours worked in excess of 40 per workweek. 29 U.S.C. § 207(a)(1).

Mr. Wills contends that if an employer pays a fixed salary for all hours worked (even when the hours are variable from week to week), then the FLSA prohibits the employer from also paying incentive compensation in the form of bonuses. Of course, the FLSA does not impose any such arbitrary limitation on an employer's right to design a compensation plan that incentivizes and rewards its employees. The payment of a fixed salary for variable hours is lawful, as is the payment of bonuses, and the FLSA does not prohibit employers from combining the two.

The district court recognized (correctly) that an employer who pays employees a fixed salary for variable hours is not prohibited from also paying "performance-based bonuses" that are not based on the number of hours worked. In its brief, RadioShack provides additional support for the legality of paying performance-based bonuses to employees who receive a fixed salary for variable hours, and this brief will not repeat those arguments.

Amici curiae submit that while the judgment of the district court was correct, the court's reasoning complicated what should be a more straightforward analysis.

The complication stems from the existence of authority supporting the idea that "hours-based" bonuses are not compatible with the "fixed salary" contemplated by the so-called "fluctuating workweek" approach to calculating overtime described in one of the Department of Labor's interpretative bulletins, at 29 C.F.R. § 778.114. The district court distinguished those cases, reasoning that the "performance-based" bonuses paid by RadioShack do not undermine the "fixed salary" contemplated by section 778.114 because they are not linked to the hours worked by the employee.

Amici curiae submit that this Court should not resort to distinguishing "hours-based" bonuses from "performance-based" bonuses in order to uphold RadioShack's compensation program. Quite simply, the FLSA does not impose *any* restrictions on the payment of "hours-based" *or* "performance-based" bonuses to employees who are also paid a fixed salary for variable hours. Certainly, bonuses must usually be incorporated into the "regular rate" when calculating overtime. But paying a bonus in addition to the fixed salary does not alter the basic overtime calculation that the Supreme Court established almost 70 years ago: (a) total wages divided by the total number of hours compensated by those wages equals the regular rate; and (b) one-half of the regular rate must be paid as the statutorily required overtime premium for all hours worked in excess of 40 in a workweek.

The Chamber and NFIB request that this Court affirm the judgment of the trial court for a different reason than the district court expressed.[2] The Court should hold that paying bonuses (whether or not based on hours worked) is compatible with paying a fixed salary for variable hours, and is allowed by the FLSA.

I. The Regular Rate Is An "Actual Fact" Derived From Whatever Compensation Arrangement The Parties Establish.

The FLSA provides that subject to certain exemptions not relevant here, "no employer shall employ any of his employees ... 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." 29 U.S.C. § 207(a)(1). In general, the "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e).[3]

A. Employers Retain Flexibility To Design Compensation Arrangements That Meet Their Needs.

Nearly 70 years ago, the Supreme Court recognized that as long as employers comply with the minimum wage provision of the FLSA, they "are free to establish [the] regular rate at any point and in any manner they see fit. They may

[2] *Leecan v. Lopes*, 893 F.2d 1434, 1439 (2nd Cir. 1990) (Court of Appeals is "free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied").

[3] 29 U.S.C. § 207(e) provides eight exceptions to this general rule, none of which are applicable in this appeal.

agree to pay compensation according to any time or work measurement they desire." *Walling v. Youngerman Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945); *see Adams v. Department of Juvenile Justice of the City of New York*, 143 F.3d 61, 66-67 (2nd Cir. 1998) (as long as regular rate equals or exceeds minimum wage, employer is free to establish compensation arrangement).[4] "It was not the purpose of Congress in enacting the [FLSA] to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement." *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203-04 (1947); *accord Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460-61 (1948) ("Contracts for pay take many forms. The rate of pay may be by the hour, by piecework, by the week, month or year, and with or without a guarantee that earnings for a period of time shall be at least a stated sum. The regular rate may vary from week to week.... The employee's hours may be regular or irregular. From all such wages the regular hourly rate must be extracted.").

B. The Regular Rate Equals Total Wages Divided By The Number Of Hours The Wages Are Intended To Compensate.

Although employers are free to establish compensation arrangements in any

[4] For example, employers may pay their non-exempt employees an hourly rate of pay; a fixed salary (for specified hours or for variable hours); piece rates, day rates or job rates; commissions, bonuses and other incentive arrangements; shift differentials; different rates of pay for different types of work; and so on. Employers may combine compensation options in a virtually infinite array of arrangements designed to incentivize and reward employees, consistent with the needs and realities of their businesses.

manner they choose, that choice will impact the "regular rate" used in the overtime calculation. The formula for determining the "regular rate" is not set forth in the FLSA. Rather, the regular rate is an "actual fact" derived from whatever compensation arrangement the parties establish:

> The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is ... an actual fact. Once the parties have decided upon the amount of wages ... the determination of the regular rate becomes a matter of mathematical computation.

Walling, 325 U.S. at 424-25. In *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 579 (1942), the Supreme Court explained the "mathematical computation" that must be used to determine an employee's regular rate. The Supreme Court began with the example of an employee "under contract for a fixed weekly wage for regular contract hours which are the actual hours worked." *Overnight Motor*, 316 U.S. at 580. In such a case, the regular rate is calculated as follows: "Wages divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours." *Id.* at n.16.

