



NORTH CAROLINA LAW REVIEW

Volume 36 | Number 3

Article 10

4-1-1958

Fair Labor Standards Act -- Belo Contracts -- Hours Guaranteed and Actually Worked

J. Halbert Conoly

James F. Smith

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

J. H. Conoly & James F. Smith, *Fair Labor Standards Act -- Belo Contracts -- Hours Guaranteed and Actually Worked*, 36 N.C. L. REV. 332 (1958).

Available at: <http://scholarship.law.unc.edu/nclr/vol36/iss3/10>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Fair Labor Standards Act—Belo Contracts—Hours Guaranteed and Actually Worked

In the 1956 case of *Mitchell v. Hartford Steam Boiler Inspection & Ins. Co.*¹ defendant was engaged in the casualty insurance business, primarily the insuring of steam boilers, pressure vessels, and machinery. The company employed some six hundred inspectors throughout the United States. Their duties necessitated irregular hours of work, usually fluctuating between thirty-five and fifty hours per week. The company paid the inspectors under individual guaranteed wage contracts which provided for an hourly rate of pay in excess of the statutory minimum for the first forty hours in each workweek, time and one-half for each hour over forty, and a weekly guarantee of an amount equivalent to the sum payable if sixty hours were actually worked. It was not contemplated that any inspector would have to work more than sixty hours in any one workweek, and each inspector was required to get special permission before doing so. Actually, only one-fourth of one percent of the workweeks over a two-year period exceeded sixty hours. The Secretary of Labor sought to enjoin the alleged violations of the overtime provisions of the Fair Labor Standards Act.² He maintained that the guaranteed wage contract was invalid because the hours worked did not exceed the hours guaranteed in a substantial number of workweeks. The Court of Appeals for the Second Circuit held that the contract was valid under section 7(e)³ of the FLSA.

The FLSA specifies in section 7(a) that an employee covered by the act must be paid "at a rate not less than one and one-half times the regular rate at which he is employed"⁴ for all hours worked in excess of forty for any one workweek. Because of the multitudinous methods of wage compensation used throughout the industries and trades covered by the FLSA, the courts have refrained from giving "regular rate" a rigid interpretation, but have consistently said that the rate the em-

constitutional provisions, one might suppose that the far-seeing barons who wrung the Great Charter from King John at Runnymede were intent upon safeguarding the twentieth century racketeer, gangster, kidnaper, gunman and corrupt political leader in the prosecution of their sinister vocations. It ought to be possible to find a way, by judicial interpretation, to use these constitutional provisions for the protection of liberty without giving them such fanciful and far-fetched interpretations as to convert them into a weapon by which criminals can make war safely upon organized society and its law-abiding members." Address by Judge Samuel Seabury, ALI Annual Meeting, May 7, 1932.

¹ 235 F.2d 942 (2d Cir.), *cert. denied*, 352 U.S. 941 (1956).

² Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended, 29 U.S.C. §§ 201-19 (1952), as amended, 29 U.S.C. §§ 204-06, 208, 210, 213, 216 (Supp. IV, 1957), hereinafter referred to as the FLSA or the act.

³ Fair Labor Standards Act § 7(e), 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 207(e) (1952).

⁴ Fair Labor Standards Act § 7(a), 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 207(a) (1952).

ployer and employee fix must be realistic and not artificial or fictitious.⁵

In seeking a method to stabilize wage costs and still comply with the overtime provisions of section 7(a) of the act, some employers have made guaranteed wage contracts with their employees. In their usual form, these contracts provide a basic hourly rate with at least 150 percent of the basic hourly rate for all hours in excess of forty. In addition, the contracts provide a fixed guaranteed salary per week, regardless of the number of hours worked up to a specified maximum. The guaranteed wage is computed from the hourly rate and overtime rate specified in the contract. No additional compensation is paid the employee unless the maximum hours are exceeded, and from that point overtime is computed from the specified contractual rate.

