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In the Supreme Court of Pennsylvania

No. 22 WAP 2018 & No. 23 WAP 2018

TAWNEY L. CHEVALIER and ANDREW HILLER,
on behalf of themselves and all others similarly situated,

Plaintiffs/Appellees,

v.

GENERAL NUTRITION CENTERS, INC. and
GENERAL NUTRITION CORPORATION,

Defendants/Appellants.

On Appeal from the December 22, 2017 Order of the Superior Court of Pennsylvania, No. 1437 WDA 2016

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA AFL-CIO, THE NATIONAL EMPLOYMENT LAW PROJECT, COMMUNITY LEGAL SERVICES INC., THE WOMEN'S LAW PROJECT, THE KEYSTONE RESEARCH CENTER, and PATHWAYS PA

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I. INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae The Pennsylvania AFL-CIO, is a federation of labor organizations operating throughout the Commonwealth of Pennsylvania, whose affiliated local unions, district councils, regional councils, central labor councils and area labor federations represent in excess of 800,000 working men and women who reside in virtually every community in the Commonwealth and who, along with their families, comprise a very substantial portion of Pennsylvania residents. The Pennsylvania AFL-CIO is the central address and public policy voice of Unions in both the public and private sectors of our Commonwealth's economy. Among the goals and missions of the Pennsylvania AFL-CIO is the protection and assurance of adherence to the precepts of our Constitution and the proper application and administration of the laws of this Commonwealth including, but not limited to, the essential public policy and legislative intent of the Pennsylvania Minimum Wage Act to protect working men and women from unreasonably low wages that would otherwise not be consistent with the value of the services they render in the private and public sectors of our economy

Amicus Curiae The National Employment Law Project ("NELP") is a national non-profit legal organization with over 45 years of experience advocating

[1] Pursuant to Pa.R.A.P. Rule 531(b)(2), *Amici* certify that no person or entity other than *Amici* or their respective counsel either (i) paid, in whole or in part, for the preparation of this brief or (ii) authored, in whole or in part, any aspect of this brief.

for workers' rights to fair pay. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of statutory and regulatory labor standards, including baseline protections like overtime pay. NELP has litigated and participated as *amicus curiae* in numerous cases addressing the rights of workers under the Fair Labor Standards Act and state wage and hour laws. NELP also provides policy and legal assistance to worker centers, labor organizations and community-based organizations in Pennsylvania regarding wage and hour rights, and this collaboration informs its position in this case. NELP is interested in the instant matter because a ruling against the workers will encourage employers to both overwork and underpay workers in derogation of the existing statutory framework, who have little recourse if their working conditions are intolerable. Failing to require minimum statutory overtime protections also undermines the essential public policy goal of maximizing employment, as employers will hire additional workers if full overtime premium pay is owed.

Amicus Curiae Community Legal Services Inc. ("CLS") was founded by the Philadelphia Bar Association in 1966 as an independent 501(c) (3) organization to provide free legal services in civil matters to low-income Philadelphians. Since its founding, CLS has served more than one million clients who could not afford to pay for legal representation. CLS's representational model is to make systemic changes based upon the legal issues identified through individual representation, to

the extent possible, so that its results reach the larger low-income community in Pennsylvania. CLS achieves these systemic reforms through class action and other impact litigation, administrative and legislative advocacy, and communications work. CLS has represented hundreds of individuals in wage cases over the last five decades, and we see how shortchanging workers contributes to poverty and lack of economic mobility in Pennsylvania.

Amicus Curiae The Women's Law Project ("WLP") is a nonprofit Pennsylvania-based legal advocacy organization dedicated to creating a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, policy advocacy, and public education. Founded in 1974, the WLP has a long and effective track record on a wide range of legal issues related to women's health, legal, and economic status. Economic justice and fair treatment of workers is a high priority for WLP.

Amicus Curiae The Keystone Research Center ("Keystone") was created to broaden public discussion on strategies to achieve a more prosperous and equitable Pennsylvania economy. Established in 1996, Keystone operates through the collaborative efforts of Pennsylvania citizens drawn from academia, labor, religious, and business organizations. As a research and policy development institution, Keystone conducts original research, produces reports and monographs, promotes public dialogue that addresses important economic and civic matters, and

proposes public policy solutions to help address those matters. Over the years, Keystone has advocated for the enactment, interpretation, application, and enforcement of robust wage and overtime rules that protect and benefit Pennsylvania working people and their families.

Amicus Curiae PathWays PA ("PathWays") serves as one of the Greater Philadelphia Region's foremost providers of residential and community-based services for women, children and families. With offices throughout Southeastern Pennsylvania and advocacy initiatives on behalf of low-wage workers statewide, PathWays provides programs committed to the development of client self-sufficiency which leads to the fulfillment of our mission: To help women, teens, children and families achieve economic independence and family well-being. Pathways is committed to client self-sufficiency and economic independence, and to supporting issues that affect our clients, including fair access to overtime pay.

II. ARGUMENT

A. Introduction

The Pennsylvania Minimum Wage Act (PMWA) begins with a declaration of policy in which the Pennsylvania legislature stated its intention to protect employees from "unreasonably low" wages "not fairly commensurate with the value of the services rendered."[2] To further that goal, it adopted a broad rule

[2] 43 P.S. § 333.101.

guaranteeing overtime pay to most workers, while exempting white-collar employees who generally enjoy higher pay, greater decision-making authority and bargaining power, and wider discretion over work hours.[3]

In the instant lawsuit, Judge Wettick explained the public purpose underlying the overtime mandate:

> The purpose of the portion of a minimum wage act requiring overtime pay is to increase employment, reduce overtime, and adequately compensate employees who must work more than a standard forty-hour workweek. The means for achieving this goal is to require sufficient extra pay for overtime work such that employers will hire new employees in lieu of requiring existing employees to work overtime.

Chevalier v. General Nutrition Centers, Inc., 42 Pa. D. & C.5th 1, 26-27 (Pa. Com. Pl., Allegheny Cty. 2014) (footnote and internal citations omitted).

The Federal Fluctuating Work Week Method ("Federal FWW Method")[4] contradicts the PMWA's goals and cannot be reconciled with Pennsylvania's proud history of vigorously protecting the overtime rights of workers who, due to a lack of economic bargaining power, count on state law to protect their basic wage and hour rights. The Superior Court majority – like four separate federal court

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[3] *See* 43 P.S. § 333.105(a)(5); 34 Pa. Code. §§ 231.82-84.

[4] As fully described in the parties' briefs and in the opinions below, the Federal FWW Method has two distinct steps. First, the employee's regular pay rate (for overtime purposes) must be calculated. Second, the overtime payment amount must be determined and paid for hours worked over 40. The issue before this Court is limited to the second aspect of the Federal FWW Method; that is, the proper determination of the overtime payment amount. Thus, when referring to the Federal FWW Method, *amici* are limiting their reference to the second aspect of the method.

judges – correctly held that the Federal FWW Method is impermissible in Pennsylvania.

Amicus curiae submit this brief to put forth five essential points: First, the workers benefitting from Pennsylvania's prohibition of the Federal FWW Method are precisely the individuals the PMWA in general, and its overtime mandate in particular, was enacted to protect. *See* pp. 6-9 *infra*. Second, the Federal FWW Method injures workers and their families and is inconsistent with the public policy underlying Pennsylvania's overtime mandate. *See* pp. 9-13 *infra*. Third, continued rejection of the Federal FWW Method is consistent with Pennsylvania's long tradition of providing Pennsylvania workers and their families with PMWA protections that extend beyond the FLSA's minimal "national floor." *See* pp. 13-17 *infra*. Fourth, the Superior Court majority's rejection of the Federal FWW Method is unsurprising, anything but novel, and merely reinforces the prevailing view in Pennsylvania. *See* pp. 17-19 *infra*. Fifth, in rejecting the Federal FWW Method, Pennsylvania is not an outlier, as six other states also have rejected the Federal FWW Method. *See* pp. 19-23 *infra*.

B. Tawney Chevalier, Andrew Hiller, and similarly situated workers protected by the Superior Court's decision are precisely among the individuals the PMWA was enacted to protect.

The differences between the Federal FWW Method and the method for calculating salaried workers' overtime pay endorsed by the Superior Court

majority ("the PMWA 1.5 Method")[5] are extensively described in the underlying court opinions and in the principal parties' briefs. *Amici* will not recount such differences in any detail here.

However, *amici* do emphasize that workers paid under the PMWA 1.5 Method are ***not*** overtime-exempt. In other words, although these workers are paid a salary, their job duties and responsibilities do not bring them within the "white collar" exemptions to the state overtime pay mandates, and their employers do not seek to claim them as exempt. These workers do not have the "managerial" responsibilities of exempt "executives,"[6] the decision-making responsibilities of exempt "administrators,[7] or the specialized educational qualifications of exempt "professionals,"[8] They are essentially "line-level" employees and are therefore entitled to overtime protections as a matter of law. For example, Plaintiffs Tawney Chevalier and Andrew Hiller worked in small retail stores and spent most of their time performing non-managerial duties such as assisting customers, stocking shelves, and operating the cash register.

Moreover, workers paid under the PMWA 1.5 Method generally are not well paid. In the underlying opinions, Judges Wettick and Moulton both used examples

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[5] The PMWA 1.5 Method requires employers to pay a premium of 1.5 times the regular rate for overtime hours, as opposed to the federal .5 x regular rate permitted in federal FWW cases.
[6] 34 Pa. Code § 231.82.
[7] 34 Pa. Code § 231.83.
[8] 34 Pa. Code § 231.83.

in which a hypothetical employee earns a salary of $1,000 per week. *See Chevalier v. General Nutrition Centers, Inc.*, 177 A.3d 280, 283-84 (Pa. Super. 2017). While the $1,000 salary makes for a clean example, it does not reflect the real-life economic circumstances of the workers and families paid under the PMWA 1.5 Method. For example, Tawney Chevalier's base weekly salary was around $658, while Andrew Hiller's base weekly base salary was around $552. *See also* GNC Brief at 13 (referencing "real world example" of employee covered by Federal FWW Method earning "total weekly wages of $753.06").

It is plainly a challenge for salaried workers like Ms. Chevalier and Mr. Hiller to make ends meet. According to the Economic Policy Institute's Family Budget Calculator, the income needed to support a two-parent, two-child family in Pennsylvania, sorted by county, range from $68,601 to $104,775, with the median landing at approximately $79,000.[9] Meanwhile, the National Low Income Housing Coalition reports that a household in Pennsylvania must earn at least $40,616 a year to afford median rental costs for an adequate two-bedroom apartment.[10]

In sum, most workers paid under the PMWA 1.5 Method earn relatively low

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[9] The Family Budget Calculator is available at https://www.epi.org/resources/budget/ and its findings regarding Pennsylvania families are summarized by the Keystone Research Center at https://www.keystoneresearch.org/media-center/press-releases/economic-policy-institute-family-budget-calculator-shows-what-families-n

[10] *See* National Low Income Housing Coalition, *Out of Reach – The High Cost of Housing* (2018) at 201, available at: http://nlihc.org/sites/default/files/oor/OOR_2018.pdf

salaries and lack the managerial, administrative, and professional characteristics of overtime-exempt employees. The PMWA was enacted to protect workers who "are not as a class on the level of equality in bargaining with their employers in regard to fair wage standards, and 'freedom of contract' as applied to their relations with their employers are illusory." 43 P.S. § 333.101.[11] These are clearly the workers who rely on the PMWA 1.5 Method when they work overtime hours.

