

# Fluctuating Workweek Pay Method Not Available in Pennsylvania, State Supreme Court Holds

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## Related Services

Wage and Hour

In a long-awaited decision, the Pennsylvania Supreme Court has concluded that the fluctuating workweek (FWW) pay method is not a proper method of overtime pay calculation under the Pennsylvania Minimum Wage Act (PMWA). *Chevalier v. General Nutrition Centers, Inc.*, 2019 Pa. LEXIS 6521 (Nov. 20, 2019). As a result, the Court affirmed the decisions of the trial court and intermediate appellate court that a class of former non-exempt, store-level managers for General Nutrition Centers were not sufficiently paid for all of the overtime hours that they worked.

### General Background

Under federal law, the Fair Labor Standards Act (FLSA) guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. Under the FLSA, employers can use the FWW method for computing any overtime compensation due when certain conditions are met. If a non-exempt employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all “straight time” (non-overtime) hours the employee works, the employer satisfies the FLSA’s overtime pay requirements if, in addition to the salary amount, it pays at least one-half of (0.5 times) the “regular rate” of pay for any hours worked in excess of 40. The salary must remain fixed and be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a “clear and mutual understanding” that the salary will remain the same regardless of the hours worked each week.

While the PMWA mirrors the FLSA in many respects, the PMWA does not expressly allow for the use of the FWW pay method. Instead, this area was left to be addressed by regulations issued by the Pennsylvania Department of Labor and Industry.

### The Lawsuit

In the instant case, the plaintiff was a former non-exempt store manager for GNC. Store managers historically were paid a fixed weekly salary plus commissions, regardless of the hours they worked in a week. To calculate overtime compensation due, GNC used the federal FWW pay method, calculating the managers’ “regular rate” by dividing their fixed weekly salary by the actual number of hours worked and then paying overtime at 0.5 times that rate. In 2013, the plaintiff filed a class action against GNC in state court, alleging that the FWW’s “0.5 multiplier” violated the PMWA because it does not truly compensate overtime at “time-and-a-half” for all hours worked over 40. The trial court agreed, holding that the FWW method violated the PMWA and granting the plaintiff’s motion for partial summary judgment. GNC appealed to Pennsylvania’s intermediate appellate court, which upheld the trial court’s decision.

### The Decision

GNC then appealed to the Pennsylvania Supreme Court, urging the Court to interpret the

PMWA in a manner consistent with the FLSA, the latter having expressly adopted the FWW pay method. Affirming the lower court's decisions, and in light of the absence of any labor department regulation resolving the issue, the Pennsylvania Supreme Court turned to a statutory interpretation of the PMWA, specifically, the following language: "Employees shall be paid for overtime not less than *one and one-half times* the employee's regular rate." 43 P.S. § 333.104(c) (emphasis added). Because the parties agreed that the regular rate is properly calculated based on *all* hours worked in a given week, the Court had to determine only which overtime multiplier was appropriate, 0.5 or 1.5. Noting that both it and other courts "have emphasized that states have the authority to enact more beneficial wage and hour laws than those provided in the FLSA" and citing "the unmistakable intent of the General Assembly to use the Commonwealth's police power to increase wages to combat the evils of unreasonable and unfair wages," the Court concluded that "the rules of statutory construction favor Plaintiffs' interpretation requiring application of the 1.5 Multiplier." This conclusion, the Court added, is supported by the express language of the regulation, that "each employee shall be paid for overtime not less than 1-1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a workweek ... regardless of whether the regular rate was calculated based upon the actual hours worked."

### The Takeaway

While the U.S. Department of Labor recently proposed regulations that would clarify the use of the fluctuating workweek pay method under the FLSA, the Pennsylvania Supreme Court has concluded that this pay method is not lawful under Pennsylvania wage and hour law. Thus, employers using this pay method for non-exempt, salaried workers located in Pennsylvania should take immediate action to review and revise their compensation method for these employees. (For more on the Department of Labor's proposal, see our article, [Labor Department Proposes Changes to Clarify Use of FLSA's 'Fluctuating Workweek' Pay Method.](#))

Jackson Lewis attorneys are available to answer inquiries regarding this case and other workplace developments.

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