220 A.3d 1038
Supreme Court of Pennsylvania.

Tawny L. CHEVALIER and Andrew Hiller, on Behalf of Themselves and All Others Similarly Situated, Appellees
v.
GENERAL NUTRITION CENTERS, INC. and General Nutrition Corporation, Appellants
Tawny L. Chevalier and Andrew Hiller, on Behalf of Themselves and All Others Similarly Situated, Appellees
v.
General Nutrition Centers, Inc., and General Nutrition Corporation, Appellants

No. 22 WAP 2018, No. 23 WAP 2018
|
Argued: April 10, 2019
|
Decided: November 20, 2019

Synopsis
Background: Employees brought action against employer alleging that calculation of their overtime pay violated Pennsylvania Minimum Wage Act (PMWA). The Court of Common Pleas, Allegheny County, Civil Division, No. G.D. 13–017194, R. Stanton Wettick, Jr., J., entered summary judgment in favor of employees, awarding $1,378,494.77 plus interest, counsel fees and costs. Employer appealed. The Superior Court, Nos. 1437 WDA 2016 and 92 WDA 2017, Moulton, J., 177 A.3d 280, affirmed in part, reversed in part, vacated in part, and remanded. Employer petitioned for allowance of appeal.

[Holding:] The Supreme Court, Nos. 22 WAP 2018 and 23 WAP 2018, Baer, J., held that employer's paying overtime premium of only one-half the "regular rate" for hours worked over the standard 40 violated state law.

Affirmed.

Mundy, J., filed concurring opinion.

Saylor, Chief Justice, filed opinion concurring in part and dissenting in part.

Donohue, J., filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion to Certify Class.

West Headnotes (1)

[1] **Labor and Employment** Computation of wage and overtime rates in general
Labor and Employment Work week

Employer's paying an overtime premium of only one-half the "regular rate" for hours worked over the standard 40, under its fluctuating workweek (FWW) method of compensating overtime, violated the Pennsylvania Minimum Wage Act (PMWA) and its accompanying regulations; although such payment of overtime was permitted under federal law at the time the PMWA was enacted, Department of Labor and Industry did not adopt the federal regulation that expressly authorized the one-half times regular rate overtime premium, and governing regulation required, in addition to regular salary, payment of "not less than 1–1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a work week." 43 Pa. Stat. Ann. § 333.104(c); 29 C.F.R. § 778.114; 34 Pa. Code § 231.41.

2 Cases that cite this headnote

***1039** Appeal from the Order of the Superior Court entered December 22, 2017 at No. 1437 WDA 2016, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Allegheny County entered December 29, 2016 at No. GD 13-017194 and remanding. R. Stanton Wettick, Jr., Senior Judge

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SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE BAER

In this case, we consider the calculation of overtime compensation for non-exempt salaried workers under the Pennsylvania Minimum Wage Act of 1968 (PMWA), 43 P.S. §§ 333.101 - 115, and the related regulations adopted by the Pennsylvania Department of Labor and Industry (Pennsylvania Regulations), 34 Pa. Code §§ 231.41- 43. Specifically, we address whether these statutory and regulatory ***1040** provisions allow for the usage of the Fluctuating Work Week method (FWW Method) for calculating overtime compensation for salaried employees working fluctuating hours. As explained in detail below, we affirm the Superior Court's decision rejecting the use of the FWW Method under the PMWA and the Pennsylvania Regulations, which we find distinguishable from the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 - 219, and related regulations, 29 C.F.R. §§ 778.0 - 778.603 (Federal Regulations), which overtly adopt the FWW Method for salaried employees working fluctuating hours, 29 C.F.R. § 778.114 (entitled "Fixed salary for fluctuating hours").

In September 2013, Tawny L. Chevalier filed a class action complaint against General Nutrition Centers, Inc., a Delaware corporation, and General Nutrition Corporation, a Pennsylvania corporation (collectively GNC).[1] Chevalier had previously been employed by GNC as a store manager and senior store manager, earning a set weekly salary plus commissions, regardless of the number of hours she worked in a given week. GNC additionally paid her overtime for any hours worked in excess of forty hours in a week by utilizing the FWW Method explained below. Essentially, Chevalier argued that the FWW Method did not satisfy the PMWA's requirement that employees "shall be paid for overtime not less than one and one-half times the employe[e]'s regular rate." 43 P.S. § 333.104(c).[2]

She later amended her complaint to add Andrew Hiller, also a former GNC store manager, as a named plaintiff and class representative (collectively, Plaintiffs). Plaintiffs asserted that they were bringing the class action "on behalf of all former or current managers, assistant managers and senior store managers and other 'non-exempt' GNC employees that are paid overtime based upon the 'Fluctuating Work Week Method' ... of overtime compensation." Compl. at ¶ 5.[3] The Plaintiffs worked at GNC between 2009 and 2011.