C. The Federal FWW Method injures workers and their families and is inconsistent with the public policy underlying Pennsylvania's overtime mandate.

Many jurists have recognized the economic harm caused by the Federal FWW Method. Judicial criticism falls into three basic categories:

First, judges observe that the Federal FWW Method makes overtime so cheap that it incentivizes companies to over-work non-exempt salaried employees. For example, in *Hasan v. GPM Investments, LLC*, 896 F. Supp. 2d 145 (D. Conn. 2012), the court observed that the Federal FWW Method "adds up to a perverse incentive" for companies to require non-exempt salaried employees to work long hours. *Id.* at 147; *accord Burris v. Dresser-Rand Co.*, 222 F. Supp. 3d 1067, 1075 (N.D. Okla. 2016). As Judge Wettick's underlying opinion observed, this contradicts public policy:

> Most employees have no protection from being required to

[11] *Accord Davis v. Sulcowe*, 205 A.2d 89, 90-91 (Pa. 1964); *Lugo v. Farmers Pride, Inc.*, 967 A.2d 963, 968-69 (Pa. Super. 2007).

> work excessive hours. For many salaried employees, excess overtime substantially interferes with the employees' responsibilities as parents and spouses and their participation in community and in religious activities.

Chevalier, 42 Pa. D. & C.5th at 26 n. 4.

In addition to interfering with personal responsibilities and community participation, excessive work hours correlate with an increased risk of workplace injuries and stress[12] and significantly increase the risk of physical disease such as, for example, chronic heart disease, non-skin cancer, arthritis, and diabetes.[13] Also, as weekly work hours increase to unreasonable levels, so too does the risk for hypertension[14] and other stress-related ailments.[15] Thus, rejection of the Federal FWW Method discourages excessive work hours and, in so doing, minimizes the social problems associated with excessive overtime.

Second, judges observe that, by encouraging employers to assign overtime work disproportionately to salaried employees, the Federal FWW Method

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[12] *See* Ellen Galinsky, et al., *Overwork in America: When the way we work becomes too much.* (Families and Work Institute 2005).

[13] *See* Allard E. Dembe & Xiaoxi Yao, *Chronic Disease Risks From Exposure to Long-Hour Work Schedules Over a 32-Year Period*, 58 Journal of Occupational and Environmental Medicine 861 (Sept. 2016); *see also* https://workfamily.sas.upenn.edu/category/legacy-topics/overwork (listing various studies addressing health consequences of over-work).

[14] Dong Hyun Yoo, et al., *Effect of Long Working Hours on Self-reported Hypertension among Middle-aged and Older Wage Workers*, 26 Annals of Occupational and Environmental Medicine 25 (2014), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4387782/.

[15] *See generally* Joel Goh, et al., *Workplace stressors & health outcomes: health policy for the workplace*, 1 Behavioral Science & Policy 55 (2015). available at https://behavioralpolicy.org/articles/workplace-stressors-health-outcomes-health-policy-for-the-workplace/

undermines the "work-sharing" goals underlying overtime pay mandates. For example, in *Zulewski v. The Hershey Co.*, 2013 U.S. Dist. LEXIS 23448 (N.D. Cal. Feb. 20, 2013), the court observed that the Federal FWW Method "goes against the FLSA's intention of encouraging employers to spread employment among more workers, rather than employing fewer workers who must then work longer hours." *Id.* at *15-16. The PMWA overtime mandates have the same goal. Once again, Judge Wettick's underlying opinion concisely summarizes this viewpoint:

> The fluctuating workweek method of compensating salaried employees provides very little financial incentive to expand the workforce.

Chevalier, 42 Pa. D. & C.5th at 27 (footnote and internal citations omitted).

Expanding the workforce by hiring more employees or giving part time employees more hours in lieu of requiring salaried employees to work excessive overtime remains an important public policy concern. As of 2015, 20.7% of part-time employees (7.2 million workers) work part-time because full-time work is unavailable,[16] and involuntary part-time work is especially common in some low-

[16] Anne Morrison & Katherine Gallagher Robbins, *Fact Sheet: Part-Time Workers Are Paid Less, Have Less Access to Benefits – and Two-Thirds Are Women* (National Women's Law Center Sept. 2015), available at https://www.google.com/search?q=Anne+Morrison+%26+Katherine+Gallagher+Robbins%2C+nwlc%2C+Part-Time+Workers+are+Paid+Less%2C+Have+Less+Access+to+Benefits%E2%80%94and+Two-Thirds+are+Women+2+%28Sept.+2015%29%2C+&ie=utf-8&oe=utf-8&client=firefox-b-1-ab

wage sectors such as retail.[17]

These dual concerns about spreading employment while curbing excessive work hours remains as relevant today as when the PMWA and FLSA were enacted. Despite steadily improving job growth and a declining unemployment rate, real wages for all but the highest-paid employees have remained stagnant for decades, due in part to the growth in involuntary part-time and other forms of insecure employment.[18] At the same time, an astounding 25% of salaried employees report they regularly work 60-plus hours each week, while another 25% reportedly work between 50 and 59 hours weekly.[19] The Federal FWW Method exacerbates an economy in which too many full-time salaried workers are working excessive hours at the expense of part-time workers whose hours are inadequate. GNC has failed to offer any evidence that the PMWA should be interpreted in a manner that encourages employers to allocate work hours in this manner.

Third, judges observe that the Federal FWW Method encourages employers to aggressively classify salaried workers as overtime-exempt. There is less

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[17] *See* Steven Greenhouse, *A Push to Give Steadier Shifts to Part-Timers*, New York Times (July 15, 2014), available at https://www.nytimes.com/2014/07/16/business/a-push-to-give-steadier-shifts-to-part-timers.html

[18] *See generally* Drew DaSilva, *For most U.S. workers, real wages have barely budged in decades*, (Pew Research Center Aug. 7, 2018), available at http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/

[19] *See* Greenhouse, *supra*; Lydia Saad, *The Forty-Hour Workweek is Actually Longer – by Seven Hours* (Gallup Aug. 2014), available at https://news.gallup.com/poll/175286/hour-workweek-actually-longer-seven-hours.aspx

economic risk to such statutorily repugnant behaviors since, if the employer is found liable for misclassification and required to pay overtime damages, such damages will be minimized by the Federal FWW Method. As U.S. District Judge Claudia Wilken has observed, "[I]t would be incongruous to allow employees, who have been illegally deprived of overtime pay, to be shortchanged further by an employer who opts for the [Federal FWW Method]." *Russell v. Wells Fargo & Co.*, 672 F. Supp. 2d 1008, 1014 (N.D. Cal. 2009); *see also Zulewski*, 2013 U.S. Dist. LEXIS 23448, at *15.

Simply put, the Federal FWW Method has been nothing but trouble for workers and their families. Fortunately – and as discussed below – Pennsylvania has charted a different path.

D. Rejection of the Federal FWW Method is consistent with Pennsylvania's long tradition of providing Pennsylvania workers and their families with PMWA protections that extend beyond the FLSA's minimal "national floor."

GNC and its *amici* argue that the Courts should not make decisions regarding state overtime laws that go beyond federal requirements. *See* GNC Brief at 23-28; Pa. Chamber Brief at 4-6. However, Pennsylvania judges have repeatedly interpreted the PMWA to provide workers and their families with PMWA rights that go beyond the FLSA's minimal "national floor." *Bayada*, 8 A.3d at 883. Examples abound:

In *Bayada Nurses, Inc. v. Dept. of Labor and Industry*, 8 A.3d 866 (Pa.

2010), this Court held that the PMWA entitled home health workers employed by third-party agencies to overtime premium pay even though these same employees were "exempt" at the time under the FLSA. *See id.* at 876-85. In so holding, this Court observed:

> [T]he FLSA does not supersede state law; Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees; and it is not mandated that state regulation be read identically to, or in pari materia with, the federal regulatory scheme.

Bayada, 8 A.3d at 883; *see also Knepper v. Rite Aid Corp.*, 675 F.3d 249, 262 (3d Cir. 2012) (observing that FLSA "evinces a clear intent to preserve rather than supplant state law" and recognizing "states' lengthy history of regulating employees' wages and hours").

In *Ciarelli v. Sears, Roebuck & Co.*, 46 A.3d 643 (Pa. 2012), this Court dismissed the appeal as "improvidently granted." *Id*. at 644. However, in dissenting from the dismissal, Justice McCafferty wrote an opinion (joined by Justice Todd) suggesting that the FLSA's "Portal-to-Portal Act" and "*de minimis*" restrictions on compensable work are not applicable to PMWA claims. *See id.* at 648.[20]

[20] Similarly, several courts outside of Pennsylvania have recently refused to read the FLSA's Portal-to-Portal and *de minimis* restrictions into state wage laws. *See Busk v. Integrity Staffing Solutions, Inc.*, __ F.3d __, 2018 U.S. App. LEXIS 26634 (6th Cir. Sept. 19, 2018) (FLSA's Portal-to-Portal restrictions inapplicable to Arizona and Nevada wage claims); *Troester v. Starbucks Corp.*, 421 P.3d 1114 (Cal. 2018) (FLSA's *de minimis* principles inapplicable to California wage claims).

In *LeClair v. Diakon Lutheran Social Ministries*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 1 (Pa. Com. Pl., Lehigh Cty. Jan. 14, 2013), *Bordel v. Geisinger Medical Center*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 37 (Pa. Com. Pl., Northumberland Cty. May 6, 2013), and *Turner v. Mercy Health System*, 2010 Phila. Ct. Com. Pl. LEXIS 146 (Pa. Com. Pl., Phila. Cty. March 10, 2010), Judges Varricchio, Saylor, and Fox all agreed that the FLSA's employer-friendly "8-80 Method" of calculating hospital workers' overtime pay was unavailable under the PMWA.

In *Dept. of Labor v. Whipple*, 6 Pa. D. & C. 4th 418 (Pa. Com. Pl., Lycoming Cty. 1989), Judge Raup held that agricultural workers could assert PMWA overtime claims even though they were exempt under the FLSA.

In *Bonds v. GMS Mine Repair & Maintenance, Inc.*, No. 2015-6310 (Pa. Com. Pl., Washington Cty. Dec. 13, 2017), Judge Faldowski held that the FLSA's Portal-to-Portal limitations and the U.S. Supreme Court's decision *in Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014), were irrelevant to a manual laborer's PMWA claim that the employer failed to pay him for all compensable work time. *See* Appendix A at 7-9. The Judge observed:

> Although the Integrity Staffing case significantly changed the scope of the federal law regarding compensation of pre- and post-shift work activities, the case ultimately has no impact on Plaintiff's [P]MWA claim. As previously stated, the law in Pennsylvania provides greater protection for employees than the federal law, and Pennsylvania has refused to adopt the

> FLSA. The standard set forth in Integrity Staffing is inapplicable to plaintiffs' state law claims, therefore Defendant's Motion for Summary Judgment is DENIED.

