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# THE FAIR LABOR STANDARDS AMENDMENTS OF 1949—OVERTIME COMPENSATION

WILLIAM C. SOULE\*

Some of the most perplexing and confusing problems relating to overtime compensation raised by the Fair Labor Standards Act of 1938,<sup>1</sup> have been somewhat clarified by the 81st Congress.<sup>2</sup> The fundamental requirements for the payment of overtime remain unchanged in that Section 7(a) still provides that no employee engaged in commerce or the production of goods for commerce may be employed for a workweek longer than forty hours, "unless such employee receives compensation for his employment in excess of the hours above stated at a rate not less than one and one-half times the regular rate at which he is employed."

In an attempt to analyze the more important provisions of the Fair Labor Standards Amendments of 1949 relating to overtime pay, the following breakdown has seemed advisable. (1) Annual and semi-annual guarantee plans, (2) The definition of the regular rate, (3) The methods of computing or establishing the regular rate.

## I. ANNUAL OR SEMI-ANNUAL WAGE PLANS

The original version of the Fair Labor Standards Act stimulated the adoption of annual and semiannual wage plans by authorizing their use as a means of avoiding some of the requirements regarding the payment of overtime compensation. When collective agreements between employers and the certified representatives of the employees guaranteed that employees would not be employed for more than 1000 hours in 26 consecutive weeks or for more than 2080 hours in 52 consecutive weeks, overtime compensation was exempted for employment up to 12 hours a day or 56 hours a week as long as the annual or semi-annual guarantees were not exceeded.<sup>3</sup>

Section 7(b) of the amended Act<sup>4</sup> continues to exempt overtime payments for work up to 12 hours a day or 56 hours a workweek when the employees are working pursuant to certain collective agreements between employee representatives, certified as bona fide by the National

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<sup>1</sup> 52 STAT. 1060 (1938), 29 U. S. C. §201-219 (1940).

<sup>2</sup> The Fair Labor Standards Amendments of 1949, Pub. L. No. 393, 81st Cong., 1st Sess. (Oct. 26, 1949).

<sup>3</sup> 52 STAT. 1063 (1938), 29 U. S. C. §207(b) (1940).

<sup>4</sup> Pub. L. No. 393, 81st Cong., 1st Sess. (Oct. 26, 1949).

Labor Relations Board, and employers. The former restrictions have been relaxed in that now the contracts may guarantee a maximum of 1040 hours in 26 consecutive weeks. Further, in the 52 week agreements, the exemption is permitted for contracts containing guarantees of not less than 1840 hours (or 46 weeks of not less than 30 hours a week) or more than 2240 hours, as long as compensation at least equals the contract rate for all guaranteed hours and time and a half for all hours in excess of the guarantee which are also in excess of forty hours in the workweek or 2080 hours in the period.

## II. THE DEFINITION OF THE REGULAR RATE

Prior to the 1949 amendments, the ultimate determination of what constituted the regular rate of pay and the items to be included or excluded therein had been made by the courts.<sup>5</sup> By judicial decision, the "regular rate" had come to mean an hourly rate.<sup>6</sup> It was generally computed by dividing the number of hours worked in a given week, consisting of seven consecutive days, into the sum paid as wages for that week, excluding any premiums paid due to the fact that the employee had worked in excess of a fixed number of hours.<sup>7</sup> In 1949 Congress again saw fit not to attempt to define "regular rate" in a comprehensive manner, for the affirmative portion of Section 7(d) simply states:

"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, . . ."<sup>8</sup>

As the former definition provided by the courts included "all remuneration," apparently no change was intended by this portion of the definition.

In the past it had been claimed that certain items should not be considered as wages or remuneration for purposes of establishing the regular rate.<sup>9</sup> The negative portion of the new definition seeks to provide clarification by listing items that are not to be included therein. "Each of the seven subdivisions of subsection (d) is intended to provide a separate carefully defined exclusion from 'regular rate.' Accordingly, a payment excluded under any one subdivision would not be deemed part of the 'regular rate' by reason of the fact that such payment may

<sup>5</sup> *Kirschbaum Co. v. Walling*, 316 U.S. 517, 523 (1942).

