

4-1949

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### Recommended Citation

Paul H. Sanders, Overtime Pay Under the Fair Labor Standards Act, 2 *Vanderbilt Law Review* 379 (1949)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol2/iss3/11>

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# OVERTIME PAY UNDER THE FAIR LABOR STANDARDS ACT

PAUL H. SANDERS\*

Any rate of pay exceeding the statutory minimum that the parties to an employment agreement decide upon is permissible as far as the Federal Fair Labor Standards Act<sup>1</sup> is concerned. In general, too, the mode of payment is uncontrolled by the statute. Does this freedom of contract include the power to make arrangements with respect to the agreed-upon compensation which will be legally effective in determining liability under the statute? This question indicates in broad scope the most persistent controversy centering around the term "regular rate of pay,"<sup>2</sup> which, although undefined in the Act, is the required basis for the computation of statutory overtime payments. That such a controversy on a matter of basic principle should continue to rage more than ten years after the effective date of FLSA suggests the existence of either confusion in court interpretations or dissatisfaction with such clear pronouncements as have been made. It may be fairly said that, at times, each of these situations has obtained. Dissatisfaction was the prevalent note after the United States Supreme Court's action at the end of its last term in *Bay Ridge Operating Co. v. Aaron*,<sup>3</sup> the case involving the New York longshoremen. As this is written, it remains to be seen whether this will result in a general legislative modification of the precisely-stated definitions set forth in that decision.

The Fair Labor Standards Act creates certain rights on the basis of individual rather than group activity. Coverage depends upon what a particular individual employee does; extra compensation depends upon hours actually worked by the individual employee. Under the general requirements of the Act now prevailing, individual employees engaged in interstate commerce, or in the production of goods for such commerce, are to receive not less than 40 cents per hour<sup>4</sup> and one and one-half times their regular rate of pay for hours worked in excess of 40 per week.<sup>5</sup> The latter provision is designated in the Act as one for "maximum hours," although it imposes no absolute limitation. It is, of course, the basis for the "overtime pay" or "time and one-half," which constitutes the Act's major significance under prevailing economic circum-

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1. 52 STAT. 1063 (1938), 29 U. S. C. A. §§ 201-219 (1947)—hereafter referred to as FLSA and by section numbers (1 through 19) of the original Act.

2. § 7(a), 29 U. S. C. A. § 207(a) (1947). See Note, 47 COL. L. REV. 1189 (1947); 35 CALIF. L. REV. 589 (1947); 45 MICH. L. REV. 1053 (1947); 31 MINN. L. REV. 745 (1947).

3. 334 U. S. 446, 68 Sup. Ct. 1186, 92 L. Ed.—(1948); Note, 16 U. OF CHI. L. REV. 116 (1948); 17 GEO. WASH. L. REV. 278 (1949).

4. § 6(a).

5. § 7(a).

stances. The requirement is applicable only to work for a single employer within a workweek of seven consecutive days. There are two major problems involved in the computation of the excess compensation required by the Act for a particular employee in a designated week: (1) How many hours has he worked in the workweek? (2) What is his regular rate of pay? Deceptively simple in statement, these questions have nevertheless required the consideration of courts in literally hundreds of instances.

More than a dozen cases on the two aspects of overtime have been decided by the United States Supreme Court.<sup>6</sup> Each of the Court's major pronouncements on the legal principles controlling the answers to the above questions has provoked nationwide comment, much of it unfavorable in character. The answer to the "hours worked" problem in *Anderson v. Mt. Clemens Pottery Co.*<sup>7</sup> resulted in the major legislative changes of the Portal-to-Portal Act of 1947.<sup>8</sup> This aspect of the overtime question is not within the scope of this discussion. As previously indicated, the longshoremen case, *Bay Ridge Operating Co. v. Aaron*,<sup>9</sup> decided in June 1948, defined "regular rate of pay" with some precision. However, the decision was vigorously protested by the United States, as well as by the union affected and by management interests,<sup>10</sup> and was announced widely as requiring employers to pay "overtime on overtime."<sup>11</sup> It appears probable that Congress during the present session will amend the Act to change the effect of this decision at least so far as the longshore, stevedore, and building and construction industries are concerned.<sup>12</sup>

It is the purpose of this article to examine the regular-rate-of-pay problem in light of the *Bay Ridge* decision and its predecessors; to note the continued, though limited, vitality of a major exception to the Supreme Court's normal "calculating-machine" approach to the determination of the "regular rate"; to ascertain what types of premium-pay arrangement are "overtime premiums" to be credited against an employer's liability under the Fair Labor Standards Act; to consider, in addition, what elements of compensation must be treated as entering into the total figure, which when divided by the number of hours worked in a week will yield the regular rate of pay of the individual employee. Finally, a brief consideration will be given to possible legislative changes affecting the rate of pay for overtime computation.

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6. See Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 HARV. L. REV. 321, 350 *et seq.* (1946).

7. 328 U. S. 680, 66 Sup. Ct. 1187, 90 L. Ed. 1515 (1946).

8. 61 STAT. 84 (1947), 29 U. S. C. A. §§ 251 *et seq.* (Supp. 1948).

9. 334 U. S. 446, 68 Sup. Ct. 1186 (1948).

10. See interests represented by counsel in the denial of the petition for rehearing, 69 Sup. Ct. 10 (1948).

11. Farmer, *Overtime on Overtime: The Supreme Court Decision in the Bay Ridge Case*, 34 VA. L. REV. 745 (1948); *Overtime on Overtime Problems under the Fair Labor Standards Act*, 10 N. A. M. L. DIG. 45 (1948).

12. See *infra* n. 139

## DEFINING "REGULAR RATE OF PAY"

If the agreed total compensation consists of nothing except a designated hourly rate for each hour worked or a fixed weekly salary<sup>13</sup> for a fixed number of hours in the workweek, then no problem arises concerning the "regular rate." Virtually every other pay arrangement, however, will present troublesome questions concerning the application of the overtime requirements of FLSA. The decisions of the Supreme Court have now supplied answers to the most important of these. In seven cases prior to the *Bay Ridge* case the Supreme Court had found it necessary to pass upon the meaning of "regular rate of pay."<sup>14</sup> In five instances the Court had rejected efforts to define the term by individual or collectively-bargained contracts designed to avoid or minimize any requirement for a 50% increase in the employer's wage bill for each hour worked in excess of 40 by an individual employee. In *Walling v. A. H. Belo Corp.*<sup>15</sup> and *Walling v. Halliburton Oil Well Cementing Co.*,<sup>16</sup> the Court sustained the contracted-for "regular rate of pay" as supplying the basis for compliance with the Fair Labor Standards Act. This resulted in spite of the fact that in many weeks a much higher rate was actually received under a guaranteed weekly salary providing compensation for both straight time and overtime through hours much in excess of 40. The doctrine of these two cases has not been overruled by the *Bay Ridge* decision. However, it appears to be fundamentally inconsistent with the principles announced in the latter decision and with the philosophy of its majority opinion as well as that of the other five cases referred to above.

There are thirteen terms defined in the Definition Section<sup>17</sup> of the Fair Labor Standards Act. Other sections permit the Administrator to define certain terms, these definitions having the force and effect of law subject to the normal restrictions on administrative action.<sup>18</sup> Nowhere, however, is there a definition or provision for a definition of "regular rate of pay." The legislative history of the Act seems to be uninformative in this regard.<sup>19</sup> Highlighting

13. See *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, 580, 62 Sup. Ct. 1216, 86 L. Ed. 1682 (1942); accord, *Kreeft v. Bates Piece Dye Works, Inc.*, 150 F. 2d 818 (C. C. A. 2d 1945); cf. *Landreth v. Ford, Bacon & Davis, Inc.*, 147 F. 2d 446 (C. C. A. 8th 1945); *Harrington v. Empire Construction Co.*, 71 F. Supp. 324 (D. Md. 1947); *McCloskey & Co. v. Dickinson*, 56 A. 2d 442 (D. C. Mun. Ct. App. 1947).

14. *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, 62 Sup. Ct. 1216, 86 L. Ed. 1682 (1942); *Walling v. A. H. Belo Corp.*, 316 U. S. 624, 62 Sup. Ct. 1223, 86 L. Ed. 1716 (1942); *Walling v. Helmerich & Payne*, 323 U. S. 37, 65 Sup. Ct. 11, 89 L. Ed. 29 (1944); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 65 Sup. Ct. 1242, 89 L. Ed. 1705 (1945); *Walling v. Harnischfeger Corp.*, 325 U. S. 427, 65 Sup. Ct. 1246, 89 L. Ed. 1711 (1945); *Walling v. Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 67 Sup. Ct. 1056, 91 L. Ed. 1312 (1947); *149 Madison Avenue Corp. v. Asselta*, 331 U. S. 199, 67 Sup. Ct. 1178, 91 L. Ed. 1432 (1947); cf. *United States v. Rosenwasser*, 323 U. S. 360, 65 Sup. Ct. 295, 89 L. Ed. 301 (1945).

15. 316 U. S. 624, 62 Sup. Ct. 1223, 86 L. Ed. 1716 (1942).

16. 331 U. S. 17, 67 Sup. Ct. 1056, 91 L. Ed. 1312 (1947).

17. § 3.

18. *E.g.*, §§ 7(c), 13(a), 14.

19. See *Bay Ridge Operating Co. v. Aaron*, 334 U. S. 446, 477, 68 Sup. Ct. 1186 (1948) (dissenting opinion).

the controversy referred to in the opening paragraph, majority opinions of the Supreme Court have stated directly contradictory conclusions as to the inference to be drawn from the failure of Congress to define the term. In the *Belo* decision, Mr. Justice Byrnes said:<sup>20</sup>

"Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employers and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it. . . ."

In the *Bay Ridge* decision, Mr. Justice Reed speaks for the Court much as he had spoken in dissent in *Belo*:<sup>21</sup>

"As Congress left the regular rate of pay undefined, we feel sure the purpose was to require judicial determination as to whether in fact an employee receives the full statutory excess compensation, rather than to impose a rule that in the absence of fraud or clear evasion employers and employees might fix a regular rate without regard to hours worked or sums actually received as pay."

