GUARANTEED WAGE PLANS: A CONTINUING PROBLEM UNDER THE FLSA

THE FAIR LABOR STANDARDS ACT requires that overtime payments be based on a "regular rate,"[1] which has been claimed by the Labor Department as the total remuneration for employment in any workweek divided by the total number of hours actually worked for which such compensation was paid.[2] In certain businesses in which employees work irregular hours, however, a "regular rate" computation of overtime compensation would burden the employer with increased overtime payments during periods of greater activity and, thus, preclude an accurate prediction of anticipated labor costs. Furthermore, to pay these employees the same hourly rate during "off-periods" would not afford them the advantages inherent in a stabilized wage. In an attempt to overcome these practical difficulties, various types of guaranteed wage plans have been developed.[3]

In the leading case of *Walling v. A. H. Belo Corp.*,[4] the Supreme

[1] 52 STAT. 1063 (1938), 29 U.S.C. § 207(a) (1952). The statute provides that an employee, "engaged in commerce or in the production of goods for commerce," shall be remunerated for all work in excess of forty hours per week "at a rate not less than one and one-half times the regular rate at which he is employed." Thus, if an employee is paid at a regular rate of $2.00 per hour, the minimum overtime rate, for all hours worked over forty in a particular week, would be $3.00.

[2] P-H 1956 WAGE-HOUR SERV. ¶ 11,284. In *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), the Supreme Court was confronted with a contract for a weekly salary to be paid employees who worked irregular hours during successive workweeks. In order to determine whether the minimum wage standard and overtime provisions of the FLSA had been violated, the Court was compelled to define the statutory term "regular rate." Under the definition proposed by the Labor Department and adopted, in substance, by the Court, if a worker is employed at a salary of $120 per week and works 60 hours in a given week, his regular rate for that week is $2 per hour ($120 divided by 60). Therefore, for the twenty hours in excess of the forty hour maximum for straight time payments, the worker will receive $60 (20 x $3 equals $60), and, if the employer is to comply with the statute, he must compensate the employee in the amount of $140 (40 x $2 equals $80 plus $60), or $20 more than was provided for in the employment contract. See generally, Livengood, *Overtime Compensation Under the Fair Labor Standards Act*, 2 LAB. L. J. 846 (1951).

[3] In general, the Supreme Court has been reluctant to approve guaranteed wage plans as a device for avoiding the extra overtime payments required by the *Missel* case, note 2 *supra*. See, Walling v. Helmerich & Payne, 323 U.S. 37 (1944); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945); Walling v. Harnischfeger Corp., 325 U.S. 427 (1945); 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199 (1947); Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948), Comment, 1950 WIS. L. REV. 99.

[4] 316 U.S. 624 (1942).

Court upheld one such plan which provided for a guaranteed weekly wage to be paid in any workweek in which remuneration based on a specified hourly rate plus statutory overtime did not exceed the guaranty.[5] In the *Belo* case, the guaranty was, in fact, exceeded for a significant number of workweeks,[6] but the 1949 amendments to the FLSA, which give statutory approval to contracts similar to that involved in the *Belo* decision, do not expressly establish this characteristic as a

[5] The following is an example of a *Belo*-type agreement: "Weiner is paid under a . . . contract, providing a regular rate of $2 an hour with a guarantee of $110 a week for straight-time and overtime. The first week he works 30 hours. His pay at the hourly rate equals $60 (30 hours x $2), which is less than the $110 guarantee, so he is paid the guarantee. The second week he works 50 hours. Pay at his regular rate totals $110 ([50 x $2] + [10 x $1]), the same amount as the guarantee, so again he receives $110. The third week he works 55 hours. At his hourly rate he earns $125 ([55 x $2] + [15 x $1]). Since this is more than his guarantee he, is paid the $125." P-H 1956 WAGE-HOUR SERV. ¶ 9653.