<sup>6</sup> *Overnight Motor Co. v. Missel*, 316 U.S. 572, 580 (1942); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944).

<sup>7</sup> *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948).

<sup>8</sup> Pub. L. No. 393, 81st Cong., 1st Sess. (Oct. 26, 1949).

<sup>9</sup> See, e.g., *Siomkin v. Fairchild Camera & Instrument Corp.*, 174 F. 2d 289 (2d Cir. 1949). For a comprehensive coverage of such items, see: Sanders, *Over-time Pay Under the Fair Labor Standards Act*, 2 VAND. L. REV. 379 (1949).

not be excluded by the language of any other subdivision."<sup>10</sup> These follow:

(1) *Gifts*—Payments in the nature of gifts made at Christmas or other special occasions need not be included in the regular rate of pay as long as the amounts thereof are not computed on the basis of the number of hours worked, production or efficiency.<sup>11</sup> It would appear that under this subsection, an employer could promise or contract to make a gift or could make a customary gift without having it included as part of the regular rate of pay as long as the amount was not computed on the basis of time worked, productivity or efficiency. If true, this would constitute an exclusion not formerly permitted.<sup>12</sup>

(2) *Bonuses*—Bonuses granted in recognition of services performed during a given period may be excluded if (1) the employer has sole discretion regarding payment and the amount, and if (2) he exercises that discretion at or near the end of the period, and if (3) there has been no prior promise, contract or agreement causing the employees to expect the bonus.<sup>13</sup> Judicial scrutiny of this exclusion will be necessary to determine whether or not discretionary bonuses granted as a matter of custom will be so excluded. Still to be included in computing the regular rate, are contractual bonuses based on productivity, efficiency or attendance.

(3) *Profit-Sharing and Savings Plans*—The bona fide nature of profit-sharing, thrift or savings plans will be dependent upon their compliance with regulations to be issued by the Administrator.<sup>14</sup> Attempts to include all bonuses based upon productivity or efficiency simply because they are related to the company profits will probably be unsuccessful.<sup>15</sup>

(4) *Pension and Health Plans*—Contributions made (a) irrevocably by an employer (b) to a trustee or other third person (c) pursuant to a bona fide plan providing old-age, retirement, life, accident or health insurance or similar benefits; need not be included in the regular rate.<sup>16</sup> This constitutes a statutory recognition of the former policy of the Administrator.<sup>17</sup>

(5) *Radio or Television Talent Fees*—An employer need not include talent fees (as defined by regulations of the Administrator) in

<sup>10</sup> Conference Comm. Rep. No. 1453, 81st Cong., 1st Sess. (1949).

<sup>11</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(d)(1) (Oct. 26, 1949).

<sup>12</sup> See, e.g., *Walling v. Adam Electric Co.*, 163 F. 2d 277 (8th Cir. 1947); *McComb v. Shepard Niles Crane & Hoist Corp.*, 171 F. 2d 69 (2d Cir. 1948).

<sup>13</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(d)(3)(a) (Oct. 26, 1949).

<sup>14</sup> *Id.* at §7(d)(3)(b).

<sup>15</sup> W-H. Div. Ann. Rep. 65 (1948).

<sup>16</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(d)(4) (Oct. 26, 1949).

<sup>17</sup> Op. Letter, W-H Adm'r., June 30, 1948, 3 CCH LAB. LAW REP. (4th ed.) ¶ 29,008 (1949).

computing the regular rates of performers and announcers.<sup>18</sup> This reverses a contrary ruling by the Administrator.<sup>19</sup>

(6) *Payments for Unworked Time*—Vacation, holiday, "call-in," "show-up" sick pay and similar types of pay provided by the employer for occasional periods when no work is performed by the employees need not be considered in the computation of the regular rate of pay.<sup>20</sup> This exclusion does not embrace all payments made for non-work periods, however, but only those that can be classified as "occasional."