The courts have had to rely on the asserted purposes of the Act and its time-and-one-half section [7(a)] in defining what Congress left undefined. The importance of the purposes of the Act in this determination can best be understood by examining some of the lower court opinions in the days prior to a Supreme Court decision dealing specifically with regular rate of pay. At that time considerable controversy existed as to whether the Fair Labor Standards Act required anything more for hours worked in excess of 40 than one and one-half times the minimum hourly rate required by Section 6. There were court decisions sustaining each position in this argument.<sup>22</sup> The Fifth Circuit Court of Appeals in its opinion in the *Belo* case<sup>23</sup> took the position that no more than time and one-half on the minimum rate was required and asserted that it was not the purpose of the Act to discourage or limit overtime. Rather both the wage and hour provisions were said to be part of a scheme to raise substandard wages. In contrast the Fourth Circuit Court of Appeals in *Missel v. Overnight Motor Transportation Co., Inc.*,<sup>24</sup> noted the diversity of approach to the problem based on assumed Congressional intent, and decided, on the basis of the Act's legislative history, that it was intended to protect

20. *Walling v. A. H. Belo Corp.*, 316 U. S. 624, 634, 62 Sup. Ct. 1223, 86 L. Ed. 1716 (1942).

21. 334 U. S. 446, 463, 68 Sup. Ct. 1186.

22. Compare *Bumpus v. Continental Baking Co.*, 124 F. 2d 549 (C. C. A. 6th 1941); *Missel v. Overnight Motor Transportation Co., Inc.*, 126 F. 2d 98 (C. C. A. 4th 1942); *Graves v. Armstrong Creamery Co.*, 154 Kan. 365, 118 P. 2d 613 (1941); *Thornberg v. E. T. & W. N. C. Motor Transportation Co.*, 178 Tenn. 298, 157 S. W. 2d 823 (1940); *Tidewater Optical Co., Inc. v. Wittkamp*, 179 Va. 545, 19 S. E. 2d 897 (1942), *with Fleming v. A. H. Belo Corp.*, 121 F. 2d 207 (C. C. A. 5th 1941); *Floyd v. DuBois Soap Co.*, 139 Ohio St. 520, 41 N. E. 2d 393 (1942), *rev'd mem.*, 317 U. S. 596 (1942).

23. *Fleming v. A. H. Belo Corp.*, 121 F. 2d 207 (C. C. A. 5th 1941).

24. 126 F. 2d 98 (C. C. A. 4th 1942).

against and compensate for long hours, as well as relieve unemployment by penalizing the employer who works an individual employee longer than 40 hours a week.

The Fourth Circuit decision in the *Missel* case assumed that it was repudiating and refusing to follow the Fifth Circuit's reasoning in the *Belo* case. Paradoxically, in its first interpretative consideration of FLSA overtime pay, the United States Supreme Court affirmed both decisions<sup>25</sup> on the same day and thereby set the stage for much of the ensuing confusion and misunderstanding. The Supreme Court opinion in the *Missel* case required that a flat weekly salary be divided by the number of hours actually worked to get the "regular rate" where a fluctuating workweek was worked and the salary was said to cover straight and overtime pay. More significantly, however, the Court affirmed not only the result but the reasoning of the Fourth Circuit on the matter of legislative purpose. The legislative history was said to indicate that Congress intended by Section 7(a) "to require extra pay for overtime work by those covered by the Act even though their hourly wages exceeded the statutory minimum."<sup>26</sup> The dual purposes of the overtime provisions of the Act, the Court found, are (1) compensation to individuals required to work in excess of the statutory hours and (2) prevention of overtime, with a consequent spreading of employment, by penalizing the employer who works an individual employee for more hours than the statutory maximum. In neither the *Belo* nor *Halliburton* decisions is there any attempt to square the results with these asserted purposes of Congress. The Supreme Court has continued, with the one exception indicated, to reiterate these dual purposes in considering subsequent contracts for "regular rate of pay." It is obvious that a majority of the Court feels that the decision in the *Bay Ridge* case<sup>27</sup> follows necessarily from the construction of the Act in light of these purposes and the individual character of the rights created under the Act. As a matter of fact, there seems no serious reason to doubt the intention of Congress to regulate hours, as well as provide for minimum wages. Quite apart from extrinsic aids, the statute in speaking of "maximum hours" and "maximum workweek"<sup>28</sup> must be taken to intend what those words would normally import as modified by the specific section covering that subject matter. In addition, significance attaches to the exemption from the overtime provision provided under Section 7(b)(1) and 7(b)(2) for certain collective bargaining contracts which have absolute maximum hour limitations for work within 26 or 52 consecutive weeks.

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25. *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572, 62 Sup. Ct. 1216, 86 L. Ed. 1682 (1942); *Walling v. A. H. Belo Corp.*, 316 U. S. 624, 62 Sup. Ct. 1223, 86 L. Ed. 1716 (1942).

26. 316 U. S. at 577.

27. *Supra* note 3.

28. § 18.

If hours are to be controlled by FLSA, what is the legal situation when a compensation arrangement fails to control or compensate for the hours of a particular employee? If, in order to compensate the individual employee affected and to deter the employer from working employees individually for more than 40 hours a week, the Act requires 50% increase in compensation to the employee (or 50% increase in labor costs from standpoint of the employer), can a contract, individually or collectively-bargained, by its designation of "regular rate of pay" or "overtime" or even "rate intended to be the sole basis of extra compensation required by the Fair Labor Standards Act" or "premium pay to be offset against statutory requirements under the Fair Labor Standards Act," change what the Act might otherwise require? These questions present more specific aspects of the broader topic of controversy suggested in the opening paragraph. Outside of the *Belo-Halliburton* doctrine, the Court has consistently refused to permit the determination of regular rate of pay to be governed by formal contract statement. The words "regular rate of pay" it has said, "obviously mean the hourly rate actually paid for the normal, non-overtime workweek."<sup>29</sup>

In its first case on the topic after the *Belo* and *Missel* cases the Court began the process of distinguishing *Belo* and following *Missel*. In *Walling v. Helmerich & Payne*,<sup>30</sup> a contract which divided each daily tour of duty in half, and compensated hours in the first half at a "base or regular rate of pay" and designated hours in the second half of the tour as "overtime" compensable at one and one-half times the "regular rate" was said to provide for a "fictitious" and "illusionary" rate. Computation of the regular rate for purpose of FLSA requirements would be achieved, the Court said, by "the simple process of dividing the wages received for each tour by the number of hours in that tour."<sup>31</sup> The vice of the plan, the Court said, lay in the fact that "the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours."<sup>32</sup> In two decisions handed down in June 1945 the Court made even stronger proclamations of this same approach to the method of determining the regular rate of compensation. In *Walling v. Youngerman-Reynolds Hardwood Co.*,<sup>33</sup> it was dealing with a case where time and one-half was supposed to be paid on a designated hourly "regular rate," but not on piece-work earnings, which averaged more than 50% above the stated hourly rate and which for virtually all the employees represented the only earnings received. The Court said:

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29. *Walling v. Helmerich & Payne*, 323 U. S. 37, 40, 65 Sup. Ct. 11, 89 L. Ed. 29 (1944).

30. 323 U. S. 37, 65 Sup. Ct. 11, 89 L. Ed. 29 (1944).

31. 323 U. S. at 40.

32. *Id.* at 41.

33. 325 U. S. 419, 65 Sup. Ct. 1242, 89 L. Ed. 1705 (1945).

"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 not an arbitrary label chosen by the parties; it is an actual fact. 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."<sup>34</sup>

The companion case of *Walling v. Harnischfeger Corporation*<sup>35</sup> involved the compensation of employees, who, under a collective bargaining agreement, were to receive the higher of designated basic hourly rates or designated job rates (calculated in terms of assumed standard performance time). For hours in excess of 40 per week the employees received a premium equal to 50% of the basic hourly rate. The "incentive bonus," if any, due under the job rates might not be calculated until perhaps weeks or months later. The collective-bargaining agreement specifically provided: "the parties agree that, for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed is the base rate of each such employee." Payment of time and one-half on the "base rate" would constitute a real penalty to the employer for working the employee more than 40 hours in the week, but the penalty would be less than 50%. The Court rejected the agreement as determinative of compliance with the statutory requirements and said:

"No contract designation of the base rate as the 'regular rate' can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of Section 7(a), are impossible of achievement under such a computation."<sup>36</sup>

Mr. Chief Justice Stone, dissenting in these two cases, stated that the approach of the majority was in flat contradiction to the *Belo* decision, which had permitted the designation by contract of an hourly regular rate of pay and of a guaranteed weekly salary providing compensation for both regular time and overtime up to more than 50 hours per week. Certain lower courts were inclined to agree with him that the Court had virtually abandoned the *Belo* approach.<sup>37</sup> The doctrine, however, survived as a "narrow precedent" through the *Halliburton*<sup>38</sup> decision in 1947. Its present significance is discussed in a later section.<sup>39</sup> Shortly after *Halliburton* the Court rejected a

34. 325 U. S. at 424, 425.

35. 325 U. S. 427, 65 Sup. Ct. 1246, 89 L. Ed. 1711 (1945).

36. 325 U. S. at 430.

37. See *Walling v. Uhlmann Grain Co.*, 151 F. 2d 381 (C. C. A. 7th 1945); *Walling v. Richmond Screw Anchor Co., Inc.*, 154 F. 2d 780, 784 n. 4 (C. C. A. 2d 1946), *cert. denied*, 328 U. S. 870 (1946).

38. *Walling v. Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 67 Sup. Ct. 1056, 91 L. Ed. 1312 (1947).

39. See *infra* p. 391.

collectively-bargained formula for determining the regular rate of pay of individual employees and the application of the formula without regard to the actual hours worked by the employees in *149 Madison Avenue Corporation v. Asselta*.<sup>40</sup> In this case the Court returned to the theme that the crucial question is whether the rate derived from the formula is "in fact" the regular rate within the statutory meaning.