The above type of contract was given a judicial test for the first time in *Walling v. A. H. Belo Corp.*,⁶ where the employer, a newspaper publisher, made contracts with some of his employees specifying a basic hourly rate and time and one-half for overtime. The contract, in addition, provided the employees with a guarantee of a fixed income each week comparable to fifty-four and one-half hours worked at the contractual hourly rates. The contracts were in writing and whenever a change was made in the guaranteed wage, a corresponding change was made in the basic hourly rate. The United States Supreme Court, in a five to four decision, upheld the contracts as complying with the FLSA. The majority noted that the contracts provided security and regularity of income for employees whose work necessitated irregular hours, and said that when such a contractual arrangement proved mutually satisfactory to employer and employee, "[W]e should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours."⁷

Guaranteed wage agreements since the *Belo* decision have generally been referred to as "Belo" contracts. In three cases after *Belo*, the Supreme Court rejected purported "Belo" contracts.⁸ In each case the

⁵ "But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Mitchell v. Youngerman-Reynolds Hardware Co.*, 235 U.S. 419, 424 (1945), quoting from *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944).

⁶ 316 U.S. 624 (1942).

⁷ *Id.* at 635.

⁸ In *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944), the employees were paid at a "regular rate" for one-half the working day and at an "overtime rate" for the remaining one-half of the day. An employee would thus have to work for eighty hours before he could complete forty hours of regular time and qualify himself for full overtime. The Court said: "Even when wages exceed the minimum . . . the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours

Court said that it was not overruling the *Belo* decision, but the effect seemed to be that *Belo* was restricted to its particular facts. In 1947 the Administrator made an unsuccessful attempt to have the *Belo* decision overruled in the case of *Walling v. Halliburton Oil Well Cementing Co.*⁹ In that case, an oil well cementing company had *Belo*-type contracts with its employees. The employees were paid a guaranteed wage which would not be exceeded unless they worked eighty-four hours a week, but it was shown that in twenty percent of the weeks worked, the eighty-four hour week was in fact exceeded. The Court again found a reasonable relationship between the hourly rate and the overtime paid, and rejected the Administrator's contention that the regular rate should be the quotient of the amount of the guarantee, divided by the number of hours *actually worked* in each workweek. Thus, *Belo* was again sustained.¹⁰

Although disappointed by the Court in his attempt to determine the "regular rate" by taking the total guarantee and dividing it by the hours worked in any given week and computing overtime with this rate as the base, the Administrator sought a narrow construction of the *Belo* and *Halliburton* cases. He felt justified in advocating as the test for the validity of *Belo* contracts a rule which would require that the hours guaranteed must be exceeded in a "substantial number of workweeks." He reasoned that *only* if the guaranteed hours are exceeded could the regular rate be put into actual operation. In both the *Belo* and *Halliburton* cases, the employees worked *more* than the number of hours guaranteed in *some* weeks. Whether or not these cases provided grounds for such a test is arguable, but the Administrator successfully

actually worked in excess of 40." *Id.* at 42. In *Walling v. Youngerman-Reynolds Hardware Co.*, 325 U.S. 419 (1945), the Court rejected a contract which provided for an hourly rate of thirty-five cents with time and one-half for hours worked over forty, but with a guarantee based on a piece rate of eighty cents per 1000 feet of lumber stacked and seventy cents per 1000 feet of lumber ricked. The evidence showed the guarantee would in practical effect greatly exceed the stipulated hourly rate. The Court said: "The [*Belo*] case is no authority however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees." *Id.* at 426. In *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945), a collective bargaining contract with an electrical equipment manufacturer provided both an hourly rate and job prices. If the job prices exceeded the hourly rate, which the evidence showed they did 98.5% of the time, the employees were paid at the job price. Overtime, however, was computed on the basis of the stipulated hourly rate. The Court held that the bonus derived from the job prices must be included in determining the regular rate on which overtime was computed.

⁹ 331 U.S. 17 (1947).