(7) *Payments for Expenses*—Reasonable travel and other expenses incurred by employees in the furtherance of the employer's interest when reimbursed, as well as other similar payments to an employee which are not made as compensation for his hours of work, are excluded from the regular rate.<sup>21</sup>

*Overtime on Overtime*—Among the items of major importance in the amendments are the provisions relating to payments made by employers which are not only excluded from the regular rate but also may be offset against overtime payments due under the Act.<sup>22</sup> These have been separated into three categories:

(1) Premium pay, of any amount, for work in excess of eight hours a day or forty hours a week or in excess of the employee's normal or regular working hours.<sup>23</sup>

(2) Premium pay, of at least 150% of the regular rate, for work on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek.<sup>24</sup>

(3) Premium pay, of at least 150% of the regular rate, pursuant to an applicable employment contract or collective bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the regular workday (not exceeding eight hours) or regular workweek (not exceeding forty hours).<sup>25</sup>

(1) The first exclusion is a reiteration of the rule expounded in the *Bay Ridge* case.<sup>26</sup> Overtime pay was defined in that decision as wages granted because of previous work of a specified number of hours in the workday or workweek.<sup>27</sup> Payments made for this purpose were said to be deductible in computing the regular rate and could be considered as a part of any overtime pay due under the Act.<sup>28</sup> For example, if an employee worked 50 hours in one week under a contract which estab-

<sup>18</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(d)(3)(c) (Oct. 26, 1949).

<sup>19</sup> Op. Letter, W-H Adm'r., Mar. 18, 1942, 3 CCH LAB. LAW REP. (4th ed.) ¶ 25,520.92 (1949).

<sup>20</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(d)(2) (Oct. 26, 1949).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.* at §7(d)(5).

<sup>23</sup> *Id.* at §7(d)(7).

<sup>24</sup> *Id.* at §7(d)(6).

<sup>25</sup> *Id.* at §7(d)(7).

<sup>26</sup> *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948).

<sup>27</sup> *Id.* at 471.

<sup>28</sup> *Id.* at 464.

lished a bona fide 32 hour workweek, with a basic hourly wage of \$1.00 and \$1.25 for any hours worked in excess of 32 during the workweek, it would be computed in the following manner:

*Under the Contract*

$$32 \text{ hrs} \times \$1.00 \text{ plus } 50 - 32 \text{ hrs} \times \$1.25 = \$54.50$$

*Under the Act*

$$40 \text{ hrs} \times \$1.00 \text{ plus } 50 - 40 \text{ hrs} \times \$1.50 = \$55.00$$

The employer would owe 50¢ to satisfy the Act, but would not have to include the \$1.25 rate in arriving at the regular rate and furthermore would be able to deduct all the payments of the additional 25¢ from any overtime payments due under the Act.

Under the *Bay Ridge* construction of the Act, any sums paid as wages that had been given for purposes other than work in excess of a specified number of hours in a workday or workweek, had to be included in computing the regular rate and could not be considered as overtime pay.<sup>29</sup> Thus under contracts which provided for additional premiums for unpopular hours or weekend or holiday work, unless such work was performed after 40 other hours of work in the workweek, or in excess of a bona fide workweek of a lesser number of hours, such premiums had to be included in the regular rate. Under a contract calling for a workweek from Wednesday through Monday at \$1.00 an hour for weekdays and \$1.50 an hour for Saturdays and Sundays, if an employee worked eight hours a day, or 48 hours in the workweek, his wages would be computed in the following manner:

$$32 \text{ hours (Wed., Thurs., Fri., Mon.)} \times \$1.00 \text{ plus } 16 \text{ hours (Sat. \& Sun.)} \times \$1.50 = \$56.00 \text{ (amount received under the contract).}$$

$$\frac{\$56.00 \text{ (weekly wages)}}{48 \text{ hours (workweek)}} = \$1.167 \text{ (Regular rate)}$$

$$40 \text{ hours} \times \$1.167 \text{ plus } 48 - 40 \text{ hours} \times 1\frac{1}{2} \times \$1.167 = \$60.68$$