The Supreme Court applied "the same method of computation" to determine the regular rate when "the employment contract is for a weekly wage with variable or fluctuating hours." *Overnight Motor*, 316 U.S. at 580. In such a case, the

formula "wages divided by hours equals regular rate" means that "the regular rate varies with the number of hours worked." *Id.* (noting that "the longer the hours, the less the rate and the pay per hour"). The Supreme Court concluded:

> It is this quotient [wages divided by the hours the wages were intended to compensate] which is the "regular rate at which an employee is employed" under contracts ... for fixed weekly compensation for hours, certain or variable.

Id. at 580; *see also Urnikis-Negro v. American Family Property Servs.*, 616 F.3d 665, 674 (7th Cir. 2010) (when employee is paid fixed weekly wage for hours that fluctuate from week to week, "proper way to calculate the employee's regular rate of pay is to divide the weekly wage by the number of hours actually worked in a particular week"). Anticipating (and rejecting) an argument repeated by Mr. Wills throughout his brief, the Supreme Court noted that when a fixed salary is paid for variable hours of work, "the longer the hours, the less the rate and the pay per hour. This is not an argument ... against this method of determining the regular rate of employment for the week in question." *Overnight Motor*, 316 U.S. at 580.

As early as 1945, the United States District Court for the Southern District of New York applied *Overnight Motor* and held that the terms of the employment contract dictate whether an employee's fixed weekly wage is compensation for a fixed number of hours (resulting in a regular rate that is salary divided by the agreed hours) or is pay for all hours worked regardless of whether they vary from week to week (resulting in a regular rate that is salary divided by all hours

worked). *Kreeft v. R.W. Bates Piece Dye Works, Inc.*, 63 F. Supp. 881, 882 (S.D.N.Y.), *aff'd as modified*, 150 F.2d 818 (2nd Cir. 1945).

While defining the "regular rate" in the foregoing two contexts (fixed salary for an agreed-upon number of hours, and fixed salary for variable hours), the Supreme Court recognized that a contract of employment may provide for any number of wage arrangements. *Overnight Motor*, 316 U.S. at 579-80 (citing, by way of example, hourly and piece rates). The contract may provide any number of compensation approaches, but the "same method of computation produces the regular rate for each week." *Id.* at 580. Specifically, the regular rate equals total wages divided by the total number of hours compensated by those wages (whether fixed or variable). *Bay Ridge Operating Co.*, 334 U.S. at 461; *Adams*, 143 F.3d at 66-67 (holding that regular rate is total agreed pay for workweek (excluding contractual overtime premiums) divided by total hours worked during workweek).

In *Chavez v. City of Albuquerque*, 630 F.3d 1300 (10th Cir. 2011), the Tenth Circuit applied the foregoing principles without difficulty. The court held that "the first step in calculating the regular rate over a particular week is to *total the week's straight time pay and add-ons*." *Id.* at 1311 (emphasis added). This total should then be divided by the "actual hours worked by the employee" to obtain the regular rate. *Id.* at 1311-12. As the Court of Appeals explained, "the FLSA hourly regular rate is calculated by dividing the relevant weekly compensation by the actual hours

worked." *Id.* at 1313.

C. The Overtime Premium Is An Additional One-Half Of The Regular Rate.

If an employee's contractually agreed pay has already paid at least minimum wage for *every* hour worked, the employer's only remaining obligation under the FLSA is to pay an additional *one-half* of that regular hourly rate for each overtime hour worked, thereby providing the required "one and one-half times the regular rate" for all overtime hours. *Chavez*, 630 F.3d at 1313. In other words, the regular rate is the "time" component of the "time and one-half" overtime obligation, while the statutorily-mandated overtime premium that must be paid in addition to the contractually-agreed pay is the "and one-half" component. *See Walling*, 325 U.S. at 426 (regular rate is for all hours worked, so compliance with "time and one-half" obligation requires only an additional 50% premium for hours worked above forty). As the United States Court of Appeals for the Seventh Circuit explained:

> Notably, the approach taken by the Court in *Missel* [*v. Overnight Motor*] treats the fixed weekly wage paid to the employee as compensation at the regular rate for *all* hours that the employee works in a week, including overtime hours. The employer will separately owe the employee a premium for the overtime hours, but because he has already been compensated at the regular rate for the overtime hours by means of the fixed wage, the employer will owe him only one-half of the regular rate for those hours rather than time *plus* one-half.

Urnikis-Negro, 616 F.3d at 675.[5] In short, in the case of an employee paid a fixed salary for variable hours, the FLSA's overtime rule is simple: (a) wages divided by hours compensated equals regular rate; and (b) since the regular rate is, by agreement, compensation for all hours worked, the payment of an additional one-half of the regular rate for all overtime hours worked satisfies the "time and one-half" requirement.

Contrary to the position taken by Mr. Wills, the payment of an additional overtime premium of one-half the regular rate is not an *exception* to "time and one-half" overtime compensation. Rather, it is a *method of achieving* "time and one-half" overtime compensation. For example, if an employer agrees to pay $10 per hour, and an employee works 50 hours in a week, the employee's agreed pay for the week is $500 (50 hours x $10 per hour). The employee's regular rate is $10 per hour—the total contractual wages for the week ($500) divided by the hours that those wages were intended to compensate (50). The overtime premium owed in

[5] *See also Mayhew v. Wells*, 125 F.3d 216, 218 (4th Cir. 1997) (employees paid fixed salary for variable hours have "already been 'paid,' in part, for their overtime hours by their fixed salary and ... by receiving an additional one-half their regular pay ... they would effectively receive 'time and a half' for overtime hours"); *Saxton v. Young*, 479 F. Supp. 2d 1243, 1256 (N.D. Ala. 2007) ("since the salary itself is the straight time component of even the overtime hours, all that remains to be paid for the overtime hours is the additional half time"); *Knight v. Morris*, 693 F. Supp. 439, 445 (W.D. Va. 1988) (employee "on a straight salary who works overtime hours and receives one-half times his regular salary for those overtime hours has received effective 'time and a half' for his overtime hours").