I. Background

Before addressing the parties' arguments, we first briefly describe the mechanics of the FWW Method in the context of the relevant Federal and Pennsylvania statutes and regulations. A starting point for understanding the FWW Method is the requirement in both the federal and state statutes that employers pay employees overtime

compensation of "not less than one and one-half times [the employee's] regular rate" for all hours worked in excess of forty during a week. *See* 29 U.S.C. § 207(a)(1); 43 P.S. § 333.104(c).[4] This requirement is fairly straightforward for employees who earn a set hourly wage as it merely requires multiplying the number of hours over forty by one and one-half times the hourly rate. The determination of what constitutes "one and one half times the regular rate," however, is more complicated for employees who are paid pursuant to non-hourly compensation arrangements, including payment for work completed, commissions, or salaries. For some of ***1041** these compensation arrangements, the Pennsylvania and Federal Regulations provide guidance concerning the permissible methods of calculating the "regular rate," with the Federal Regulations addressing a significantly greater variety of compensation arrangements than what is provided in the Pennsylvania provisions.[5]

As is relevant to the case at bar, the Pennsylvania provisions do not specifically address a method for calculating overtime for employees, such as Plaintiffs, who are paid a set weekly salary regardless of the hours worked each week. For these employees, the hourly rate of pay necessarily "fluctuates" each week based upon the number of hours worked, given that the agreed upon salary stays constant while the number of hours worked varies from week to week.

Unlike the Pennsylvania provisions, the Federal Regulations specifically address the overtime compensation of salaried employees working fluctuating hours, providing at least two potential methods of calculation, as will be discussed in detail *infra*. Relevant to this case, federal Section 778.114, entitled "Fixed Salary for Fluctuating Hours," explicitly permits employers to use the FWW Method, 29 C.F.R. § 778.104. Indeed, the permissibility of the FWW Method under federal jurisprudence predates the adoption of the regulation. In 1940, the FWW Method was set forth in the Department of Labor's Interpretive Bulletin Number 4 and was approved two years later by the United States Supreme Court in *Overnight Motor Transportation Company, Inc. v. Missel*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942).

Under the FWW Method, the salaried employee's "regular rate" of pay is determined by dividing the total of the weekly salary by the number of hours actually worked that week. This construct presumes that the weekly salary compensates the employee for the "straight time" worked during the week, including any hours worked in excess of forty. Thus, in regard to the statutory requirement that an employee be paid overtime of "one and one-half times the regular rate," an employer utilizing the FWW Method arguably has paid the employee the initial "one ... times the regular rate" through the payment of the weekly wages for the hours worked. The employer then accounts for the overtime requirement of an additional "one-half times the regular rate" by multiplying the number of hours in excess of forty by 0.5 times the regular rate, which we will refer to as the "0.5 Multiplier."[6] As ***1042** explained in detail below, Plaintiffs assert that overtime compensation should be calculated by multiplying the number of hours worked in excess of forty by 1.5 times the regular rate, which we will refer to as the "1.5 Multiplier."

II. Trial Court Proceedings

In support of their class action complaint, Plaintiffs contrasted the explicit federal adoption of the FWW Method for salaried employees working fluctuating hours with the absence of a similar provision under the PMWA or the Pennsylvania Regulations. As noted, instead of the FWW Method, Plaintiffs asserted that overtime under the PMWA for salaried employees with fluctuating hours should be calculated by using the 1.5 Multiplier.[7] Plaintiffs sought restitution of all overtime wages due to the class, as well as costs of litigation and reasonable attorney fees. Am. Compl. at ¶ 27.

After GNC filed its answer and new matter, the trial court ordered the parties to file cross motions for summary judgment, presumably recognizing that the dispute raised a pure question of law regarding the permissibility of the FWW Method for salaried employees working fluctuating hours under the PMWA and the relevant Pennsylvania Regulations, 34 Pa. Code §§ 231.41-43. In response, Plaintiffs filed a Motion for Partial Summary Judgment or in the Alternative, for Judgment on the Pleadings, and GNC filed a Motion for Summary Judgment.[8]

In their several filings, Plaintiffs reiterated their argument which they continue to pursue before this Court, claiming that the FWW Method's use of the 0.5 Multiplier violated the PMWA-mandated payment of "one and one-half times the regular rate." They also rejected GNC's

suggestion that the PMWA should be interpreted consistently with federal Section 778.114, adopting the FWW Method. Rather than incorporating the federal provisions *in toto*, Plaintiffs maintain that the PMWA and the Pennsylvania Regulations selectively adopted aspects of the federal provisions with the intent to provide greater protection for Pennsylvania's workers and did not embrace Section 778.114. Thus, Plaintiffs argued that GNC violated the PMWA by failing to utilize the 1.5 Multiplier.

In response, GNC asserted that the FWW Method is permissible under the PMWA. GNC maintained that Plaintiffs' calculation of overtime pay would override the clear statutory mandate of "one and one-half times the regular rate." GNC claimed that under Plaintiffs' formulation salaried employees would receive two and one-half times their regular rate of pay because the salary provides the initial payment for each hour worked and employees would then receive an additional 1.5 times ***1043** for every hour worked in excess of forty. GNC argued that the FLSA should be used as a guide for interpreting the PMWA, given that the PMWA adopted substantial aspects from its federal counterpart. It contended that if the General Assembly had intended to deviate from the FLSA it would have done so explicitly.