(2 & 3) The second and third exclusions, with slight alterations in the phraseology, incorporate in the Act the provisions of Public Law 177,<sup>30</sup> the interim statute passed to counteract the effect of the *Bay Ridge* case. These exclusions are retroactive to the time that any such premiums mentioned therein were paid.<sup>31</sup>

(2) The second exclusion allows an employer to pay extra wages for work on Saturdays, Sundays, holidays, regular days of rest or the sixth or seventh day of a workweek without having to include the premium in computing the regular rate.<sup>32</sup> In addition, such payments may be deducted from any overtime pay due under the Act.<sup>33</sup> These pre-

<sup>29</sup> *Id.* at 466.

<sup>30</sup> Pub. L. No. 177, 81st Cong., 1st Sess. (July 20, 1949) was repealed by §7(f) of the amended Act of Oct. 26, 1949.

<sup>31</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(e) (Oct. 26, 1949).

<sup>32</sup> *Id.* at §7(d) (6). <sup>33</sup> *Id.* at §7(g).

miums must amount to 150% of the regular rate in order to be excluded or be used as setoffs. If an employee worked from Wednesday through Sunday at \$1.00 an hour under an agreement providing for time and a half for Saturday or Sunday work, in a week in which he worked a total of 58 hours, only 16 of which were on Saturday and Sunday, his compensation would be computed in the following manner:

*Under the Contract*

$$42 \text{ hours} \times \$1.00 \text{ plus } 16 \text{ hours} \times \$1.50 = \$66.00$$

*Under the Act*

$$40 \text{ hours} \times \$1.00 \text{ plus } 58 - 40 \text{ hours} \times \$1.50 = \$67.00$$

In order to satisfy the Act, the employer need only pay \$67.00, or one dollar more than he would have had to have paid under the terms of the contract. The premium pay of 50¢ per hour on Saturday and Sunday is not included in computing the regular rate, and payments of such premiums may be deducted from overtime pay due under the Act.

(3) The third exclusion is similar to the second in that in order to qualify, the premium must be 150% of the regular rate. It constitutes a direct reversal of the *Bay Ridge* decision.<sup>34</sup> Premiums paid pursuant to a contract or agreement for work outside of the hours established in good faith by the contract or agreement as the normal workday or workweek, need not be included in computing the regular rate and may be used to offset any overtime payments due under the Act.<sup>35</sup>

Under the Act, as amended, if an employee worked for 50 hours in a week at \$1.00 per hour base pay, with 15 hours outside the "straight time" pay period (*i.e.* after 5 P.M.), his wages would be computed in the following manner:

*Under the Contract*

$$35 \text{ hours} \times \$1.00 \text{ plus } 50 - 35 \text{ hours} \times \$1.50 = \$57.50$$

*Under the Act*

$$40 \text{ hours} \times \$1.00 \text{ plus } 50 - 40 \text{ hours} \times \$1.50 = \$55.00$$

Under such circumstances, the overtime provisions of the Act would have no effect on the payments due to the employee.

<sup>34</sup> The *Bay Ridge* case involved compensation rates established by a collective agreement between the International Longshoremen's Association and the New York Shipping Association together with certain steamship and stevedore companies. The agreement provided for a workday of eight hours and a workweek of forty-four hours. The basic or "straight time" pay, which varied with the cargo handled, applied from 8 a.m. to 12 Noon and from 1 p.m. to 5 p.m., Monday through Friday, and from 8 a.m. to 12 Noon on Saturday. Overtime rates of one and one-half times the basic pay were paid for work at all other times, including meal hours and legal holidays. There was no other proviso for pay in excess of 40 hours per week. The Supreme Court rejected the contention of the company that the regular rate was the rate set by contract and sustained the government construction, holding that the premiums paid for the meal hours and holidays were to be included within the regular rate unless those premiums were for work in excess of 40 hours or a lesser number of hours if the normal workweek was reduced by the collective agreement.