Id. at 9.

In *In re Cargill Meat Solutions Wage and Hour Litig*., 632 F. Supp. 2d 368 (M.D. Pa. 2008), Judge Nealon held that, while the FLSA permits labor unions to "negotiate away" workers' rights to be paid for certain pre-shift "clothes-changing" activities, such provisions did not limit the workers' rights to recover for such activities under the PMWA. *See id.* at 392-94. The Judge observed that the PMWA "is more protective in individual employee rights" than the FLSA. *Id.* at 394.

In *Reed v. Friendly's Ice Cream, LLC*, 2016 U.S. Dist. LEXIS 62197 (M.D. Pa. May 11, 2016), Judge Rambo held that workers could seek injunctive relief under the PMWA even though such relief is unavailable to private litigants under the FLSA. *See id.* at *14-16.

In *Truman v. DeWolff, Bomberg & Associates, Inc.*, 2009 U.S. Dist. LEXIS 57301 (W.D. Pa. July 7, 2009), Judge Cohill held that the PMWA provided overtime protections to Pennsylvania workers stationed outside of the United States, even though the FLSA contained a specific exemption for such work. The Judge observed that this expansive reading of the PMWA was consistent with the law's broad remedial purpose. *See id.* at *5.

In *Gonzalez v. Bustleton Services, Inc.*, 2010 U.S. Dist. LEXIS 23158 (E.D. Pa. March 5, 2010), Magistrate Judge Hey explained that, while the FLSA requires workers to demonstrate a "willful violation" in order to benefit from a 3-year (rather than 2-year) limitations period, the PMWA carries an automatic 3-year limitations period. *See id.* at *19-21.

In *Sloan v. Gulf Interstate Field Services, Inc.*, 2016 U.S. Dist. LEXIS 29458, *15 (W.D. Pa. March 8, 2016), and *Galdo v. PPL Electric Utilities Corp.*, 2016 U.S. Dist. LEXIS 14045, *9 (E.D. Pa. Feb. 5, 2015), Judges Fisher and Sanchez agreed that the FLSA's "highly compensated" employee exemption did not exist under the PMWA and, therefore, was irrelevant to the PMWA claims.

In sum, there is nothing novel or unusual with respect to the result reached by the Superior Court majority. The PMWA's prohibition of the Federal FWW Method is just one of many examples of the PMWA helping Pennsylvania workers to rise above the FLSA's "national floor."

E. The Superior Court majority's rejection of the Federal FWW Method is unsurprising and merely reinforces the prevailing view of Pennsylvania overtime law.

Although this case is one of first impression before this Court, Pennsylvania judges in four other cases have addressed the issue of whether the Federal FWW

Method can be used under the PMWA.[21] They all have rejected its use. Thus, there simply is no merit to the assertion by the Pennsylvania Chamber of Business and Industry and its fellow *amici* that, prior to the Superior Court's 2017 ruling, employers lacked "any prior indication that Pennsylvania followed a different rule." PA Chamber Brief at p. 3; *see also id.* at 10-11.

Since 1993, four Federal Judges have explained to GNC and other businesses that the Federal FWW Method is not permitted under the PMWA. *See Friedrich v. U.S. Computer Services, Inc*., 833 F. Supp. 470, 475-76 (E.D. Pa. 1993) (Gawthrop, J.); *Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920, 942-45 (W.D. Pa. 2011) (Conti, J.); *Foster v. Kraft Foods Global, Inc.*, 285 F.R.D. 343, 344-48 (W.D. Pa. 2012) (Bissoon, J.); *Verderame v. Radioshack Corp.,* 31 F. Supp. 3d 702, 703-10 (E.D. Pa. 2014) (Goldberg, J.).[22]

As a result of the above decisions, most Pennsylvania employment lawyers have considered it settled law that the Federal FWW Method violates the PMWA. Professional organizations and attorneys who advise employers have warned their clients that the Federal FWW Method should not be used in all states, including Pennsylvania. In fact, nearly *five years ago* years ago in the *Verderame* action,

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[21] Those cases interpret regulations described in 34 Pa. Code § 231.43. GNC has disclaimed reliance on such regulations. *See* GNC Brief at 14, 29-30. Nevertheless, as Judge Moulton found, their reasoning is "instructive." *Chevalier*, 177 A.3d at 296.

[22] Although GNC argues these cases are wrongly decided, *see* GNC Brief at 50-53, they have not been overruled and remain the law under which that Pennsylvania employers have operated.

undersigned counsel submitted to Judge Goldberg a collection of website pages in which corporate defense firms advised their clients against utilizing the Federal FWW Method in Pennsylvania. *See* Appendix B. More recently (but well before the Superior Court's ruling), Fisher Phillips, among the country's leading employment law firms representing business, advised clients that Pennsylvania rejected the Federal FWW Method.[23] Likewise, the Society for Human Resource Management ("SHRM"), purportedly "the world's largest HR professional society, representing 300,000 members in more than 165 countries,"[24] advises that several states, including Pennsylvania, do not permit use of the Federal FWW Method.[25]

Moreover, nearly *25 years ago*, Judge Gawthrop recognized that "There is no state-law analog to the [Federal FWW Method]" and bluntly provided the following advice to the business community:

> While it might be convenient for defendant and multi-state employers if federal law and Pennsylvania law were identical on the issue of overtime compensation, the fact is that they are not.

Friedrich, 833 F. Supp. at 476 (emphasis supplied).

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[23] Fisher Phillips Wage and Hours Laws Blog, *Fluctuating-Workweek Plans: Don't Forget State Law!* (Jan. 27, 2017), available at https://www.fisherphillips.com/Wage-and-Hour-Laws/fluctuating-workweek-plans-dont-forget-state-law

[24] *See* https://www.shrm.org/about-shrm/pages/default.aspx

[25] See Lisa Nagele-Piazza, *Should Employers Use the Fluctuating Workweek Method?* (SHRM Mar. 13, 2017), available at https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/fluctuating-workweek-method-of-calculating-overtime-pay.aspx

F. In rejecting the Federal FWW Method, Pennsylvania is not an outlier, as six other states also have rejected the Federal FWW Method.

Consistent with this Court's observation that the FLSA "establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded," *Bayada*, 8 A.3d at 883, various state courts have refused to impose the Federal FWW Method on workers covered by their state's overtime laws. These court decisions contradict GNC's assertion that affirming the Superior Court majority will make Pennsylvania "the first and only state where the Federal FWW method was deemed unlawful in the absence of an express statutory prohibition." GNC Brief at 30). While it is true that Alaska prohibited the use of the Federal FWW by the regulation upheld in *Dresser Industries, Inc. v. Alaska Dept. of Labor*, 633 P.2d 998 (Alaska 1981), other state statutes have been interpreted to prohibit the Federal FWW Method without having either express statutory or regulatory prohibitions.

In particular, some states have concluded, similar to Judge Moulton, that the Federal FWW Method is not permitted under state law because it is incompatible with other wage and hours provisions, either statutory, regulatory, or both. For example, in *Skyline Homes, Inc. v. Dept. of Industrial Relations*, 211 Cal. Rptr. 792 (Cal. Ct. App. 1985), the California Court of Appeals refused to allow California employers to use the Federal FWW Method in determining the overtime pay owed

to salaried manufacturing workers based upon other statutory and regulatory provisions it interpreted as incompatible with the Federal FWW Method.[26] *See id.* at 794-802. A similar approach was taken by the Montana Supreme Court in *Glick v. State of Montana*, 509 P.2d 1 (Mont. 1973). Likewise, in *Williams v. General Nutrition Centers, Inc.*, 166 A.3d 625 (Conn. 2017), the Connecticut Supreme Court, relying on *administrative* orders that it interpreted to be incompatible with the Federal FWW Method, held that GNC's use of the Federal FWW Method to pay its salaried employees violated Connecticut wage law. *See id.* at 627-34[27].

Meanwhile, like Judge Wettick in his underlying opinion, rulings in New Mexico and New Jersey interpret state laws to prohibit the Federal FWW Method based on the public policy behind the laws. Particularly, in *New Jersey Dept. of Labor v. Pepsi Cola Co.*, 2000 WL 34401845 (N.J. Admin. Aug. 29, 2000), the New Jersey Commissioner of Labor issued a final determination holding that using the Federal FWW Method to determine overtime wages under the New Jersey Wage and Hour Law was not "legally or equitably appropriate." *Id.* at 5. As the Commissioner explained, the absence of any state law provision explicitly

---

[26] As in the current appeal, *see* Chamber Brief at p11, a group of *amici* trade organizations complained to the *Skyline* Court that "employers with nationwide wage programs will have to deviate from those programs and suffer added costs" when doing business in California. *Skyline*, 211 Cal. Rptr. at 801-02. The Court rejected this argument, observing that "protecting . . . employees is a legitimate state interest." *Id.* at 802.

[27] The Court rejected GNC's argument – which is similarly made by GNC and its amici in the instant appeal Briefs at) – that only state statutory law can override the Federal FWW Method. *See id.*

adopting the Federal FWW Method is, standing alone, dispositive of the issue. *See id.* On appeal, the Appellate Division of New Jersey's Superior Court affirmed the Commissioner's holding. *See New Jersey Dept. of Labor v. Pepsi Cola Co.*, 2002 N.J. Super. Unpub. LEXIS 2, *260-73 (N.J. Super Ct. App. Div. Jan. 31, 2002), *cert. denied*, 798 A.2d 1271 (N.J. 2002).

More recently, in *Frisari v. Dish Network, LLC*, AAA Case No. 18-160-001431-12 (Oct. 30, 2015), retired New Jersey Appellate Division Judge William A. Dreir issued a detailed arbitration award agreeing that the Federal FWW Method "has no basis in New Jersey law." *See* Appendix C at 2. Judge Dreir's thoughtful analysis – which is similar to Judge Wettick's analysis in the instant lawsuit – bears repeating:

> The New Jersey Supreme Court has noted the remedial purpose of the NJWHL and has dictated that this law "should be given a liberal construction." *New Jersey Dep't of Labor v. Pepsi-Cola Co.*, 170 N.J. 59, 62 (2001). By engrafting this Fluctuating Work Week exception, the Arbitrator would not be giving this liberal construction to the law. If the Legislature or the Department of Labor through its regulatory powers had determined that the Fluctuating Work Week standard should apply, it could have amended the statute or promulgated a regulation in the many years that this rule has been applicable to the FLSA. As the New Jersey authorities have not done so, the Arbitrator will not make this extension here. The Arbitrator finds the Pennsylvania approach in *Verderame*, measured against the liberal construction required by the New Jersey courts, to be the correct application to apply in this case.