In light of the foregoing series of pronouncements, at least, it should have occasioned little surprise that in 1948 the Court in the *Bay Ridge* case should set forth the following definition as applicable to each individual employee:

"Regular rate of pay.—Total compensation for hours worked during any work-week less overtime premium divided by total number of hours worked."<sup>41</sup>

In other words, all the elements of compensation which the parties have agreed shall be paid for work done, no matter when or in what form the payments are made, except those extra payments for work because the individual has worked previously a specified number of hours in the day or week,<sup>42</sup> are to be added together and divided by the number of hours actually worked to arrive at the "regular rate" of the individual. By applying the above definition in the *Bay Ridge* case involving certain longshoremen who in some instances had worked nothing but time designated by their union contract as "overtime," the majority of the Court was accused by Mr. Justice Frankfurter, in dissent, of needlessly sapping the principle of collective bargaining, of treating the words of the FLSA "as though they were parts of a crossword puzzle," and of applying that Act "in disregard of industrial realities."<sup>43</sup> A more detailed study of this latest decision and its factual background would seem in order.

#### THE *Bay Ridge* CASE

The plaintiffs in the two cases involved in this decision were longshoremen, working in the Port of New York under a collective bargaining agreement between the International Longshoremen's Association and the New York Shipping Association together with certain steamship and stevedore companies. The collective bargaining agreement established a basic workday of 8 hours and basic workweek of 44 hours. "Straight time" rates, varying with the type of cargo handled, were applicable for work performed from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M., Monday to Friday, inclusive, and from 8 A.M. to 12 Noon Saturday. "Overtime" rates (150%

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40. 331 U. S. 199, 67 Sup. Ct. 1178, 91 L. Ed. 1432 (1947).

41. 334 U. S. 446, 450 n. 3, 68 Sup. Ct. 1186.

42. *Ibid.*

43. 334 U. S. 446, 477-478, 68 Sup. Ct. 1186.

of "straight time," or approximately that percentage) were paid for work at all other times, including meal hours and legal holidays. No differential for work in excess of 40 hours per week was provided under the contract, the general features of which had been maintained since 1916. The plaintiffs claimed that their regular rate of pay for the purposes of Section 7(a) of the FLSA was the average hourly rate computed by dividing the total compensation received pursuant to the agreement in any workweek from any single employer by the total number of hours worked for that particular employer in that week. The defendant stevedoring companies claimed that the "straight time" rates of the agreement constituted the regular rate of pay of each employee, regardless of when he worked. It followed that, if the employee had been compensated for as many or more "contract overtime" hours as the number of hours he had worked in excess of 40 in a week, there did not exist any liability for statutory excess compensation under FLSA. The contract was treated by the courts passing on it as being expressly intended by the parties to designate the "straight time" rate as the "regular rate of pay." Since the stevedoring companies operated under cost-plus contracts for the wartime operations involved, the United States was the real party in interest. Officials of the union of which the plaintiffs were members vigorously opposed their claim. The District Court held that the contract straight-time rates constituted regular rates of pay for FLSA purposes.<sup>44</sup> The Circuit Court of Appeals for the Second Circuit held otherwise.<sup>45</sup>

The Supreme Court agreed with the conclusion reached by the Circuit Court of Appeals. It reverted to the purposes of the Act to compensate individual employees working hours in excess of the statutory maximum and to spread employment through inducing employers to shorten hours because of the pressure of extra cost. The Act affords protection to each individual employee from overly long hours, the Court says: "So although only one of a thousand works more than forty hours, that one is entitled to statutory excess compensation."<sup>46</sup> It becomes necessary, therefore, to determine for each individual plaintiff his regular rate of pay.

In arriving at its definition of "regular rate of pay" the Court reviews the terminology as developed from the *Missel* case<sup>47</sup> through the *Asselta* case<sup>48</sup> as discussed above, The *Belo*-<sup>49</sup> *Halliburton*<sup>50</sup> exception, providing by contract for a guaranteed weekly wage as well as a regular rate of pay,

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44. *Sub nom.* Addison v. Huron Stevedoring Corp., 69 F. Supp. 956 (S. D. N. Y. 1947).

45. 162 F. 2d 665 (C. C. A. 2d 1947).

46. 334 U. S. 446, 460, 68 Sup. Ct. 1186.

47. *Supra* note 25.

48. *Supra* note 40.

49. *Supra* note 15.

50. *Supra* note 16.

is inapplicable, the Court states. It must, in any event, be regarded as a "narrow precedent" covering its particular factual situation and does not mean that "mere words in a contract can fix a regular rate."<sup>51</sup> The Court rejects the argument that a collective bargaining agreement purporting to establish a regular rate of pay for individual employees can have any special validity when it is demonstrated not to be an accurate portrayal of the true compensation received. Nothing in FLSA, the Court says, authorizes giving decisive weight to contract declarations as to regular rate because they are the result of collective bargaining. Collective bargaining contracts had been held legally insufficient in both the *Harnischfeger*<sup>52</sup> and *Asselta*<sup>53</sup> cases. The Court states its conclusion

"... that Congress intended the regular rate of pay to be found by dividing the weekly compensation by the hours worked unless the compensation paid to the employee contains some amount that represents an overtime premium. If such overtime premium is included in the weekly pay check that must be deducted before the division."<sup>54</sup>

The Court specifically disavows any allowance for "overtime on overtime" in the following language:

"When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay. To permit overtime premiums to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended. In order to avoid a similar double payment, we think that any overtime premium paid, even if for work during the first forty hours of the workweek, may be credited against any obligation to pay statutory excess compensation."<sup>55</sup>

The Court then turns to the definition of "overtime premium" and concludes that "it is that extra pay for work because of previous work for a specified number of hours in the workweek or workday."<sup>56</sup> This is because such extra pay, whether required by statute or contract, serves the same basic purposes as the Fair Labor Standards Act itself. Higher pay for work on a less desirable shift, or for a disagreeable or dangerous job or because of the day of the week, or for work on a holiday, does not fit the definition. "The higher rate must be paid because of the hours previously worked for the extra pay to be an overtime premium."<sup>57</sup> In this case, the Court said, the size of the differential paid for night and other work outside of the prescribed standard workweek did not change the fact that large wages were

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51. *Bay Ridge Operating Co. v. Aaron*, 334 U. S. 446, 462, 68 Sup. Ct. 1186 (1948).

52. *Supra* note 35.

53. *Supra* note 40.

54. 334 U. S. 446, 464, 68 Sup. Ct. 1186.

55. *Ibid.*

56. *Id.* at 465.

57. *Id.* at 466.

paid for work in undesirable hours and not because of having worked previous hours. Charts showing concentration of work in the straight time hours are of no significance in determining the regular rate of pay of individual workmen. "As a matter of fact," the Court says, "regular working hours under a contract, even for an individual, has no significance in determining the rate of pay under the statute. It is not important whether pay is earned for work outside of regular working hours. The time when work is done does not control whether or not all or a part of the pay for that work is to be considered as a part of the regular pay."<sup>58</sup> As the employment contract was one for irregular hours, the rule of dividing the weekly wage by the number of hours worked to find the regular rate of pay was found to be applicable.

In his dissenting opinion, Mr. Justice Frankfurter dwells on the dislocating effect that the Court's decision will have on premium-pay arrangements under collective bargaining contracts in general and in the longshoring industry in particular. He points out the casual nature of the employment in that industry and the fact that employees do not usually work continuously for one employer. In light of these peculiarities, he asserts the collective bargaining agreement involved in this decision was the only effective way to deter a long workweek. "The 'regular rate' in a given industry must be interpreted in the light of the customs and practices of that industry."<sup>59</sup> It was competent for the parties to a labor agreement to establish a "regular rate," provided only that the rate so established "truly reflects the nature of the agreement and is not a subterfuge to circumvent the policy of the statute."<sup>60</sup> His reasoning may be paraphrased thus: Here the employees are represented by a strong union, the parties have dealt at arm's length, and the defined "regular rate" is not an artifice for circumventing the commands of the law. In fact, the contractual arrangements, designed to discourage overwork and underemployment, were established in their general features more than twenty years before the effective date of FLSA. The "overtime" provided by the contract is clearly distinguishable from a shift differential. He concludes that the "regular rate" was the "straight time" scale provided by the union contract and that this was true for the whole union including the individual plaintiffs. "To call their demand one for 'overtime pyramided on overtime' is not to use a clever catchphrase, but to describe fairly the true nature of their claim."<sup>61</sup>

It will be seen that the Court, by its rigorous, arithmetical formula has disturbed an established relationship by doing that which neither party to a collective agreement desired. Likewise, it has made clear the probable existence of considerable liability for excess statutory compensation in the

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58. *Id.* at 473.

59. *Id.* at 482.

60. *Ibid.*

61. *Id.* at 495.

industry directly affected and others, and required an approach to premium-pay arrangements that may prove quite distressing in ensuing collective bargaining negotiations. If, for example, an employer must average in with the other pay of an employee the double pay for work on a holiday, in computing a base for statutory overtime, and receive no credit toward statutory overtime from such payment, he may be very reluctant to continue any such holiday pay provision in his union contract. Similarly, the requirement would be a deterring factor, if the original inclusion of such a contract provision were under consideration. These features of the decision are undoubtedly disturbing. The peculiarities of longshoring, in which an individual frequently works for several different employers in the course of the week, the urgent wartime conditions under which the work in question was performed, the large governmental liability involved, the extraordinary size of the premiums for night and other "non-standard" work (which hindsight would say certainly should not have been permitted to be effective during the war emergency)—all these factors appeal for a decision limiting the plaintiffs to no more than permitted by the collective agreement under which they had worked.