In the *Belo* case, the employment contract provided for a "basic rate" of $.67 per hour for the first forty-four hours. (At that time the maximum workweek under the FLSA was forty-four hours and the minimum wage was $.25 per hour.) The contract guaranteed a weekly wage of $40. At this stipulated rate no overtime payments in excess of the guaranty would be due until the hours in the workweek exceeded 54½. (44 hours at $.67 equals $29.48; the statutory overtime rate would be 1½ times $.67 or $1; 10½ hours of overtime equals $10.50, which added to $29.48 equals $39.98, or about $40). 316 U.S. at 628, n. 5. Mr. Justice Reed, in a vigorous dissent in which Justices Black, Douglas and Murphy concurred, relied on the *Missel* case, *supra* note 2, which was decided on the same day as *Belo*. Under the definition of "regular rate," adopted in the former case, the regular rate in the *Belo* case for a 54½ hour week would be $.73 per hour ($40 divided by 54½). Thus, carrying *Missel* to its logical conclusion, the employees would be entitled to receive $.73 per hour for all work up to forty-four hours, and $1.099 for all hours in excess of forty-four, or $43.91 per week. 316 U.S. at 639, n. 3.

The *Belo* case aroused a veritable storm of adverse comment. See, Notes, 54 HARV. L. REV. 1077 (1941); 27 VA. L. REV. 1096 (1941), in which the decision of the district court is severely criticized. For discussion of the Supreme Court decision, see, Tepper, *The* Belo *and* Missel *Cases and the Overtime Provisions of the Fair Labor Standards Act of 1938*, 22 B. U. L. REV. 494 (1942); Notes, 16 TEMPLE L. Q. 442 (1942); 21 TEXAS L. REV. 323 (1943); 52 YALE L. J. 159 (1942).

[6] The contract rate will become operative *in fact* as the regular rate only if the guaranty of hours is exceeded, for no employee will receive payments actually determined by the contract rate until the employer makes payments in addition to the guaranteed amount. Assume a contract which calls for a regular rate of $2 per hour with a guaranteed weekly wage of $140 for all work up to sixty hours. If an employee works only fifty hours, he receives compensation in excess of the statutory overtime rate ($2 x 40 equals $80. The $60 remainder of the guaranty is paid to him for only 10 working hours, or at a rate of $6 per hour, whereas the overtime rate, if the contract rate is *in fact* the "regular" hourly rate, is $3). On the basis of the *Missel* formula, the regular rate would be $2.80 per hour ($140 divided by 50 hours). However, if the hours of the guaranty are exceeded, then overtime compensation is actually based on the contract rate. (40 hours x $2 equals $80; 20 hours x $3 equals $60; $80 plus $60 equals $140, or the amount of the guaranty). Therefore, unless the guaranty is exceeded, the contract rate becomes a purely fictional basis for computing overtime payments, and the regular rate requirements of the FLSA are violated. See, LIVENGOOD, THE FEDERAL WAGE AND HOUR LAW 143 (1952).

prerequisite of a valid guaranteed wage contract.[7] Unless the guaranty is so exceeded, however, the regular contract rate becomes a purely artificial basis for computing overtime payments, and the statutory requirement that overtime be based upon a "regular rate" is completely thwarted. But when an employee earns in excess of the contract guaranty, the contract is actually utilized in the computation of overtime.[8] Consequently, the Labor Department, in its administration of the act, has taken the position that the guaranty must be exceeded in a significant number of workweeks if the underlying purposes of the forty-hour week and overtime provisions of the FLSA are to be served.[9] On the other hand, an increasing number of courts have refused to read this requirement into section 7(e) of the amended act.[10] The resulting conflict, as reflected in the recent decision of the Court of Appeals for the Second Circuit in *Mitchell v. Hartford Steam Boiler Inspection and Insurance Co.*,[11] calls for a reappraisal of this problem.

