(2) Where employees are given time off on a temporary basis such as all Saturdays or some part of them in the summer months, or other bona fide seasonal vacation periods, without reduction of salary or take-home pay, the time off will be regarded as vacation time within the meaning of section 7(e)(2). Thus, the pay for such time off will not affect the regular rate of pay. Likewise, there would be no violation of the act if the employer required the employees to work those hours which were scheduled as vacation time off, without paying them additional compensation. The same result would follow if a half day off was given every other Saturday during the period of Daylight Saving Time.

(c) Permanent schedule of alternating workweek, of different fixed lengths

Where an employer has established a permanent schedule of alternating workweeks of different fixed lengths he/she may, by agreement or understanding with the employee, pay the same straight-time compensation for the scheduled hours of the long and short workweeks, but he/she may not pay the same fixed salary for the long and short schedules of hours to cover total compensation including the overtime pay. The payment of the same straight-time compensation for the scheduled long and short workweeks establishes different rates of pay for the long and short scheduled workweek. If in such a case the employer has paid the same total compensation for both the long and short scheduled workweeks the policy expressed in FOH 32j05(a) above will be followed.

32j06 Lump-sum overtime payment.

Under appropriate circumstances, and where close scrutiny reveals there is a clear understanding between the employer and the employee that a lump-sum payment is predicated on at least time and one-half the established rate, and that overtime payment is clearly intended, the fact that the payment is a lump sum will not result in a violation if it equals or exceeds the proper overtime payment due. For example, during a limited period each year hourly-rated employees worked after regular hours on a special job for their employer. Under a clearly understood agreement with his/her employees, the employer, based on experience paid for this special job in a lump sum arrived at by computing time and one-half the regular rate for the estimated special job hours, and then adding an additional bonus amount. This policy shall be applied very narrowly and shall not be applied to lump-sum payments which are nothing more than bonuses for working undesirable hours.

32j07 Retroactive increases.

(a) If retroactive increases are given as compensation for services, they must be included in determining the employee's regular rate of pay and must be prorated over the previous weeks in which the work, to which the compensation is attributed, was performed.

(b) If it is not feasible to allocate the retroactive increases among the workweeks of the period in proportion to the amount of the increases actually applicable to each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be assumed that the employee earned an equal amount of the increase each hour of the pay period and so the resultant hourly increase may be determined by dividing the total amount of increase by the number of hours worked by the employee during the period for which it is paid.

32j08 Deductions in overtime weeks.

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(a) FLSA section 7(a) requires that an employee receive compensation for overtime hours at "a rate not less than one and one-half times the regular rate at which he/she is employed." Where board, lodging, and facilities are charged to the employee and the employer recovers the amount by deductions from the employee's cash wages, the regular rate is determined before the deductions are made. There is no limit to the amount which may be deducted for these items, provided that the deductions are confined to the reasonable cost of the board and lodging furnished. Where such deductions are in amounts that exceed the reasonable cost, the excess amount shall be handled the same as deductions for items other than "board, lodging, or other facilities." The term "other facilities" means such items as meals furnished at company restaurants; housing furnished; general merchandise bought at company stores (including food, clothing, and household effects); and fuel, electricity, water, and gas furnished for the personal use of the employee.

(b) Employers must pay statutorily-required minimum wage and overtime premium pay finally and unconditionally, or free and clear. The cost of furnishing items that are primarily for the benefit or convenience of the employer do not qualify as facilities under FLSA section 3(m); thus they may not be included as part of wages due. Further, deductions for articles that do not qualify as "board, lodging, or other facilities" under FLSA section 3(m), such as tools, equipment, cash register shortages, and other similar items, may not be made if they cut into required minimum wage or overtime premium pay. Deductions that reduce an employee's average hourly earnings for the workweek after the deductions to less than the highest applicable minimum wage rate are illegal in an overtime week unless the law establishing that minimum wage (*e.g.*, state law; the Davis-Bacon and Related Acts; SCA; H-2A, H-1B, and H-2B visa programs; or a MSPA contracted promised wage) allows the particular deduction. (Note: if a MSPA contract specifically discloses that the employer will make certain particularized deductions not otherwise prohibited by other law, those deductions would be permitted. For example, if a MSPA-covered employer disclosed a wage rate of $8.00 per hour and fully disclosed in writing at the time of recruitment that $1.50 per hour would be deducted for non-3(m) items, and the deductions are otherwise legal and not prohibited by other applicable laws, then those fully-disclosed deductions are permitted to reduce the hourly wage to below the $8.00 per hour contracted promised wage (*i.e.* to $6.50 per hour). Deductions for non-3(m) items may be made in an overtime workweek to the same extent as permitted in a non-overtime workweek *if* their purpose and effect are not to evade the overtime requirements of the FLSA *or other law*, and *if* they are *bona fide* deductions made for *particular items* according to a prior *agreement or understanding* between the employer and the employee before the work is performed (29 CFR 531.37(a) and 29 CFR 778.315).