¹⁰ *Ibid.* It is interesting to note the language of the Court with reference to the *Belo* decision. "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." *Id.* at 26.

invoked it in cases in two different courts of appeals;¹¹ however, the Seventh Circuit upheld a Belo contract where the employees never exceeded the hours guaranteed,¹² and the Second Circuit upheld such a contract without reference to the number of workweeks in which the hours guaranteed were exceeded.¹³

The FLSA was extensively amended in 1949,¹⁴ and among the amendments modifying the strict application of section 7(a) was the provision now found in section 7(e) of the act.¹⁵ In substance, this provision lays down the tests which Congress has established for the legality of a particular Belo contract. Four separate tests are included, and all of them must be met if a guaranteed wage contract is to be valid. *First*, the duties of the employee must necessitate irregular hours; *second*, the arrangement must be based on a *bona fide* contract; *third*, the contract must provide a *regular rate* not less than the minimum wage, and at least one and one-half times this rate for *all* hours over forty a week; and *fourth*, the guarantee must cover *not more than sixty* hours at the rate specified.

Following the enactment of section 7(e), the Administrator continued to apply the "substantial number of workweeks" test. His position was that by use of the phrase "regular rate," this section incorporated by implication the "substantial number of workweeks" requirement which had been applied to some "Belo" contracts by judicial interpretation prior to the 1949 amendments.¹⁶

¹¹ *McComb v. Sterling Ice & Cold Storage Co.*, 165 F.2d 265 (10th Cir. 1947); *McComb v. Roig*, 181 F.2d 726 (1st Cir. 1950). In the latter case, the court stated: "It is possible, of course, that the relation between the hourly rate and the guaranty might be set by the employer with reference . . . to what the employer supposes would be the maximum possible workweek. In such a case . . . the workers would never exceed their guarantees, the purported hourly rate would never control the amount of the weekly pay and would pretty surely be found to be fictitious." *Id.* at 729-30.

¹² *McComb v. Pacific & Atlantic Shippers Ass'n*, 175 F.2d 411 (7th Cir. 1949).

¹³ *McComb v. Utica Knitting Co.*, 164 F.2d 670 (2d Cir. 1947).

¹⁴ Fair Labor Standards Amendments of 1949, 63 STAT. 910 (1949), 29 U.S.C. §§ 201-08, 211-17 (1952), amending 52 STAT. 1060 (1938).

¹⁵ Fair Labor Standards Act § 7(e), 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 207(e) (1952), which provides: "No employer shall be deemed to have violated subsection [7](a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract . . . if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay not less than the minimum hourly rate provided in section 206(a) of this title and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guarantee of pay for not more than sixty hours based on the rates so specified."

¹⁶ "In order for a contract to qualify as a bona fide contract . . . the number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours the employee may be expected to work. A guarantee of pay for 60 hours to an employee whose duties necessitate irregular hours of work which can reasonably be expected to range no higher than 50 hours would not qualify as a bona fide contract under this section. The rate specified in such a contract would be

The courts of appeals have consistently rejected the Administrator's test in all cases which have been decided since the 1949 amendments to the FLSA. In *Tobin v. Little Rock Packing Co.*¹⁷ an action was brought to enjoin the company from violating overtime and record keeping provisions of the act. The case involved employees (meat processors) of the company who were paid a guaranteed wage based on a fifty hour week. Although none of the employees ever worked in excess of fifty hours, the contract was held to be valid. After stating that the FLSA imposed no inflexible form of contract, the court ruled that the test in each case is whether the wage rate (for non-overtime work) is "fictitious" or whether it is in fact the actual rate paid. The "substantial number of workweeks" test is not mentioned, and section 7(e) is not relied upon to justify the decision. The court said: "Contracts in which, as in the present case, the guaranteed compensation is actually predicated upon and computed by the stipulated wage rate meet all requirements of the Act. This was true before as it is after the amendment of the Act in 1949 to recognize the validity of such contracts."¹⁸

In *Mitchell v. Brandtjen & Kluge, Inc.*¹⁹ the First Circuit summarized the judicial history of Belo contracts prior to the 1949 amendments, and said that the passage of section 7(e) means that courts are no longer "groping in the dark . . . without statutory guidance . . ."²⁰ but rather that "the new § 7(e) enables the courts to make a fresh start . . ."²¹ The court distinguished the case of *McComb v. Roig*,²² which it had decided in 1950 under the pre-1949 act, where the contract was held invalid because, among other reasons, it did not comply with the "substantial number of workweeks" test. The court said that reading a substantial number of workweeks test into section 7(e) as the Administrator proposed would be unwarranted judicial legislation.