addition to the contractually agreed $10 per hour is one-half of that calculated regular rate, or an additional $5 per hour, for the 10 hours worked above 40 hours. The combination of the contractually agreed $10 per hour with the statutorily mandated overtime premium of $5 per hour provides payment of "time and one-half" for each overtime hour worked. What the FLSA does *not* require is an additional payment, on top of the contractually-agreed $10 per hour, of one and one-half times the regular rate. If it did, this $10 per hour worker would be owed $25 for each overtime hour ($10 + (1.5 x $10)), which of course is not the case. Yet that is precisely the incorrect overtime calculation for which Mr. Wills advocates.

Put simply, paying overtime premiums equal to one-half the regular rate is not an exception. It is the rule. When RadioShack applied this calculation to its pay plan, it was not relying on an exemption available only if its plan fits within the so-called "fluctuating workweek regulation." Rather, it was applying the same method that applies to *all* pay plans.

II. The Department Of Labor Agreed That "Wages Divided By Hours Compensated" Equals The Regular Rate And Provided Examples Of This Rule, Not Restrictions On Its Application.

The so-called "fluctuating workweek regulation" is but one part of a broader interpretative bulletin that the Department of Labor issued in 1968. 29 C.F.R. Part 778, 33 Fed. Reg. 986 (Jan. 23, 1968). The bulletin was not issued pursuant to

notice and comment rulemaking procedures required for formal regulations. 33 Fed. Reg. 986 (1968) (preamble). Moreover, the FLSA did not authorize the Department of Labor to establish regulations pertaining to the regular rate or the overtime calculation. *Bay Ridge Operating Co.*, 334 U.S. at 461 ("no authority was given any agency to establish regulations"). As a result, the "courts must apply the statute ... without the benefit of binding interpretations...." *Id.*

In the interpretive bulletin, the Department of Labor announced its agreement with the "wages divided by hours compensated" statutory interpretation that the Supreme Court adopted in the 1940s:

> [T]he regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.

29 C.F.R. § 778.109; *see also* 29 C.F.R. § 778.108 (relying on the Supreme Court's decisions in *Bay Ridge* and *Walling* as the foundation of the "wages divided by hours compensated" approach); 29 C.F.R. § 778.308 ("Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived ... by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made."). The Department of Labor's adoption of the Supreme Court's longstanding view that the regular rate is determined by dividing total wages by total hours worked "is consistent with the

statutory language." *Chavez*, 630 F.3d at 1313.

In the sections following section 778.109, the Department of Labor's bulletin provides examples of "different employment arrangements and the proper method for complying with the FLSA for each type of arrangement." *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306, 1313 (11th Cir. 2007). The examples include the so-called "fluctuating workweek" salary arrangement (29 C.F.R. § 778.114), as well as examples involving hourly, piecework, day rate, job rate, salary for fixed hours, and commission arrangements. 29 C.F.R. §§ 778.110-778.122. The Department of Labor made clear that the list is neither exhaustive nor limiting:

> The following sections give *some examples* of the proper method of determining the regular rate of pay in particular instances....

29 C.F.R. § 778.109 (emphasis added).

In *Allen*, the Court of Appeals for the Eleventh Circuit recognized that employers are not required to conform their compensation plans to the precise terms of one of the examples in the interpretive bulletin in order to use the "wages divided by hours compensated" approach. The *Allen* case involved section 778.115, which provides:

> Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay ... have been established, his regular rate for that week is the weighted average of such

> rates. That is, his total earnings ... are ... divided by the total number of hours worked at all jobs.

29 C.F.R. § 778.115. The employees argued that their employer did not comply with section 778.115 because it used different rates of pay for the *same* (not different) types of work. *Allen*, 495 F.3d at 1312. Even though section 778.115—by its own terms—applies only when "different types of work" are performed, the court rejected the employee's argument. It recognized that section 778.115 was merely *an example* of a type of pay plan, showing how the regular rate would be calculated for that type of plan. *Id.* at 1313. "[R]eading section 778.115 in the context of section 778.109, it becomes apparent that the former is one of the examples mentioned in the latter as a way that the regular rate may be calculated in certain cases. While it exemplifies one way that a regular rate may be determined, it does not mandate that differing rates of pay are only permitted when different types of work are performed." *Allen*, 495 F.3d at 1313. Hence, even though the employer used different rates of pay for the same types of work, the employer complied with the FLSA because it adhered to the "wages divided by hours compensated" approach. *Id.*

III. Employers May Combine A Fixed Salary For Variable Hours With Additional Bonus Compensation.

As the district court noted, a few courts have held that the payment of hours-based bonuses "violated" section 778.114 because such bonuses "offended

§ 778.114's requirement of a 'fixed weekly salary.'" *Wills v. RadioShack Corp.*, 13 Civ. 2733, 2013 U.S. Dist. LEXIS 159727, at *25-26 (S.D.N.Y. Nov. 7, 2013) (citing cases holding that extra pay for holiday, weekend or night work, or for sea-duty or off-shore work, or for working on days off, "violates the FWW method's fixed salary requirement"). The erroneous view that an employer must "comply" with section 778.114's purported fixed salary "requirement" in order to use the "wages divided by hours compensated" approach appears to have originated in *O'Brien v. Town of Agawam*, 350 F.3d 279, 287-90 (1st Cir. 2003). But in that case, the parties *assumed* that there was such a requirement, so the Court of Appeals did not consider the issue further. *Id.* at 287 n.15 ("[T]he parties limit their arguments to whether the compensation scheme ... comports with [section 778.114], and we confine ourselves to the same question.").