<sup>35</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(d) (7) and §7(g) (Oct. 26, 1949).

### III. THE METHODS OF COMPUTING OR ESTABLISHING THE REGULAR RATE OF PAY

Formerly the establishment of the regular rate of pay rested in the courts.<sup>36</sup> In addition, however, to the necessity of determining the items included therein, we have the problem of actually computing or establishing the regular rate. In general, this still depends upon the manner in which the employer undertakes to pay his employees.

*Employees compensated by the hour.* The hourly rate paid to employees compensated by the hour for non-overtime work constitutes the regular rate.<sup>37</sup> Thus, if an employee is normally paid \$1.00 an hour and works 50 hours in a given workweek, his compensation would be computed in the following manner:

40 hours  $\times$  \$1.00 plus 10 hours  $\times$  \$1.50 (*i.e.*,  $1\frac{1}{2} \times \$1.00$ ) = \$55.00

An exception to this general rule was added by the 1949 Amendment<sup>38</sup> when an employee has performed two or more kinds of work for which different rates apply. Formerly overtime was computed on the basis of the weighted average of the applicable hourly rates.<sup>39</sup> Now, if the employer and employee have established the hourly rates by an agreement or understanding prior to the time that the work has been performed, overtime can be computed on the basis of the hourly rate applicable to the work performed during the overtime hours; or if the employer and employee establish, by agreement or understanding, a basic rate on which overtime is to be computed, which is authorized by regulation of the Administrator as being substantially equivalent to the hourly earnings of the employee, this rate is permissible.

*Salaried employees.* In the absence of an hourly rate, the weekly earnings are divided by the number of hours in the workweek to determine the regular rate of pay.<sup>40</sup>

(1) If an employee regularly works 40 hours a week, and receives \$50.00 a week any week in which he works for a greater number of hours, for example 55 hours, his compensation would be computed in the following manner:

$$\frac{\$50.00 \text{ (regular weekly salary)}}{40 \text{ hours (normal workweek)}} = \$1.25 \text{ (Regular rate)}$$

$$\$50.00 \text{ plus } \$26.62 \text{ (i.e., } 1\frac{1}{2} \times \$1.25 \times 55 - 40 \text{ hours)} = \$76.62$$

(2) If an employee regularly works more than 40 hours a week, for example 50 hours, and receives \$50.00 a week, any week in which he

<sup>36</sup> *Supra*, note 5.

<sup>37</sup> *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461 (1948).

<sup>38</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(f) (2) and (3) (Oct. 26, 1949).

<sup>39</sup> *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 476 (1944); 3 CCH LAB. LAW REP. (4th ed.) ¶ 25,520.24 (1949).

<sup>40</sup> *Overnight Motor Co. v. Missel*, 316 U.S. 572, 580 (1942); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 459, 460 (1944).



works 55 hours, his compensation would be computed in the following manner:

$$\begin{aligned} \frac{\$50.00 \text{ (regular weekly salary)}}{50 \text{ hours (normal workweek)}} &= \$1.00 \text{ (Regular rate)} \\ \$50.00 \text{ plus } \$5.00 \text{ (i.e., } 50¢ \times 50 - 40 \text{ hours)} &\text{ plus } \$7.50 \text{ (i.e., } \$1.50 \\ &\times 55 - 50 \text{ hours)} = \$62.50 \end{aligned}$$