If the decision in *Bay Ridge* had been different, however, the Court would have accorded validity for FLSA purposes to a contract designation of "straight" and "overtime" bearing no necessary relationship to the actual facts in the case of a particular employee. Much as it may have tried it would have been difficult, if not impossible, to restrict the scope of the precedent to the peculiar facts of the longshore case. Experience after the *Belo* decision indicated caution in this regard. It might very well be assumed that it was this "consciousness of precedent,"<sup>62</sup> which prevented a majority acceptance of the dissenting point of view as to the disposition of the case. If the Court had announced such a decision, would it have let the country in for another period of contract-making such as ensued from the *Belo* decision (in many instances unrelated to the special facts of that decision)? Could the Court have possibly drawn a line between "individual" and "collective-bargaining" contracts in this connection without causing a storm of criticism? Could it have made the strength and independence of the contracting union criteria in judging the validity of "regular" and "overtime" rate set by contracts? Could it have made "good faith" and a "fair bargain" elements of such contractual validity? Would it have been feasible to judge an "overtime premium" on the basis of size, regularity of receipt, or any purpose other than extra pay for having previously worked specified hours? Could the courts administer a rule which permits "regular" and "overtime" rates to be set by contract, overriding actual pay arrangements for particular individuals, provided that

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62. See Mr. Justice Reed's dissent in *Walling v. A. H. Belo Corp.*, 316 U. S. 624, 635, 62 Sup. Ct. 1223, 86 L. Ed. 1716 (1942).

the whole arrangement is not "an artifice for circumventing the plain commands of the law" without provoking continuing litigation? Could the Court have abandoned the individual basis upon which the rights in the Act are established and written an exemption for the peculiar facts of longshoring without indulging in judicial legislation to an extreme degree? Consideration had to be given to long-run effects on the great bulk of those to whom the law was of importance, considering the essential features and stated purposes of FLSA. It may be asked fairly whether these purposes are more likely to be achieved by adapting the interpretation of the general words of the statute to "industrial reality" with all of its variety of contract draftsmanship, or by asking that "industrial reality" adapt itself, in its compensation arrangements, to the simply stated and definitely understandable definition set forth in the majority opinion. If exemptions are needed Congress should write them, not the Court. It is clear that the prevention-of-long-hours and employment-spreading purposes of Congress will receive no necessary protection in individual or collective agreements. The desire to secure work for additional hours might lead to compromises on the 50% penalty. Apparently the Court felt that it was important to develop an approach which would be least likely of abuse and most likely to effectuate the purposes of Congress in the enactment of FLSA. The Court was required to lay down controlling principles drawn from general language. It would have been basically unsound to have permitted private parties, by contract, to control absolutely the legal effect of an arrangement into which they have entered. If exceptions are needed, and it appears that they are in certain instances,<sup>63</sup> Congress should be expected to provide them. They should not, necessarily, control rules applicable to more normal situations.

#### THE *Belo-Halliburton* EXCEPTION

In the *Belo* case<sup>64</sup> in 1942 there were individual written contracts designating a regular rate of pay in cents per hour. This hourly rate was 1/60th of a former weekly salary, which remained the guaranteed weekly minimum compensation the employee would receive regardless of the number of hours worked. With time and one-half after 44 hours (then the weekly maximum), his guaranty was the equivalent of pay for 54½ hours. After that point additional hours were paid for at one and one-half times the "regular rate" set in the contract. Employees worked irregular hours, in some instances less than 40 in a workweek. It is very obvious that, under such a contract, although the employee receives the advantages of stability in income,

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63. See *infra* p. 406.

64. *Walling v. A. H. Belo Corp.*, 316 U. S. 624, 62 Sup. Ct. 1223, 86 L. Ed. 1716 (1942), *supra* note 15. See Feldman, *Algebra and the Supreme Court*, 40 ILL. L. REV. 489 (1946); Levy, *Belo Revisited*, 15 GEO. WASH. L. REV. 39 (1946).

he receives no more compensation for 54½ hours than for 44. Conversely, the labor costs of the employer are no more at all for working his employees 10½ hours in excess of the statutory maximum, much less 150% of what they have been in the "maximum workweek" set by the statute. Nevertheless, the arrangement was held valid, and the "regular rate" set by the individual contracts was said to provide a proper basis for statutory excess compensation. The fact that an "overtime" rate much in excess of 150% was paid for certain hours was regarded as immaterial since Section 7(a) speaks of "not less than one and one-half times the regular rate." If the *Missel*<sup>65</sup> formula (announced simultaneously), of dividing hours worked into amount received for a fluctuating workweek, had been required for the weeks when the employee worked less than 54½ hours an entirely different "regular rate" would have resulted. Resulting decisions in the lower courts showed confusion as to the scope of the doctrine announced by the case, and the interrelation of it with the *Missel* decision.<sup>66</sup>

Subsequent decisions of the Supreme Court in the *Helmerich & Payne*, *Youngerman-Reynolds* and *Harnischfeger*<sup>67</sup> cases were considered by many lower courts to have virtually repudiated the *Belo* doctrine. Nevertheless in the *Halliburton* case, in 1947, the Court reaffirmed it within the scope of a comparable fact situation, possessing certain features which could have provided a basis of distinction if the Court had been so inclined. This case also involved written individual contracts setting forth a "regular basic rate of [a specified number of] cents per hour for the first 40 hours of any workweek and not less than one and one-half times such basic hourly rate of pay for all time over 40 hours in any workweek, with a guarantee that Employee shall receive for regular time and for such overtime as the necessities of the business may demand a sum not less than \$ [a specified number] for each workweek."<sup>68</sup> The rate was so related to the guarantee that additional compensation would not be forthcoming unless the employee worked more

65. *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, 62 Sup. Ct. 1216, 86 L. Ed. 1682 (1942), *supra* note 25.

66. The "split-day plan" in *Walling v. Helmerich & Payne*, 323 U. S. 37, 65 Sup. Ct. 11, 89 L. Ed. 29 (1944), was upheld in the circuit court of appeals on the authority of the *Belo* decision, 138 F. 2d 705 (C. C. A. 10th 1943). On the same authority the district court upheld the contract designation of "overtime rates" in the *Bay Ridge* case, 69 F. Supp. 956 (S. D. N. Y. 1947). Compare *Shepler v. Crucible Fuel Co.*, 140 F. 2d 371 (C. C. A. 3d 1943); *Murray v. Noblesville Milling Co.*, 131 F. 2d 470 (C. C. A. 7th 1942), *cert. denied*, 318 U. S. 775 (1943); *Clay v. Motor Freight Express, Inc.*, 52 F. Supp. 948 (E. D. Pa. 1943); *Marvin v. Hodgson*, 202 P. 2d 1 (Cal. 1949); *Watson v. Hightower*, 50 N. M. 322, 176 P. 2d 670 (1947); *with Watkins v. Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3d 1945); *Walling v. Uhlmann Grain Co.*, 151 F. 2d 381 (C. C. A. 7th 1945); *McComb v. Sterling Ice Co.*, 165 F. 2d 265 (C. C. A. 10th 1947); *Walling v. Highway Express, Inc.*, 7 CCH LAB. CAS. ¶ 61568 (U. S. D. C. W. D. Tenn. 1943); *Walling v. Arctic Circle Exploration Inc.*, 56 F. Supp. 944 (W. D. Wash. 1944); *Walling v. Lippold*, 72 F. Supp. 339 (D. Neb. 1947); *Sevier v. Andersons, Inc.*, 15 CCH Lab. Cas. ¶ 64582 (U. S. D. C. M. D. Tenn. 1948).

67. All *supra* note 14.

68. 331 U. S. 17, 19, 67 Sup. Ct. 1056, 91 L. Ed. 1312 (1947).

than 84 hours in the workweek. Usually the employees worked less hours than 84. In about 20% of the weeks the employees worked more than 84 hours; in other weeks their hours fell to less than 30. The Court first asserted that the case was indistinguishable from the *Belo* case except in the amount of the hourly rates and weekly guarantees. The 84-hour breaking-point was said to be as closely related to the widely-fluctuating, actual workweek of the employees in this case as was the 54½ hour designation in *Belo*. In both cases extra compensation was paid to employees for such excess hours at the time and one-half rate as prescribed by contract. In both cases the full weekly guarantee was paid even though hours fell to less than 40. There being no substantial difference, the Court concluded that *Belo* must either be followed or overruled.

The Court next considered whether *Belo* had been implicitly overruled by the intervening decisions refusing to sanction designated "regular rates" which were other than the "actual rate." In each of these cases, it was noted that *Belo* was expressly distinguished and considered inapplicable. Furthermore, the Court said, in *Belo* the specified basic hourly rate was the "actual regular rate" because (1) as to weeks in which more than 54½ hours were worked, the specified rate determined the amount of compensation actually payable and (2) as to weeks in which less hours were worked, it could be inferred from the collateral specification of a basic rate and provision for a legal but variable rate of overtime pay, that the guaranteed flat sum then due also contemplated both basic pay and overtime. The Court then proceeded to demonstrate that the agreed method of wage computation in the three intervening Supreme Court "regular rate" cases fitted neither of these requirements. The Court, finally, refused to overrule *Belo* directly:

"The reasons . . . for rejecting this argument are equally valid today, and need not be repeated. Moreover, our holding in *Belo* has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. Knowing of the *Belo* decision, the Congress has permitted § 7(a) to stand unmodified and the courts have applied it as so construed. Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. Even if we doubted the wisdom of the *Belo* decision as an original proposition we should not be inclined to depart from it at this time."<sup>69</sup>

The *Bay Ridge* decision snms up the *Halliburton* decision as a reaffirmance of *Belo* as a "narrow precedent principally because of public reliance upon and congressional acceptance of the rule there announced."<sup>70</sup> There remains the question of the scope of the "narrow precedent." Since the problem is created by the existence of the guaranty, it is rather pointless to say that there must be such a guaranty. It seems to be clear that there is nothing

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69. *Id.* at 25.

70. 334 U. S. 446, 462, 68 Sup. Ct. 1186.

in FLSA to prevent reduction of wages and consequently of the actual "regular rate."<sup>71</sup> The provision in Section 18 clearly does not effectuate any such blanket prohibition. The Wage and Hour Administrator seems to agree that wages can be reduced without FLSA violation.<sup>72</sup> However, he asserts, the regular rate of pay may not be "manipulated" for the purpose of avoiding the overtime requirements of the Act.<sup>73</sup> "Manipulation" may involve a purported reduction while the total pay for the week remains the same, or a temporary reduction in weeks where overtime is worked.