Subsequent cases perpetuated the error by mistakenly citing *O'Brien* for the proposition that section 778.114 included a "fixed salary requirement" that must be satisfied before an employer could utilize the "wages divided by hours" approach. *See Dooley v. Liberty Mut. Ins. Co.*, 369 F. Supp. 2d 81, 85-86 (D. Mass. 2005) (relying on *O'Brien* for holding that premium pay for Saturday work "precludes application of the fluctuating workweek method"); *Adeva v. Intertek USA, Inc.*, 09 Civ. 1096, 2010 U.S. Dist. LEXIS 1963, at *9 (D.N.J. Jan. 11, 2010) (relying on *O'Brien* for holding that offshore pay, holiday pay and day-off pay "run afoul of

the 'fixed salary' requirement of 29 C.F.R. § 778.114(a)"); *Ayers v. SGS Control Servs., Inc.*, 03 Civ. 9078, 2007 U.S. Dist. LEXIS 19634, at *33 (S.D.N.Y. Feb. 27, 2007) (relying on *O'Brien* for holding that sea pay and day-off pay resulted in "violation of 29 C.F.R. § 778.114(a)"). Rather than confront those decisions directly, the district court distinguished them, holding that because the premium payments in those cases were based on hours worked whereas RadioShack's bonus was based on performance, it did not "offend" or "violate" the fixed salary "requirement" of section 778.114.

Amici curiae respectfully submit that the *O'Brien* line of cases are inapt and should be *rejected*, rather than *distinguished* based upon the characterization of a bonus as either "hours-based" or "performance-based."[6] Those cases overlook the critical point that while section 778.114 provides an *example* of how the regular rate is calculated when employees are paid a fixed salary for variable hours, it does not (and could not) prohibit employers from paying bonuses to such employees while adhering to the "wages divided by hours compensated" approach.

A. An Employee Who Receives A Fixed Salary For Variable Hours *And* A Bonus Is Still Paid A Fixed Salary For Variable Hours.

The example discussed in section 778.114 involved a "fixed salary" paid as

[6] *Amici curiae* note that not all bonus programs fit so neatly into these two categories. For example, a bonus paid for hitting certain performance metrics, but calculated based in part on an employee's attendance record, could arguably be characterized as either performance-based or hours-based.

"compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114. The example does not state (or even suggest) that the employer could not also pay bonus compensation to the employee *in addition to* a fixed salary for variable hours.

In fact, none of the examples in this part of the bulletin include a bonus payment in the example. The reason is readily apparent—an entire separate section of the bulletin is devoted to the complexities of incorporating bonus payments in the regular rate calculation. 29 C.F.R. §§ 778.208-778.215. Once the bonus is allocated to particular workweeks, the basic rule of "wages divided by hours compensated" applies: "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.... The employee must then receive an additional amount of compensation ... equal to one-half of the hourly rate of pay allocable to the bonus ... multiplied by the number of statutory overtime hours worked during the week" 29 C.F.R. § 778.209(a).

Certainly, an employee may receive a fixed salary for all hours worked, and *also* receive additional compensation in the form of bonus compensation. Such payments should be encouraged—not prohibited or even discouraged. For example, an employer who pays an employee a fixed salary for variable hours may

also want to pay the employee an additional sum to acknowledge the employee's working on a scheduled day off to complete a project. That additional sum would not change the fact that the employee still received his or her fixed salary as compensation for all hours worked. Rather, the bonus would merely need to be included when calculating the regular rate and overtime premium.

So long as there is an agreement or understanding with the employee that the fixed salary component of the compensation is intended to compensate the employee for all hours worked rather than for a specific number of hours, the fixed salary should be divided by all hours worked in order to establish the "regular rate" attributable to the salary.[7] Any additional bonus or incentive compensation would also be incorporated into the regular-rate calculation, but it does not undermine the reality that the fixed salary was compensation that applied to all hours worked. Section 778.109 expressly states that it is the "total remuneration" (except statutory exclusions) that must be included in the regular-rate calculation, confirming that different components of remuneration may be added together (*i.e.*, to make a "total") in connection with a compliant compensation plan. 29 C.F.R. § 778.109.

[7] Likewise, if an employer agrees to pay a salary for a particular number of hours each week (*e.g.,* 35, 40, 50 or any other number), the regular rate "is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113(a). In short, the regular rate from a salary is always calculated by dividing the salary by the number of hours the salary is intended to compensate, whether fixed or variable.

Mr. Wills would have this Court adopt the nonsensical fiction that paying a bonus means that, contrary to the parties' actual agreement, the salary must be deemed to have been compensation only for the first 40 hours of work each workweek (*i.e.*, that there was no pay *at all* for hours worked over 40). Nothing in the interpretive bulletin (or in the FLSA itself) supports that characterization of the salary or fundamental alteration of the employment contract between the parties. Rather, the bulletin specifies that the regular rate and overtime calculation "must be drawn from what happens under the employment contract ... an 'actual fact.'" 29 C.F.R. § 778.108 (citations omitted).

