
29 C.F.R. § 778.219

Pay for forgoing holidays and unused leave.

(a) *Sums payable whether employee works or not.* As explained in § 778.218, certain payments made to an employee for periods during which he performs no work because of a holiday, vacation, or illness are not required to be included in the regular rate because they are not regarded as compensation for working. When an employee who is entitled to such paid leave forgoes the use of leave and instead receives a payment that is the approximate equivalent to the employees' normal earnings for a similar period of working time, and is in addition to the employee's normal compensation for hours worked, the sum allocable to the forgone leave may be excluded from the regular rate. Such payments may be excluded whether paid out during the pay period in which the holiday or prescheduled leave is forgone or as a lump sum at a later point in time. Since it is not compensation for work, pay for unused leave may not be credited toward overtime compensation due under the Act. Four examples in which the maximum hours standard is 40 hours may serve to illustrate this principle:

(1) An employee whose rate of pay is \$12 an hour and who usually works a 6-day, 48-hour week is entitled, under his employment contract, to a week's paid vacation in the amount of his usual straight-time earnings—\$576. He forgoes his vacation and works 50 hours in the week in question. He is owed \$600 as his total straight-time earnings for the week, and \$576 in addition as his vacation pay. Under the statute he is owed an additional \$60 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of \$12 per hour has not been increased by virtue of the payment of \$576 vacation pay, but no part of the \$576 may be offset against the statutory overtime compensation which is due. (Nothing in this example is intended to imply that the employee has a statutory right to \$576 or any other sum as vacation pay. This is a matter of private contract between the parties who may agree that vacation pay will be measured by straight-time earnings for any agreed number of hours or days, or by total normal or expected take-home pay for the period, or that no vacation pay at all will be paid. The example merely illustrates the proper method of computing overtime for an employee whose employment contract provides \$576 vacation pay.)

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