In the *Hartford* case, an employment contract was entered into which provided for a guaranteed weekly wage for all work up to and including sixty hours, the statutory maximum for a *Belo*-type contract under section 7(e) of the FLSA.[12] The regular contract rate plus statutory overtime which purported to determine the amount of the guaranty was mathematically derived from a weekly salary paid to employees for a forty-four hour workweek prior to the enactment of the 1949 amendments.[13] For a two-year period subsequent to the adoption of the con-

[7] The relevant portion of the amendments, adding section 7(e) to the act, provides: "No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate . . . 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 guaranty of pay for not more than sixty hours based on the rates so specified." 63 STAT. 912 (1949), 29 U.S.C. § 207(e) (1952).

[8] See note 6 *supra*.

[9] See P-H 1956 WAGE-HOUR SERV. ¶ 9654.4.

[10] See cases cited note 21 *infra*.

[11] 235 F.2d 942 (2d Cir. 1956), *cert. denied*, 352 U.S. 941 (1956).

[12] This particular amendment has been set forth in note 7 *supra*.

[13] Assume that an employee formerly received a salary which averaged $92 per week for a forty-four hour workweek. Under such a contract the regularly hourly rate would have been $2—$80 for 40 hours straight time ($2 x 40) plus $12 of overtime ($3 x 4), a total of $92. If the employer then decides to draft a guaranteed wage contract within the literal meaning of section 7(e), *supra* note 7, he might, as was done in the *Hartford* case, guarantee an employee $92 for a workweek of 60 hours. This

tract, the sixty-hour guaranty was exceeded in only one-quarter of one per cent of the workweeks. Nevertheless, an action brought by the Secretary of Labor to enjoin an alleged violation of the overtime requirements of section 7 was dismissed by the United States District Court for the District of Connecticut.[14]

On appeal, the Secretary, in urging that the "significant number of workweeks" test be given judicial approval as the critical determinant of the validity of guaranteed wage contracts, argued that the 1949 amendments to the FLSA were intended by Congress to incorporate prior judicial decisions.[15] In this connection, heavy reliance was placed on the fact that in the two pre-1949 Supreme Court decisions in which *Belo*-type agreements were approved[16] the hours of the guaranty were exceeded for a significant number of workweeks;[17] yet, in a series of intervening cases, the Court felt constrained to invalidate guaranteed wage plans in which the guaranties were not so exceeded.[18] Furthermore, it

new agreement would require a reduction of the employee's hourly rate to $1.31, instead of $2, and, thus, a reduction of his former overtime rate from $3 to $1.97—40 x $1.31 equals $52.40 which added to $39.40 of overtime (20 x $1.97) equals $91.80, or approximately $92. Should the employer then elect to work his employees a full sixty hours under the terms of the guaranty instead of the usual forty-four, he not only could avoid any overtime payments for the additional sixteen hours, but also would make overtime payments based on the actual hourly rate of $1.31 rather than the $2 formerly received by the employee. See Petition by the Secretary of Labor for a Writ of Certiorari to the Court of Appeals for the Second Circuit, pp. 13-14 in the case of Mitchell v. Hartford Steam Boiler Inspection and Insurance Co., *supra* note 11.

[14] 12 Wage & Hour Cas. 498 (D. Conn. 1955).

[15] This contention is not without support. Subsequent to the enactment of section 7(e), most writers agreed that the amendment was designed to codify the pre-1949 decisions of the Supreme Court and, thus, implied the "significant number of workweeks" test a had been adopted. See, 95 CONG. REC. A-5476 (1949); LIVENGOOD, THE FEDERAL WAGE AND HOUR LAW 143 (1952); Brewer, *A "Belo" Primer for 1950*, 1 LAB. L. J. 94, 160 (1950). Section 7(e) has also been discussed in its relation to other amendments adopted in the 1949 revamping of the FLSA. See, in general, Smethurst and Haslam, *The Fair Labor Standards Amendments of 1949*, 18 GEO. WASH. L. REV. 127 (1950); Livengood, *Overtime Compensation Under the FLSA*, 2 LAB. L. J. 846 (1951); Soule, *The Fair Labor Standards Amendments of 1949—Overtime Compensation*, 28 N. C. L. REV. 173 (1950).

