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Connecticut Supreme Court Upholds Fluctuating Workweek Method . . . but Not for Retail Employees

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The Connecticut Supreme Court's holding in *Williams v. General Nutrition Centers, Inc.,* No. SC 19829 (August 17, 2017) is a mixed bag for Connecticut employers. While the court held that Connecticut law does not generally prohibit an employer's use of the fluctuating workweek method to calculate a nonexempt employee's hourly overtime rate, it also held that a Connecticut Department of Labor wage order does prohibit its use in connection with mercantile employees, which includes retail employees.

Background

The plaintiffs in *Williams* worked as nonexempt managers at General Nutrition Centers (GNC) stores in Connecticut. They were paid a fixed weekly salary, along with commissions based on the sale of merchandise. They were paid overtime whenever they worked more than 40 hours in a week.

Although their base salaries were fixed, their commissions fluctuated from week to week, based on sales in their respective stores. GNC chose to calculate the plaintiff's overtime rate using the fluctuating workweek method.

Under this method, which was developed under the federal Fair Labor Standards Act (FLSA), if certain criteria are met, a salaried, nonexempt employee's regular rate of pay for overtime purposes can be calculated by dividing the employee's total weekly pay in a given week by the number of hours they actually worked during that week. Thus, the employee's regular rate, and, therefore, his overtime pay rate, decreases with each additional hour worked.

Whether an employer can utilize the fluctuating workweek method is a fact-specific inquiry. For example, the U.S. Department of Labor takes the position that the following requirements should be met for the fluctuating workweek method of calculating overtime to be utilized: (1) the employee's hours must fluctuate from week to week; (2) the employee must receive a fixed salary that does not vary with the number of hours worked during the week, excluding overtime premiums; (3) the fixed amount must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage; and (4) the employer and employee must share a clear mutual understanding that the employer will pay that fixed salary regardless of the number of hours worked.

The plaintiffs in *Williams* filed a class action lawsuit against GNC, alleging that GNC's use of the fluctuating workweek method violated Connecticut law. Citing to a wage order issued by the Connecticut Department of Labor pertaining to employees in the mercantile trade (the parties agreed the plaintiffs are mercantile employees), the plaintiffs alleged that "an employer must calculate an employee's regular rate of pay by dividing his total weekly pay by the hours he *usually* works in a week, not the hours he *actually* works."

The Court's Decision

The Connecticut Supreme Court began its analysis by recognizing that, with the exception of certain employees

described as “delivery drivers” and “merchandisers,” Connecticut wage laws do not define the “regular rate” of pay for most employees. The court reasoned that “[b]ecause the wage laws are silent as to how to calculate the regular rate for all other types of employees, nothing in the wage laws expressly prohibits use of the fluctuating method, and its approach of dividing total pay by actual hours worked, for employees who are not delivery drivers or sales merchandisers. By setting a specific formula for only one category of employees, it further appears that the legislature did not intend to limit the formulas that may be used for other categories of employees.”

The court also recognized that Connecticut’s overtime requirements are almost identical to the federal FLSA, which allows for use of the fluctuating workweek method. The court saw no reason to interpret Connecticut law differently. For these reasons, the court held “the [Connecticut] wage laws do not prohibit use of the fluctuating method to derive an employee's regular rate, with the sole exception of certain delivery drivers and sales merchandisers.”

Having found that Connecticut law doesn’t prohibit the use of the fluctuating workweek method, the court then set out to determine whether the wage order concerning mercantile employees prohibits the use of the fluctuating workweek method for retail employees. The court found that it does.

The wage order provides in relevant part that: “the regular hourly rate for the purpose of computing overtime [for mercantile employees] shall be determined by dividing the employee's total earnings by the number of hours in the usual work week as supported by time records.” Although the wage order does not define “usual work week,” the court found that “[t]he plain meaning of ‘usual work week’ . . . requires employers to divide the employee's pay by the hours usually worked in a week to calculate an employee's regular rate.” Given that the fluctuating workweek method examines the hours *actually* worked, as opposed to the hours *usually* worked, the court found that the wage order was controlling and incompatible with the fluctuating workweek method: “The wage order's command to use a divide by usual hours method therefore precludes use of the fluctuating method's divide by actual hours method, except, of course, when an employee's actual hours match his usual hours.”

For those employees whose regular hours don’t match their actual hours, the difference in their regular rates of pay, and thus overtime pay, can be significant. By way of example, an employee usually works 40 hours per week but in one week work 60 hours. The employee makes $600 in base salary and $400 in commissions. Applying the fluctuating workweek method, the employer would determine the regular rate of pay by dividing the employee’s base salary, plus commissions earned, by the 60 hours *actually* worked: $400 + $600 = $1,000/60 hours = $16.66 per hour. However, if the fluctuating workweek method is not utilized, the employer must divide the employee’s base salary, plus commissions earned, by the 40 hours *usually* worked, resulting in a higher regular rate than what would result under the fluctuating workweek method: $400 + $600 = $1,000/40 hours = $25 per hour. In addition, under the fluctuating workweek method, the 20 hours of overtime would be calculated at $25 per hour, as compared to the overtime rate of $37.50 per hour that would apply absent the fluctuating workweek method—a substantial difference.

Key Takeaways

Given the *Williams* decision, Connecticut employers can no longer compensate retail employees using the fluctuating workweek method. However, now that the Connecticut Supreme Court has recognized that the fluctuating workweek is not prohibited by Connecticut law, employers that do not fall within the mercantile trade, or any other exception, may want to consider whether the fluctuating workweek is a suitable method for calculating the regular rate of pay for their salaried, nonexempt employees. If properly implemented, it can represent an effective, cost-saving option.

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