Mitchell v. Adams,²³ pending appeal at the time of the *Brandtjen*

wholly fictitious and therefore would not be a 'regular rate' . . ." 29 C.F.R. § 778.18(f) (1956). See also 29 C.F.R. § 778.18(g) (1956).

¹⁷ 202 F.2d 234 (8th Cir.), cert. denied, 346 U.S. 832 (1953).

¹⁸ *Id.* at 238.

¹⁹ 228 F.2d 291 (1st Cir. 1955), cert. denied, 352 U.S. 940 (1956). Here, erectors of printing presses were working under a guarantee of a forty-eight hour week. They exceeded the hours guaranteed in about 3% of the workweeks. The court upheld the contracts and specifically rejected the contention that although the contract otherwise qualified, it was still invalid since the employees did not exceed the hours guaranteed in a "substantial" or "significant" number of workweeks. The Administrator's requirement that the guarantee be based on a weekly "average" was rejected. The court said Congress has chosen not to put the "substantial number of workweeks" test in the Belo contract section of the act. Rejecting the Administrator's contention that the workweeks must be averaged, the court stated that Congress had only restricted the contracts to guarantees of pay for "not more than sixty hours."

²⁰ *Id.* at 295.

²¹ 181 F.2d 726 (1st Cir. 1950).

²² 230 F.2d 527 (5th Cir. 1956).

²³ *Id.* at 296.

decision, was decided by the Fifth Circuit in 1956. The result was that still another circuit rejected the Administrator's test. In the *Adams* case a shirt manufacturer made the following contract with some of his employees:

The Employer agrees to employ the Employee at a regular hourly rate of pay at \$1.36 per hour for the first 40 hours in any workweek and at a rate of \$2.04 per hour for all hours in excess of 40 in any workweek, with the guarantee that the employee will receive, in any week in which he performs any work for the Company, the sum of \$95.20 as total compensation, for all work performed up to and including 60 hours in such workweek.²⁴

In this case only one employee during one week worked in excess of sixty hours during the five years the contracts were in operation. The Administrator argued that in order to *demonstrate* good faith and show that the regular rate of \$1.36 was not fictitious it must be *actually* put into operation in a "substantial number of workweeks" by having the sixty hours exceeded. The court said: "But what was mentioned by the Supreme Court [in the *Belo* case] as merely specific *proof* of good faith . . . the Secretary now turns into an indispensable ingredient of the contractual operations."²⁵ And also, "We think this misreads both the *Belo* decisional law and the specific 1949 Amendment and is again the search for the handy, arbitrary rule-of-thumb criteria, displacing inquiry and deliberative judgment, leaving it all to the wisdom of the Administrator."²⁶ The court implies that it could decide the case as it does even without invoking the aid of section 7(e), but cites the *Brandtjen* case with approval. There was no request for certiorari from the *Adams* decision.

In *Mitchell v. Hartford Steam Boiler Inspection & Ins. Co.*, the principal case, the Second Circuit, in rejecting the "substantial number of workweeks" test and sustaining the contracts, summarizes the law of *Belo* contracts. *First*, the court denies the assertion that this test was established by pre-1949 case law. The court found nothing in either *Belo* or *Halliburton* to substantiate such a test, and although admitting that two courts of appeals had followed this test prior to the 1949 Amendments,²⁷ called attention to others which did not follow that test.²⁸ *Second*, the court states that judicial interpretation of section 7(e) has been contrary to the Administrator's position, citing the *Little Rock*, *Brandtjen*, and *Adams* cases discussed above. The court rejects

²⁴ *Id.* at 528.

²⁵ *Id.* at 530.

²⁶ *Id.* at 529.

²⁷ See note 11 *supra*.