The *Belo* situation will necessarily involve a weekly or some other type of guaranteed salary regardless of weekly hours. Obviously there must be arrangement for and actual payment of time and one-half for hours in excess of the breaking-point set in the written individual contracts. A flat weekly guaranty covering straight time and overtime regardless of hours worked will be handled by the *Missel* formula.<sup>74</sup> It would seem that the "regular rate" set in the contract must be a rate not a formula,<sup>75</sup> although a dictum in the *Asselta*<sup>76</sup> case indicates the contrary possibility. Certainly the contract rate must be treated by the parties as the "actual rate" and adjusted to reflect changes in the guaranteed salary.<sup>77</sup> Since the *Halliburton* decision the United States Circuit Court of Appeals for the Second Circuit in *McComb v. Utica Knitting Co.*<sup>78</sup> has upheld a contract specifying an hourly "regular rate," with time and one-half of that rate for hours over 40, with a guaranteed weekly salary covering straight and overtime compensation for 45 hours, after which additional compensation at the time and one-half rate was paid. The majority opinion stated that the weekly guaranty was not enough to secure approval under the *Belo* doctrine, but there must be, in addition, "a

71. See *Walling v. A. H. Belo Corp.*, 316 U. S. 624, 630 n. 6, 62 Sup. Ct. 1223, 86 L. Ed. 1716 (1942); accord: *White v. Witwer Gro. Co.*, 132 F. 2d 108 (C. C. A. 8th 1942); *General Mills, Inc. v. Williams*, 132 F. 2d 367 (C. C. A. 6th 1942); *Siegel v. Blechman & Sons, Inc.*, 60 N. Y. S. 2d 116 (Sup. Ct. 1946). *Contra*: *Anuchick v. Transamerican Freight Lines, Inc.*, 46 F. Supp. 861 (E. D. Mich. 1942); cf. *Walling v. Belikoff*, 59 F. Supp. 167 (S. D. N. Y. 1944), *aff'd mem.*, 147 F. 2d 1008 (C. C. A. 2d 1945).

72. See "Reduction of Wages," in WAGE & HOUR MANUAL 50:147 (B. N. A. 1949); cf. Wage & Hour Administrator's Interp. Bull. No. 4, ¶¶ 15, 26 (1940), also in WAGE & HOUR MANUAL 50:9.

73. Wage & Hour Administrator's Interp. Bull. No. 4, ¶¶ 15, 16, 17 (1940), *supra* note 72; *Walling v. Green Head Bit and Supply Co.*, 138 F. 2d 453 (C. C. A. 10th 1943); cf. *Walling v. Belikoff*, 59 F. Supp. 167 (S. D. N. Y. 1944); *Murray v. Noblesville Milling Co.*, 42 F. Supp. 808 (S. D. Ind. 1942), 131 F. 2d 470 (C. C. A. 7th 1942); *cert. denied*, 318 U. S. 775 (1943).

74. See *Peffer v. Federal Cartridge Co.*, 63 F. Supp. 291 (W. D. Minn. 1945); *Sawyer v. Selig Mfg. Co.*, 74 F. Supp. 319 (D. Mass. 1947); *White v. Modern Methods, Inc.*, 15 CCH LAB. CAS. ¶ 64653 (U. S. D. C. N. D. Ga. 1948).

75. *Watkins v. Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3d 1945), *cert. denied*, 327 U. S. 777 (1946).

76. 331 U. S. 199, 204, 67 Sup. Ct. 1178, 91 L. Ed. 1432 (1947).

77. *McComb v. Sterling Ice & Coal Storage*, 165 F. 2d 265 (C. C. A. 10th 1947); *Walling v. Highway Express, Inc.*, 7 CCH LAB. CAS. ¶ 61568 (U. S. D. C. W. D. Tenn. 1943).

78. 164 F. 2d 670 (C. C. A. 2d 1947).

condition of irregularity" in the workweek or such uncertainty of work being performed that the guaranty provides stability of employment and income otherwise absent.<sup>79</sup> It was added that the guaranty must be "fair in the circumstances." These conditions were held to be satisfied in this instance although it appears from the dissent, in the denial of a petition for rehearing,<sup>80</sup> that less than 2% of the workweeks fell to less than 40 hours, instead of 20% as first asserted by the majority.

#### OVERTIME PREMIUMS

The very vital significance of "overtime premiums" under FLSA has already been suggested. Under the Supreme Court's definition of "regular rate of pay" such premiums are deducted from total compensation received before dividing by the number of hours worked in the week to ascertain the "regular rate." Of equal significance is the fact that such premiums, having been paid for the same purposes as the FLSA requirements, may be offset against any liability for overtime pay under the Act. In defining "overtime premium," it will be recalled the *Bay Ridge* majority opinion emphasized that it was extra pay because of previous work for a specified number of hours, whether by statute or contract, in the workweek or workday. Premiums or penalties for any other purpose for work performed must be included in total compensation for "regular rate" determination, and no credit may be taken for such payments against liability for excess statutory compensation.<sup>81</sup> Consideration will be given to specific premium arrangements fitting the Court's requirements. Other premium arrangements will be treated in a subsequent section.

*Premium for Hours Worked in Excess of a Specified Number in a Day.*—Many collective bargaining agreements contain provisions for time and one-half for hours worked in excess of eight in a day. A similar requirement may be prescribed by statute—the Walsh-Healey Public Contracts Act,<sup>82</sup> for example. These are the clearest examples of overtime premiums, fitting the *Bay Ridge* definition. The extra pay is for work because of previous work for a specified number of hours in the workday. It is therefore deductible before figuring the "regular rate" and may be offset against overtime compensation required to be paid by FLSA. For employees normally working daily schedules of seven, ten, or twelve hours identical treatment would be accorded with respect to extra compensation, pursuant to a contract requiring time and one-half for hours worked in excess of the prescribed daily tour. If instead of a 50% premium, the agreement called for 25%, 100%, or some other figure, for

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79. *Id.* at 673.

80. *Id.* at 678.

81. 334 U. S. 446, 465-466, 68 Sup. Ct. 1186.

82. 49 STAT. 2036 (1936), 41 U. S. C. A. §§ 35-45 (1943).

hours worked in excess of the normal daily schedule, the result would be the same.

The *Bay Ridge* case in its definition of overtime premium makes no reference to its relationship to the normal or regular workday. As stated, the question is whether the extra pay is "because of previous work for a specified number of hours." Would it be possible then to provide for time and one-half rate to be paid for work done after four, six or seven hours in a regular eight-hour day, and make use, for FLSA purposes, of the extra pay for the last four, two or one hours of the day as an overtime premium? This is, of course, the split-day plan rejected by the Court in *Walling v. Helmerich & Payne*.<sup>83</sup> The Court recognized a possible misunderstanding in this connection and asserted that its holding in *Helmerich & Payne* was not contrary to the position taken in the *Bay Ridge* case.<sup>84</sup> The facts of the former case "indicated a palpable evasion of the statutory purposes," the Court said. Would it make any difference that a contract specified a regular working day of six hours with time and one-half for hours in excess of six, while the normal daily tour of duty actually amounted to eight hours?<sup>85</sup> It is considered that under these circumstances, the Court would not adhere to its literal statement in *Bay Ridge* about the "standard fixed by contract for the day or week," but would revert to the *Helmerich & Payne* approach. The Administrator states that the specified number of hours must be pursuant to a bona fide standard.<sup>86</sup> A United States District Court decision, entered since the *Bay Ridge* opinion, phrases the "overtime premium" definition as "excess compensation paid for work . . . in excess of regular hours in any one day."<sup>87</sup> It bears repeating that the question in every case is on an individual basis. To qualify as an overtime premium the pay must be for work by the individual over and above previous work performed by him for a specified number of hours in the day or week pursuant to a bona fide standard.

*Premium for Hours Worked in Excess of a Specified Number in a Week.*—Much that has been written in the previous section is obviously adaptable under this heading. Contract provisions identical with FLSA requirements or calling for time and one-half for hours worked in excess of 36 hours in a week, for example, are clear examples of overtime premiums under the Supreme Court's definition in the *Bay Ridge* case. Premium pay pursuant to contract for the sixth or seventh consecutive day of work in the

83. *Supra* note 14.

84. 334 U. S. 446, 466 n. 22, 68 Sup. Ct. 1186.

85. *Walling v. Alaska Pacific Consolidated Mining Co.*, 152 F. 2d 812 (C. C. A. 9th 1945), *cert. denied*, 327 U. S. 803 (1946); *Robertson v. Alaska Juneau Gold Mining Co.*, 157 F. 2d 876 (C. C. A. 9th 1946), *cert. denied* (on this point), 331 U. S. 823 (1947); *cf. Walling v. Arctic Circle Exploration, Inc.*, 56 F. Supp. 944 (W. D. Wash. 1944).

86. Statement issued by Wage & Hour Administrator, Aug. 6, 1948, § 778.2, also in *WAGE & HOUR MANUAL* 50:647, 648 (B. N. A. 1949).

87. *Burke v. Mesta Machine Co.*, 15 CCH Lab Cas. ¶ 64673 (U. S. D. C. W. D. Pa. 1948).

workweek would probably qualify as overtime premium although not literally within the Court's statement. The Wage and Hour Administrator has so indicated.<sup>88</sup> Premium pay for work on Saturday and Sunday may or may not be sufficient to meet the test, depending upon the wording of the agreement and the actual practice controlling such payments. Such premiums were involved in the *Bay Ridge* situation and the Court held in that case that they must be included in total compensation rather than deducted in arriving at the "regular rate."<sup>89</sup> The reason, of course, was that the premium for Saturday afternoon and Sunday work was for work at undesirable hours and in no way related to the fact that the individual employee had worked previously a specified number of hours.

The specified workweek and the actual practice at a particular establishment may be such that Monday through Friday covers a normal weekly tour for all employees and work on Saturday and Sunday (with a specified premium) represents, in virtually every instance, work by the individual in excess of the standard weekly hours. It is possible by contract to provide specifically that a particular employee will receive the specified Saturday and Sunday premium only in the event of having previously worked a certain number of hours or days. The contract can be worded, then, so as to take full advantage of the *Bay Ridge* definition. In the absence of specific treatment, under the above factual situation, the Administrator has stated that actual practice will be examined as well as the wording of agreements.<sup>90</sup> If the practice shows that the Saturday and Sunday premiums are contingent upon individuals having previously worked specified hours or days, then they may be treated as overtime premiums, in the Administrator's opinion. Before the *Bay Ridge* decision the Administrator's opinion had been that premiums for work performed on Saturdays and Sundays (and holidays) "outside the normal or regular working hours" were to be excluded in determining the "regular rate" and credited toward overtime compensation requirements under FLSA.<sup>91</sup>

#### ELEMENTS OF "TOTAL COMPENSATION"

As has been stated, the regular rate of pay of an employee is arrived at by dividing his total compensation during any workweek by the total number of hours worked after deducting any overtime premiums received by him. The Supreme Court's definition being mutually exclusive in its terms,

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88. See reference, note 86 *supra*.