Id. at 6-7 (footnote omitted); *see also New Mexico Dept. of Labor v. Echostar*

Communications Corp., 134 P.3d 780 (N.M. Ct. App. 2006) (rejecting Federal FWW Method basedon public policy behind New Mexico Minimum Wage Act).

In sum, there is nothing sacred about the Federal FWW Method. At least six other states have rejected the method, upholding state sovereignty and protecting the state's workers on top of the FLSA's "minimum floor."

III. CONCLUSION

Based on the above, *Amici* respectfully request that the Court affirm the Superior Court majority opinion.

Dated: September 26, 2018

Respectfully,

/s/ Peter Winebrake

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: September 26, 2018

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WORD COUNT CERTIFICATION

In accordance with Pennsylvania Rule of Appellate Procedure 531(b)(3), I certify that the attached brief contains 5,464 words as calculated by the word-count feature of Microsoft Word.

Date: September 26, 2018

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CERTIFICATE OF SERVICE

I certify that, on September 26, 2018, I caused a copy of the foregoing to be served on the following via PACFile, which satisfies Pennsylvania Rule of Appellate Procedure 121:

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Appendix A

Slip Opinion in *Bonds v. GMS Mine Repair & Maintenance, Inc.*, No. 2015-6310 (Pa. Com. Pl., Washington Cty. Dec. 13, 2017)

Larry Weisburg, Esq.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JOSEPH A. BONDS, individually and on Behalf of all others similarly situated,	)	ENTRY OF OPINION & ORDER, DECREE, ADJUDICATION OR JUDGMENT FILED 12-13-17
	)	MAILED 12-13-17
	)	TO Larry Weisburg, Esq.
Plaintiffs,	)	
	)	
vs.	)	Civil Action No. 2015-6310
	)	
GMS MINE REPAIR & MAINTENANCE, INC.,	)	
	)	
Defendant.	)	

December 12, 2017

OPINION

The matter presently before the Court pertains to the Motion for Partial Summary Judgment and Supplemental Motion for Summary Judgment filed on behalf of ~~Defendant~~, GMS Mine Repair & Maintenance, Inc. (hereinafter "GMS" or "Defendant"). Plaintiffs filed a Motion for Class Certification on June 24, 2016, and Defendant filed a Motion for Partial Summary Judgment on September 16, 2016. The Court decided to delay argument on Defendant's Motion until the Court disposed of Plaintiffs' Motion for Class Certification. The Court granted Plaintiffs' Motion for Class Certification on January 30, 2017, and Defendant subsequently filed a Supplemental Motion for Summary Judgment. The Plaintiffs filed responses to the Motions and the Court held argument on August 2, 2017.

I. Statement of the Case

GMS provides underground maintenance and contracting services at the Enlow Fork Mine (hereinafter " the Mine") located in East Finley, Pennsylvania, which is owned and

operated by Consol Energy (hereinafter "Consol"). Plaintiffs are former GMS employees who worked at the Mine. The putative class includes current and former GMS employees who work or have worked at the Mine from April 27, 2012 until April 14, 2014. GMS miners were assigned to work 8:00 A.M. to 4:00 P.M., 4:00 P.M. to 12:00 A.M., or 12:00 A.M. to 8:00 A.M. All shifts were paid for eight (8) hours of work. Sometime in 2012, Consol informed GMS that contractor employees, including those from GMS, would have to park in a satellite lot approximately one quarter mile away and take a shuttle to the Portal.

Before the policy change in 2012, GMS employees were permitted to park in a lot adjacent to the Pleasant Grove Portal (hereinafter "the Portal"). Initially, the shuttle was to run continuously up until fifteen minutes before the start of a shift, or longer. At some point, this practice was later changed by the site coordinator so that the shuttle would stop running approximately 30 minutes prior to the start of the shift. All GMS employees, who were transported to the Portal by shuttle at the start of their shift, would also be transported back to the parking lot via the shuttle at the end of the shift. GMS employees were not compensated for the time spent waiting to be transported to or from the Portal via the shuttle.

Prior to beginning their shifts, GMS employees would often have discussions about safety and, on some occasions, individual employees would be selected for random drug tests. Some GMS employees were randomly drug tested after their shift had ended. GMS employees

were not compensated for the time spent in the safety meetings, nor were they paid for the time spent taking random drug tests before their shift started or after their shift ended.

Plaintiffs initially filed suit in the United States District Court for the Western District of Pennsylvania. The Honorable Terrence F. McVerry granted Defendant's Motion for Summary Judgment on Plaintiffs' federal wage and hour claims, but declined to exercise supplemental jurisdiction over Plaintiffs' state law claims under the Pennsylvania Minimum Wage Act (hereinafter "MWA") and the Pennsylvania Wage Payment and Collection Law (hereinafter "WPCL"). On October 1, 2015, Plaintiffs filed a praecipe to transfer the MWA and WPCL claims to this Court.

II. Standard of Review

Pursuant to Pa.R.C.P. No. 1035.2, a motion for summary judgment may be filed by any party once the relevant pleadings are closed and:

1. Whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
2. If, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2.

In the case presently before the Court, Defendant is seeking summary judgment under Pa.R.C.P. No. 1032.2. A motion for summary judgment may only be granted when the moving party is entitled to judgment in its favor as a matter of law. *Lance v. Wyeth*, 85 A.3d 434, 449 (Pa. 2014). Additionally, "facts and reasonable derivative inferences are generally considered in the light most favorable to the non-moving party, and doubts are resolved against the moving party." *Id.*

III. Discussion and Analysis

A. Breach of Contract Claim

According to Defendant, Plaintiffs' claim for breach of contract must fail as a matter of law because Defendant never manifested the intent to enter into any agreement to pay GMS employees for the pre- and post-shift activities described in the pleadings. Defendant further claims that Plaintiffs undermined the breach of contract claim by their own admissions. Specifically, Defendant argues that Plaintiffs' deposition testimony is evidence that the contract claim is based on their own subjective impressions and assumptions, rather than a uniform understanding between Defendant and the GMS miners. Conversely, Plaintiffs claim that there exists an oral contract for employment between Defendant and GMS employees and, since employment contracts need not be in writing, this oral agreement is sufficient to maintain the breach of contract claim.

It is obvious that the issue of whether a contract exists between the parties is material to Plaintiffs' claim for breach of contract. "When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery." *Swords v.*

Harleysville Ins. Companies, 883 A.2d 562 (Pa. 2005)(citing *Fine v. Checcio*, 870 A.2d 850 (Pa.2005)). At this time, there remain genuine issues of material fact as to whether a contract existed between the parties. Therefore, Defendant's Motion for Summary Judgment, as to Plaintiffs' breach of contract claim, is DENIED.

B. Pennsylvania Wage Payment and Collection Law

The parties agree that the WPCL is a vehicle for enforcing the rights under a contract, and therefore if Plaintiffs' contract claim fails then so must the claim under the WPCL. *See Oxner v. Cliveden Nursing & Rehab. Ctr. PA, L.P.*, 132 F. Supp. 3d 645 (E.D. Pa. 2015); *Bootel v. Verizon Directories Corp.*, No. 03-1997, 2004 WL 1535798, at *1 (E.D. Pa. June 25, 2004); *McIntyre v. Philadelphia Suburban Corp.*, 90 F.Supp.2d 596 (E.D. Pa. 2000). The Court has already determined that Plaintiffs' breach of contract claim survives summary judgment, therefore it follows that the WPCL claim also survives. Defendant's Motion for Summary Judgment as to Plaintiffs' WPCL claim is hereby DENIED.

C. Pennsylvania Minimum Wage Act of 1968

1. Doctrine of Collateral Estoppel

Defendant argues that the doctrine of collateral estoppel precludes Plaintiffs from pursuing their claim under the MWA. Specifically, Defendant claims that Plaintiffs had the opportunity to fully litigate the MWA claim when the case was initially filed in federal court and, since Defendant's Motion for Summary Judgment was granted by Judge McVerry, Plaintiffs cannot relitigate this claim before this Court.

In Pennsylvania, the doctrine of collateral estoppel applies when the following circumstances are present: (1) the issue decided in a prior proceeding is identical to the one

presented in a later action; (2) there exists a final judgment on the merits; (3) the party defending the suit was a party or is in privity with a party to the prior proceeding; and (4) the party asserting the claim has had a full and fair opportunity to litigate the issue in the prior proceeding. *Murphy v. Duquesne University of The Holy Ghost*, 777 A.2d 418 (Pa. 2001). It is undisputed that the parties in the matter presently before the Court are the same parties that participated in the proceedings in the Federal Court. However, it is clear to this Court that Plaintiffs did not have the opportunity to fully litigate the MWA claim.

On September 23, 2017, Judge McVerry issued an Opinion and Order granting Defendant's Motion for Summary Judgment. Judge McVerry determined that the pre- and post-shift safety meetings were not compensable under the Federal Labor Standards Act (hereinafter "FLSA"). Importantly, Judge McVerry only decided the issues under the federal law and expressly declined to exercise supplemental jurisdiction over the remaining state law claims under the WPCL and MWA. In fact, and in support of his decision to decline jurisdiction, Judge McVerry reasoned that Plaintiffs' WPCL *and* MWA claims raise novel issues of state law.[1]

Although Judge McVerry's decision constitutes a final judgment on the merits with respect to Plaintiffs' claims through the lens of the federal law, his decision is not of any consequence to Plaintiffs' state law claims. Plaintiffs have yet to have the opportunity to fully litigate the MWA claim since Judge McVerry refused to exercise jurisdiction over the state claims. Therefore, the doctrine of collateral estoppel is inapplicable and Defendant's Motion for Summary Judgment as to Plaintiffs' PMWA claim is DENIED.

[1] *See* Memorandum Opinion and Order of Court filed September 23, 2017 by Judge McVerry in the United States District Court for the Western District of Pennsylvania.

2. "Hours Worked"

Defendant claims that the pre- and post-shift activities performed by Plaintiffs do not constitute activities that are included in the legal definition of "hours worked." In Pennsylvania, the phrase "hours worked" is explicitly defined under the MWA as the following:

> Hours worked -- The term includes time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place, time spent in travelling as part of the duties of the employee during normal working hours and time during which an employee is employed or permitted to work [. . .]
>
> 34 Pa. Code §231.1(b)

In *Lugo v. Farmers Pride, Inc.*, 967 A.2d 963 (Pa.Super.2009), the Superior Court of Pennsylvania decided that the phrase "hours worked" is a term of art, that "includes all time that the worker is required to be on the employer's premises." In the instant case, whether or not the pre- and post-shift activities fall within this definition is integral to Plaintiffs' MWA claim, thus there remains issues of material fact that preclude summary judgment. Therefore, Defendant's Motion for Summary Judgment as to Plaintiffs' claim under the MWA is DENIED.

3. Federal Fair Labor Standards Act of 1938

According to Defendant, since Plaintiffs' claim under the FLSA failed at the federal level, Plaintiffs' MWA claim should also fail. Plaintiffs, on the other hand, argue that Pennsylvania has explicitly refused to adopt the FLSA, and the MWA and FLSA are not interchangeable. For the following reasons, the Court agrees with Plaintiffs.

