

Pa. Justices' Ruling Highlights Federal, State Wage Law Divide

By **Jo Bennett and Osazenoriuwa Ebose**

The Pennsylvania Supreme Court's recent decision in *Chevalier v. General Nutrition Centers Inc.*^[1] reinforces the message that compliance by employers with federal wage law alone may not insulate them from violations of Pennsylvania wage law. Businesses operating in other states should also take note, as federal and state wage laws often do not align on a range of issues.

In the GNC case, Pennsylvania's high court held that overtime wages for salaried, nonexempt employees under the state wage statute must be calculated using a 1.5 multiplier rather than the 0.5 multiplier permitted under the federal Fair Labor Standards Act. Although it sounds rather technical, this is a significant issue potentially affecting compensation practices for many businesses.

Background

The GNC case addressed whether Pennsylvania's Minimum Wage Act permitted overtime to be calculated using the so-called fluctuating workweek, or FWW, method. According to the most recent summary prepared by the Wage & Hour Defense Institute, 28 states had accepted the fluctuating workweek method, which permits use of the 0.5 multiplier to calculate overtime pay. This means nearly half the states have either rejected the approach or the law remains unclear.

The court's GNC decision is a reminder that: (1) federal wage law sets the floor, but not the ceiling, for worker pay; and (2) key differences persist between federal and state wage laws. Indeed, the laws and regulations of only a handful of states mirror federal law exactly, according to the WHDI.

When federal and state wage laws differ, businesses are challenged to assess how these differences may impact their practices and then make complicated decisions about how to best comply with the regulatory regimes to avoid problems. Such complexities add cost and risk to employment and compensation decisions.

Pennsylvania's statutory and regulatory framework is a mixture — adopting with clarity some provisions of the federal regulatory framework but remaining silent on other federal provisions. When it passed the Minimum Wage Act, Pennsylvania's Legislature required the payment of overtime at "one and one half times the regular rate"^[2] and instructed the secretary of labor and industry to establish regulations on overtime.

Although the department adopted regulations permitting the 0.5 multiplier to be used to calculate overtime in some circumstances, Pennsylvania regulations are silent on use of the 0.5 overtime multiplier for employees who are paid a set salary regardless of the number of hours they work in a week (hence the term fluctuating workweek).



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Analysis of the GNC Decision

In the GNC case, the plaintiff filed a class action challenging GNC's use of the FWW method in calculating overtime pay for store managers. GNC paid store managers a set weekly salary plus commissions, regardless of the number of hours the managers worked in a given week.

GNC paid the plaintiff overtime for any hours worked in excess of 40 hours in a week by utilizing the FWW method with the 0.5 multiplier:

$$(\text{regular rate}) \times (\text{hours worked above 40}) \times (0.5).$$

GNC calculated the regular rate to be the total pay for the week divided by total hours worked in the week.

Although the plaintiff agreed with how GNC had calculated the regular rate, she contended that the Pennsylvania wage statute required GNC to multiply the regular rate by 1.5 for all hours worked beyond 40 instead of the 0.5 multiplier used by GNC. GNC's position was that it already had paid the plaintiff for all of her straight time hours because her weekly salary covered all hours worked. GNC contended that use of the 1.5 multiplier would in effect require it to pay store managers 2.5 times their regular rate for hours worked beyond 40.

The plaintiff prevailed at the trial court, and the Pennsylvania Superior Court affirmed the plaintiff's core argument that GNC could not use the 0.5 multiplier to calculate store manager overtime. After it held oral argument, the Superior Court sought the Pennsylvania Department of Labor & Industry's views on whether the Minimum Wage Act permitted use of the FWW method to calculate overtime for salaried nonexempt employees.

The department declined the opportunity to share its perspective, stating that the question "[implicated] not merely an interpretation of law but policy choices among competing positions as to how best to effectuate the intent of the legislature."^[3]

In his majority opinion for the Pennsylvania Supreme Court,^[4] Justice Max Baer opined that both parties had legitimate interpretations of the statute, but that a mechanical application of the regulatory language favored the plaintiff — that all hours in excess of 40 be paid at 1.5 times the regular rate. The majority reasoned that this interpretation was supported by the department's decision to adopt the 0.5 multiplier under certain pay structures but to remain silent on the multiplier for a FWW pay structure. Based on the regulations' silence, the court would not read intent by the department to permit the 0.5 FWW calculation method under the Minimum Wage Act.

The case generated one concurring opinion and two opinions concurring in part and dissenting in part. Justice Sallie Updyke Mundy wrote a concurring opinion in which she agreed with the result, but found that the department's silence on the FWW method was not evidence of the department's intent to apply the 1.5 multiplier.

Justice Christine Donohue joined in the result because it was consistent with the Legislature's intent to benefit workers and increase wages, but she also found that the department's silence on the FWW method should not carry any weight in the court's analysis. Chief Justice Thomas Saylor, concurring in part and dissenting in part, concluded that the 0.5 multiplier applied.

In their opinions, the justices expressed some frustration about the ambiguity of department regulations and its decision to not participate in the appeal. The question now is whether the Pennsylvania Supreme Court's decision prompts further action by Pennsylvania's General Assembly or the Department of Labor & Industry.

The Legislature has taken similar steps in the past. Nearly 10 years ago, after a trial court in Philadelphia held that the so-called 8/80 overtime method permitted by the Fair Labor Standards Act violated Pennsylvania's Minimum Wage Act, the Legislature amended the statute to permit medical care providers to use the 8/80 overtime method under the state wage law.

Related Developments

The GNC decision is merely one of several recent developments under Pennsylvania wage law. In November, Gov. Tom Wolf and the Pennsylvania Senate reached an agreement on a modest increase in Pennsylvania's minimum wage, currently \$7.25 per hour, the same as the federal minimum wage.

Under the Wolf-Senate agreement, Pennsylvania's minimum wage would increase by 50 cents per hour in July 2020, followed by 50-cent increases every six months until the minimum wage reaches \$9.50 per hour in January 2022. In exchange for the Senate's agreement, the Wolf administration withdrew proposed regulations to increase the salary threshold for the executive, administrative and professional exemptions — yet another area of potential difference between federal rules and Pennsylvania law. This compromise is pending before the House of Representatives, with action not certain at this time.

None of these pending developments would directly affect the FWW issues addressed by the GNC case. Thus, the court's decision may lead to increased wage costs for employers facing FWW situations.

Practical Takeaways

In light of the GNC decision, the potential for legislative action on the minimum wage, and the start of a new year, Pennsylvania employers may want to take stock of their compensation plans to ensure compliance not only with the FLSA, but also the Pennsylvania Minimum Wage Act. As a result of the GNC decision, employers who pay set salaries to nonexempt employees working more than 40 hours may want to evaluate whether these arrangements meet legal, operational and budgetary objectives.

In many businesses, the amount of salary paid likely includes the consideration that employees would on occasion work more than 40 hours per week. The GNC decision undercuts that assumption.

Employers likewise must be mindful that the salary threshold for the executive, administrative and professional exemption under federal law increases to \$35,568 per year, or \$684 per week, effective Jan. 1, 2020, from the current \$23,660 annual salary (or \$455 per week). With these various changes, employers should consider assessing their pay practices and compliance with federal and state wage laws.

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[1] ____ A.3d ____ (2019), 2019 WL 6139547 (Nov. 20, 2019).

[2] 43 P.S. § 333.104(c).

[3] 2019 WL 6139547 at * 5.

[4] Justices Todd, Dougherty and Wecht joined the majority opinion.