[16] Prior to 1949 the Supreme Court upheld guaranteed wage plans in only two cases —the *Belo* case, *supra* note 4, and *Walling v. Haliburton Oil Well Cementing Co.*, 331 U.S. 17 (1947).

[17] The *Belo* contract guaranty was based on a workweek of 54½ hours and was frequently exceeded. In the *Halliburton* case, *supra* note 16, the contract rate did not become operative until an employee had worked 84 hours, but the guaranty was surpassed in 20% of the workweeks. Note, however, that the *Halliburton* contract would now be invalid under section 7(e) which limits a weekly guaranty to 60 hours. See note 7 *supra*.

The Secretary of Labor has adopted the 20% figure as a rule of thumb for determining what is a "significant" number of workweeks. P-H 1956 WAGE-HOUR SERV. ¶ 9654.4.

was asserted, Congress incorporated this purported pre-1949 decisional law into section 7(e), by implication at least, in the statutory requirements of a "regular rate" and a "bona fide" contract.[19] For, until the guaranty is exceeded, the contract rate will never become "regular"—*i.e.*, operative in fact. Moreover, it was argued, if an employment contract is to be deemed "bona fide" within the meaning of the act, there must be an attempt, in good faith, to draft its terms in such a manner that the contract hourly rate will constitute the "regular" rate;[20] and this good faith, the Secretary contended, can only be shown by an exceeding of the guaranty for a significant number of workweeks.

The lower federal courts, however, have generally evinced a reluctance to read the "significant number of workweeks" test into section 7(e).[21] Initially, these courts had been thrown into confusion by the

[18] While the Supreme Court has never expressly adopted the "significant number of workweeks" formula, its pre-1949 decisions permit an inference that the Court recognized this test. Subsequent to the *Belo* decision in 1942, the Court held invalid other types of guaranteed wage plans which deviated, to some extent, from one or more of the elements present in *Belo*. See cases cited in note 3 *supra*. These decisions led many to believe that *Belo* had been overruled except as to its own particular facts. Walling v. Uhlmann Grain Co., 151 F.2d 381, 383 (7th Cir. 1945). When the Court granted certiorari in the *Halliburton* case, *supra* note 16, it was predicted, on the basis of the decisions following *Belo* and the views expressed by individual members of the Court in those intervening cases, that *Belo* would be overruled. Levy, *Belo Revisited*, 15 GEO. WASH. L. REV. 39 (1946). However, the Court in *Halilburton* reaffirmed *Belo* as good law and held it to be controlling because of substantially identical fact situations. Only in *Belo* and *Halliburton* was the contract guaranty exceeded in a significant number of workweeks. For a mathematical-legal critique of the cases intervening between *Belo* and *Halliburton*, see Feldman, *Algebra and the Supreme Court*, 40 ILL. L. REV. 489 (1946). After the *Halliburton* decision, the former Administrator of the Wage-Hour Division of the Labor Department voiced an appeal for legislative amendment. Walling, *The Search for Finality in Wage and Hour Litigation*, 17 FORDHAM L. REV. 200 (1948).

[19] The pertinent provisions of this section are set forth in note 7 *supra*.

[20] The soundness of this argument is questionable because of the words of section 7(e), *supra* note 7, which seem to limit the scope of "bona fide" to a modification of the words "individual contract." Clearly, "bona fide" does not modify "an agreement made as a result of collective bargaining," and, therefore, it would require an extremely flexible interpretation of the statute to sustain the Secretary's contention that "bona fide" applies to all types of contracts envisioned in section 7(e).