The absurd consequences that would flow from Mr. Wills' contention may be shown by an example. Assume that an employee receives a fixed weekly salary of $400 for variable hours. Assume further that the employer pays an *additional* $2 per hour for work performed on Saturday in recognition of the inconvenience to the employee. Now assume that in a particular week, the employee worked 50 hours, including 5 hours on Saturday. In this example, the employee received $400 as compensation for all hours worked (including the work on Saturday), and he *also* received an additional $10 premium in recognition of the five hours worked on Saturday. Pursuant to *Overnight Motor* and section 778.109, the employee's regular rate for the week is $8.20 [($400 salary + $10 Saturday premium) ÷ 50 total hours = $8.20], and the employee would be entitled to an additional $41 in

overtime compensation [$8.20 regular rate x 0.5 x 10 overtime hours = $41].

In this example, Mr. Wills would have this Court hold that the additional $10 payment for the Saturday work "violated" section 778.114, and that the employer should be punished by artificially inflating the overtime obligation far beyond what the FLSA requires. Specifically, Mr. Wills seeks a ruling that upon receipt of the additional payment, the employer must retroactively pretend that the fixed weekly salary for all hours worked was actually compensation only for non-overtime hours, and that the employee was not paid *at all* for the overtime hours. Pursuant to this view, the employee in our example would be entitled to an overtime premium of $153.75 [{($400 salary + $10 Saturday premium) ÷ 40 hours} x 1.5 x 10 overtime hours = $153.75]. In short, Mr. Wills would seek to leverage the employer's decision to provide a modest $10 bonus into more than a tripling of the statutory overtime pay obligation (to $153.75 from $41).

The Department of Labor recognizes that "[p]aying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for employees." 73 Fed. Reg. 43654 (July 28, 2008), at 43662. Unfortunately, the argument advanced by Mr. Wills would discourage employers from paying bonuses to employees who are paid a fixed salary for all hours worked. This Court should reject Mr. Wills' "no good deed goes unpunished" interpretation, which does not find any support in the text of the

statute itself.

B. Although Section 778.114 Provides An *Example* Of The "Wages Divided By Hours Compensated" Rule, Other Approaches That Include A Fixed Salary For Variable Hours Component Are Also Permissible.

Contrary to the view of the courts that misinterpreted the import of *O'Brien*, it is not possible for an employer to "violate" section 778.114. Like the other examples in sections 778.110-778.122, section 778.114 merely provides an example of how the regular rate may be calculated under the circumstances described. It does not foreclose other compensation arrangements, and it does not exclude other compensation arrangements from the standard "wages divided by hours compensated" approach to determining the regular rate. *Cf. Allen*, 495 F.3d at 1313.

If it is determined that section 778.114 does not apply because the payment of a bonus to an employee offends the "fixed salary" contemplated by that section, then the most that could be said in such a case is that section 778.114 does not apply. But that does not mean that the employer must suddenly adopt the fiction (proposed by Mr. Wills) that the salary was actually compensation only for the first 40 hours worked. Rather, if it is determined that the receipt of additional bonus compensation is not consistent with the "fixed salary" described in section 778.114, then the rule of *Overnight Motor*, *Walling*, *Allen* and section 778.109 will still apply. That is: (a) total wages divided by the total number of hours

compensated by those wages equals the regular rate; and (b) one-half of that regular rate must be paid as an additional overtime premium for all hours worked in excess of 40 in the workweek. In other words, section 778.114 does not provide the exclusive authority for determining the regular rate in the case of an employer who pays its employees a fixed salary for variable hours, and section 778.114 does not impose any restrictions on an employer's right to pay a fixed salary plus additional compensation. Employers have had the right to use the "wages divided by hours compensated" approach since long before the Department of Labor published its list of examples in 1968. As recognized by the Supreme Court in the 1940s, the "wages divided by hours compensated" approach is all that the FLSA requires.

IV. The "Wages Divided By Hours Compensated" Rule Applies To All Compensation Plans Subject To 29 U.S.C. § 207(a)(1).

Amici curiae note that the issue at the core of this appeal extends far beyond employers such as RadioShack who pay a fixed salary for variable hours and who wish to reward their employees with performance bonus compensation. A narrow ruling based on a perceived distinction between "hours-based" and "performance-based" bonuses will perpetuate uncertainty among employers who utilize any number of compensation arrangements and who want to incentivize their employees without running afoul of the FLSA. This Court should confirm that the examples set forth in the interpretive bulletin do not impose restrictions, conditions

or limitations on an employer's flexibility to design compensation plans that meet their needs, so long as the employer adheres to the "wages divided by hours compensated" rule announced in *Overnight Motor* (and otherwise refrains from designing the plan as a subterfuge to evade the overtime obligation). For example:

- As noted above, 29 C.F.R. § 778.115 includes the phrase "[w]here an employee ... works at two or more different types of work" in the example for employees working at two or more hourly rates. As *Allen* recognized, this language merely describes an example in which two different hourly rates were paid for different types of work. *Allen*, 495 F.3d at 1313. The language is not a limitation and does not preclude the use of two different rates for the same type of work.

- Similarly, 29 C.F.R. § 778.112, which addresses day-rate and job-rate payments, includes the phrase "if he receives no other form of compensation for services" in the example. This language merely clarifies the scope of the example and facilitates an uncomplicated explanation of how the overtime for day rates and job rates is calculated ("his regular rate is determined by totaling all sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked"). The language is neither a limitation nor a prohibition on the payment of bonuses or commissions to employees who are paid a day rate or job rate. Rather, if such incentive compensation is also paid, it is simply included in the regular rate calculation as part of the "total remuneration" noted in section

778.109. The example does not (and could not) include every possible configuration of compensation arrangements involving day-rate and job-rate employees.