89. 334 U. S. 446, 451 n. 5, 68 Sup. Ct. 1186.

90. See Statement issued by Wage & Hour Administrator, Aug. 6, 1948, § 778.2, also in WAGE & HOUR MANUAL 50:649 (B. N. A. 1949); 6 CCH LAB. LAW REP. ¶ 29012 (1948).

91. W. & H. Admr's Interp. Bull. No. 4, ¶¶ 69, 70 (1940); see WAGE & HOUR MANUAL 50:22-26 (B. N. A. 1949), particularly "editor's note," 50:25.

premiums, penalties or any other payments which do not qualify as overtime premiums but which are nonetheless "for hours worked" during the work-week must enter into the total compensation figure.

*Shift Differentials and Premiums for Work at Non-Standard Hours.*—These were of paramount significance in the *Bay Ridge* facts. There was no disagreement in that case about the principle of including, for "regular rate" computation, the extra amounts designated and understood to be compensation for work on less-popular shifts. The attempted distinction between the small differential designed as compensation and the 50% differential designed to be prohibitive was rejected by the majority opinion in *Bay Ridge*.<sup>92</sup> It may be taken that any extra payments, regardless of amount, given merely because the hours worked are at an undesirable time, must be included in total compensation.<sup>93</sup> Premium-pay arrangements for work at hours other than during the prescribed standard workday or outside of the employee's regular shift involve the same problem and receive the same answer. If the night-work premium or after-shift or before-shift premium is made contingent upon having worked previously a prescribed number of hours in the workday it would then be an overtime premium as discussed above.<sup>94</sup>

*Premiums for Work on Designated Days of the Week and Holidays.*—Saturday and Sunday work premiums have already been discussed. Together with premiums for work on holidays they were dealt with directly in the *Bay Ridge* decision. It is clear that if the premium is for work on these days as such, and unrelated to previous work for a prescribed number of days or hours pursuant to a bona fide standard, the extra pay must be included in total compensation.<sup>95</sup> This approach threatens the survival of such provisions in union contracts and would inevitably make it more difficult for unions to secure such provisions where they do not now exist. It appears likely that Congress will adopt the suggestion of the Administrator that these premiums, where the work is performed outside of normal or regular working hours, may be treated as overtime premiums and excluded from "regular rate" computation.<sup>96</sup> Premium pay for work performed on a holiday is normally unrelated (and frequently unrelatable) to any previous number of hours worked in the

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92. 334 U. S. 446, 469, 68 Sup. Ct. 1186.

93. *Cabunac v. National Terminals Corp.*, 139 F. 2d. 853 (C. C. A. 7th 1944); *Walling v. Schollhorn Co.*, 54 F. Supp. 1022 (D. Conn. 1944); *Ferrer v. Waterman S. S. Corp.*, 70 F. Supp. 1 (D. Puerto Rico 1947).

94. It has been suggested that, under an employment contract calling for time and one-half for hours worked in excess of eight daily and for time and one-half for hours worked before 8 A.M. or after 5 P.M., an arrangement of a normal 24-hour workday beginning at 8 A.M., would permit treating extra payments for "before-8" and "after-5" work for those working the regular shift as overtime premiums pursuant to the *Bay Ridge* definition. See 3 CCH LAB. LAW REP. ¶ 29,044 (1949).

95. 334 U. S. 446, 68 Sup. Ct. 1186; cf. *Barker v. Ga. Power & Light Co.*, 5 CCH LAB. CAS. ¶ 61,095 (M. D. Ga. 1942).

96. See *infra*, p. 406.

week. It could be made so, of course, by specific contract provision. There seems little likelihood, however, of contract adjustment to minimize materially this feature in the way that is feasible in the case of Saturday and Sunday premiums. Furthermore, it should not be assumed that there would be any valid method of arranging, for those working on holidays, a "flexible rate" for workweeks including holidays, so as to permit total compensation to remain the same as if the holiday premium were not to be counted in "regular rate" computations.<sup>97</sup>

*Premiums for Unpleasant and Dangerous Work.*—These, too, were dealt with directly in the *Bay Ridge* case. Payments so received must be included in total compensation for purposes of "regular rate" computation.<sup>98</sup>

*Bonuses.*<sup>99</sup>—The varieties of extra compensation to which the term "bonus" is or might be applied are many. Any of the types of premium payment already discussed, for example, will be called "bonuses" somewhere in the American industrial scene. The extra compensation may be geared to the production or efficiency of the individual employee or a group of employees and made payable on the units produced, generally, or per day, per week or some other interval.<sup>100</sup> Completion of tasks (on an individual or group basis) ahead of the "standard performance time" may yield a "bonus."<sup>101</sup> It is obvious that many such "incentive bonus" plans are not provisions for extra compensation in any realistic sense. Such payments are frequently the only wages which are expected to be received normally by the individual employee competent to perform his job. The Supreme Court decisions in the *Youngerman-Reynolds* and *Harnischfeger* cases made clear that actual payments received under such plans must enter into the "regular rate." In addition to these incentive bonuses which are closely and intimately related to the quality and quantity of work performed, one may find a great variety of weekly, monthly, quarterly, and yearly additional payments, from funds established as a percentage of profits,<sup>102</sup> or labor costs,<sup>103</sup> or volume of

97. See opinion letter, 3 CCH LAB. LAW REP. ¶ 29,036 (1948).

98. 334 U. S. 446, 469, 68 Sup. Ct. 1186.

99. See, in general, Note, *Profit-Sharing Bonuses as Part of the Overtime Base under the Fair Labor Standards Act*, 56 YALE L. J. 1429 (1947).

100. *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 65 Sup. Ct. 1242, 89 L. Ed. 1705 (1945); *U. S. v. Rosenwasser*, 323 U. S. 360, 65 Sup. Ct. 295, 89 L. Ed. 301 (1945); *Walling v. Stone*, 131 F. 2d 461 (C. C. A. 7th 1942).

101. *Walling v. Harnischfeger Corp.*, 325 U. S. 427, 65 Sup. Ct. 1246, 89 L. Ed. 1711 (1945); *McComb v. La Casa del Transporte, Inc.*, 167 F. 2d 209 (C. C. A. 1st 1948); *Burke v. Mesta Machine Co.*, 15 CCH LAB. CAS. ¶ 64,673 (U. S. D. C. W. D. Pa. 1948); *Selan v. Becker*, 71 F. Supp. 689 (E. D. Wisc. 1947).

102. *Walling v. Wall Wire Products Co.*, 161 F. 2d 470 (C. C. A. 6th 1947); *Stomkin v. Fairchild Camera and Instrument Corp.*, 14 CCH LAB. CAS. ¶ 64,300 (U. S. D. C. E. D. N. Y. 1948); see *Simons, Economic and Legal Aspects of Profit-Sharing*, 2 IND. & LAB. REL. REV. 76, 88 (1948).

103. *De Waters v. Macklin Co.*, 167 F. 2d 694 (C. C. A. 6th 1948); *Burke v. Mesta Machine Co.*, 15 CCH LAB. CAS. ¶ 64,673 (U. S. D. C. W. D. Pa. 1948).

production,<sup>104</sup> or bearing some relationship to dividends,<sup>105</sup> or simply chosen as an arbitrary amount. Payments may be made to individuals on the basis of straight-time<sup>106</sup> or total earnings,<sup>107</sup> base rates,<sup>108</sup> length of service,<sup>109</sup> attendance,<sup>110</sup> or some arbitrary plan of selection. Under what circumstances will these payments be included in the total compensation used in computing the regular rate of pay for FLSA purposes?

It may be observed that if payments designated as "bonuses" are free, as such, from inclusion in the "regular rate" computation it would permit an employer to minimize the penalizing effect of the 50% increase in labor costs for working employees in excess of 40 hours in a workweek. In its least subtle form this is illustrated by an arrangement to reduce an employee's hourly wage to the statutory minimum, with the agreement that he will be paid one and one-half the minimum for hours in excess of 40 in the week, and will receive as a "weekly bonus" an amount sufficient to make his weekly "take-home pay" equivalent to his former or a stated salary. It was early held that such a bonus must be included in total compensation in computing the regular rate of pay.<sup>111</sup> To the extent, though, that any bonus, however computed or whenever paid, is regarded by the employee as an expected part of his compensation, as deferred payment for work done, it is in substantially the same position as an incentive to continued proficiency and stability as the "weekly bonus" described. Yet it may be excluded from total compensation if it can be regarded as "discretionary" on the employer's part. Furthermore, the Administrator in an announced enforcement policy, since revoked, stated that bonuses paid at greater intervals than quarterly would not be proceeded against by his office.<sup>112</sup> As a practical matter the recalculation of "regular rates of pay" in previous weeks because of a subsequent bonus payment imposes a gigantic bookkeeping burden and undoubtedly deters the generous impulses of some employers. If the possibility of abuse is controlled, it would be desir-

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104. *Walling v. Baush Machine Tool Co.*, 8 CCH LAB. CAS. ¶ 62,160 (U. S. D. C. D. Mass. 1944).

105. *Walling v. Garlock Packing Co.*, 159 F. 2d 44 (C. C. A. 2d 1947), *cert. denied*, 331 U. S. 820 (1947).

106. *Walling v. Richmond Screw Anchor Co.*, 154 F. 2d 780 (C. C. A. 2d 1946), *cert. denied*, 328 U. S. 870 (1946); *Walling v. Adam Electric Co.*, 136 F. 2d 277 (C. C. A. 8th 1947); *McComb v. Shepard Niles Crane & Hoist Corp.*, 171 F. 2d 69 (C. C. A. 2d 1948).

107. *De Waters v. Macklin Co.*, 167 F. 2d 694 (C. C. A. 6th 1948), *cert. denied*, 69 Sup. Ct. 48 (1948).

108. *McComb v. Shepard Niles Crane & Hoist Corp.*, 171 F. 2d 69 (C. C. A. 2d 1948).

109. *Ibid.*

110. *Bibb Mfg. Co., v. Walling*, 164 F. 2d 179 (C. C. A. 5th 1947), *cert. denied*, 333 U. S. 836 (1948).