(3) If an employee regularly works less than 40 hours a week, for example 36 hours, he will receive overtime under the Act only after having worked over 40 hours in a particular week. His total compensation is generally computed by adding to his regular salary, his regular rate of pay for the hours up to 40 (although this is not required under the Act) and then adding one and one-half times his regular rate for the hours in a particular week, his salary would be computed in the following manner:

$$\begin{aligned} \frac{\$50.00 \text{ (regular weekly salary)}}{36 \text{ hours (normal workweek)}} &= \$1.38 \text{ (Regular rate)} \\ \$50.00 \text{ plus } \$5.52 \text{ (i.e., } \$1.38 \times 40 - 36 \text{ hours)} &\text{ plus } \$10.35 \text{ (} 1\frac{1}{2} \\ &\times \$1.38 \times 45 - 40 \text{ hours)} = \$65.87 \end{aligned}$$

(4) If an employee has irregular workweeks, he will receive overtime pay of one-half of his regular rate. The regular rate will vary from week to week, but will be found by dividing the weekly salary by the number of hours worked. If he receives \$50.00 a week and has worked 60 hours in a particular week, his salary would be computed in the following manner:

$$\begin{aligned} \frac{\$50.00 \text{ (regular weekly salary)}}{60 \text{ hours (number of hours worked)}} &= \$83 \text{ (Regular rate)} \\ \$50.00 \text{ plus } \$8.30 \text{ (i.e., } \frac{1}{2} \times \$83 \times 60 - 40 \text{ hours)} &= \$58.30 \end{aligned}$$

**Piecework Employees.** In the past, it has been necessary to compute the average hourly wages earned by employees hired on a piecework basis in order to ascertain the amount of overtime due.<sup>41</sup> This was accomplished by dividing the total weekly piecework earnings plus any production or incentive bonuses, by the number of hours worked in a given week.<sup>42</sup> The difficulty of promptly ascertaining the regular rate was advanced as a reason for the allowance of plans such as that attempted by the Harnischfeger Corporation.<sup>43</sup> The 1949 Amendment provides a means by which employers are enabled to compute overtime without having to reduce the piecework rate to an average hourly rate at the end of each week.

(1) A piecework employee can be paid one and one-half times the rate applicable to the work done in the overtime hours.<sup>44</sup> This may

<sup>41</sup> *United States v. Rosenwasser*, 323 U.S. 360, 364 (1944).

<sup>42</sup> *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419 (1945).

<sup>43</sup> *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945).

<sup>44</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(f)(1) (Oct. 26, 1949).

be done even though a different rate applies to the work performed in the overtime hours than the rate that was applicable to the work that the employee performed during the non-overtime hours.<sup>45</sup> The second phase dispenses with the former requirement of having to compute a weighted average of the different rates considering the hours worked under each rate.<sup>46</sup> It is required, however, that the rates have been established prior to the performance of the work pursuant to an agreement or understanding between the employer and employee.

(2) Any employee can be paid overtime on a basic rate established by a prior agreement or understanding between the employer and employee, if the rate so established has been authorized by regulation of the Administrator as being the substantial equivalent of the average hourly earnings of the employee.<sup>47</sup>

*Employees compensated by the hour or in the alternative by a weekly guarantee.*

The Belo plan, approved by the United States Supreme Court in 1942,<sup>48</sup> was incorporated to a limited extent in the new Act. The Belo plan involved a situation wherein employees with fluctuating workweeks contracted to work for a fixed hourly rate on the condition that a guaranteed minimum weekly wage would be paid in the event that the hourly rate plus overtime computed thereon did not equal the guaranteed wage. The hourly rates were adjusted so as to make it necessary for an employee to work for 53½ hours even under a 40 hour week before he received any overtime pay. It was contended by the Administrator that as the vast majority of the employees were actually paid the guaranteed wage, that the regular rate should be computed by dividing the guaranteed wage by the number of hours that the men actually worked, and overtime should be computed with relation to that amount. The Supreme Court, by a five to four decision, accepted the Company contention that the Act did not prevent employment contracts and hence did not prevent the setting of the hourly rate by contract; further, that the Act did not prevent payments in excess of the minimum wages and thus as long as the hourly rates exceeded the statutory minimum, and the guaranteed wage exceeded that which the employees would have received under the hourly rate with overtime, that the Act had been complied with. In so deciding, it appeared that the Court had departed temporarily from the doctrine of computing overtime on the actual wages paid and had approved the right of the parties to set the regular rate by contract.<sup>49</sup>

<sup>45</sup> *Id.* at §7(f)(2).

