



Fluctuating Workweek Overtime Method Not Permissible Under Pennsylvania Law

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A federal court in Pennsylvania recently held that the “fluctuating workweek method” of calculating overtime compensation violates Pennsylvania’s Minimum Wage Act (PMWA), 34 Pa. Code. § 231.43(d)(3). See *Foster v. Kraft Foods Global, Inc.*, No. 2:09-cv-00453 (W.D. Pa. Aug. 27, 2012). Under the fluctuating workweek method, a non-exempt (or “overtime eligible”) employee is paid a fixed weekly salary, regardless of the number of hours worked. Then, for overtime, the employee is paid one-half times his or her regular rate (a calculation of the employee’s weekly salary divided by the number of hours actually worked in the week) multiplied by the number of overtime hours worked, as opposed to the traditional overtime calculation of one and one-half times the regular rate. Some employers have utilized the fluctuating workweek method because it can result in significant overtime savings compared to the traditional “time and a half” model.

In *Foster*, the court noted federal regulations implementing the Fair Labor Standards Act explicitly permit use of the fluctuating workweek method. See 29 C.F.R. § 778.114. The court went on to note, however, that the PMWA and its implementing regulations contain no reference to a corresponding state fluctuating workweek method. Notably, the PMWA states that employers must pay employees “at a rate not less than 1 ½ times the rate established by the agreement or understanding as the basic rate ...” 34 Pa. Code. § 231.43(d)(3). The court noted that if “the

Pennsylvania regulatory body wished to authorize one-half-time payment under Section 231.43(d), it certainly knew how to do so.”

The court also recognized a previous decision from the Western District of Pennsylvania which, based on nearly identical facts, also held that paying employees under the federal fluctuating workweek method nevertheless violates the PMWA. See *Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920 (W.D. Pa. 2011).

The *Foster* decision raises serious concerns about the continued use of the fluctuating workweek method in Pennsylvania. Although the fluctuating workweek methodology is permissible under federal law, employers in Pennsylvania may face liability under the PMWA for continuing to use this method. Accordingly, employers in Pennsylvania currently using the fluctuating workweek method are urged to contact a legal professional to discuss how best to address this update in the law.

To discuss any questions you may have regarding the issues addressed in this alert, or how they may apply to your particular circumstances, please contact George A. Voegelé, Jr. at gvoegele@cozen.com or 215.665.5595 or Rachel S. Fendell at 215.665.5548 at rfendell@cozen.com.