111. *Carleton Screw Products Co. v. Fleming*, 126 F. 2d 537 (C. C. A. 8th 1942), *cert. denied*, 317 U. S. 634 (1942); *Walling v. Fischer Lime & Cement Co., Inc.*, 8 CCH LAB. CAS. ¶ 62,260 (U. S. D. C. W. D. Tenn. 1944).

112. Wage and Hour Division Release A-13 (Feb. 5, 1943), see "Editor's Note," WAGE & HOUR MANUAL 50:439 (B. N. A. 1948).

able to exclude bonuses, such as semi-annual or annual profit-sharing arrangements, from "regular rate" calculations.<sup>113</sup>

The Supreme Court has not yet dealt directly with any of the more troublesome types of bonus. The decisions which developed the definition of "regular rate of pay," reviewed above, would indicate that the inclusion of any extra payment in "total compensation" would depend upon whether the parties had agreed (in writing or orally, expressly or impliedly) upon it as part of the payment for the work to be done.<sup>114</sup> Certainly the time when the payment would be received would not be controlling as the *Harnischfeger* case<sup>115</sup> shows. The Administrator of the Wage and Hour Division follows substantially this approach:

"Where it can be conclusively demonstrated that a particular payment is a gift or gratuity it need not be included in computations of the regular rate of pay. In this respect, it should be noted that, if the employee has a right by contract, express or implied, to a payment, it cannot be considered a gift."<sup>116</sup>

Applying these principles to bonus payments, the Administrator has announced the following interpretations:

#### "DISCRETIONARY BONUS

"A. In bonus plans of the first category, the payment and the amount of the bonus are solely in the discretion of the employer. The sum, if any, is determined by him. The employee has no contract right, express or implied, to any amount. This type of bonus is illustrated by the employer who pays his employees a share of the profits of his business or a lump sum at Christmas time without having previously promised, agreed or arranged to pay such bonus. In such case, the employer determines that a bonus is to be paid and also sets the amount to be paid.

"Bonus payments of this type will not be considered a part of the regular rate. . . .

#### "AGREED BONUS

"B. In bonus plans of the second category the employer promises, agrees or arranges to pay a bonus. The amount to be paid may be fixed or it may be ascertained by the application of a formula. . . . Other kinds of bonuses [than direct incentives] falling within this group are bonuses distributed in a certain amount or on the basis of a fixed percentage of the profits of the employer or of his gross or net income. . . .

"Bonus payments of this type will be considered a part of the regular rate. . . ."<sup>117</sup>

113. See *infra* p. .

114. In the *Bay Ridge* decision see particularly 334 U. S. 446, 461, 68 Sup. Ct. 1186.

115. 325 U. S. 427, 432, 65 Sup. Ct. 1246, 89 L. Ed. 1711 (1945).

116. Opinion of Wage and Hour Administrator, R-1548 (Sep. 2, 1941), WAGE & HOUR MANUAL 50:413 (B. N. A. 1949). When a discretionary year-end bonus was declared, because of service in the preceding years, but made payable in regular installments during the ensuing year if the individual remained in the employ of the company, it was held that, although the sum of the bonus was not a part of the regular rate for the year on which it was based, the regular payments became part of the regular rate of pay of the employee as he received them during the ensuing year. *Jacksonville Paper Co. v. McComb*, 167 F. 2d 448 (C. C. A. 5th 1948); cf. *McComb v. Paulson*, 12 CCH LAB. CAS. ¶ 63,833 (U. S. D. C. N. D. Ill. 1947). A bonus which is a part of agreed compensation may not be used to offset liability for excess compensation arising under FLSA; rather it must be included in total compensation in computing regular rate of pay. But see *Corey v. Detroit Steel Corp.*, 52 F. Supp. 138 (E. D. Mich. 1943); cf. *Roland Electric Co. v. Black*, 163 F. 2d 417 (C. C. A. 4th 1947), *cert. denied*, 333 U. S. 854 (1948); *Bender v. Crucible Steel Co.*, 71 F. Supp. 420 (W. D. Pa. 1947).

117. WAGE & HOUR MANUAL 50:413 (B. N. A. 1949).

Pursuant to this interpretation the inclusion of the bonus payments in regular rate computation will depend not upon the name given, or the source or measure of the payments or the directness of the relationship of the payments to individual effort, but upon whether there is a contract right to receive the bonus.<sup>118</sup> Certain courts, however, have taken the word "arrange" in this interpretation as providing a basis for inclusion of bonus payments, regularly made, in the total compensation of the employee, regardless of the possibility of enforcement of payment. In *Walling v. Richmond Screw Anchor Co.*<sup>119</sup> the Second Circuit Court of Appeals held that a reserved power in the employer's board of directors to cease previously-authorized monthly bonus payments, based on a percentage of weekly base salaries, did not prevent the bonus payments from being included in the regular rate. The court said that, even though there was no legal obligation to pay the bonuses, they were in fact paid regularly and because of such "arrangement" for payment the amounts must be included in total compensation. In this case and in *Walling v. Garlock Packing Co.*,<sup>120</sup> decided by the same court in 1947, it is noted that the alleged discretionary bonus payments are treated as compensation to employees by the employers for purposes of tax and other laws.

The *Garlock Packing* case also involved a reserved power to withdraw or amend a quarterly bonus plan which depended for its operation on the declaration of a dividend to the corporation's shareholders. It is emphasized by the court that the employees were informed of the plan and looked forward to receiving the bonus, which the employer had, in fact, arranged to grant with regularity. Certiorari was denied by the Supreme Court in both cases.<sup>121</sup> It may be observed that in both instances machinery was established which would virtually make certain the amount of the bonus automatically, unless action was taken to stop it, and such action was not taken. In its latest decision the Second Circuit Court has said expressly that there is no difference in operation between an announced plan with a reservation to stop and regular payment over a period of time of quarterly "prosperity bonuses," without an announced plan, thus inducing the expectation of continuance.<sup>122</sup> It is believed that all these cases might well be considered to fall within an implied contract pattern, where no right would exist to force continuation of the bonus but there would be contractual rights to payments allocable to the period already worked by the employee. These rights arise by his continuing to work at the establishment under circumstances where he has been led to believe, reasonably, that he will

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118. *Walling v. Wall Wire Products Co.*, 161 F. 2d 470 (C. C. A. 6th 1947); *cert. denied*, 331 U. S. 828 (1947).

119. 154 F. 2d 780 (C. C. A. 2d 1946), *cert. denied*, 328 U. S. 870 (1946).

120. 159 F. 2d 44 (C. C. A. 2d 1947), *cert. denied*, 331 U. S. 820 (1947).

121. *Supra* notes 119 and 120.

122. *McComb v. Shepard Niles Crane & Hoist Corp.*, 171 F. 2d 69 (C. C. A. 2d 1948). The Supreme Court has been requested to review this decision, 23 LAB. REL. REP. 1949 WH 1626 (Mar. 7, 1949).

receive the bonus. In any event, that specific point would not have to be determined if the arrangement is the only requirement and the payments are in fact made. It is believed, however, that the language of these Second Circuit opinions goes beyond the Administrator's interpretation set forth above as well as the principles thus far enunciated by the Supreme Court. Even completely discretionary bonuses must be to some extent "arranged." The Eighth Circuit Court of Appeals in *Walling v. Adam Electric Co.*<sup>123</sup> refused to compel the inclusion in the regular rate of certain bonuses declared quarterly from 1942 to 1945 on the ground that there was "no contract, promise, agreement or arrangement to pay them in advance of the work period for which they were later declared."

In arranging profit-sharing bonuses it may be noted that there is one very simple method of avoiding any difficulties concerning regular rate of pay under FLSA. If the monthly, quarterly, semi-annual, or annual bonus is paid to a particular employee in terms of a percentage increase of his total earnings then, to the extent that he has worked hours in excess of the statutory maximum, his bonus will take that into account. For example, if a quarterly "profit-sharing" bonus is to be paid in varying amounts depending upon length of service, and a particular employee is to receive a bonus equal to 10% of his earnings for the quarter, then his straight time earnings and his overtime earnings, if any, are both increased by 10%. This satisfies the requirements of the Act; to hold otherwise is to require "overtime on overtime."<sup>124</sup>

*Board, Lodging, and Other Facilities.*—Section 3(m) of the FLSA defines "wage" to include the reasonable cost, as determined by the Administrator, to the employer of furnishing an employee with board, lodging or other facilities where such are customarily furnished. The reasonable cost, so determined, would thus be part of the total compensation of the employee for computing the regular rate of pay.<sup>125</sup>

*Insurance, Health and Welfare Plans, and Pension Plans.*—It has been stated by the Wage and Hour Division that if certain conditions are met, there need not be reflected in regular rate-of-pay computations the amount of any payment by an employer on behalf of his employees generally or for a class or classes of his employees on account of the following types of plans:

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123. 163 F. 2d 277 (C. C. A. 8th 1947).

124. *De Waters v. Macklin Co.*, 167 F. 2d 694 (C. C. A. 6th 1948); *Stomkin v. Fairchild Camera and Instrument Corp.*, 14 CCH LAB. CAS. ¶ 64,300 (U. S. D. C. E. D. N. Y. 1948); see Wage & Hour Division Opinion Letter (Aug. 16, 1947), WAGE & HOUR MANUAL 50:469, 470 (B. N. A. 1949).

125. *Southern Pacific Co. v. Joint Council Dining Car Employees*, 13 CCH LAB. CAS. ¶ 64,175 (C. C. A. 9th 1947). In some instances employees work for tips and do not receive any formal compensation. It was held in *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, 62 Sup. Ct. 659, 86 L. Ed. 914 (1942), that the tips are wages for the purpose of compliance with FLSA. In *Gaffney v. Atlantic Greyhound Corp.*, 170 F. 2d 302 (C. C. A. 4th 1948) the court rejected the claim of shoeshine boys employed in an interstate bus terminal for overtime compensation based on tips earned on the ground that no regular rate of pay for such purpose existed.

1. Retirement, annuity or pension plans.
2. Sickness or accident disability plans.
3. Medical and hospitalization plans.
4. Death benefit plans."<sup>126</sup>

The conditions which must be met are:

"(1) The employee must not have the option to receive instead of the benefits under the plan any part of the contributions of the employer and (2) the employee must not have the right to assign the benefits or to receive a cash consideration in lieu of the benefits either upon termination of the plan or his withdrawal from it voluntarily or through severance of employment with the particular employer."<sup>127</sup>

The administrative view seems to be that since such payments can provide benefits to the employee only when he is not working that they are analogous to compensation for hours not worked. This may be a convenient, though definitely unrealistic, rationalization for what would be universally recognized as a necessary result.

