

## Pennsylvania Supreme Court Rejects Fluctuating Workweek Pay Method

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As previously reported, the U.S. Department of Labor (DOL) recently announced a proposed rule that clarified the fluctuating workweek method (FWW) under the Fair Labor Standards Act (FLSA). Now, just two weeks later, the Pennsylvania Supreme Court in *Chevalier v. General Nutrition Centers, Inc.* 2019 Pa. LEXIS 6521 (Nov. 2019) (*Chevalier*) held that the method is unavailable under the Pennsylvania Minimum Wage Act (PMWA).

The FLSA guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. Under the FLSA's regular method of calculating overtime pay, employees are paid an hourly rate and receive 1.5 times that rate for any overtime hours.

Under the FWW, however, if a non-exempt employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all "straight time" (non-overtime) hours worked, the employer satisfies the FLSA's overtime pay requirements if, in addition to the salary amount, it pays at least 0.5 times the base rate for any hours worked in excess of 40. The salary must remain fixed and be sufficient to pay at least minimum wage for all hours worked and the employer and employee must have a "clear and mutual understanding" that the salary will remain the same regardless of the hours worked each week.

In *Chevalier*, the plaintiff was a former non-exempt store manager for General Nutrition Centers, Inc. (GNC). As a store manager, GNC paid the plaintiff a fixed weekly salary plus commissions, regardless of the hours worked in a week. To calculate overtime compensation, GNC utilized the FWW pay method, calculating the managers' "regular rate" by dividing the fixed weekly salary by the actual number of hours worked and then paying overtime at 0.5 times that rate. The plaintiff challenged this method of calculating overtime as improper under the PMWA.

GNC argued that the PMWA should be interpreted in a manner consistent with the FLSA, which expressly adopts the FWW method. The Pennsylvania Supreme Court rejected the argument, focusing on the following language under the PMWA: "Employees shall be paid for overtime not less than one and one-half times the employee's regular rate." Emphasizing that "states have the authority 'to enact more beneficial wage and hour laws' than those provided in the FLSA" and citing "the unmistakable intent of the General Assembly to use the Commonwealth's police power to increase wages to combat the 'evils of unreasonable and unfair wages,'" the court held that "the rules of statutory construction favor . . . application of the 1.5 Multiplier." Accordingly, the court rejected the FWW method to the extent it utilizes a 0.5 multiplier.

Employers using the FWW method for non-exempt, salaried workers located in Pennsylvania are encouraged to immediately review and revise their compensation methods for these employees. For questions or guidance on the above rules or your wage and hour policies and procedures, please contact George Morrison ([morrison@whiteandwilliams.com](mailto:morrison@whiteandwilliams.com); 610.782.4911) or any member of the Labor and Employment Group.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.