[21] The decisions of the district courts and the courts of appeals have reflected, since 1949, a judicial desire to achieve a formerly elusive uniformity of decision by a strict construction of the "Belo" amendment. In *Mitchell v. Brandtjen & Kluge, Inc.*, 228 F.2d 291 (1st Cir. 1955), *cert. denied*, 352 U.S. 940 (1956), the First Circuit held that the "significant number of workweeks" test was not necessary to determine the validity of guaranteed wage plans since it was not specifically alluded to by Congress in section 7(e).

In *Tobin v. Little Rock Packing Co.*, 202 F.2d 234 (8th Cir. 1953), *cert. denied*, 346 U.S. 832 (1953), the employer had formerly satisfied the significant number of workweeks requirement, but, due to increased efficiency in his plant, had reduced the number of working hours of his employees to the extent that the guaranty was not exceeded

seemingly irreconcilable decisions of the Supreme Court in the period 1942-47,[22] and, consequently, the enactment of the 1949 amendments

for several years. Nevertheless, he continued to pay the guaranteed wage. "The test applied in each case is whether the wage rate specified in the contract of employment is . . . in fact the actual rate paid for the normal non-overtime workweek. Contracts of employment in which the stipulated hourly rate bears no relation to the compensation guaranteed by the contract are violative of the Act. 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." (Emphasis added.) 202 F.2d at 238. However, under the Secretary's construction of the statute the contract rate in the *Little Rock Packing Co.* case would not be "regular."

Subsequent to its decision in the *Hartford* case, *supra* note 11, the Second Circuit in *Mitchell v. Feinberg*, 236 F.2d 9 (2d Cir. 1956), *cert. denied*, 352 U.S. 943 (1956), sustained a guaranteed wage plan in a brief per curiam opinion citing the *Hartford* decision as controlling. However, Circuit Judge Waterman, who wrote the opinion in *Hartford*, dissented vigorously in *Feinberg*. In the latter case, the employment contract provided for a regular rate and overtime pay with a guaranteed wage based on a 48 hour workweek. No employee ever worked over 40 hours in any workweek. If an employee was absent from work for a day, the employer reduced his pay by one-fifth of the *guaranty*. Thus, an employee received, in lieu of the guaranteed wage, payments *including overtime* for working less than 40 hours per week. Since, in effect, there was no guaranteed wage, Judge Waterman contented that the employees must be paid on the basis of the regular contract rate. "[T]he provision in appellant Feinberg's collective bargaining agreement by which appellant pays overtime compensation for non-overtime work clearly demonstrates that there was no compliance—and no intent to comply—with the requirements that a 'regular rate' of pay be paid for a workweek of forty hours or less. . . ." 236 F.2d at 10-11.

These decisions indicate that the courts of appeals will continue to sustain any guaranteed wage contract which meets the literal requirements of section 7(e), regardless of a failure to satisfy the approved definition of "regular rate." See note 2 *supra* and text thereto. Several federal district courts have, however, at least implicitly recognized the "significant number of workweeks" test. Sikes v. Williams Lumber Co., 123 F. Supp. 853 (E.D. La. 1954); Tobin v. Morristown Poultry Co., 10 Wage & Hour Cas. 571 (E.D. Tenn. 1952); Tobin v. Aronow, 96 F. Supp. 279 (D. Mont. 1951); Tobin v. Beechwood Lumber Co., 10 Wage & Hour Cas. 444 (N.D. Ga. 1951).