- Likewise, 29 C.F.R. § 778.118 includes the phrase "[w]hen the commission is paid on a weekly basis" in the example for calculating overtime on commissions. This language merely clarifies the scope of the example to provide an uncomplicated explanation of how overtime on commission is calculated (based on a "weekly" compensation), not a restriction limiting the "wages divided by hours compensated" approach to employers who use a weekly payroll system.[8] It would be absurd to conclude that when commission is paid on a bi-weekly basis, the "wages divided by hours compensated" rule is suddenly forfeited.

In short, all of the examples in the interpretive bulletin merely show how to apply the rule of "wages divided by hours compensated" in the circumstances described in the particular example. None of the examples impose restrictions or limitations on an employer's ability to design a compensation plan that best meets its needs. It is simply incorrect to interpret section 778.114 as precluding an

[8] Section 778.118 provides that "[w]hen the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek ... and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard." 29 C.F.R. § 778.118.

employer from paying bonuses to employees who are also paid a fixed salary for variable hours, merely because the example set forth in section 778.114 did not happen to include a bonus. It is imperative that employers retain the flexibility granted by the FLSA to design compensation plans that meet their needs, so long as they comply with the minimum wage and overtime provisions of the statute.

CONCLUSION

Amici curiae request that this Court affirm the judgment of the district court, but not because of a purported distinction between "hours-based" bonuses and "performance" bonuses. Rather, when an employer pays a fixed salary for variable hours, it is permitted to also pay a bonus, even if that bonus is based on hours worked. The FLSA merely requires that such bonuses be incorporated into the standard FLSA overtime calculation: (a) total wages divided by the total number of hours compensated by those wages equals the regular rate; and (b) one-half of that regular rate must be paid as an additional overtime premium for all hours worked over 40 in a workweek. This straightforward approach will ensure adherence to the text of the FLSA, Supreme Court precedent and section 778.109 of the interpretive bulletin, while allowing employers to design compensation plans that meet their needs.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED.R.APP.P. 37(a)(7)(B) and FED.R.APP.P.29(d) because this brief contains 6,820 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

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ADDENDUM

necessarily to become a part of or additions to an existing interstate highway system, but their construction is plainly of a national rather than a local character, as evidenced by the Federal financial contribution to their construction. And neither the fact that they are not dedicated to interstate use during their construction, nor the fact that they will constitute alternate routes rather than replacement of existing road, constitute sufficient basis, under the controlling court decisions, for excluding them from the coverage of the Act.[51] Accordingly, unless and until authoritative court decision in the future hold otherwise, the construction of such new highways and expressways will be regarded as covered.

§ 776.30 Construction performed on temporarily idle facilities.

The Act applies to work on a covered interstate instrumentality or production facility even though performed during periods of temporary non-use or idleness.[52] The courts have held the Act applicable to performance of construction work upon a covered facility even though the use of the facility was temporarily interrupted or discontinued.[53] It is equally clear that the repair or maintenance of a covered facility (including its machinery, tools, dies, and other equipment) though performed during the inactive or dead season, is subject to the Acts.[54]

[51] *Mitchell* v. *Vollmer & Co.*, ante; *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334, certiorari denied 345 U.S. 915; and *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286.

[52] *Walton* v. *Southern Package Corp.*, 320 U.S. 540; *Slover* v. *Wathen & Co.*, 140 F. (2d) 258 (C.A. 4); *Bodden* v. *McCormick Shipping Corp.*, 188 F. (2d) 733; and *Russell Co.* v. *McComb*, 187 F. (2d) 524 (C.A. 5).

[53] *Pedersen* v. *J. F. Fitzgerald Construction Co.*, ante; *Bennett* v. *V. P. Loftis*, ante; *Walling* v. *McCrady Const. Co.*, ante; and *Bodden* v. *McCormick Shipping Corp.*, 188 F. (2d) 733.

[54] *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Bowie* v. *Gonzalez*, 117 F. (2d) 11; *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. (2d) 597, certiorari denied 328 U.S. 858; *Walling* v. *Keensburg Steamship Co.*, 462 F. (2d) 405.

PART 778—OVERTIME COMPENSATION

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AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* Section 778.200 also issued under Pub. L. 106–202, 114 Stat. 308 (29 U.S.C. 207(e) and (h)).

SOURCE: 33 FR 986, Jan. 26, 1968, unless otherwise noted.

Subpart A—General Considerations

§ 778.0 Introductory statement.

The Fair Labor Standards Act, as amended, hereinafter referred to as the Act, is a Federal statute of general application which establishes minimum wage, overtime pay, child labor, and equal pay requirements that apply as provided in the Act. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act. Such employers are also required to comply with specified recordkeeping requirements contained in part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 778.1 Purpose of interpretative bulletin.

This part 778 constitutes the official interpretation of the Department of Labor with respect to the meaning and

and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a weekly basis.

§778.105 Determining the workweek.

An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made, is discussed in §§778.301 and 778.302.

§778.106 Time of payment.

There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in §778.303. For a discussion of overtime payments due because of increases by way of bonuses, see §778.209.

PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE "REGULAR RATE"

§778.107 General standard for overtime pay.