<sup>46</sup> *Supra*, note 39.

<sup>47</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(f)(3) (Oct. 26, 1949).

<sup>48</sup> *Walling v. A. H. Belo Corp.*, 316 U.S. 624 (1942).

<sup>49</sup> Note, *Overtime Compensation Under the Fair Labor Standards Act for Workers with a Fluctuating Number of Hours per Week*, 52 YALE L. J. 159 (1942).

Encouraged by the *Belo* decision, other plans were devised which combined a contract-established "regular rate" in excess of the statutory minimum wage on which overtime could be computed with a salary plan under which most of the employees were actually paid.<sup>50</sup> Such plans constituted waivers of the overtime provisos of the Act in favor of wages in excess of those that would have had to be paid by the employer to comply with the Act. Under one plan, the employees in the mining and oil drilling fields were being paid according to the so-called Poxon or split-day plan. Under contracts of employment drawn up following the *Belo* decision, each day of work (or tour of duty) was divided into two parts. The first half was compensated for at the "regular rate" and the second at one and one-half times the "regular rate." The "regular rates" were adjusted so that for each complete day, or tour, the employee would receive exactly the same amount that he had been receiving prior to the passage of the Act, regardless of the number of hours that he had worked per week. Assuming that a worker had been receiving \$10.00 per day for seven eight-hour days each week, which prior to the Act would have amounted to \$70.00 per week, under the plan, his compensation would have been computed as follows:

$$7 \text{ (days per week)} \times (4 \text{ hours} \times \$1.00 \text{ plus } 4 \text{ hours} \times \$1.50) = \$70.00$$

The dual fictions of the "normal four-hour work day" and the "regular rate," which was paid for just half of the actual working time, were held to constitute an unsuccessful attempt to circumvent the Act.<sup>51</sup> The Supreme Court reiterated its former position in applying the "actual wage" theory by stating that the regular rate should be computed in the following manner:

$$\frac{\$70.00 \text{ (regular weekly wage)}}{56 \text{ hours (actual workweek)}} = \$1.25 \text{ (Regular rate)}$$

$$\$70.00 \text{ plus } \$10.00 \text{ (i.e., } \frac{1}{2} \times \$1.25 \times 56 - 40 \text{ hours)} = \$80.00$$

Again, in *Walling v. Youngerman-Reynolds Hardwood Company, Inc.*,<sup>52</sup> the Court rejected a contract-set "regular rate" on the basis that it was a fictional rate and not that under which the employees were normally paid. The major distinction between this plan and that in the *Belo* case was that instead of a guaranteed minimum wage, the employees were granted the alternative of a piecework rate. It was indicated that under the piecework plan, the workers averaged 59¢ per hour regardless of the number of hours worked, while under the hourly plan they received only 35¢ per hour for the first 40 hours and 52¢ for any hours in excess of 40. As in *Helmerich and Payne*, it was held

<sup>50</sup> Levy, *Belo Revisited*, 15 GEO. WASH. L. REV. 39 (1946).

<sup>51</sup> *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944).

<sup>52</sup> 325 U.S. 419 (1945).

that the "regular rate" must bear some relation to the actual wages paid and that overtime compensation must be computed on the basis of the wages normally received.

In a companion case,<sup>53</sup> a regular rate established by collective agreement was also declared unsatisfactory. Here, an hourly rate was established, upon which overtime was to be computed. An incentive piece rate was also provided, but it was understood that overtime would be computed solely on the regular hourly rate. In about 98% of the cases the employees were compensated under the piece rate plan, so the Court sustained the government contention that the piecework compensation constituted the "regular rate" in spite of the agreement to the contrary and ruled that overtime should be computed thereon.