The United States District Court of the Eastern and Middle Districts of Pennsylvania have interpreted and compared the FLSA and the MWA. In doing so, both Courts have

determined that the purpose of the FLSA is "to establish a national floor under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." See *Verderame v. RadioShack Corp.*, 31 F. Supp. 3d 702 (E.D. Pa. 2014); *In re Cargill Meat Solutions Wage and Hour Litigation*, 632 F. Supp. 2d 368 (M.D. Pa. 2008); *Lehman v. Legg Mason*, 532 F. Supp. 2d 726 (M.D. Pa. 2007). Moreover, the Court in the *In re Cargill* case discussed extensively that, in enacting the FLSA, it was not the intent of Congress to "interfere with a state's police powers with respect to wages and hours more generous than the federal standards." *In re Cargill Meat Solutions Wage and Hour Litigation*, 632 F. Supp. 2d 368 (M.D. Pa. 2008). The Court goes on to discuss how the laws in Pennsylvania are more "employee-protective" than the FLSA, thus establishing a distinct difference between the two laws. *Id.*

Since Pennsylvania has not fully adopted the provisions of the FLSA, and since Pennsylvania law, in general, offers stronger protections for employees, the Court finds that it would be inappropriate to see the MWA and FLSA as interchangeable. The law under the FLSA and Pennsylvania's MWA are substantively different, therefore Plaintiffs' MWA claim does not fail simply because the FLSA claim has already been disposed of by the federal court. Defendant's Motion for Summary Judgment as to Plaintiffs' MWA claim is DENIED.

4. Integral and Indispensable Duties

Defendant argues that the pre- and post-shift activities outlined in the pleadings do not meet the standard of "integral and indispensable duties" as determined by the Supreme Court of the United States (hereinafter "SCOTUS"), therefore these activities are not compensable under the law. In *Integrity Staffing Solutions, Inc., v. Busk*, 135 S. Ct. 513 (2014), SCOTUS considered

whether certain postliminary activities were "integral and indispensable" and therefore compensable under the FLSA. The Court held that employees could only be compensated for pre- and post-shift activities under the FLSA if "it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id.*

Although the *Integrity Staffing* case significantly changed the scope of the federal law regarding compensation of pre- and post-shift work activities, this case ultimately has no impact on Plaintiffs' MWA claim. As previously stated, the law in Pennsylvania provides greater protection for employees than the federal law, and Pennsylvania has refused to adopt the FLSA. The standard set forth in *Integrity Staffing* is inapplicable to Plaintiffs' state law claims, therefore Defendant's Motion for Summary Judgement is DENIED.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JOSEPH A. BONDS, individually and on Behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 2015-6310
GMS MINE REPAIR & MAINTENANCE, INC.,	)	
Defendant.	)	

ORDER

AND NOW, this 12th day of December, 2017, upon consideration of the briefs and arguments of counsel, it is hereby ORDERED that Defendant's Motion for Partial Summary Judgment and Supplemental Motion for Summary Judgment are DENIED.

BY THE COURT,

_____, J.
Damon J. Faldowski, J.

Appendix B

Website Pages Submitted to Judge Goldberg in
***Verderame v. Radioshack Corp.* (U.S.D.C., E.D. Pa. 2014)**

Court Rules that Pennsylvania Minimum Wage Act Does Not Permit Fluctuating Work Week
9/11/2012
Articles & Alerts

On August 27, 2012, the District Court for the Western District of Pennsylvania ruled that the Pennsylvania Minimum Wage Act ("PMWA") does not permit employers to use the fluctuating workweek method of calculating overtime pay, even though federal law permits it.

In *Foster v. Kraft Foods Global Inc.*, 2012 WL 3704992 (W.D. Pa. Aug. 27, 2012), Plaintiff Terri L. Foster ("Foster") was a former sales representative of Kraft Foods Global, Inc. ("Kraft"). Kraft is a multi-state employer, but Foster only serviced clients in Pennsylvania. On July 1, 2007, Kraft adopted the fluctuating workweek method of overtime compensation. Although Foster began a medical leave after just 16 days (from which she never returned), she claimed that she had worked overtime during that period for which she was not adequately compensated.

Under the fluctuating workweek method of overtime calculation, an employer divides an employee's weekly salary by the number of hours he or she worked in a given week. *See* 29 C.F.R. §778.114. The resulting hourly rate is called the employee's "regular rate." If an employee works more than 40 hours in a week, he or she is then compensated for the overtime hours at half their regular rate. This method of overtime calculation is permissible under federal law so long as it does not cause an employee's regular rate to drop below minimum wage.

Foster argued that the fluctuating workweek method of overtime payment did not apply in Pennsylvania because the PMWA requires employers to pay employees at a rate of time and a half for all hours worked in excess of 40 hours per week, *see* 34 Pa. Code §231.43(d)(3), and the PMWA's regulations do not specifically provide for the fluctuating workweek. The court agreed.

The court ruled that, given the plain language of §231.43(d)(3), employers cannot apply the fluctuating workweek in Pennsylvania because, in doing so, they would fall

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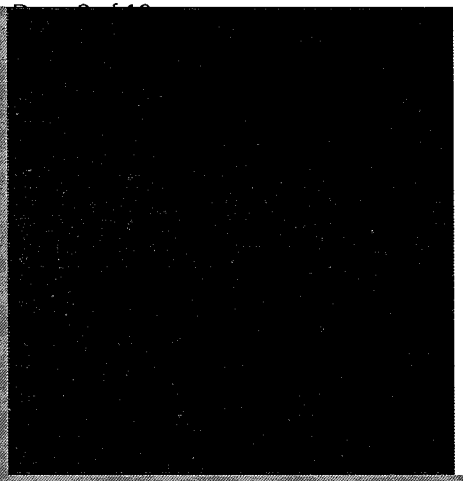
short of the minimum time and a half overtime pay requirement set forth in the PMWA. The court reasoned that this conclusion was not adverse to federal law, inasmuch as the relevant regulation, 29 C.F.R. §778.114, states that a rate of half-time for overtime in the fluctuating workweek is a *minimum* requirement (*i.e.*, employers are free to pay more than the minimum, in this case, time and a half). The court also observed that, while Pennsylvania has chosen to adopt many aspects of federal wage and hour laws, its failure to expressly adopt the federal fluctuating workweek regulation demonstrates that it did not intend to permit such an arrangement.

Thus, it appears that employers in Pennsylvania cannot use the fluctuating workweek method of overtime pay calculation and must, instead, pay at a rate of at least time and a half for hours worked over 40 per workweek. The *Foster* decision also serves as a good reminder that, while most states follow federal wage and hour laws, that is not always the case and employers need to consider applicable state laws when dealing with wage and hour issues.



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ALERT
SEPTEMBER 13, 2012

LABOR AND EMPLOYMENT
News Concerning
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COZEN O'CONNOR
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Fluctuating Workweek Overtime Method Not Permissible Under Pennsylvania Law

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A federal court in Pennsylvania recently held that the "fluctuating workweek method" of calculating overtime compensation violates Pennsylvania's Minimum Wage Act (PMWA), 34 Pa. Code. § 231.43(d)(3). *See Foster v. Kraft Foods Global, Inc.*, No. 2:09-cv-00453 (W.D. Pa. Aug. 27, 2012). Under the fluctuating workweek method, a non-exempt (or "overtime eligible") employee is paid a fixed weekly salary, regardless of the number of hours worked. Then, for overtime, the employee is paid one-half times his or her regular rate (a calculation of the employee's weekly salary divided by the number of hours actually worked in the week) multiplied by the number of overtime hours worked, as opposed to the traditional overtime calculation of one and one-half times the regular rate. Some employers have utilized the fluctuating workweek method because it can result in significant overtime savings compared to the traditional "time and a half" model.

In *Foster*, the court noted federal regulations implementing the Fair Labor Standards Act explicitly permit use of the fluctuating workweek method. *See* 29 C.F.R. § 778.114. The court went on to note, however, that the PMWA and its implementing regulations contain no reference to a corresponding state fluctuating workweek method. Notably, the PMWA states that employers must pay employees "at a rate not less than 1 ½ times the rate established by the agreement or understanding as the basic rate …." 34 Pa. Code. § 231.43(d)(3). The court noted that if "the Pennsylvania regulatory body wished to authorize one-half-time payment under Section 231.43(d), it certainly knew how to do so."

The court also recognized a previous decision from the Western District of Pennsylvania which, based on nearly identical facts, also held that paying employees under the federal fluctuating workweek method nevertheless violates the PMWA. *See Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920 (W.D. Pa. 2011).

The *Foster* decision raises serious concerns about the continued use of the fluctuating workweek method in Pennsylvania. Although the fluctuating workweek methodology is permissible under federal law, employers in Pennsylvania may face liability under the PMWA for continuing to use this method. Accordingly, employers in Pennsylvania currently using the fluctuating workweek method are urged to contact a legal professional to discuss how best to address this update in the law.

To discuss any questions you may have regarding the issues addressed in this alert, or how they may apply to your particular circumstances, please contact George A. Voegele, Jr. at gvoegele@cozen.com or 215.665.5595 or Rachel S. Fendell at 215.665.5548 at rfendell@cozen.com.

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THE Employer Handbook
The labor & employment law blog for leading businesses in PA, NJ, and across the country

PUBLISHED BY Eric B. Meyer, Esquire

Kiss the "fluctuating workweek" OT method goodbye in PA

AUGUST 30, 2012

Tweet Like

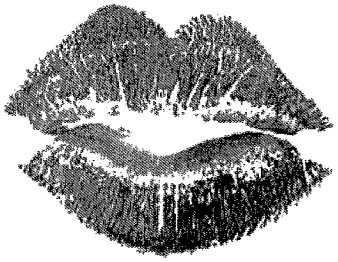
Posted In: Overtime , Pennsylvania

By Eric B. Meyer on August 30, 2012 7:00 AM | Permalink | Comments

mmmmmmmmmmmmwah!

What is the fluctuating workweek method of overtime compensation? Why is it no longer good in PA? And why should you care?

I answer all of these hard-hitting questions -- like a BOSS -- after the jump...



What is the fluctuating workweek overtime compensation method?

If an employee is classified as non-exempt, that employee must receive at least one and one-half times their regular rate of pay for overtime (hours worked over 40 in a workweek).

The fluctuating workweek method of calculating OT compensation allows an employer to pay an employee a fixed, weekly salary, regardless of the number of hours worked. OT is then paid out at one-half times the regular rate of pay (rather than one and one-half times the regular rate). The regular rate of pay is determined by dividing the fixed salary by the total number of hours worked in a workweek. This method of paying OT benefits the employer if employees generally work more than 40 hours per week (because the effective hourly rate is driven down).

Sort've confusing, huh? Well, don't worry PA employers, because it appears that you can't use it in PA anymore.

Why can't Pennsylvania employers use it anymore?

