

THE
NATIONAL LAW REVIEW

Review your Pay Practices for Pennsylvania Employees After Recent Court Decision

Friday, January 19, 2018

The Pennsylvania Superior Court [recently affirmed](#) that the use of the "fluctuating workweek" method to determine the amount of overtime owed violates the Pennsylvania Minimum Wage Act (PMWA), unlike the federal Fair Labor Standards Act (FLSA). This decision can lead to overtime liability for employers with Pennsylvania employees. This decision could be of particular concern to employers in the mortgage industry, who commonly pay nonexempt employees on a fixed salary, rather than a strict hourly basis, including a common arrangement in which loan originators receive minimum wage and commissions to the extent they exceed minimum wage. It will also lead to increased liability for back pay where employees have been misclassified as exempt because it prevents using the fluctuating workweek method to calculate the back pay due, as is commonly the case under the FLSA.

The FLSA permits an employer to satisfy its overtime obligation to a nonexempt employee who is paid a fixed weekly salary regardless of the number of hours actually worked using the fluctuating workweek method. This requires an employer to divide the employee's total weekly salary by the total amount of hours worked in a week to determine the regular rate of pay (e.g., \$1,000 per week / 50 hours worked = \$20 per hour). The employer then provides the employee with pay for the hours worked in excess of 40 at one-half the regular rate (\$10 x 10 hours = \$100 of overtime pay).

This method requires an understanding with the employee that the fixed salary will compensate the employee for all their hours each week on a straight-time basis and also requires that the employee receive that same salary, even if his or her hours fall below 40 in a given week, regardless of the reason.

The Pennsylvania Superior Court, however, rejected this methodology under the PMWA, finding that it was not supported by the statute and its implementing regulations—which do not address the fluctuating workweek method specifically. Initially, the court noted that the FLSA merely sets a "floor" to protect Pennsylvania employees.

After reviewing both state and federal regulations regarding calculation of the regular rate, the court found that the PMWA permits the regular rate to be calculated consistent with the fluctuating work week method. That is, employers can calculate the regular rate by dividing the number of hours worked in a given week into the weekly salary—which results in a regular rate that fluctuates from week to week—rather than always dividing the weekly salary by 40 hours to calculate a regular rate that remains fixed.

When it comes to how the overtime due should be calculated using that regular rate, however, the court found that Pennsylvania and federal law diverge. Addressing the appropriate multiplier for calculating overtime payments, the Superior Court explained that 34 Pa. Code § 231.41 requires Pennsylvania employers to pay "*not less than 1½ times* the employee's regular rate of pay for all hours in excess of 40 hours in a workweek."

In contrast, the applicable FLSA regulation permits employers to pay only an additional one-half the regular rate for hours over 40 using the fluctuating workweek methodology. Thus, the court determined that salaried nonexempt employees are entitled to greater overtime protections under the PMWA than under the FLSA.

To comply with the PMWA under this decision, Pennsylvania employers who pay nonexempt employees a weekly salary must convert it to an hourly rate by one of two methods which should be determined and agreed to by the

Ballard Spahr
LLP

Article By [Kelly T. Kindig](#)
[Shannon D. Farmer](#)[Noah J. Goodman](#)
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employee in advance: (1) dividing the salary by 40 or (2) dividing the salary by the actual number of hours worked each week. Employers then must pay the employee overtime calculated at 150% of that regular rate for hours worked in excess of 40 each workweek.

To highlight the impact of the difference between the PMWA and FLSA methods, a nonexempt employee with a regular rate of \$20 per hour would earn \$300 for working 10 overtime hours under Pennsylvania law (\$30 per hour for 10 additional hours worked), instead of \$100 under federal law. Like the FLSA, the PMWA provides for back pay and liquidated damages—as well as attorneys' fees—making noncompliance costly.

This case serves as a timely reminder that employers need to ensure compliance with state wage and hour laws, in addition to the FLSA, to avoid liability for their pay practices.

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