

Pennsylvania Supreme Court: Fluctuating Workweek Method of Overtime Pay is Unlawful

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On November 20, 2019, the Pennsylvania Supreme Court ruled that the fluctuating workweek (“FWW”) method of calculating overtime pay owed to salaried workers is prohibited by state law. [Chevalier v. General Nutrition Centers Inc.](#), Pennsylvania Supreme Court, No. 22-WAP-2018.

Under the FWW method of pay, an overtime-eligible employee receives a fixed salary for all hours worked regardless of how many hours are worked in a particular week. For workweeks in which the employee works more than 40 hours, he or she is entitled to overtime pay calculated at one-half the regular rate of pay (the fixed weekly salary divided by the actual number of hours worked in the workweek). The principle behind the arrangement is that the fixed salary for all hours worked has already compensated the employee for the straight time component of the worked hours above 40 (*i.e.*, the “time” in “time and a half”). As a result, all that is left to pay is the halftime component.

The FWW method of pay arises from the general principle, confirmed by the U.S. Supreme Court in [Overnight Motor Transportation Co. v. Missel](#), 316 U.S. 572 (1942), and codified on the federal level at 29 C.F.R. § 778.113, that if an overtime-eligible employee is paid on a salary basis, the regular rate of pay is computed by dividing the weekly salary by the number of hours which the salary “is intended to compensate.” The example and requirements of the FWW method of pay are further explained in 29 C.F.R. § 778.114.

Of course, employers must comply with both federal and state overtime laws, and state laws can (and often do) provide for additional or different rights and obligations. The issue in *Chavalier* was whether the employer’s practice of paying overtime based on the FWW method satisfied Pennsylvania law—specifically, the requirement under the Pennsylvania Minimum Wage Act of 1986 (“PMWA”) that employees “shall be paid for overtime not less than one and one-half times the employe[e]’s regular rate.”

The Pennsylvania Supreme Court affirmed the Superior Court's holding that the FWW violated Pennsylvania law. The issue was whether the PMWA's silence on the FWW method of pay permits or forbids employers from using it. The plaintiffs argued that Pennsylvania intended for its wage law to be more protective than the federal Fair Labor Standards Act, and that the court should decline to interpret legislative silence on the issue as an endorsement of the pay practice.

The court agreed with the plaintiffs, and further noted that the Pennsylvania Department of Labor's silence on the FWW method, combined with the agency's explicit approval of other methods of overtime calculation, indicated that its failure to address the FWW method was intentional.

The *Chevalier* decision comports with the decisions of federal district courts in Pennsylvania, which have previously rejected the FWW method under Pennsylvania law. Alaska, California, and New Mexico have similarly refused to permit the FWW method of pay under their state laws.

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