Just check out this decision from Monday, where a PA federal court held that fluctuating workweek method of calculating OT compensation, although legal under the Fair Labor Standards Act, violates the Pennsylvania Minimum Wage Act.

The court found the analysis of this prior decision convincing. Namely, a plain reading of the supporting regulations to the Pennsylvania Minimum Wage Act require that even if an employer reaches an agreement with its employees before work is performed as to a regular rate of pay, the employer must still pay OT at a "rate not less than *1 ½ times* the rate established by the agreement."

So much for an agreement to pay a fixed salary and only 1/2 times the regular rate for OT.

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But, hey! Don't shoot the messenger. Instead, why not take a few seconds and nominate The Employer Handbook for the ABA Journal's 2012 Blawg 100 Amici.

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Posted by Eric B. Meyer | Comments

That's what he/she/they said... (9)
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Federal Court Holds that FLSA's "Fluctuating Workweek" Method Violates Pennsylvania Law

Posted on September 13th, by Editor in LaborSphere. No Comments

By: Maria L. H. Lewis and Dennis M. Mulgrew, Jr.

A recent decision out of the Western District of Pennsylvania, Foster v. Kraft Foods Global, Inc., Civ. No. 09-453 (W.D.Pa. August 27, 2012), highlights the challenges employers face in simultaneously complying with both local and national wage and hour regulations. In Foster, the court held that the "fluctuating workweek" method of overtime compensation – which is *expressly* permitted by the FLSA – is not permitted under Pennsylvania law.

Under the fluctuating workweek method, an employer pays a nonexempt employee a fixed weekly salary, regardless of the number of non-overtime hours worked. This method is generally used in industries in which an employee's hours change unpredictably from week to week based on factors such as customer demand or seasonal variation – e.g., lawn maintenance companies, golf courses, or the travel industry. In using this method, the employer benefits from significant cost savings over traditional methods of overtime calculation and the employee

benefits from the stability of a fixed weekly salary.

There are five requirements for using the fluctuating workweek method. The employee's hours must fluctuate from week to week; the employee must receive a fixed salary that does not vary with the number of hours worked (excluding overtime); the salary must be high enough that the employee's regular rate of pay is at least the minimum wage; the employer and employee must have a clear mutual understanding that the salary is fixed; and the employee must receive overtime compensation equal to at least **one-half** the regular rate for all hours worked over forty.

In Foster, the court's analysis focused on this last requirement. The court held that "the payment of overtime under the FWW method, at any rate less than **one and one-half** times the 'regular' or 'basic' rate," is impermissible under the Pennsylvania Minimum Wage Law. We'll be watching this decision (if appealed) and subsequent cases closely, because if this interpretation of the Minimum Wage Act is upheld, the primary advantage to the employer in utilizing the fluctuating workweek method is eliminated. In the meantime, Pennsylvania employers who use this method to compensate nonexempt employees should reconsider their policies, given that it may no longer result in cost savings. Moreover, this case should serve as a reminder that, although many local wage and hour regulations are modeled after (and in some respects identical to) the FLSA, compliance with the FLSA does not guarantee compliance with local statutes.

FLSA **Pennsylvania**

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Pennsylvania Employers Can't Use Fluctuating Workweek Method to Calculate Overtime

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A federal court recently held that Pennsylvania law does not allow for the fluctuating workweek method of paying overtime, which means that Pennsylvania employers who compensate non-exempt employees pursuant to this method shoudl revise their practices ASAP. If they don't, such employers might find themselves embroiled in overtime class action claims.

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Here's what employers need to know. Wage and hour requirements are mandated at the federal and state level. The federal government sets threshold wage and hour requirements, but states can enact more stringent requirements. For employers, this means that you have to constantly monitor whether you are in compliance with federal wage and hour requirements and state wage and requirements. For example, the federal minimum wage rate for non-exempt workers is $7.25 per hour. It just so happens that Pennsylvania's minimum wage rate is also $7.25 per hour, but California employers have to pay non-exempt employees more because California's minimum wage rate is $8.00 per hour.

On the federal level, the Fair Labor Standards Act ("FLSA") dictates overtime and minimum wage requirements. The FLSA's state law equivalent in Pennsylvania is the Pennsylvania Minimum Wage Act ("PMWA"). The FLSA and PMWA are similar, but not identical.

For example, under the FLSA an employer may compensate non-exempt employees pursuant to the "fluctuating workweek" method of overtime compensation. Under this method, an employee receives a guaranteed fixed weekly salary for all straight-time earnings, regardless of the number of hours worked, and an additional one-half of the employee's regular rate for all hours worked over forty in the workweek. This method lets the employer divide an employee's weekly salary by the number of hours actually worked to determine the regular rate. As long as the regular rate is more than the minimum wage, FLSA regulations allow the employer to compensate any hours worked beyond 40 with not less than one-half the regular rate. Here's how the fluctuating workweek method works:

Gerald is an exempt employee who receives a weekly salary of $400 dollars. In week 1 Gerald works 41 hours. Gerald's rate of pay for week 1 is 9.76 per hour ($400 divided by 41 hours). Since Gerald worked one hour beyond 40 in week 1, the employer is only required to pay Gerald $404.88 ($400 plus half of $9.76). In week 2 Gerald works 50 hours. Gerald's rate of pay for week 2 is $8.00 per hour ($400 divided by 50 hours). Since Gerald worked 10 extra hours in week 2, the employer must pay Gerald $440.00 ($400 plus (10 times half of $8.00). The advantage to employers is that so long as the regular rate is more than the minimum wage, the employer only has to compensate any hours worked beyond 40 with not less than one-half the regular rate. So, the more hours the employee works beyond 40 per week, the cheaper the labor rate becomes for the employer.

However, in *Foster v. Kraft Food Grp. Inc.* a federal court recently held that contrary to the FLSA's regulations, the PMWA's regulations do not allow payment of only an additional one-half of the regular rate for overtime hours pursuant to the fluctuating workweek method. Instead, Pennsylvania employees compensated under this method must receive an additional one and one-half of their regular rate for overtime hours. For example, using the same example used above, in week 2 Gerald would have to be compensated $520 for the week ($400 plus ((1.5 x $8.00) x10).

On the heals of this decision, Kraft Foods Inc. agreed to pay $1.75 million to resolve two proposed class actions filed by employees who alleged that Kraft's use of the federal fluctuating workweek method to calculate overtime violated the Pennsylvania Minimum Wage Act. Because wage and hour claims can expose employers to costly class actions, employers should pay careful attention to how they calculate overtime payments.

The attorneys at Harmon & Davies are well versed in wage and hour requirements and routinely defend employers in wage and hour actions.

This article is authored by attorney Shannon O. Young and is intended for educational purposes and to give you general information and a general understanding of the law only, not to provide specific legal advice. Any particular questions should be directed to your legal counsel or, if you do not have one, please feel free to contact us.

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Date: February 8, 2013

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Fluctuating Workweek Overtime Calculation Method Not Available in Pennsylvania

Sep 06, 2012 | Posted in Articles, Labor & Employment - Private Sector

Generally speaking, Pennsylvania employers are required to pay employees according to the minimum wage and overtime standards under state and federal law. In many cases, state and federal law are similar. However, employers are often unaware of differences between the two laws, which can lead to significant wage and hour violations and penalties. Where state and federal law differ on wage and hour issues, the more stringent requirements will control. This principle was reaffirmed in a recent case heard before a Pennsylvania federal court.

In *Foster v. Kraft Foods* (Civil Action No. 09-453, W.D.Pa. Aug. 27, 2012), the Western District of Pennsylvania found that the employer's method of calculating overtime, although permitted under the federal Fair Labor Standards Act (FLSA), was not permissible under the Pennsylvania Minimum Wage Act (PMWA). Both the FLSA and the PMWA dictate minimum wage and overtime requirements. The FLSA allows employers to pay employees using a "fluctuating workweek method." This method allows employers to pay non-exempt employees a salary for all straight time earnings and pay only one-half (.5) times the employee's regular rate for any hours worked over 40 in a week, rather than paying one and one-half (1.5) times the regular rate, which is usually required by the FLSA. Generally, an employee's regular rate fluctuates using this method, as it is based on the number of hours worked, but employers see an overall salary cost-savings.

Unlike the FLSA, Pennsylvania law does not provide for the use of a fluctuating workweek method. Instead, The PMWA calls for employers to compensate for overtime using the standard one and one-half times the regular rate calculation. In *Foster*, the employer used the FLSA fluctuating workweek method, failing to comply with the PMWA's standard for calculating overtime. The court struck down the employer's practice. Essentially, because the PMWA does not provide for a similar overtime calculation, Pennsylvania employers cannot use the FLSA's fluctuating workweek method. Pennsylvania employers must calculate overtime at a rate of one and one-half times the employee's regular rate, regardless of the method used for straight-time payment.

Foster serves as an important reminder that where federal and Pennsylvania wage and hour laws overlap, and your business is subject to both laws, the more restrictive law prevails. If you are a Pennsylvania employer who uses the fluctuating workweek method, please seek immediate legal assistance. If you have other questions about the differences between the allowable methods of overtime calculations under the PMWA and the FLSA, please contact Carsen Ruperto or another Knox Labor and Employment attorney at (814) 459-2800.

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Carsen N. Ruperto is an Associate at Knox McLaughlin Gornall & Sennett, P.C.'s Erie office.

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Developments in Wage & Hour and Class Action Law

Fluctuating Workweek Under Attack in Pennsylvania

Posted on September 12, 2012

By Robert W. Pritchard

In a pair of recent decisions, the United States District Court for the Western District of Pennsylvania held that the "fluctuating workweek" method of calculating overtime is not lawful under Pennsylvania law when the employer pays an overtime premium of one-half of the employee's regular hourly rate, in addition to the employee's salary. *Foster v. Kraft Foods Global, Inc.*, 2012 U.S. Dist. LEXIS 121282 (W.D. Pa. Aug. 27, 2012); *Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920 (W.D. Pa. 2011). While these cases do not necessarily represent the last word on the subject (indeed, the *Foster* case is still pending in district court), employers who utilize the fluctuating workweek method in Pennsylvania should take note of these developments.

Under federal law, the fluctuating workweek method allows an employer to pay an employee a fixed weekly salary for all hours worked, so long as the employer also pays an overtime premium equal to one-half of the employee's regular hourly rate for hours worked in excess of 40 per week. In order to determine the employee's regular hourly rate, the employee's salary is divided by all hours worked during the week. Because the employee has already been paid (by the salary) at that regular rate for all hours worked (including the overtime hours), the employee is only owed an additional "one-half" the regular rate for the overtime hours. This method of calculating overtime is expressly authorized under the federal Fair Labor Standards Act (FLSA). 29 C.F.R. § 778.114.