In October 2014, the trial court denied GNC's motion for summary judgment and granted Plaintiffs' motion for partial summary judgment, holding that the FWW Method violated the PMWA. In so doing, the court initially opined that the PMWA and the Pennsylvania Regulations did not provide an unambiguous answer to "the question of whether an employer can use the fluctuating workweek to calculate the overtime pay owed to a salaried employee." Tr. Ct. Op. at 10. The court also recognized that the ambiguity had yet to be resolved by a Pennsylvania appellate court. It next discounted the federal cases, applying Pennsylvania law, which had rejected use of the FWW Method in connection with a specific statutory provision related to preexisting employment agreements establishing a "basic rate," specifically 34 Pa. Code §§ 231.43(d)(3) (the "Basic Rate Provision").[9] Tr. Ct. Op. at 10-12 (discussing *Verderame v. RadioShack Corp.*, 31 F.Supp. 3d 702 (E.D. Pa. 2014); *Foster v. Kraft Foods Global, Inc.*, 285 F.R.D. 343, 347 (W.D. Pa. 2012); and *Cerutti v. Frito Lay*, 777 F.Supp. 2d 920, 944-45 (W.D. Pa. 2011)). The trial court concluded that these federal cases were inapposite because they addressed the Basic Rate Provision, which both GNC and Plaintiffs agreed did not apply in the case at bar.

In determining whether the PMWA should be interpreted to encompass the FWW Method explicitly adopted in the FLSA, the trial court related the histories of the two statutory provisions. It observed that the FLSA was adopted in 1938 and provided for overtime payment of "one and one-half times the regular rate," 29 U.S.C. § 207(a)(1), without defining the term "regular rate" or providing explicitly for the FWW Method. The court noted that within four years of the enactment of the FLSA, the United States Supreme Court approved the use of the FWW Method for salaried employees working fluctuating hours in *Missel*, 316 U.S. 572, 62 S.Ct. 1216, which was incorporated into the Federal Regulations in 1950, and eventually recodified as 29 C.F.R. § 778.114.

The trial court further observed that when Pennsylvania adopted the PMWA and the relevant regulations, it utilized substantial language from the FLSA and the Federal Regulations but did not specifically incorporate the FWW Method for salaried employees working fluctuating hours.[10] The court rejected GNC's argument that Pennsylvania's adoption of the phrasing "one and one-half times the regular rate" along with large portions of the federal provisions demonstrated a "uniformity of purpose between federal and state law" such that it should be deemed an incorporation of the entire federal scheme regarding the "regular rate." Tr. Ct. Op. at 15.

The trial court instead emphasized the PMWA's language mandating that overtime would be "prescribed in regulations adopted by the Secretary." Tr. Ct. Op. at 16 (quoting 43 P.S. § 333.104(c)). The court viewed this language as expressly delegating ***1044** to Pennsylvania's Secretary of Labor and Industry the task of "answering the unanswered questions" related to the calculation of overtime. The court concluded that this provision demonstrated an intent not to adopt the FLSA and its regulations *in toto*, but only those provisions adopted by the Secretary. Moreover, the court acknowledged that the absence of a provision applying the FWW Method to salaried employees suggested an intent not to incorporate that method, in light of Pennsylvania's adoption of numerous other sections of the federal law. The court found this argument especially compelling given that the Secretary had promulgated regulations that copied nearly verbatim the federal provision approving a calculation

methodology essentially the same as the FWW Method in regard to employees subject to day or job rate compensation but did not adopt the FWW Method for salaried employees working fluctuating hours. Tr. Ct. Op. at 17 (comparing the adoption of 29 C.F.R. § 778.112 into 34 Pa. Code § 231.43(b) and the absence of § 778.114).

The court, however, did not view this distinction as indicative of an intent to forbid the use of the FWW Method for salaried employees. Instead, the court concluded that "the most reasonable explanation as to why the [S]ecretary did not promulgate a regulation governing salaried employees is that there was not sufficient support for a regulation answering, one way or the other, the question of whether an employer may use the fluctuating workweek for salaried employees." Tr. Ct. Op. at 18.

The trial court next attempted to ascertain whether the General Assembly's purpose in enacting the relevant portion of the PMWA "is best furthered by permitting employers to use the fluctuating workweek to calculate overtime pay for salaried employees or by barring the use of this method." *Id.* The court opined that "[t]he purpose of the portion of a minimum wage act requiring overtime pay is to increase employment, reduce overtime, and adequately compensate employees who must work more than a standard forty-hour workweek." *Id.* It further reasoned that the method for achieving these goals was to require "extra pay for overtime work such that employers will hire new employees in lieu of requiring existing employees to work overtime," citing *inter alia* the Supreme Court's decision in *Missel*, 316 U.S. at 577-78, 62 S.Ct. 1216. *Id.* at 19. The court then concluded that the presumed goals were furthered by barring the use of the FWW Method because the FWW Method "provides very little financial incentive to expand the workforce rather than pay substantial hours of overtime to existing employees at lower rates per hour." *Id.*

The trial court subsequently granted Plaintiffs' motion for class certification. On September 6, 2016, the trial court entered judgment in favor of the Plaintiffs, in the amount of $1,378.494.77, representing the unpaid overtime, in addition to $362,286.08 in interest to date, with costs and attorneys' fees to be calculated later. The trial court also granted an award of attorney fees in the amount of $360,000 and $8,000 in costs on December 29, 2016.