²⁸ See notes 12 and 13 *supra*.

the cases on which the Secretary relied²⁹ (all of them in the district courts) as being either distinguishable on their facts or erroneously decided. *Third*, the court interpreted the legislative history of section 7(e) as indicating congressional unwillingness to adopt the test advocated by the Secretary. The court said that Congress had all the conflicting views on Belo contracts presented to it in 1949 and bills were presented which "(1) expressly outlawed guaranteed wage contracts; (2) permitted their use, but subject to specific limitations including a 'significant number of workweeks' test; (3) permitted their use, without limitation as to the relation between hours worked and hours guaranteed."³⁰ The court felt that "Congressional adoption of the third alternative . . . suggests . . . that it did not intend their [Belo contracts] use in the manner suggested by the Secretary."³¹ To reinforce its view, the

²⁹ *Sikes v. Williams Lumber Co.*, 123 F. Supp. 853 (E.D. La. 1954); *Tobin v. Keystone Mfg. Co.*, 143 F. Supp. 231 (W.D. Ark. 1952); *Tobin v. Ewbank Motor Freight Lines, Inc.*, 23 CCH Lab. Cas. ¶ 67411 (W.D. Tenn. 1952); *Tobin v. Wenatchee Air Service, Inc.*, 21 CCH Lab. Cas. ¶ 67019 (E.D. Wash. 1952); *Tobin v. Morristown Poultry Co.*, 21 CCH Lab. Cas. ¶ 66798 (E.D. Tenn. 1952); *Tobin v. Aronow*, 96 F. Supp. 279 (D. Mont. 1951).

³⁰ 235 F.2d at 945.

³¹ *Ibid.* Recourse to the bills introduced in both houses of Congress reveal that H.R. 2033, 81st Cong., 1st Sess. § 7(c) (1949), and S. 653, 81st Cong., 1st Sess. § 7(c) (1949), would have outlawed Belo contracts. H.R. 3190, 81st Cong., 1st Sess. § 7(c) 1949, would not have outlawed Belo contracts, but would have made them meet the specifications of regulations promulgated by the Secretary of Labor.

In its reference to congressional rejection of a bill that permitted the use of Belo contracts "subject to certain limitations including a 'significant number of workweeks' test," the court was probably referring to H.R. 5856, 81st Cong., 1st Sess. (1949), which was introduced by Congressman Lesinski on August 2, 1949. This bill was cited by appellee in his brief before the Second Circuit at pages 9-11. Letter from Stuart Rothman, Solicitor of Labor, to J. Halbert Conoly, February 27, 1958.

The Lesinski bill was removed from committee and debated on the floor of the House. The Lesinski bill provided in part in section 7(c):

"[I]n the case of an employee in an occupation in which hours of work necessarily vary from week to week, employed in pursuance of a written contract . . . which expressly provides, in conformity with regulations of the Secretary—

"(1) a bona fide hourly rate of pay specified and actually used as the basis on which all compensation . . . is computed;

"(2) a guarantee of compensation to the employee for each hour in excess of forty worked by him in any workweek, in an amount not less than one and one-half times such bona fide hourly rate; and

"(3) a specified minimum number of hours (not less than forty and not more than sixty, and bearing a reasonable relationship to the range of weekly hours customarily worked in such occupation during a representative period of time) for which such employee is guaranteed employment or pay in each workweek at the rates specified in the contract;

nothing in this subsection shall be deemed to require the payment by the employer to such employee of a greater amount of overtime compensation under this section than is provided by such written contract."

The Lesinski bill was amended by the Lucas bill, and in place of section 7(c) above, the provision found in section 7(e) of the present law was passed by the House. See note 15 *supra*.

This portion of the 1949 Amendments received very little attention on the floor of the House. Congressman Combs, speaking on behalf of the Lesinski bill

court applied two guides of statutory construction. First, that the inclusion of express limitations on the use of *Belo* contracts in section 7(e) indicates limitations not expressed were not intended, and second, the inclusion of a requirement in section 7(f) (3) similar to that advocated by the Secretary in section 7(e) would support a similar inference.³² The court in *Hartford* felt that the legislative history of section 7(e) indicated that Congress rejected any "substantial number of workweeks" test.