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Robert W. Pritchard

The Pennsylvania Minimum Wage Act (PMWA) does not include language tracking the FLSA's fluctuating workweek provision. Rather, employers utilizing the fluctuating workweek method in Pennsylvania have relied on 34 Pa. Code section 231.43(d)(3), which provides:

> No employer may be deemed to have violated [the PMWA] by employing an employee for a workweek in excess of [40 hours] if, under an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in the workweek in excess of [40 hours] . . . [i]s computed at a rate not less than 1½ times the rate established by the agreement or understanding as the basic rate to be used in computing overtime compensation thereunder. . . .

In *Foster* and *Cerutti*, the court held that section 231.43(d)(3) requires overtime payment at a rate of "1½ times" the regular rate, and does not authorize the "½ time" calculation used under the FLSA's version of the fluctuating workweek.

In Foster, the court did not dispute that section 231.43(d)(3) may authorize the employer to use the fluctuating workweek method to calculate an employee's regular hourly rate. However, the court concluded that the employer must then pay overtime at a rate of one-and-one-half times that hourly rate for all overtime hours worked – *in addition to* the employee's full salary. This effectively results in employees earning "double time and a half" for overtime hours.

To better understand how this might work in Pennsylvania, consider the following example. An employee is paid a salary of $400 per week and works 50 hours in a week. Under both the FLSA and the PMWA, the employee's regular hourly rate would be $8 per hour ($400 / 50 hours). Under the FLSA fluctuating workweek method, the employee would be owed an additional $40 as an overtime premium ($8/hour x ½ x 10 hours), or $440 total. Under Pennsylvania law as described in *Foster* and *Cerutti*, however, the employee would be owed an overtime premium of $120 ($8/hour x 1½ x 10 hours), for a total of $520.

In *Foster*, the employer argued that the fluctuating workweek method complies with the "1½ times" requirement because the employee's salary is compensation for all hours worked, and thus the employee receives the "1 times" component of the "1½ times" overtime obligation via the salary payment, leaving only the "½ times" component as the overtime premium. In our view, this is the correct interpretation of the applicable provision of the Pennsylvania Code. The *Foster* court rejected this interpretation, however, calling it a "textbook example of trying to force a square peg into a round hole."

In our view, by focusing solely on the "1½ times" language of section 231.43(d), the *Foster* and *Cerutti* decisions overlooked that section 231.43(d) does not require payment of the employee's entire salary *in addition to* the "1½ times" the amount determined to be the employee's hourly rate. In fact, section 231.43(d) does not even mention the concept of "salary" as a necessary prerequisite for compliance with that section. It would seem, therefore, that an employer and employee should be permitted to agree that for purposes of Pennsylvania law the employee's "salary" is simply a tool that is used to determine the employee's "basic rate to be used in computing overtime" (which would be determined by dividing the salary by all hours worked). Then, the employee would be paid that "basic rate" for the first

40 hours, and "1½ times" that "basic rate" for all overtime hours. Following the above example, the employee's "basic rate" would be $8 per hour ($400 / 50 hours), and the employee would be paid $8 per hour for the first 40 hours (or $320), and $12 per hour for the 10 overtime hours (or $120), for a total of $440. The end result would be payment of the same amount authorized under the FLSA, while still complying with the "1½ times" requirement of Pennsylvania law. While this approach may enable employers to continue using the fluctuating workweek method in Pennsylvania, we note that the Pennsylvania Code requires that there be an "agreement or understanding" about the approach before the work is performed. Thus, employers should carefully consider whether their existing fluctuating workweek policies provide employees with sufficient information to understand how their overtime will be calculated for purposes of the FLSA and also for purposes of Pennsylvania law. Also, we emphasize that *Foster* and *Cerutti* did not endorse (or even consider) this potential approach, and we anticipate further challenges. Employers who continue to utilize the fluctuating workweek method in Pennsylvania should take note of *Foster* and *Cerutti* and should recognize the risks associated with continuing to utilize this practice in Pennsylvania.

Photo credit: Matthew John Hollinshead

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PENNSYLVANIA LABOR & EMPLOYMENT BLOG

Federal Court Holds That FLSA's "Fluctuating Workweek" Method of Overtime Compensation Violates PA Law

Posted on August 31, 2012 by Adam Santucci

This post was contributed by Adam R. Long, a Member in McNees Wallace and Nurick LLC's Labor and Employment Group.

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In the wage and hour realm, even the most knowledgeable Pennsylvania employers often are unaware of potential compliance pitfalls presented by state law. Like the FLSA, the Pennsylvania Minimum Wage Act ("PMWA") contains overtime and minimum wage requirements applicable to Pennsylvania employers. The PMWA is similar, but not identical, to the FLSA, and compliance with the FLSA does not always guarantee compliance with this state law. For example, unlike the FLSA, the PMWA does not contain a specific overtime and minimum wage exemption for employees in computer-related occupations. Thus, a computer professional in Pennsylvania who safely falls within the FLSA exemption still may be entitled to overtime compensation pursuant to the PMWA. In other words, compliance with the FLSA could result in overtime liability for the unwary Pennsylvania employer.

Earlier this week, a federal court in Pennsylvania highlighted another area where the requirements of the FLSA and PMWA arguably differ. In *Foster v. Kraft Foods Global, Inc. (pdf)*, the employer compensated non-exempt employees pursuant to the "fluctuating workweek" method of overtime compensation. Under the fluctuating workweek method, an employee receives a guaranteed fixed weekly salary for all straight-time earnings, regardless of the number of hours worked, and an additional one-half of the employee's regular rate for all hours worked over forty in the workweek. The employee's regular rate may change (or "fluctuate") from week to week, because it is based upon the employee's actual hours worked. The fluctuating workweek method of overtime compensation is expressly permitted by the FLSA's regulations and used by many employers to compensate non-exempt employees on a fixed salary basis while minimizing overtime costs.

The court in *Foster* held that, contrary to the FLSA's regulations, the PMWA's regulations do not allow payment of only an additional one-half of the regular rate for overtime hours pursuant to the fluctuating workweek method. Instead, the court found that the PMWA requires that employees compensated under this method receive an addition one and one-half of their regular rate for overtime hours, essentially eliminating this method of compensation's primary advantage to employers.

Pennsylvania employers who compensate non-exempt employees pursuant to the fluctuating workweek method should reevaluate their practices in light of the *Foster* decision. The decision serves as a stark reminder for all Pennsylvania employers, even those who do not use the fluctuating workweek method, that FLSA compliance may be only half the wage and hour battle. All Pennsylvania employers should be aware that the requirements of the FLSA and the PMWA are not identical and ensure compliance with both laws.

TAGS: Wage & Hour, compensation, compliance, overtime, wage

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POSTED ON SEPTEMBER 12, 2012 BY VALERIE M. EIFERT

Federal Court Rules Pennsylvania Employers Cannot Use "Fluctuating Workweek" Overtime Method

*This post was written by **Valerie M. Eifert** and **Michael D. Jones**.*

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A federal court in Pennsylvania ruled that the fluctuating workweek method of calculating overtime, while compliant with the Fair Labor Standards Act, violates Pennsylvania's Minimum Wage Act ("PMWA"). The fluctuating workweek method of calculating overtime permits an employer to pay a non-exempt employee a fixed, weekly salary, regardless of the number of hours that employee works. Overtime is then paid at 50% of the regular rate of pay, rather than 150% of the regular rate of pay. The regular rate of pay is calculated by dividing the fixed salary by the total number of hours worked in the applicable week. Using this method benefits employers whose employees typically work in excess of 40 hours per week.

In ***Foster v. Kraft Foods Global, Inc.***, the Federal District Court for the Western District of Pennsylvania ruled that the PMWA requires employers to pay overtime at 150% the regular hourly rate, regardless of any agreement to utilize the FLSA's approved fluctuating workweek method. Employers may nevertheless still use the total number of hours worked to calculate the regular rate (e.g. weekly salary amount divided by

total hours worked in the given workweek), which still results in some savings from the traditional calculation of overtime. This decision makes clear however, that compliance with the FLSA's computation of the fluctuating workweek overtime rate does not equal compliance with the PMWA.

In light of this decision, employers in Pennsylvania who use the fluctuating workweek method to calculate employee overtime should revisit their policy and consult with their legal counsel to ensure they are complying with this latest court decision.

TAGS: Employment & Labor (U.S.), Wage and Hour

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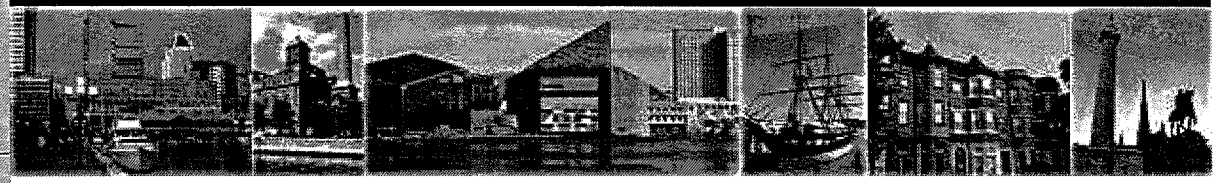

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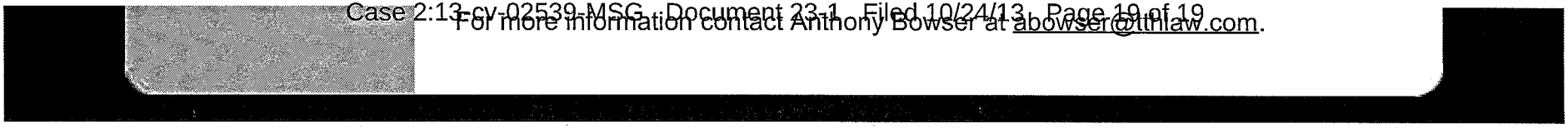
Court Rules "Fluctuating Workweek" Overtime Calculation Impermissible in PA

In a decision handed down earlier this week in the US District Court for the Eastern District of Pennsylvania, the court ruled that the fluctuating workweek method of calculating overtime is impermissible under Pennsylvania law.

The fluctuating workweek method allows the employer to pay a non-exempt employee a fixed salary and then pay overtime based on the rate of pay arrived at by dividing the fixed weekly wage by the number of hours actually worked that week. Because the hours worked are deemed to be paid at straight time, the employer is required only to pay one-half the rate of pay for overtime hours worked. The result is beneficial to employers because the rate of pay for overtime diminishes as more hours are worked.

The fluctuating workweek method is specifically allowed under the federal Fair Labor Standards Act (FLSA). The court in Foster v Kraft Foods Global, nevertheless found that this method violates the Pennsylvania Minimum Wage Act (PWMA). The court looked to the PMWA's companion regulations and found their clear text to require all employers to pay at least 1 ½ times the regular rate of pay despite any agreement between the employer and employee.

Where the FLSA differs from a state wage law, employers must use the law that provides the greatest benefit to the employee. In light of this recent decision, Pennsylvania employers who currently use the fluctuating workweek method should look to revise their policies accordingly.


For more information contact Anthony Bowser at abowser@tthlaw.com.