The general overtime pay standard in section 7(a) requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed. The regular rate of pay at which the employee is employed may in no event be less than the statutory minimum. (The statutory minimum is the specified minimum wage applicable under section 6 of the Act, except in the case of workers specially provided for in section 14 and workers in Puerto Rico, the Virgin Islands, and American Samoa who are covered by wage orders issued pursuant to section 8 of the Act.) If the employee's regular rate of pay is higher than the statutory minimum, his overtime compensation must be computed at a rate not less than one and one-half times such higher rate. Under certain conditions prescribed in section 7 (f), (g), and (j), the Act provides limited exceptions to the application of the general standard of section 7(a) for computing overtime pay based on the regular rate. With respect to these, see §§778.400 through 778.421 and 778.601 and part 548 of this chapter. The Act also provides, in section 7(b), (i), (k) and (m) and in section 13, certain partial and total exemptions from the application of section 7(a) to certain employees and under certain conditions. Regulations and interpretations concerning these exemptions are outside the scope of this part 778 and reference should be made to other applicable parts of this chapter.

[46 FR 7309, Jan. 23, 1981]

§778.108 The "regular rate".

The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (*Bay Ridge Operating Co.* v. *Aaron*, 334 U.S.

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446). The Supreme Court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed—an ''actual fact'' (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419). Section 7(e) of the Act requires inclusion in the ''regular rate'' of ''all remuneration for employment paid to, or on behalf of, the employee'' except payments specifically excluded by paragraphs (1) through (7) of that subsection. (These seven types of payments, which are set forth in § 778.200 and discussed in §§ 778.201 through 778.224, are hereafter referred to as ''statutory exclusions.'') As stated by the Supreme Court in the Youngerman-Reynolds case cited above: ''Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts.''

§ 778.109 The regular rate is an hourly rate.

The ''regular rate'' under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§ 778.400 through 778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).

§ 778.110 Hourly rate employee.

(a) *Earnings at hourly rate exclusively.* If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the ''regular rate.'' For overtime hours of work the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $12 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $588 (46 hours at $12 plus 6 at $6). In other words, the employee is entitled to be paid an amount equal to $12 an hour for 40 hours and $18 an hour for the 6 hours of overtime, or a total of $588.

(b) *Hourly rate and bonus.* If the employee receives, in addition to the earnings computed at the $12 hourly rate, a production bonus of $46 for the week, the regular hourly rate of pay is $13 an hour (46 hours at $12 yields $552; the addition of the $46 bonus makes a total of $598; this total divided by 46 hours yields a regular rate of $13). The employee is then entitled to be paid a total wage of $637 for 46 hours (46 hours at $13 plus 6 hours at $6.50, or 40 hours at $13 plus 6 hours at $19.50).

[76 FR 18857, Apr. 5, 2011]

§ 778.111 Pieceworker.

(a) *Piece rates and supplements generally.* When an employee is employed on a piece-rate basis, the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's ''regular rate'' for that week. For overtime work the pieceworker is entitled to be paid, in addition to the total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as

far as pieceworkers are concerned, *see* §778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, for example, if the employee has worked 50 hours and has earned $491 at piece rates for 46 hours of productive work and in addition has been compensated at $8.00 an hour for 4 hours of waiting time, the total compensation, $523.00, must be divided by the total hours of work, 50, to arrive at the regular hourly rate of pay—$10.46. For the 10 hours of overtime the employee is entitled to additional compensation of $52.30 (10 hours at $5.23). For the week's work the employee is thus entitled to a total of $575.30 (which is equivalent to 40 hours at $10.46 plus 10 overtime hours at $15.69).

(b) *Piece rates with minimum hourly guarantee*. In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum hourly guaranty is the regular rate in that week. In the example just given, if the employee was guaranteed $11 an hour for productive working time, the employee would be paid $506 (46 hours at $11) for the 46 hours of productive work (instead of the $491 earned at piece rates). In a week in which no waiting time was involved, the employee would be owed an additional $5.50 (half time) for each of the 6 overtime hours worked, to bring the total compensation up to $539 (46 hours at $11 plus 6 hours at $5.50 or 40 hours at $11 plus 6 hours at $16.50). If the employee is paid at a different rate for waiting time, the regular rate is the weighted average of the 2 hourly rates, as discussed in §778.115.

[76 FR 18857, Apr. 5, 2011]

§778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

§778.113 Salaried employees—general.

(a) *Weekly salary*. If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $350 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $350 divided by 35 hours, or $10 an hour, and when the employee works overtime the employee is entitled to receive $10 for each of the first 40 hours and $15 (one and one-half times $10) for each hour thereafter. If an employee is hired at a salary of $375 for a 40-hour week the regular rate is $9.38 an hour.

(b) *Salary for periods other than workweek*. Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $1,560, or a regular semimonthly salary of $780 for 40 hours a week, is thus found to be $9 per hour. Under regulations of the Administrator, pursuant to the authority given to him in section 7(g)(3) of the Act, the parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in

such a case must not be less than the statutory minimum wage.

[46 FR 7310, Jan. 23, 1981, as amended at 76 FR 18857, Apr. 5, 2011]

§ 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose total weekly hours of work never exceed 50 hours in a workweek, and whose salary of $600 a week is paid with the understanding that it constitutes the employee's compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is $15.00, $16.00, $12.00, and $12.50, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $600; for the second week $600.00; for the third week $660 ($600 plus 10 hours at $6.00 or 40 hours at $12.00 plus 10 hours at $18.00); for the fourth week $650 ($600 plus 8 hours at $6.25, or 40 hours at $12.50 plus 8 hours at $18.75).

(c) The ''fluctuating workweek'' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the ''fluctuating workweek'' method of overtime payment are present, the Act, in requiring that ''not less than'' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with

the Act cannot be rested on any application of the fluctuating workweek overtime formula.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981; 76 FR 18857, Apr. 5, 2011]

§778.115 Employees working at two or more rates.

Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternative methods of computing overtime pay in such cases are discussed in §§778.400 and 778.415 through 778.421.

§778.116 Payments other than cash.

Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the regular rate. (See part 531 of this chapter for a discussion as to the inclusion of goods and facilities in wages and the method of determining reasonable cost.) Where, for example, an employer furnishes lodging to his employees in addition to cash wages the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined.

[46 FR 7310, Jan. 23, 1981]

§778.117 Commission payments—general.

Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay day or pay period, does not excuse the employer from including this payment in the employee's regular rate.

[36 FR 4981, Mar. 16, 1971]

§778.118 Commission paid on a workweek basis.

When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek (except overtime premiums and other payments excluded as provided in section 7(e) of the Act), and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard.

§778.119 Deferred commission payments—general rules.

If the calculation and payment of the commission cannot be completed until sometime after the regular pay day for the workweek, the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained. Until that is done he may pay compensation for overtime at a rate not less than one and one-half times the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. The employee must then receive additional overtime compensation for each week

during the period in which he worked in excess of the applicable maximum hours standard. The additional compensation for that workweek must be not less than one-half of the increase in the hourly rate of pay attributable to the commission for that week multipled by the number of hours worked in excess of the applicable maximum hours standard in that workweek.

§ 778.120 Deferred commission payments not identifiable as earned in particular workweeks.

If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable and equitable method must be adopted. The following methods may be used:

(a) *Allocation of equal amounts to each week.* Assume that the employee earned an equal amount of commission in each week of the commission computation period and compute any additional overtime compensation due on this amount. This may be done as follows:

(1) For a commission computation period of 1 month, multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week. If there is a semimonthly computation period, multiply the commission payment by 24 and divide by 52 to get each week's commission. For a commission computation period of a specific number of workweeks, such as every 4 weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week.

(2) Once the amount of commission allocable to a workweek has been ascertained for each week in which overtime was worked, the commission for that week is divided by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due is computed by multiplying one-half of this figure by the number of overtime hours worked in the week. A shorter method of obtaining the amount of additional overtime compensation due is to multiply the amount of commission allocable to the week by the decimal equivalent of the fraction

$$\frac{\text{Overtime hours}}{\text{Total hours} \times 2}$$

A coefficient table (WH–134) has been prepared which contains the appropriate decimals for computing the extra half-time due.

Examples: (i) If there is a monthly commission payment of $416, the amount of commission allocable to a single week is $96 ($416×12=$4,992÷52=$96). In a week in which an employee who is due overtime compensation after 40 hours works 48 hours, dividing $96 by 48 gives the increase to the regular rate of $2. Multiplying one-half of this figure by 8 overtime hours gives the additional overtime pay due of $8. The $96 may also be multiplied by 0.083 (the appropriate decimal shown on the coefficient table) to get the additional overtime pay due of $8.

(ii) An employee received $384 in commissions for a 4-week period. Dividing this by 4 gives him a weekly increase of $96. Assume that he is due overtime compensation after 40 hours and that in the 4-week period he worked 44, 40, 44 and 48 hours. He would be due additional compensation of $4.36 for the first and third week ($96÷44=$2.18÷2=$1.09×4 overtime hours=$4.36), no extra compensation for the second week during which no overtime hours were worked, and $8 for the fourth week, computed in the same manner as weeks one and three. The additional overtime pay due may also be computed by multiplying the amount of the weekly increase by the appropriate decimal on the coefficient table, for each week in which overtime was worked.

(b) *Allocation of equal amounts to each hour worked.* Sometimes, there are facts which make it inappropriate to assume equal commission earnings for each workweek. For example, the number of hours worked each week may vary significantly. In such cases, rather than following the method outlined in paragraph (a) of this section, it is reasonable to assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period. The amount of the commission payment should be divided by the number of hours worked in the period in

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order to determine the amount of the increase in the regular rate allocable to the commission payment. One-half of this figure should be multiplied by the number of statutory overtime hours worked by the employee in the overtime workweeks of the commission computation period, to get the amount of additional overtime compensation due for this period.

Example: An employee received commissions of $192 for a commission computation period of 96 hours, including 16 overtime hours (*i.e.*, two workweeks of 48 hours each). Dividing the $192 by 96 gives a $2 increase in the hourly rate. If the employee is entitled to overtime after 40 hours in a workweek, he is due an additional $16 for the commission computation period, representing an additional $1 for each of the 16 overtime hours.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981]

§ 778.121 Commission payments—delayed credits and debits.

If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during such period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work which actually occurred during a previous period. The hourly increase resulting from the commission may be computed as outlined in the preceding paragraphs.

§ 778.122 Computation of overtime for commission employees on established basic rate.

Overtime pay for employees paid wholly or partly on a commission basis may be computed on an established basic rate, in lieu of the method described above. See § 778.400 and part 548 of this chapter.

Subpart C—Payments That May Be Excluded From the "Regular Rate"

THE STATUTORY PROVISIONS

§ 778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

(a) *Section 7(e).* This subsection of the Act provides as follows:

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; [discussed in § 778.212].

(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; [discussed in §§ 778.216 through 778.224].

(3) Sums 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 Secretary of Labor 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 Secretary) paid to performers, including announcers, on radio and television programs; [discussed in §§ 778.208 through 778.215 and 778.225].

(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; [discussed in §§ 778.214 and 778.215].

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2014, a copy of the foregoing document was filed using the United States Court of Appeals for the Second Circuit's ECF system, through which this document is available for viewing and downloading, causing notice of electronic filing to be served upon all counsel of record.

/s/ Tammy D. McCutchen