III. Superior Court Decision

GNC appealed to the Superior Court from the trial court's order of September 6, 2016, entering final judgment, and the order of December 29, 2016, granting attorney fees and costs. After oral argument, the Superior Court sought the Pennsylvania Department of Labor and Industry's views on "whether the PMWA authorizes an employer to use the [FWW] method to calculate overtime compensation for salaried employees." ***1045** *Chevalier v. General Nutrition Centers, Inc.*, 177 A.3d 280, 287 (Pa. Super. 2017) (quoting Super. Ct. Order, 9/22/17, at 2). The Department declined the invitation, asserting that the question "implicate[d] not merely an interpretation of law but policy choices among competing positions as to how best to effectuate the intent of the legislature." *Chevalier*, 177 A.3d at 289.

Judge Moulton authored the lead opinion which garnered a majority for its holdings, although with different constellations of the three-judge panel joining the separate holdings. *Id.* at 303. First, as joined by Judge Solano and detailed more fully below, Judge Moulton reversed the trial court in part and held that GNC's application of the first half of the FWW Method, which uses the actual hours worked to calculate the regular rate, did not violate the PMWA.[11] However, in a second holding, the majority affirmed the trial court's reasoning regarding the second half of the FWW Method, holding that the use of the 0.5 Multiplier violated the PMWA and its accompanying regulations. *Id.* As a result of the reversal in part, the panel also vacated the order granting attorneys' fees and costs and remanded for further proceedings. *Id.*

In addressing the first issue, the court considered the language and history of the PMWA and the Pennsylvania Regulations as well as the reasoning of the federal courts in *Verderame*, *Foster*, and *Cerutti*, in regard to the calculation of the regular rate. The court recognized that the term "regular rate" was not defined in either the statute or in the regulations adopted by the Secretary and that the term could be interpreted to provide for calculation based on either a "regular" forty hour week or the rate that resulted from the "regular" weekly payment based upon the hours actually worked each week. The question then became, in the absence of regulations from the Secretary, whether the silence should be interpreted to adopt or reject the federal guidance.

In interpreting the term, the Superior Court majority observed that Pennsylvania "borrowed" the term "regular rate" directly from the FLSA and its regulations which at the time were "clearly understood" to allow employers to utilize the actual hours worked rather than forty to calculate the regular rate. *Id.* at 299. In reaching this conclusion, the court was guided by our caselaw providing that courts may consider federal authority when a Pennsylvania statute tracks a federal statute. *Id.* at 299 (*citing Commonwealth v. Garrison*, 478 Pa. 356, 386 A.2d 971, 977 n.5 (1978)). Emphasizing that the General Assembly overtly diverged from the FLSA and its regulations in regard to several other provisions, the court found that the absence of language contrary to the use of actual hours in calculating the regular rate indicated that the General Assembly did not intend to reject the federal interpretation. It accordingly concluded that the use of the actual hours worked did not violate the PMWA and the Pennsylvania Regulations.[12]

The Superior Court then turned to the second question regarding the trial court's adoption of the 1.5 rather than the 0.5 Multiplier for hours worked in excess of forty. The court presented the issue as raising a similar question as the first: whether the silence of the PMWA and the ***1046** Pennsylvania Regulations in regard to the multiplier should be interpreted to adopt or reject the Federal Regulations' express authorization of the 0.5 Multiplier for salaried employees working fluctuating hours in 29 C.F.R. § 778.114(a).

Ultimately, the Superior Court reached the opposite result from the first question, finding the silence of Pennsylvania's provisions as indicative of a decision to reject the federal guidance. In contrast to the first question, the court found significance in the fact that the Pennsylvania statute and regulations had specifically adopted multipliers in regard to other employee classes. In particular, the Superior Court majority focused on Pennsylvania's adoption of the 0.5 Multiplier for employees paid via day or job rates, 34 Pa. Code § 231.43(b), which mirrors Section 778.112 of the Federal Regulations, but did not adopt a comparable section applicable to salaried employees working fluctuating hours, as is present in federal Section 778.114. The court held that the absence of language adopting the 0.5 Multiplier for salaried employees indicated an intent not to adopt the federal provisions, given the incorporation of other federal calculation systems elsewhere in the Pennsylvania provisions. The court therefore concluded that GNC's use of a 0.5 Multiplier violated the PMWA and the Pennsylvania Regulations. Given that the court reversed the trial court in part, it vacated the order granting attorney fees and costs and remanded the case to the trial court for further proceedings.

In his concurring and dissenting opinion, Judge Solano viewed the case as presenting issues that would be better addressed by the political bodies and particularly by the Secretary, who the General Assembly had authorized to promulgate regulations. He opined that the provisions should be interpreted as they would have been when Section (4)(c) of the PMWA was enacted in 1968, which would allow for the FWW Method of calculation as provided in *Missel* and adopted in Section 778.114 of the Federal Regulations. As such, he agreed with the majority that GNC may use actual hours worked to calculate the regular rate.

He parted with the majority because, employing the same analysis, he would have additionally applied the second half of the FWW Method as adopted in the federal system utilizing the 0.5 Multiplier rather than the 1.5 Multiplier. Judge Solano faulted the lead opinion for essentially concluding that "one and one-half times the regular rate" "means that the total hourly compensation paid for the overtime hours must be 1 ½ times higher than the employee's regular rate, rather than an amount that is equal to 1 ½ times the regular rate." *Chevalier*, 177 A.3d at 305 (Solano J., concurring and dissenting) (emphasis omitted). He continued that, "because the Secretary promulgated no regulations that departed from that [federally approved FWW Method,] there was no need for another regulation reiterating the existing default rule." *Chevalier*, 177 A.3d at 308.