[22] In *Green Head Bit & Supply Co. v. Hendricks*, 49 F. Supp. 698 (W.D. Okla. 1943), the district court was confronted with a wage contract which provided for a guaranteed weekly salary based on an hourly rate and overtime pay. The employer, however, varied the hourly rate in his books each week, depending on the number of hours worked. The contract rate was completely disregarded in favor of a rate found weekly through mathematical computation. The court upheld the contract on the ground that the rate varied from week to week and not within a particular week, citing *Overnight Motor Transportation Co. v. Missel*, note 2 *supra*. The court was apparently impressed with the fact that the employees were pleased with the arrangement and only the Labor Department appeared dissatisfied. *But cf. Walling v. L. J. Mueller Furnace Co.*, 50 F. Supp. 561 (E.D. Wis. 1943), where on similar facts a contract was invalidated on the ground that it lacked a regular rate specified in the contract and was therefore not analogous to a *Belo*-type agreement. See also, 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199 (1947); Walling v. United Distillers Products Corp., 63 F. Supp. 474 (D. Conn. 1945).

In *Lynch v. Vincent*, 55 F. Supp. 44 (W.D. Mo. 1944), an employment contract provided for a weekly wage based on a regular rate and overtime payments geared to a 56 hour workweek. Because there were no fluctuating hours during successive workweeks, the *Belo* case was held not to apply although the contract was upheld since the

provided an apparent basis for needed uniformity from which the courts have hesitated to depart. Adhering to this pattern, the Second Circuit Court of Appeals, in the instant case, unanimously affirmed the trial court, pointing out, by way of justification, that Congress had excluded the "significant number of workweeks" test when its incorporation in the amendments was proposed, and that Congress could easily have manifested its alleged intention by explicitly including the test within the context of section 7(e).[23]

This decision, however, unfortunately demonstrates a failure to recognize the practical realities of a situation in which such a literal construction of section 7(e) may permit abuses[24] that would seriously frus-

employees worked a 56 hour week and, therefore, the contract rate was equal to the actual hourly rate.

In *Walling v. Uhlmann Grain Co.*, 151 F.2d 381 (7th Cir. 1945), the Seventh Circuit expressed the opinion that the *Belo* decision was effective only as to its own particular facts and, on that ground, invalidated the contract in question. Following the decision of the Supreme Court in *Halliburton*, *supra* note 16, the same court in *McComb v. Pacific & Atlantic Shippers Ass'n.*, 175 F.2d 411 (7th Cir. 1949), 98 U. PA. L. REV. 264 (1949), followed the *Belo* rule in sustaining an employment contract in which the guaranty had not been exceeded in a significant number of workweeks. The court found that the employees were pleased with the scheme and that there had been no violation of the minimum wage and overtime provisions of the FLSA. *But cf.*, *McComb v. Sterling Ice & Cold Storage Co.*, 165 F.2d 265 (10th Cir. 1947), in which the court held that a *Belo*-type contract, in order to be valid, *must be executed in good faith and, therefore, the guaranty must be exceeded for a significant number of workweeks.*

A contract similar to the *Belo* plan in every respect, except the number of hours upon which the guaranty was based, was upheld through reliance upon the *Belo* decision, although the court indicated that it viewed the *Belo* rule as applicable only in an extremely narrow situation. McComb v. Utica Knitting Co., 164 F.2d 670 (2d Cir. 1947).

See also, *McComb v. Roig*, 181 F.2d 726 (1st Cir. 1950), in which the First Circuit held that the "significant number of workweeks" test was the correct determinant of validity of a guaranteed wage plan since it precluded the possibility of an artificial contract rate. (This case involved recovery of overtime payments for workweeks prior to the 1949 amendments.) But in *Mitchell v. Brandtjen & Kluge, Inc.*, *supra* note 21, the same court in a subsequent decision requiring a judicial application of section 7(e) reached the opposite conclusion.

[23] The legislative history of section 7(e), *supra* note 7, is inconclusive insofar as it concerns the question of whether Congress expressly rejected the "significant number of workweeks" test when various bills were introduced. All of the bills were broad in scope, covering many proposed amendments, and were not limited to section 7(e). Therefore, rejection of one cannot be said to indicate preference for another insofar as each related to one small provision of several amendments. Petition by the Secretary of Labor for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit pp. 18-21 in the case of Mitchell v. Hartford Steam Boiler Inspection and Insurance Co., *supra* note 11. See also, LIVENGOOD, THE FEDERAL WAGE AND HOUR LAW 14-16 (1952).