Doubts expressed as to the continuing validity of the *Belo*-type contracts in the light of the intervening cases,<sup>54</sup> were dispelled in 1947 by the decision of the Supreme Court in *Walling v. Halliburton Oil Well Cementing Co.*<sup>55</sup> Here, the employees were compensated under a plan almost identical to that sustained in the *Belo* case. Individual contracts set forth a regular rate for the first 40 hours per week and provided for time and a half for hours in excess of that amount. In addition, provision was made for a guaranteed minimum weekly wage, in lieu of hourly rates plus overtime, that the employee would receive regardless of the number of hours worked. It was necessary, however, to work more than 84 hours at the hourly rates, including overtime, to receive as much as the guaranteed weekly wage. The only difference between this plan and the *Belo* plan was that here it would seem that an employee would have even a smaller chance of ever being paid under the contract-set hourly rate. Actually though, in approximately 20% of the workweeks the employees were paid at the hourly rate. This was a higher percentage than that indicated in the *Belo* case.<sup>56</sup>

The Court distinguished the three intervening cases on the ground that it was possible to receive payment at the hourly rate set by the contracts in the *Belo* and *Halliburton* plans, whereas in the other cases the basic hourly rates set by contract were not the rates at which the employees were actually paid.<sup>57</sup> Noting that Congress had not seen fit to amend the Fair Labor Standards Act in the years following the *Belo* decision and that the *Belo* case had never been expressly overruled, the Court ruled that the *Halliburton* plan did not violate the Act.

Following the decision in the *Halliburton* case, the question arose

<sup>53</sup> *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945).

<sup>54</sup> Brundage, "Regular Rate" of Pay Under Section 7(a) of the Fair Labor Standards Act of 1938, 34 CALIF. L. REV. 227 (1946); Levy, *Belo Revisited*, 15 GEO. WASH. L. REV. 39 (1946).

<sup>55</sup> 331 U.S. 17 (1947).

<sup>56</sup> *Id.* at 21.

<sup>57</sup> *Id.* at 22-23.

as to whether or not there was any limit to the number of hours that an employee could be made to work under a plan before he would receive payment under the "regular rate" instead of the guaranteed minimum wage.<sup>58</sup> The answer was provided in the amendments, when Congress ratified the Supreme Court's conclusion in the *Belo* case, but limited the application of guaranteed minimum-wage plans to 60 hours.<sup>59</sup> In effect, this appears to strike down contracts drafted on the basis of the *Halliburton* decision,<sup>60</sup> for now, if an employer desires to offer a guaranteed minimum, it must be coordinated with the regular hourly rate in such a way that if an employee works for more than 60 hours, he will receive his compensation based upon the hourly rate plus overtime. Thus, if the hourly rate is set at the minimum of 75¢ an hour, the guaranteed minimum cannot exceed \$52.50.

$$40 \text{ hours} \times \$ .75 \text{ (i.e., } \$30.00) \text{ plus } 20 \text{ hours} \times 1\frac{1}{2} \times \$ .75 \text{ (i.e., } \$22.50) = \$52.50$$

The amended law further specifies that the duties of the employee must necessitate irregular hours of work in order to authorize the use of a guaranteed minimum wage.<sup>61</sup>

In spite of the risk of litigation over the interpretation of the new statute, the long-desired provision of a definition of "regular rate" has now been made; specific exclusions have been codified; and methods of computing and establishing the regular rate have been spelled out.

<sup>58</sup> 45 MICH. L. REV. 1053 (1947); 32 MINN. L. REV. 189 (1948).

<sup>59</sup> Pub. L. No. 393, 81st Cong., 1st Sess. §7(e) (Oct. 26, 1949).

<sup>60</sup> Brewer, *A "Belo" Primer for 1950*, 1 CCH LAB. LAW J. 94, 100 (1949).

<sup>61</sup> This should eliminate the application of the *Belo* doctrine to employees with regular workweeks. *McComb v. Utica Knitting Co.*, 164 F. 2d 670 (2d Cir. 1947).