Judge Musmanno drafted a brief concurring and dissenting statement adopting the trial court's opinion in full. Thus, he dissented from the majority's holding allowing the use of actual hours to calculate the regular rate but joined its application of the 1.5 multiplier for salaried employees working fluctuating hours.

IV. Parties' Arguments

GNC appealed the Superior Court's decision to the extent it rejected the application of the FWW Method to salaried

***1047** employees working fluctuating hours.[13] Before this Court, GNC reiterates its contention that the PMWA should be interpreted consistently with the Federal Regulations, which explicitly adopt the FWW Method, 29 C.F.R. § 778.114. It argues that Pennsylvania's "silence on this issue should be interpreted as acceptance of the FWW Method, rather than a repudiation of it." GNC Brief at 14.

GNC begins its argument by addressing the first half of the FWW Method, which was accepted by Superior Court and is not challenged by Plaintiffs before this Court, whereby the regular rate is calculated using the employee's "actual hours worked" rather than being based on forty hours. GNC emphasizes that this holding is consistent with the long-standing interpretation of the FLSA as providing flexibility to employers and employees to utilize different compensations arrangements so long as those arrangements comply with minimum wage requirements. These arrangements include compensation "by the hour, by piecework, by the week, month, or year, and with or without a guarantee that earnings for a period of time shall be a stated sum." GNC Brief at 16 (quoting *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460-61, 68 S.Ct. 1186, 92 L.Ed. 1502 (1948)).

GNC reiterates the United States Supreme Court's holding in *Missel* that, regardless of the compensation arrangement, the regular rate is determined based on the same simple mathematical formula: "wages divided by hours equals regular rate." *Id.* at 17 (quoting *Missel*, 316 U.S. at 580 n.16, 62 S.Ct. 1216). Applying this formula to salaried employees working fluctuating hours simply requires total wages (in this case, salary and commission) to be divided by the actual hours worked in the week to calculate the "regular rate." As noted, GNC emphasizes that Plaintiffs have conceded this application.

GNC contends, however, that Plaintiffs' concession to the first half of the FWW Method is logically incompatible with a rejection of the second half of that Method. It notes that, by mathematical principal, if the regular rate is calculated by dividing the salary by the actual hours worked, then the salary must be deemed to have compensated the employee for those actual hours at "one times" the regular rate. GNC Reply Brief at 7-8. Accordingly, GNC asserts that the employer need only pay an additional "one-half" times the regular rate for all hours over forty to meet the requirement of "one and one half times the regular rate." GNC Brief at 19-20.

GNC additionally asserts that the FWW Method should be deemed applicable to the PMWA, given the substantial similarity of the PMWA and the FLSA. GNC recognizes that the only difference between the state and federal "regular rate" provisions requiring overtime compensation of "not less than one and one-half times the regular rate" is that the PMWA additionally provides for the Secretary to promulgate regulations. GNC Brief at 24-25 (quoting 29 U.S.C. § 207(a)(1); 43 P.S. § 333.104(c)). It further emphasizes that the Secretary later promulgated a regulation ***1048** reiterating this language. 34 Pa. Code. § 231.31.

It notes that at the time of the PMWA's adoption of the "regular rate" language, the FLSA had long been interpreted to allow for application of the FWW method to salaried employees working fluctuating hours pursuant to *Missel*. GNC Brief at 29. Thus, it argues that "the terms 'regular rate' and 'one and one-half times the regular rate' had each acquired a 'peculiar and appropriate meaning' in light of that jurisprudence, to permit the FWW method, and they should be construed according to that meaning." GNC Brief at 27 (quoting 1 Pa.C.S. § 1903(a)). Therefore, GNC argues that PMWA should be interpreted consistently with federal law, absent a clear indication that the General Assembly intended to diverge from the federal provisions.[14]

GNC also rejected the Superior Court majority's focus on the absence of a specific Pennsylvania provision mirroring federal Section 778.114, adopting the FWW Method for salaried employees with fluctuating hours. GNC contends that the Federal Regulations include a non-exhaustive selection of applications of overtime to different compensation arrangements. It emphasizes that the Pennsylvania Regulations did not incorporate most of these provisions. Indeed, GNC highlights that while Pennsylvania adopted the federal provision applying the 0.5 Multiplier to day and job rates in 34 Pa. Code § 231.43(b), it did not adopt federal guidance on several significant compensation categories such as hourly rates, commission, and bonuses. 29 C.F.R. §§ 778.110, .117-.120, and .209 (respectively). It argues that "[t]he absence of regulations dealing with these common compensation arrangements surely does not mean that they were all rendered unlawful in 1977 by the adoption of the day [and job] rate regulation, or that employers could no longer look to the FLSA for guidance." GNC

Brief at 40.