(c) If an employer and an employee have an express or implied agreement about a deduction policy for particular items, then bona fide deductions pursuant to the policy will be allowed during an overtime workweek to the extent that they would be allowed in a non-overtime workweek, *provided that* the deductions do not violate other applicable laws (*e.g.*, state law), the employee receives free and clear the highest applicable minimum wage (including prevailing wages) required by *any* federal, state or local law for the non-overtime hours, and the employee receives time and one-half the regular rate of pay based on the stipulated wage, before any deductions are made, for all the overtime hours. For example, if a forestry worker subject to a $9.00 per hour SCA prevailing wage rate is paid $10.00 per hour ($1.00 above the legally-required SCA prevailing wage rate of $9.00) and works 50 hours in a particular workweek, the most that may be deducted from this worker's wages for that week pursuant to a prior agreement covering specific deductions (*e.g.*, purchase of a saw) is 40 times $1.00 ($40.00). Statutory wages due net after deductions = [40 x $9.00 ($360.00 minimum

wage]+[(10 x 1.50 x $10.00 ($150.00 overtime)] or $510.00 total minimum wage and overtime.)

(d) Unless there is an agreement as to deductions for particular items, or if the employer reduces an employee's wages for a reason not addressed in the contractual arrangement or for no legitimate reason, the deductions will be considered illegal and will not be allowed during overtime workweeks. To determine if these criteria are met, apply the following standards:

(1) *Deductions must be made for particular items according to an agreement or understanding between the parties*

The agreement must be reached before the employee performs the work that becomes subject to the deductions. The agreement must be specific concerning the particular items for which the deductions will be made, and the employee must know how the amount of the deductions will be determined that are included in the agreement (*e.g.*, cash register shortages). The employee must affirmatively agree or assent to the employer's deduction policy. While the employee's assent to the policy may be written or unwritten, the employer bears the burden of proof that an employee has agreed to the deduction policy.

(2) *Only bona fide deductions, made for particular items, are permitted*

Deductions that are otherwise prohibited by other laws or authority (federal, state *or* local) are not bona fide (*e.g.*, if a state law prohibits *any* deductions from employees' wages for tools and similar items or equipment that are business expenses of the employer, the WHD would not allow any deductions in that state in an overtime workweek, regardless of whether the highest WHD-enforced minimum wage was paid (net) after the deductions). Deductions for amounts above the reasonable cost to the employer of furnishing a particular item to an employee are also not bona fide (*e.g.*, furnishing items to employees at a profit; deductions for substandard housing). Deductions from wages where no prior agreement exists as to particular items are never permitted in an overtime workweek.

(3) *The regular rate of pay is based on the stipulated wage before any deductions are made*

Deductions for non-3(m) items that reduce an employee's rate of pay to below the highest applicable legally-required minimum wage are illegal *unless* the law establishing that minimum wage allows the particular deductions. In overtime workweeks (where overtime requirements apply), deductions may be made according to an agreement that reduce the effective hourly rate down to the highest required minimum wage, but only from the non-overtime hours (first 40 hours in the week). Proper time and one-half the full regular rate (pre-deductions) must be paid for all statutory overtime hours.

(4) *The purpose and effect of the deductions are not to evade the overtime requirements or other laws*

Deductions made only in overtime workweeks, or increases in prices charged during overtime workweeks compared to non-overtime workweeks, will be considered manipulations to evade statutory overtime requirements which are prohibited.

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Deductions that violate other applicable laws are prohibited in an overtime workweek. *See* 29 CFR 531.37(a) and 29 CFR 778.315.

32j09 **Payments for activities not normally hours worked.**

Payments for those voluntary clothes-changing and wash-up periods and bona fide lunch periods which need not be regarded as hours worked, but which take place at the establishment or work site either during or at the beginning or end of the workday, shall be treated as follows:

(1) Where the activity has been paid for and the time has been included in computing the hours worked, in the absence of evidence of an attempt to evade the overtime requirements, the time shall be accepted as hours worked for the purpose of determining whether the overtime provisions have been met.

(2) 29 CFR 778.320(b) indicates that the conversion of certain activities into hours worked by virtue of the employer's payment for such time depends on "whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked." It is explained in this section of the 29 CFR 778 that the parties may agree to exclude from hours worked those activities, such as eating meals between working hours, which would not be hours worked even if they were paid for pursuant to a contract, custom, or practice. 29 CFR 778.320(b) states further that where "the parties have agreed to exclude such activities from hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2)" of the FLSA.

32j10 **Delayed payment of overtime compensation.**

In the ordinary case, the FLSA and the PCA require the payment of both minimum wage and overtime compensation earned in a given workweek at the regular payday for that workweek or, where the pay period covers more than a single week, at the regular payday for the pay period in which the particular workweek ends. However, if the correct overtime compensation cannot be determined until sometime after the regular pay period, the requirements of the FLSA or the PCA will be satisfied if the employee is paid the excess overtime compensation as soon after the regular payday as is practicable, but not later than the next payday after the computation can be made. Where bonuses are paid, any extra overtime pay due upon the increase in the regular rate resulting from the bonus payment is due only at the time the bonus itself is paid, not earlier.

32j11 **Semi-monthly or monthly payments which include overtime.**

Where the wages due an employee are properly computed on a workweek basis, an employer may pay the determinable portion of such wages in semi-monthly or monthly installments without destroying time validity of the regular rate of pay or violating the provisions of the FLSA or PCA. For example, where an employee is hired to work a regularly scheduled workweek of 44 hours at a rate of $2.00 per hour with time and one-half that rate ($3.00) for hours in excess of 40 in the workweek, which equals $92.00, it is permissible for the employer to make semi-monthly wage installments to him/her of $199.33 ($92.00 x 52 weeks in a year divided by 24 semi-monthly payments in a year), provided additional compensation at time and one-half pay day for any workweek in which hours in excess of 44 are worked, or