Under the conditions set forth in the above ruling, if the employer makes contributions toward purchase of life insurance policies which become the property of the employees and which policies have or can acquire cash and other values capable of being realized immediately, then the contributions amount to bonuses and are to be treated by the rules for such payments.<sup>128</sup>

*Pay for Time Not Worked (Holidays, Vacations, Sick Leave, Voting Time and Reporting Time).*—Pay for holidays, vacations and other absences has never been regarded as within the regular rate problem.<sup>129</sup> Such payments are not included in total compensation nor may they be used to offset claims for statutory excess compensation.<sup>130</sup> The *Bay Ridge* definition speaks of "total compensation for hours worked." This should not be understood though as permitting an artificial "on-call" arrangement for an exceedingly long number of hours during the week to obscure the fact that actually a much shorter fluctuating workweek existed, which should be the basis of regular rate computation.<sup>131</sup>

"Reporting time" is provided in a union contract calling for payment for a minimum number of hours of work when an employee is permitted or ordered to report for work and less than the guaranteed number of hours is available. Two to four hours pay to the employee under such circumstances is frequently provided. To the extent that it is pay for time not worked, it is not

126. Wage & Hour Division Release, R-1743, WAGE & HOUR MANUAL 50:519 (B. N. A. 1949).

127. *Ibid.*

128. See WAGE & HOUR MANUAL 50:539 (B. N. A. 1949); *cf.* *United Garment Workers v. Jacob Reed's Sons*, 16 CCH LAB. CAS. ¶ 64,927 (U. S. D. C. E. D. Pa. 1949) (loans to employees from retirement trust funds).

129. See WAGE & HOUR MANUAL 50:559 (B. N. A. 1949).

130. *Palmer v. Howard*, 12 CCH LAB. CAS. ¶ 63,756 (U. S. D. C. W. D. Tenn. 1946); *Hutchinson v. Barry*, 50 F. Supp. 292 (D. Mass. 1943).

131. *Walling v. Uhlmann Grain Co.*, 151 F. 2d 381 (C. C. A. 7th 1945).

included in the regular rate, nor do the hours which the payment represents count as hours worked for FLSA purposes.<sup>132</sup> This is quite different from what is sometimes referred to as "call-in" pay, where, if an employee is called in to work at night, outside of his regular shift, for example, he is guaranteed pay for a certain number of hours. Although formerly classed as an overtime premium because for work outside of the regular or normal hours, it is now declared by the Administrator to be like a lump-sum bonus for work at a disagreeable time and hence to be included in "total compensation."<sup>133</sup> Another guaranteed payment may result when an employee cannot perform his regular duties because the machinery is broken or the power is off. If the employee is dismissed, any pay for a period after the dismissal would be for time not worked. If he is required to remain on the premises and paid a guaranteed "down-time" rate, then he is considered to be working and the payment is treated like any other compensation for hours worked. Pay for rest periods and lunch periods where the employee is not free to do entirely as he pleases would be treated similarly.<sup>134</sup>

#### LEGISLATIVE CHANGES

Proposals for changes in the provisions of the Fair Labor Standards Act affecting overtime computation have been frequently offered, and many of these have been incorporated in bills introduced in the two houses of Congress.<sup>135</sup> Extensive hearings on the subject have been held during the last three years,<sup>136</sup> and are continuing as this is being written. Suggestions to Congress have ranged from those calling for complete elimination of Section 7(a) or a requirement of no more than time and one-half on the minimum rate, on through proposals eliminating certain bonuses or premium payments from the regular rate, to the retention of the present section without change in any respect. Senator Ball introduced a bill (S. 2386) in the 80th Congress which contained five pages devoted to the definition of "regular rate of pay." This bill would have written the *Belo* doctrine into the statute and would have granted very full freedom under collective bargaining for the exclusion of a great variety of payments from "regular rate" calculations.

The 81st Congress has produced no program quite so ambitious, but there are proposals which would seek to change in varying degrees the situation re-

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132. See Wage & Hour Administrator, Opinion Letter (Feb. 1, 1949), 3 CCH LAB. LAW REP. ¶ 29,049 (1949).

133. *Ibid.*

134. See administrative opinions referred to in 3 CCH LAB. LAW REP. ¶¶ 25,335.22, .23, .42 and .45 (1948); cf. *Fox v. Summit King Mines, Ltd.*, 143 F. 2d 926 (C. C. A. 9th 1944).

135. See summary of proposals and pending legislation in *Hearings before Subcommittee No. 4 of the Committee on Education and Labor, on Proposed Amendments of the Fair Labor Standards Act of 1938*, H. R., 80th Cong., 1st Sess. Vol. 4, p. 2609 (1947).

136. See, e.g., *Hearings* cited *supra* note 135, vols. 1-4.

sulting from the Supreme Court's decision in the *Bay Ridge* case.<sup>137</sup> The scope of the pending suggestions may be best indicated by setting forth the provisions of H. R. 858, which has been passed by the House. It is limited to the longshore, stevedoring, building and construction industries, but Senator Wiley's bill (S. 252) would make similar provisions generally applicable.<sup>138</sup> H. R. 858 would add the following as subsection (e) of Section 7 of the Fair Labor Standards Act:

"(e) For the purpose of computing overtime compensation payable under this section to an employee employed in the longshore, stevedoring, building and construction industries—

(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days, or

(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek, the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."<sup>139</sup>

It will be noted that this abandons the idea of compelling by law extra payment for hours worked after 40 where the individual is receiving a premium rate during his normal working hours. On the other hand such a statute, even if it were made general, would not give a free hand to contract designations of "regular rate" and "overtime premium."

In contrast with the provisions set forth above the suggested changes in Section 7 contained in a draft submitted by the Wage and Hour Administrator would affect the result in *Bay Ridge* only to the extent of excluding from the "regular rate" the amounts paid as extra compensation for hours worked on Saturday or Sunday or on a recognized holiday or on the sixth or seventh day of the workweek, or for hours outside the employee's normal or regular working hours, provided the rate paid for such work is at least 50% in excess of the bona fide rate applicable to the same work performed at other times.<sup>140</sup> Other changes proposed in regular rate computation by the Administrator include the suggested codification of existing interpretations as to gifts, discretionary bonuses and pay for time not worked. Profit-sharing bonuses "meeting requirements to be determined by the Administrator" would be excluded

137. See summaries of bills introduced in the 81st Congress, 23 LAB. REL. REP. 1949 WH 1550 (Jan. 17, 1949).

138. 23 LAB. REL. REP., 1949 WH 1535, 1536 (Jan. 17, 1949).

139. As appearing in CCH LAB. LAW REP., "Weekly Summary," Feb. 24, 1949, p. 2.

140. See 23 LAB. REL. REP., 1949 WH 1542, 1543 (Jan. 17, 1949); cf. 3 CCH LAB. LAW REP. ¶ 29,009 (1948).

from the regular rate, as well as certain payments for employee benefit plans.<sup>141</sup>

There are two other pending proposals for FLSA changes by the Administrator which bear upon the subject under discussion in a less direct fashion. One has to do with making more flexible the exemption from the usual overtime provisions of the Act provided by Section 7(b)(2) for annual employment plans. By encouraging greater use of the exemption, its enactment would seek to provide the opportunity for less concern for the usual "regular rate" problems.<sup>142</sup> Another very pertinent suggestion of the Administrator goes to the relationship of his office to the application and interpretation of the law. He suggests that the Administrator be granted adequate rule-making power comparable to that provided under certain other federal laws. This would permit his office to make, issue, amend and rescind such regulations and orders as are necessary or appropriate to carry out the provisions of the Act.<sup>143</sup>

Under the situation now obtaining, the Portal-to-Portal Act<sup>144</sup> has the effect of making interpretations of the Wage and Hour Administrator binding only in providing a defense to employers against alleged liability under the FLSA. In other words, what the Administrator says may be used to avoid liability, but has no legal effect, in most respects, in imposing liability. Apart from the matter of balance, however, there is a very practical problem in the administration of the Act which should be definitely improved by the granting of rule-making power to the Administrator. There has been a tremendous volume of FLSA litigation during the last ten years but there are still many terms in the Act and many possible applications of the Act that have not received judicial consideration by the Supreme Court. As presently administered the meaning of most of the terms in the statute is a matter for court interpretation alone, unaided, in a legal sense, by any administrative agency. It is believed that the uncertainties of the statute yet remaining, or those inhering in such amendments as might be adopted, could be minimized by providing the Administrator with the power to make rules having the force and effect of law, subject of course to the checks against administrative abuse provided by the Federal Administrative Procedure Act.<sup>145</sup> It is quite evident that the Supreme Court would welcome the assistance that such administrative rule-making power would provide in dealing with the wage and hour problem. In the *Bay Ridge* decision the majority opinion states:

"As no authority was given any agency to establish regulations, courts must apply the statute to this situation without the benefit of binding interpretations within the scope of the Act by an administrative agency."<sup>146</sup>

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141. *Ibid.*

142. See *Hearings*, cited note 135, vol. 4, p. 2650.

143. 23 LAB. REL. REP., 1949 WH 1546 (Jan. 17, 1949).

144. 61 STAT. 84 (1947), 29 U. S. C. A. § 258 (Supp. 1948).

145. 60 STAT. 237 (1946), 5 U. S. C. A. §§ 1001-11 (Supp. 1948).

146. 334 U. S. 446, 461, 68 Sup. Ct. 1186.

This comes close to sounding like a call for help. Nothing is to be gained by forcing the Court to define the terms of the Act on a case-by-case basis and to apply these terms to the myriad possible industrial situations without administrative assistance. It is idle to speculate on what might have been, but certainly there is reason to believe that both the portal-to-portal fiasco and the storm now centering around "overtime on overtime" could have been largely prevented or minimized through intelligent and legally-effective administrative handling.<sup>147</sup>

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147. For a more detailed study of possible legislative changes affecting overtime pay, see Dabney and Dabney, *Regular Rate and the Bay Ridge Case: A Guide to Legislative Revision*, 58 YALE L. J. 353 (1949).