However, it is difficult to find any clear congressional intent on this subject. It is doubtful whether Congress was sufficiently concerned with this issue to either affirm or reject such a test. With the exception of limiting a *Belo* contract to a maximum guarantee of sixty hours, Congress adopted the *Belo* case as set out by the Supreme Court. This could indicate that the Congress in general was satisfied with the judicial interpretations of guaranteed wage contracts. Congress may have lacked any specific intention to incorporate by implication a "substantial number of workweeks" test into the FLSA by the use of the term "regular rate." It would be just as doubtful that Congress intended to authorize a wage contract where the hourly rate was fictitious and unrealistic. The use of the words "regular rate" in the light of judicial interpretation would seem to reject any such intention. The better reasoning would be that Congress left this question to be determined by the courts in the light of the earlier cases dealing with *Belo* contracts.³³

and against the Lucas substitution, said, "The Lesinski bill authorizes the Secretary to issue regulations setting forth the conditions under which such contracts may be used, and how they have to work. The Lucas bill . . . fails to define the terms, fails to set real restraints, and fails to authorize the Secretary to issue regulations." 95 CONG. REC. 11221 (1949). If H.R. 5856, as originally proposed by Lesinski, is the bill referred to by the court in the *Hartford* case as incorporating the "substantial number of workweeks" test, the court's conclusion is open to the criticism that Congress merely may have refused to allow the Secretary such broad rule-making authority. Neither H.R. 3190 nor the Lesinski version of H.R. 5856 specifically sets out the "substantial number of workweeks" test.

³² The court appears to be applying its rules of construction to a situation where they are inapplicable. In most of the 1949 amendments to § 7 of the act, Congress was seeking to deal with problems created by specific decisions. The amendments sought to adjust § 7 to the realities of the industrial world by permitting wage plans that complied with the spirit of the act if not its technical language. Since the purpose of § 7(a) would still apply to the exceptions such as § 7(e), the application of a strict technical construction as in the *Hartford* case is unjustified. Furthermore, the analogy the court attempts to make between §§ 7(e) and 7(f) (3) is unjustified since § 7(e) was aimed at employees whose *hours* of employment were irregular, and § 7(f) (3) was designed for employees whose *hourly rate* was subject to unusual fluctuations such as salesmen on salary and commission.

³³ Several articles and publications after the 1949 amendments indicate approval of the "substantial number of workweeks" test. See Brewer, *A "Belo" Primer for 1950*, 1 LAB. L.J. 94 (1949); Note, 98 U. PA. L. REV. 264 (1949); LIVENGOOD, *THE FEDERAL WAGE AND HOUR LAW* 143 (1952).

The Second Circuit followed its decision in *Hartford* when it was confronted with *Mitchell v. Feinberg*,³⁴ where a group of delivery men, working under a collective bargaining contract, was guaranteed a forty-eight hour week, and the hours worked did not exceed the hours guaranteed in a substantial number of workweeks. In addition to the guarantee, the contract provided that one-fifth of the guarantee was to be deducted for each day the employee missed work during the five-day week, for any reason other than lack of work. The district court had held the contract invalid.³⁵ The court of appeals in a per curiam opinion reversed, relying on the *Hartford* case, and saying with regard to the one-fifth deduction provision, "It is true that under the Feinberg contract an employee may receive greater compensation, in terms of hourly rates, for weeks in which he works four days (or less) than in weeks in which he works five days. This incident, however, is not violative of the Act and constitutes, in our judgment, insufficient ground to differentiate the case from *Hartford*." The judge who wrote the *Hartford* decision concurred in holding that the "substantial number of workweeks" test was no basis for saying the contract was invalid, but dissented from the view of the majority that *Hartford* was a ground for saying a deduction from the guarantee could be validly made.³⁶