Appendix C

Retired Judge William A. Dreir's Arbitration Award in F*risari v. Dish Network, LLC*, AAA Case No. 18-160-001431-12 (Oct. 30, 2015)

AMERICAN ARBITRATION ASSOCIATION
Employment and Class Action Tribunal

Re: 18-160-001431-12

In the Matter of the Arbitration between

Elizabeth Frisari, individually and on behalf of all others similarly situated

(Claimants)

and

Dish Network, LLC.

(Respondent)

INTERIM ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENTS

After full briefing and earlier oral arguments, the parties' cross-motions for summary judgment were heard by the Arbitrator, Hon. William A. Dreier, on October 28, 2015, with a supplemental argument on October 29, 2015, Jonathan I. Nirenberg, Esq. (Rabner, Allcorn, Baumgart & Ben-Asher, P.C., attorneys) and Ryan F. Stephan, Esq. (Stephan Zouras, LLP, attorneys) appeared for Claimants; and Christian C. Anitkowiak, Esq. and David J. Laurent, Esq. (Buchanan, Ingersoll & Rooney, attorneys), appeared for Respondents. Jonathan Weed, Manager of ADR Services, supervised the conference for AAA.

OVERVIEW

The parties agreed that there are no factual disputes concerning the single issue to which their cross-motions are addressed, namely, whether the method of payment for overtime satisfied the Federal Fair Labor Standards Act ("FLSA") and the

New Jersey Wage and Hours Law (NJWHL) requiring the payment of one and one-half times the employees' regular rate for hours worked over forty hours in a week. Some of these issues were considered and discussed in the Arbitrator's Opinion and Award dated August 18, 2014.

Respondent contends here that it met the Fair Labor Act standards either on an absolute basis or by application of the federal statute authorizing the use of Fluctuating Work Week method of payment. Claimants assert that the Fluctuating Work Week Regulation, 29 CFR § 778.114(a), exception has no basis in New Jersey law, which may be used to interpret the FLSA but not the NJWHL, and that there are numerous examples shown in Respondents' accounting records demonstrating that the employees did not receive a true time and one-half payment when they worked over forty hours in a week. Respondent counters with the argument that nearly all of Claimants' examples relate to work weeks that were either the employees' first or last week on the job and thus are specifically exempted for the provisions of the FLSA, or that the smattering of additional items are so small as to constitute nothing but individual mistakes that can be corrected without upsetting the general method of payment employed by Respondent.

For the following reasons, the Arbitrator determines that the method employed by Respondent violates the NJWHL in that although Respondent may have intended to employ a Fluctuating Work Week method of calculation, this method is unauthorized for New Jersey payments governed by the NJWHL. As to these claims, therefore, Claimants may proceed to a quantification of their losses on a class basis. The Arbitrator attributes no bad faith to Respondent, but only legal error.

Left open by this decision, is Claimants' assertion that the login and logoff times that allegedly had not been properly compensated by Respondent, is a proper subject for additional claims, including but not limited to the defense that the times involved are *de minimis*. These issues are clearly factual in nature and must await final hearing.

DISCUSSION

Claimants are or were Inside Sale Associates (ISAs) employed by Respondent, which has acknowledged that they were not exempt from the overtime provisions of both the FLSA and NJWHL. Under both state and federal law, they were required to be paid an overtime premium so that they receive "not less than one and one-half times the regular rate at which [the employee] is employed.." 29 U.S.C. § 207(a)1. The NJWHL requires the payment of the regular hourly wage for forty hours of working time in any week "and 1 ½ times such employee's regular hourly wage for each hour of working time in excess of forty hours in any week." N.J.S.A. 34:11-56(a)4. This formula is reiterated in N.J.A.C. 12:56-6.1.

The difference in Claimants' and Respondent's positions can be exemplified as follows: If the normal work week for an ISA was forty hours, but the employee worked fifty hours in the particular week, the base pay for the forty hours would be $400.00 (exclusive of commission adjustments which increase the employee's pay). According to Respondent, and using the variant of the Fluctuating Work Week (discussed in detail later), if the employee worked fifty hours in the particular week, one could calculate the overtime pay by first determining how much pay the employee received without the overtime bonus by dividing the fifty hours by the forty

hour contract pay of $400.00 (which would equal $8.00 per hour), and then give the employee the overtime bonus for the extra ten hours at one-half that rate of $4.00, making the total pay **$440.00** for that week. According to Claimants, the pay would be computed by the employee being paid $400.00 for the fifty hours, thus a pay level of $8.00 per hour and the ten overtime hours at one and one-half times the base rate ($12.00 per hour) with a total pay of **$520.00**. Claimants contend that Respondent employed the former method, but was required by state and federal law to use the latter method.

The statutes and regulations view the employee's "regular hourly rate," which is required to take into effect the fixed rate divided into the total hours worked. Thus, the longer the employee works, the lower the base rate becomes and the lower the overtime rate becomes.[1]

In this summary judgment motion, the Arbitrator is not reaching the issues of the actual pay each employee may have received when adjusted by commission pay, holiday pay or bonuses or any charges that the employee may have encountered for disciplinary deductions, willful absences, tardiness or infraction of work rules. Nor is the Arbitrator considering questions arising from the employee being paid from sub-accounts because there was a paid vacation day, paid holiday, sick day or other adjustment. In such cases, the base forty hours might be made up of time actually worked and time credited to the employee, but appearing on a different account

[1] A variant of this calculation was discussed by the Arbitrator with Claimants and Respondent in a supplementary argument. It would provide for pay for forty hours be $400.00, the base weekly rate, or $10.00 per hour, and then provide for a bonus for the extra ten hours of one and one-half times this rate, or $15.00 per hour, making a total of **$550.00** for the week. This calculation is, of course, acceptable to Claimants, but it was not argued, nor is it based on the case law interpreting the federal or state statutes.

within Respondents' accounting system. Again, these numbers will be adjusted in any final award when final schedules are presented concerning the pay, if any, due to each member of the class of Claimants. The limited issue before the Arbitrator is the proper method of computing the pay when there were overtime hours and whether a schedule of adjusted pay need be created that conforms to this decision.

Insofar as the Fluctuating Work Week method of computation is available for application in this case, one of the prerequisites is that the employee must receive a fixed salary that does not vary with the number of hours worked in each work week. *See* 29 C.F.R. § 778.114(a). The parties' agreement so provides, but, in practice, there are frequent and substantial adjustments. As Claimants' counsel have noted in both their opposition to Respondent's motion and in support of their own motion for this partial summary judgment, the various adjustments made to the ISAs' pay both by way of the deductions and additions noted above (*e.g.*, disciplinary deductions and commission, holiday pay and bonuses), indicated that the ISAs maye not really be paid fixed salaries. Employees are also told that the commission structure will usually override the minimum weekly salary.

These factors may or may not affect a decision on the use of a Fluctuating Work Week under the FLSA, and the cases are split on this issue. But the analysis under the NJWHL claim avoids a decision on the federal issue. There is no provision in the NJWHL or New Jersey regulations under which the Fluctuating Work Week payment rules could be authorized. The Arbitrator makes this finding with full knowledge of the February 21, 2006 letter from Michael P. McCarthy, the Director of the Division of Wage and Hour Compliance, New Jersey Department of Labor, which

was never implemented by a proposed or actual regulation, favoring the Fluctuating Work Week computations. As is noted in Claimant's opposing memorandum to Respondent's motion, for the Arbitrator to give effect to this letter would be to create and enforce a regulation that was never promulgated.

The Fluctuating Work Week method permits a one-half pay bonus for overtime after a fixed pay weekly payment where the employee's job conditions meet the five standards for application of the rule. *See* 29 C.F.R. § 778.114 and the general discussion in *Aiken v. County of Hampton*, 172 F.3d 43, at *2-*3 (4th Cir. 1998) and the more extensive discussion in *Verderame v. RadioShack Corporation*, 31 F. Supp. 3rd 702, 703-05 (E.D. Pa. 2014). As noted above, there is no New Jersey authority on this subject, and states have taken various positions whether the Fluctuating Work Week will be applied to their own state statutes and regulations. The authorities on this point have been collected in an article by John F. Lomax, Jr. entitled "The Attack on the Fluctuating Work Week Method," 30 ABA J. Lab. & Emp. L., 347 (2015), in which the author notes that on the state level, six states have determined that the method could be used under their state laws (Illinois, Massachusetts, Michigan, Ohio, Washington, and Connecticut) and four states have found the method to be incompatible with their state laws (Alaska, California, New Mexico and Pennsylvania).

The Arbitrator determines that the nature of the Fluctuating Work Week computation, with its half-time work week adjustment, effectively reduces the benefit of overtime pay to the individual worker, especially for longer overtime periods. The worker receives only a fixed benefit no matter how many hours he or she works and then only a half-time bonus, which is reduced for each extra hour because the hourly

rate is determined by dividing the fixed pay by the total hours worked. The worker gets very little for substantial benefits conferred on the employer. The worker certainly does not receive one and one-half times his or her usual pay for these extra efforts.

The New Jersey Supreme Court has noted the remedial purpose of the NJWHL and has dictated that this law "should be given a liberal construction." *New Jersey Dep't of Labor v. Pepsi-Cola Co.*, 170 N.J. 59, 62 (2001).[2] By engrafting this Fluctuating Work Week exception, the Arbitrator would not be giving this liberal construction to the law. If the Legislature or the Department of Labor through its regulatory powers had determined that the Fluctuating Work Week standard should apply, it could have amended the statute or promulgated a regulation in the many years that this rule has been applicable to the FLSA. As the New Jersey authorities have not done so, the Arbitrator will not make this extension here. The Arbitrator finds the Pennsylvania approach in *Verderame*, measured against the liberal construction required by the New Jersey courts, to be the correct application to apply in this case.

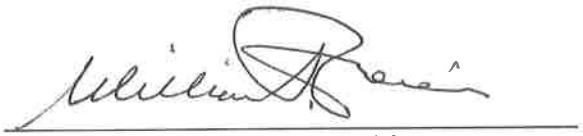
Based upon the foregoing, the Arbitrator determines that Claimants' interim motion for a partial summary judgment will be **GRANTED** and Respondent's interim motion for a partial summary judgment will be **DENIED**. The method of overtime compensation for the ISAs will be by a determination of the hourly rate, dividing their

[2] *See* also, *New Jersey Dep't of Labor v. Pepsi-Cola Co.*, (2002) W.L. 187400 at *95 - *96 (N.J. Sup. Ct. App. Div. January 31, 2002) noting that the Commissioner's rejection of the Fluctuating Work Week method of calculating overtime was inapplicable under the facts of that case and the Commissioner's use of the base forty hour week was reasonable and would be accepted by the court. Given the complex factual nature of the *Pepsi-Cola* case, and the fact that the opinion is not approved for publication, it cannot be taken as either an approval or disapproval of the use of the Fluctuating Work Week under the NJWHL.

base compensation by the total hours worked in the week and multiplying this figure by 1.5, as required by the NJWHL. As this computation will subsume any claim under the FLSA, calculations under that act need not be made.

IT IS SO ORDERED.

Date: October 30, 2015



Hon. William A. Dreier, Arbitrator