GNC also responds to the distinction between the "extra one-half time" utilized for purposes of the day and job rate compensation, 34 Pa. Code § 231.43(b), in contrast to the general provision of "one and one-half times" the regular rate. It reasons that the use of "extra" is a distinction without a difference, arguing that "[w]hile the regulation describing a 0.5 multiplier includes the word 'extra' to describe the additional amount needed to bring the overtime rate to one and one-half times the regular rate, the regulations describing a 1.5 multiplier do not include the word 'extra' because they are describing the total amount owed for the overtime hours, not the extra amount owed." GNC Brief at 30-31. In contrast, it views Plaintiffs' and the Superior Court majority's construction as providing for a total payment of two and one-half times the regular rate for all except those who are paid on a day or job rate basis.[15]

GNC also criticizes the trial court and Judge Musmanno's concurring and dissenting statement in the Superior Court for applying public policy to decide whether the FWW Method should be permitted. It avers that the General Assembly, rather ***1049** than the courts, is the proper venue for deciding whether the FWW Method violates public policy. Moreover, GNC asserts that "it would be fundamentally unfair for the courts to impose substantial retroactive liability on GNC for using a pay practice that had been recognized as lawful since 1942 and that is not prohibited by any Pennsylvania statute or regulation." GNC Reply Brief at 3.[16,17]

In response, as noted by GNC, Plaintiffs concede that the regular rate is calculated by dividing the weekly salary by the actual hours worked. Pls.' Brief at 1-2. They nevertheless continue to argue that overtime hours should be compensated using the 1.5 Multiplier based upon the statutory and regulatory provisions.

In so doing, Plaintiffs reject GNC's argument that the PMWA is a mirror image of the FLSA and the related argument that acceptance of the FWW Method in the federal statutes and regulations should be imported into the state provisions. They contrast the histories of the federal and state schemes in regard to salaried employees working fluctuating hours. Plaintiffs argue that the Federal Regulations derived from United States Supreme Court's post-World War I decisions, which they view as an attempt by the Court "to harmonize the new [FLSA] statute with [the] long-established doctrine of 'freedom of contract.' " Pls.' Brief at 13. They observe that the High Court approved two overtime compensation methods for salaried workers with fluctuating wages, which allowed for freedom of contract in devising different compensation arrangements in *Missel* and *Walling v. A. H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1942),[18] which was filed on the same day as *Missel*. They note that the *Missel* decision utilizing the FWW Method was incorporated into 29 C.F.R. § 778.114(a), while the *Belo* contract was adopted in 29 U.S.C. § 207(f) as well as 29 C.F.R. 778.402.

In contrast to what they view as federal integration of the FLSA and the freedom to contract, Plaintiffs assert that the PMWA preamble rejects the "freedom to contract" premise. Pls.' Brief at 17. The preamble states that employees are not "on a level of equality and bargaining with their employers in regard to minimum fair wage standards" and continues that " 'freedom of contract' as applied to [employees'] relations with their employers is illusory." 43 P.S. § 333.101. They highlight that the FLSA has been deemed to act as a floor for minimum wage and overtime compensation while the PMWA has been recognized as providing greater protection for employees. Pls.' Brief at 20 (citing *Bayada Nurses, Inc. v. Commonwealth of Pennsylvania Department of Labor & Industry*, 607 Pa. 527, 8 A.3d 866 (2010)).

Plaintiffs emphasize that, unlike the FLSA, the PMWA authorizes the Secretary to promulgate regulations addressing overtime compensation, citing ***1050** 43 P.S. §§ 333.104(c) and 333.109. They view this distinction as indicative of a need for affirmative action by the Secretary rather than allowing for adoption of the FLSA provisions by implication. Plaintiffs discuss numerous variations between the federal and state provisions and identify several Federal Regulations addressing overtime calculations that were not adopted into the PMWA or the Pennsylvania Regulations, including: "different calculations of the regular rate for the regular and overtime compensation for workers on an hourly wage (§ 778.110), a piece worker (§ 778.111), salaried employees [- general] (§ 778.113), [and] fixed salary for fluctuating hours (§ 778.114)." Pls.' Brief at 39. To these specific methods, Plaintiffs assert that the Pennsylvania provisions simply provide that overtime should be compensated at "one and one-half times the regular rate."

Plaintiffs also highlight specific state regulatory provisions as indicative of the Secretary's intent. First, they observe that 34 Pa. Code § 231.43(b), which addresses employees paid via day and job rate, mirrors 29 C.F.R. § 778.112 of the Federal Regulations and compensates employees for overtime through "extra half-time pay." 34 Pa. Code § 231.43(b). Plaintiffs observe that this is the only use of a 0.5 Multiplier in the Pennsylvania Regulations, despite appearing in several Federal Regulations. They assert that "Pennsylvania clearly exercised a choice in terms of including this particular spreading mechanism for compensation over all hours for day rates and job rates [by adopting 29 C.F.R. § 778.112] but excluding the same for salaried employees" by not adopting 29 C.F.R. § 778.114. Pls.' Brief at 41.

Next, as discussed *infra*, Plaintiffs emphasize that while Pennsylvania incorporated the federal *Belo* provisions of 29 U.S.C. § 207(f) and 29 C.F.R. § 778.402 into 34 Pa. Code § 231.43(c), neither the General Assembly nor the Secretary incorporated the FWW Method, even though both provisions related to overtime compensation methods for employees working fluctuating work weeks. Pls.' Brief at 40-41. Plaintiffs view this as intentional differentiation by the General Assembly and Secretary in choosing which portions of the federal provisions to incorporate into Pennsylvania law.