[24] The possible abuses of the overtime provisions of the FLSA are illustrated in the hypothetical situation presented in note 13 *supra*.

trate the policies which the act was designed to implement,[25] a result that the Secretary's construction of the statute is designed to minimize. For, while the inherent rigidity of the standard that the Secretary has adopted imposes limitations upon the employer's freedom to contract, substantially all of the benefits of a guaranteed wage are still available to both employer and employees if the number of hours of the guaranty are fixed sufficiently low to insure compliance with the "significant number of workweeks" test. Yet, application of this prophylactic standard, while executing underlying congressional policies, could conceivably lead to harsh results in a particular case. Thus, if an employer enters into a *Belo*-type agreement with a bona fide and reasonable expectation that the guaranty will be exceeded in a significant number of workweeks, and subsequently, due to peculiar conditions existing in the industry, his employees' working hours so decrease that the guaranty is never exceeded, the Secretary's test, if applied, would invalidate the contract, despite the employer's willingness to continue to pay the weekly guaranteed wage because of an honestly held belief that conditions would improve.[26]

Accordingly, in order to effect a compromise that will embody the "significant number of workweeks" test and yet permit of an exception for the "honest" employer, it is suggested that the test should be so modified that a failure to satisfy it will raise, at most, a presumption that the contract is invalid. Thus, if the guaranty were not exceeded in a significant number of workweeks, the contract would be regarded as prima facie

[25] The Fair Labor Standards Act, with its minimum wage and overtime provisions, was initially enacted during a period of economic depression in order to make more jobs available for the vast numbers of unemployed by imposing a fifty per cent premium to be paid all employees working over a certain number of hours per week. These policy considerations have diminished in importance during the present era of inflation and nearly full employment, but the minimum wage and overtime sections of the act have been retained because of a public desire to alleviate unsatisfactory working conditions.

[26] In *Mitchell v. Adams*, 230 F.2d 527 (5th Cir. 1956), the employer was engaged in the manufacture of shirts. However, due to circumtsances beyond his control, the volume of his business dropped off sharply with the result that his employees who were employed under the terms of a *Belo*-type agreement did not work enough hours in any workweek to receive compensation in excess of the guaranty. The employer was found to have contemplated that the guaranty would be exceeded for a significant number of workweeks. The failure of section 7(e), *supra* note 7, to provide for the "significant number of workweeks" requirement, together with a finding that the employer had a bona fide belief that conditions would change and, thus, enable him to exceed the guaranty, was deemed sufficient to sustain the contract. This rationale of the Fifth Circuit resembles the "good faith" reasoning of the court in *McComb v. Sterling Ice & Cold Storage Co.*, *supra* note 22, although the Tenth Circuit in that case required a showing of satisfaction of the "significant number of workweeks" test in order to establish good faith.

invalid, and it would then be incumbent upon the employer to show that, at the time the contract was entered into, he was justified, under the circumstances, in believing that the guaranty would be so exceeded.[27] This compromise solution not only would substantially achieve the results sought by the Secretary of Labor, but would also assure some degree of flexibility in an otherwise unduly rigorous formula. The marked refusal of the lower federal courts to incorporate the Secretary's test into the FLSA by means of judicial interpretation, however, will necessitate effectuation of this scheme by means of congressional amendment of section 7(e).

[27] If an employer drafts an employment contract in an honestly held belief that the guaranty will be exceeded, and subsequently he finds that conditions will prevent an exceeding of the guaranty, he cannot be permitted to maintain indefiuitely that he bona fide believes that these conditions will improve. Therefore, the courts will have to adopt an arbitrary period during which an employer can raise this good faith defense, so that if, upon expiration of that period, he does not revise the contract guaranty to meet the requirements of the "significant number of workweeks" test, his defense will be lost to him.