In spite of its rejection by the courts, there is merit in the Administrator's argument. If the courts are going to approve contracts similar to those in the *Hartford* case, the overtime policy of the FLSA is being defeated. It would seem that any basic or overtime rates specified in such contracts have no meaning and are completely fictitious. An attorney for an employer whose employees work irregular hours but never in excess of sixty could advise the employer to set the maximum hours covered by the guaranteed wage contract at sixty per week. The employer could determine a "regular rate" sufficient to guarantee a weekly wage the employee is willing to accept. It is obvious in such a case that the specifying of an hourly regular rate is nothing more than creating an arbitrary figure to satisfy a technical requirement of the FLSA. The employees will always receive the same amount of pay,

³⁴ 236 F.2d 9 (2d Cir.), *cert. denied*, 352 U.S. 943 (1956).

³⁵ *Mitchell v. Feinberg*, 123 F. Supp. 899 (E.D.N.Y. 1954).

³⁶ 236 F.2d at 13. "I contend that the Act requires the employer . . . to pay the guaranteed sum in compliance with § 7(e), or . . . to pay his employees in accordance with the 'regular rate' specified in the agreement as required by § 7(a) and reiterated in § 7(e). I reach this conclusion reluctantly because of the obvious benefits to employees of such a practice as the daily crediting of overtime." The dissent relied on a pre-amendment case, *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947). The idea expressed was that it should be a case of either pay the guarantee regardless of days missed, or use the regular rate without the overtime in workweeks of less than forty hours. The act does not permit the payment of daily overtime, which this contract permits, and this practice would undermine the "regular rate" language of the act.

exactly as though they were being paid a weekly salary without regard to an hourly rate.

The courts have consistently rejected Belo wage plans where no hourly rate is specified or where the fixed wage is changed without a corresponding change in the hourly rate. Assume a plan that specified no hourly rate, but merely guaranteed a fixed wage for sixty hours work,³⁷ and the employer testified at the trial of the case that neither he nor the employees felt it necessary to specify any hourly rate since none of the employees exceeded sixty hours of work per week. If a court should hold such a contract invalid and yet hold the contract in *Hartford* valid, it would in effect be saying that it was looking only to the technical form of the contract, and not to its substance, since in either situation the wages paid the employees would be the same. It is difficult to believe that Congress in enacting section 7(e) intended such a result.

Although the "substantial number of workweeks" test so persistently advocated by the Administrator has not survived judicial scrutiny,³⁸ it is submitted that the overtime provisions of the FLSA are being circumvented by Belo-type contracts where the hours guaranteed are not exceeded. If the "regular rate" set in these contracts is truly bona fide, it is difficult to perceive how employers could afford to pay such high wages for hours not spent on the job. Perhaps this is another reason why the Administrator looks upon these contracts with a jaundiced eye.

J. HALBERT CONOLY

JAMES F. SMITH

Marriage—Annulment—Doctrine of Relation Back

In October 1952 a widow was entitled to benefits under the Social Security Act¹ as the unremarried widow of a deceased wage earner. These benefits were terminated because of her marriage in June 1954. In November she filed for annulment on the ground of fraud in that the husband never intended to consummate the marriage. The husband

³⁷ See *Sikes v. Williams Lumber Co.*, 123 F. Supp. 853 (E.D. La. 1954), where the district court rejected a purported Belo contract which provided \$75.00 for fifty-three hours work, with no regular rate stated in the contract. The court said that since no hourly rate was specified in the agreement, the rate alleged by the defendant was fictitious.

³⁸ Although there have been no revisions of the Administrator's Interpretative Bulletins published since the *Hartford* and *Femberg* decisions, the public is currently being advised on request that the "substantial number of workweeks" test is no longer the sole criterion in adjudging the validity of a particular Belo-type contract, but may be given weight in determining the bona fide nature of the contract. Interview with Pauline W. Horton, North Carolina Federal Representative for the Wage and Hour and Public Contracts Division of the United States Department of Labor, February 13, 1958. This position has some support in the language of the court in the *Adams* case. See notes 23-26 *supra*.

¹ 49 STAT. 623 (1935), 42 U.S.C. § 402 (1952).