Plaintiffs distinguish the cases from other states cited by GNC, and point to differences in the governing statutory provisions of the relevant states. Pls.' Brief at 37-38. Plaintiffs additionally recognize that, unlike Pennsylvania, twenty-eight states have adopted the FWW Method either through specific legislation or by incorporating the FLSA *in toto*. Additionally, they observe that three states have rejected the FWW[19] and in twenty, including Pennsylvania, the legality of the method is unresolved. Pls.' Brief at 46 (citing the Wage and Hour Defense Institute's "State-by-State Wage And Hour Law Summary," updated 1/20/2017).

Plaintiffs acknowledge that the "general directive to pay overtime at one and one-half times the regular rate" is ambiguous when viewed in a vacuum. Pls.' Brief at 50. They reason that the phrase should not be interpreted to allow the application of the FWW Method to salaried employees working fluctuating hours, when viewed in light of Pennsylvania's greater protection of employees and its failure to adopt the applicable Federal Regulation of Section 778.114 applying the FWW Method. It argues that ***1051** "[i]f the Secretary wanted to include the FWW, it would have been written into the PMWA's regulations in 1977." Pls.' Brief at 54.[20]

V. Analysis

This case presents the question of whether the FWW Method for calculating overtime compensation for salaried employees working fluctuating hours is permissible under the PMWA, despite the absence of any specific adoption of the method in the PMWA or the related Pennsylvania Regulations. All agree that the answer depends on the interpretation of the following language in the PMWA: "Employe[e]s shall be paid for overtime not less than one and one-half times the employe[e]'s regular rate as prescribed in regulations promulgated by the secretary." 43 P.S. § 333.104(c). Similar language is echoed in the regulations promulgated by the Secretary: "[E]ach employee shall be paid for overtime not less than 1-1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a workweek." 34 Pa. Code § 231.41.

This language easily applies to employees paid based on an hourly rate, as it merely requires application of the following simple formula: 1.5 x hourly rate x number of hours over forty. Not all employees, however, are paid based on an hourly rate. Instead, compensation structures differ based upon the relevant work performed and may involve, *inter alia*, salaries, commissions, payment based on the work completed, or a combination of these compensation methods. These compensation arrangements do not always easily convert to the hourly structure of the generic overtime formula. Moreover, unlike the federal system which includes detailed regulations addressing numerous compensation structures, Pennsylvania's Secretaries of Labor and Industry have provided very limited guidance as to how to convert the generic overtime compensation formula to other compensation methods.

The case at bar involves one of these compensation arrangements that does not fit neatly into the generic overtime formula. Plaintiffs, like many Pennsylvania residents, are paid a set weekly salary plus commissions regardless of the hours worked.[21] Thus, their weekly wages compensate them for the hours they work whether they work thirty or sixty hours.[22] ***1052** Accordingly, their

"straight time" hourly rate can vary significantly week to week such that they do not have a uniform hourly rate applicable each week in the same way an hourly employee does.

All acknowledge that this payment arrangement creates ambiguities regarding (1) how to calculate the regular rate, and (2) whether to multiply that rate by 0.5 or 1.5 to achieve the one and one-half times the regular rate required by the statute. As to the first half of the calculation, the parties now agree with the Superior Court majority that the regular rate should be calculated by using the actual hours worked.

The next question is whether a 0.5 or 1.5 Multiplier should be applied to the regular rate to determine the overtime compensation rate. As noted, the regulation provides that "each employee shall be paid for overtime not less than 1-1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a workweek." 34 Pa. Code § 231.41. This language is susceptible to two readings as applied to employees working fluctuating hours for a set weekly salary. As forwarded by Plaintiffs, the simplest reading of the plain language provides that the regular rate should be multiplied by 1.5 "for all hours in excess of 40 in a workweek." Thus, an employee would receive the following total compensation: salary + (1.5 x regular rate x number of overtime hours).

Nevertheless, this formulation does not account for the fact that the parties agreed that the salary would compensate the employee for all hours worked. Indeed, the same statutory and regulatory language can be read, as it was by the United States Supreme Court in *Missel*, to support GNC's calculation of total compensation: salary + (0.5 x regular rate x number of overtime hours). This formulation accounts for the fact that the regular rate was calculated to include compensation for overtime hours, such that only an additional half of the regular rate for each overtime hour is needed to achieve one and one half times the regular rate.

Given that both readings have merit resulting in ambiguity, we look to the rules of statutory construction to determine the intent of the legislature. As we have often noted, when faced with a question of statutory interpretation, "our standard of review is de novo, and our scope of review is plenary." *Whitmoyer v. Workers' Compensation Appeal Board (Mountain Country Meats)*, 646 Pa. 659, 186 A.3d 947, 954 (2018). The goal of all statutory interpretation is to "ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Id.* § 1921(b). However, when the language is ambiguous, we are guided by several factors set forth in our rules of statutory construction including "the occasion and necessity for the statute," "the circumstances under which it was enacted," "the object to be obtained," and "the former law, if any, including other statutes upon the same or similar subjects." *Id.* § 1921(c).

