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## PENNSYLVANIA SUPREME COURT TO DECIDE OVERTIME FORMULA FOR NONEXEMPT SALARIED EMPLOYEES WITH FLEXIBLE WORKWEEKS

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The Pennsylvania Supreme Court agreed to hear an appeal of the lower court's decision in Chevalier v. Gen Nutrition Ctrs., 117 A.3d 280 (Pa. Super. 2017), which held that the Pennsylvania's Minimum Wage Act did not permit employers to calculate a nonexempt, salaried employees' overtime pay using the federal Fair Labor Standards Act's ("FLSA") flexible workweek model. The Supreme Court's decision will significantly impact how employers pay overtime to salaried employees in Pennsylvania, so employers should track future developments.

Under the FLSA's "flexible workweek model," employers are permitted to calculate the "regular rate" of overtime pay for certain nonexempt, salaried employees based on the actual number of hours worked above 40 hours. 29 C.F.R. § 778.114(a); Overnight Motor Transportation Co. v. Missel, 316 U.S. 572 (1942). The rationale behind the flexible workweek is to permit employers to pay nonexempt employees on a salary basis so that they are paid the same weekly amount regardless of the number of hours they work above or below 40 hours a week. Because the employee's salary already compensates the employee for the "straight time" for all hours worked over 40 hours, under the flexible workweek model, employers only have to pay overtime at a rate of one half (.5) of the regular rate for every overtime hour the employee works over 40 in a workweek. Therefore, under the flexible workweek model, the regular rate changes every week depending on the number of hours

worked – the more hours the employee works in a given workweek, the lower his/her overtime hourly rate becomes. The following examples illustrate the flexible workweek model as compared to standard overtime calculations:

**1. Standard Overtime Calculation:** *Using the standard model for overtime rate calculation, the overtime pay for a salaried employee making \$1,000 per week for 50 hours of work should be calculated as follows:*

- A.  $\$1,000/40 \text{ hours} = \$25/\text{hr}$ . This represents the regular rate for calculating overtime pay.
- B.  $\$25/\text{hr} * 1.5 = \$37.50/\text{hr}$ . This represents the regular rate, times 1.5, which is the amount the employee is entitled to earn for every hour of overtime worked over 40 hours in a workweek.
- C.  $\$37.50/\text{hr} * 10 \text{ hours (actual hours worked in the workweek} - 40 \text{ hours)} = \$375$ . This represents the total overtime pay for the 50 hour workweek.
- D.  $\$1,000 + \$375 = \$1,375$ . This represents the employee's salary and overtime pay for a 50 hour workweek.

**2. FLSA Flexible Workweek Model:** *Under the FLSA's flexible workweek model, if a salaried employee makes \$1,000 per week and works*

50 hours per week, the employee's overtime pay is calculated as follows:

- A.  $\$1,000/50 \text{ hours} = \$20/\text{hr}$ . This represents the regular rate for calculating overtime pay.
- B.  $\$20/\text{hr} * .5 = \$10/\text{hr}$ . This represents the regular rate, times one half, which is the amount the employee is entitled to earn for every hour worked over 40 hours.
- C.  $\$10/\text{hr} * 10 \text{ hours (actual hours worked in the workweek} - 40 \text{ hours)} = \$100$ . This represents the total overtime pay for the 50 hour workweek.
- D.  $\$1,000 + \$100 = \$1,100$ . This represents the employee's salary and overtime pay for a 50 hour workweek.

The regular rate changes depending on the number of hours worked. Using this example, if the employee worked only 45 hours in a week, the regular rate would be \$22.22, the employee could earn \$11.11 per hour of overtime worked, and the employee would be entitled to \$55.56 for five hours of overtime.

The net result is that under the flexible workweek model above, employers are permitted to pay qualifying nonexempt salaried employees less than 1.5 times all hours worked over 40 in a workweek.

In the Chevalier case, the employer argued that the Pennsylvania's Minimum Wage Act ("PMWA") authorizes employers to calculate salaried employees' overtime pay based on the FLSA's flexible workweek model. Conversely, the employees argued that the PMWA required that the employer calculate the employee's regular rate based on the standard overtime calculation. The employees also argued that salaried employees are entitled to one and a half times the regular rate for all hours worked over 40 in the workweek.

In its decision, the Superior Court split the difference between the two calculations. First, it agreed with the employer, holding that under the

PMWA and the FLSA, the employer may base the regular rate for salaried employees' overtime pay on the actual number of hours worked as opposed to using 40 hours. (see *FLSA Flexible Workweek Model*, step A, above). The Court noted that the PMWA, which was enacted after the FLSA, mimics the FLSA's provision calculating overtime based on a "regular rate." 34 Pa. Code §§ 231.43(a). Under this method, the regular rate fluctuates every week depending on number of overtime hours worked. This method results in a lower regular rate than used in the standard overtime calculation (see *Standard Overtime Calculation*, step A, above).

Next, the Superior Court agreed with the employees that under the PMWA, overtime pay must be based on one and a half (1.5) times the regular rate of hours worked over 40 hours per week. (see *Standard Overtime Calculation*, step B, above). The Superior Court reasoned that the PMWA expressly provides that "employees shall be paid for overtime not less than one and one-half times the employee's regular rate," and therefore, the PMWA did not specifically adopt the FLSA's provision allowing the lower one half (0.5) multiplier when calculating overtime pay for nonexempt salaried employees. See 43 P.S. 333.104(c); 29 C.F.R. § 778.114(a). The Superior Court held that the employer violated the PMWA because it did not pay employees one and half (1.5) times the regular rate of pay for all hours over 40 hours worked in a week. The example below illustrates the Superior Court's hybrid calculation of the overtime rate for nonexempt, salaried employees working bona fide fluctuating workweeks:

**3. Superior Court's Hybrid Formula:** Under the Chevalier decision, overtime pay for a salaried employee making \$1,000 per week and working a 50 hour workweek should be calculated as follows under the PMWA:

- A.  $\$1,000/50 \text{ hours} = \$20/\text{hr}$ . This represents the regular rate for calculating overtime pay.

- B. **\$20 /hr\* 1.5 = \$30/hr.** This represents the regular rate, times 1.5 , which is the amount the employee is entitled to earn for every hour of overtime worked.
- C.  $\$30/\text{hr} * 10 \text{ hours (actual hours worked in the workweek - 40 hours)} = \mathbf{\$300}$ . This represents the total overtime pay for the 50 hour workweek.
- D.  $\$1,000 + \$300 = \mathbf{\$1,300}$ . This represents the employee's salary and overtime pay for a 50 hour workweek.

Under the PMWA and the FLSA, employers may calculate the regular rate based on the actual number of hours worked in a workweek. This method of calculation can be more difficult to administer because the regular rate changes each workweek, however, if properly administrated, allows employers to pay a lower regular rate.

### **Significance For Employers**

The Superior Court's holding requires that employers pay qualifying nonexempt employees according to its hybrid formula. The Pennsylvania Supreme Court will likely address which of the three calculations apply, or if another calculation is required under the PMWA. Until the Pennsylvania Supreme Court decides the issue, employers will be left in limbo regarding the correct formula to use. Until that time, employers should carefully assess, with legal counsel, the risks and rewards for using the FMLA's flexible workweek formula in Pennsylvania. ◆

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