In this case, application of the rules of statutory construction requires consideration of the relevant language, read within the context of the history and structure of PMWA and the FLSA. The FLSA was adopted in 1938 to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[23] 29 U.S.C. § 202. It addressed ***1053** these societal ills by providing, *inter alia*, minimum wage, overtime compensation, and child labor laws. In regard to overtime, it forbid overtime work unless the "employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207.[24]

Soon after the passage of the FLSA, the United State Supreme Court interpreted the generic overtime compensation provision of Section 207 to apply to the specific situation of an employee, like Plaintiffs in the case at bar, "working irregular hours for a fixed weekly wage." *Missel*, 316 U.S. at 573, 62 S.Ct. 1216. The employer in *Missel* maintained that it satisfied the dictates of Section 207 so long as the lump salary exceeded the amount the employee would be due if he had been paid minimum wage for the first forty hours of work and 1.5 times minimum wage for all hours over forty. The High Court rejected this argument outright.

Instead, the Court set forth what it viewed as a proper application of Section 207 to salaried employees working fluctuating hours. It first observed that the purpose of the FLSA was not only to "increas[e] pay for overtime work" but also to prevent excessive work hours and to increase the distribution of the available work.

Id. at 578, 62 S.Ct. 1216. It next recognized that Section 207 could apply to a salaried employee even though the language was phrased entirely in the context of an hourly rate. *Id.* at 580, 62 S.Ct. 1216. The Court viewed Section 207 as providing the simple formula that "wages divided by hours equals regular rate." *Id.* at 580 n.16, 62 S.Ct. 1216. The Court applied this formula to salaried employees working fluctuating hours merely by dividing the salary by the actual hours worked to obtain the regular rate. It recognized that:

> As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked. It is true that the longer the hours the less the rate and the pay per hour.

***1054** *Id.* at 580, 62 S.Ct. 1216 (footnote omitted). Essentially, the Court set forth the FWW Method used in the case at bar, which was originally proffered in the Department of Labor's Interpretive Bulletin Number 4. *Id.* at 580 n.17, 62 S.Ct. 1216.

On the same day as it decided *Missel*, the Supreme Court also approved the use of a different compensation arrangement for salaried employees working fluctuating hours in *Belo*, 316 U.S. 624, 62 S.Ct. 1223. *Belo* addressed a situation where an employer restructured its compensation system, which had previously been based on weekly salaries, to meet the newly enacted FLSA's overtime provisions. The company translated the weekly salary to an hourly rate by assuming that the first forty-four hours (the then-applicable work week) would be paid at a "basic rate" and the next ten and one-half hours at 1.5 times the basic rate. Moreover, the employer guaranteed its employees the resulting compensation (which was equal to the employee's pre-FLSA salary) based upon an assumed 54.5 hour work week even if they worked fewer hours and paid them for any additional hours at 1.5 times the basic rate.

The Court approved this method as in compliance with the FLSA. Moreover, the Court noted that an employee working sixty-five hours under a *Belo* contract would earn substantially more than an employee working the same hours under the FWW Method set forth in *Missel*. It recognized that "[t]here is a difference in compensation, but that is the agreement of the parties and it is within the letter and the intention of the law," *Belo*, 316 U.S. at 634, 62 S.Ct. 1223, seemingly relying on the "freedom of contract" approach.

The Court in *Belo* additionally acknowledged "special problems confronting employers and employees in businesses where the work hours fluctuate from week to week and from day to day." *Id.* at 635, 62 S.Ct. 1223. It observed that "[m]any such employees value the security of a regular weekly income" to "operate on a family budget, [and] to make commitments for payments on homes and automobiles and insurance." *Id.* Given the complexities of these arrangements, the Court was hesitant to "provide a rigid definition of 'regular rate,' " especially where Congress had also avoided acting. The Court opined that "[p]resumably Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable." *Id.* at 634, 62 S.Ct. 1223.

Eventually, the federal Department of Labor acted to elaborate upon the application of Section 207(a)'s requirement of "one and one half times the regular rate" in regard to various specific compensation methods.[25] In 1950, the Department ***1055** adopted the *Missel* framework into what was eventually codified as 29 C.F.R. § 778.114(a). Similarly, the *Belo* contract was incorporated into the FLSA as 29 U.S.C. § 207(f) and into the regulations as 29 C.F.R. § 778.402.

Thirty years after the enactment of the FLSA, the Pennsylvania General Assembly adopted the PMWA in 1968, Act of 1968, P.L. 11, but limited its applicability to only those employees not otherwise subject to the FLSA. The coverage was expanded in 1988 to include "any individual employed by an employer." 43 P.S. § 333.103(h).[26] In enacting the PMWA, the General Assembly did not mince words in stating its purpose and fervently indicating its intent to use the Commonwealth's police power to increase employee wages:

> Employe[e]s are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Employe[e]s employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are often found to bear no relation to the fair value of the services rendered. In the absence of effective minimum fair wage rates for employe[e]s, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of the economy. The evils of unreasonable and unfair wages as they affect some employe[e]s employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employe[e]s employed therein and of the public interest of the community at large.

43 P.S. § 333.101.

Notably, this Court and others have emphasized that states have the authority "to enact more beneficial wage and hour laws" than those provided in the FLSA. *Bayada Nurses, Inc.*, 8 A.3d at 883. We have observed that "the federal statute establishes only a national floor under which wage protections cannot drop, but more generous protections provided by a state are not precluded."[27] *Id.*

With this strong public policy favoring employee protection as a backdrop, the PMWA specifically addresses overtime ***1056** compensation in Section 333.104(c), utilizing the now familiar language of the FLSA requiring payment of "one and one half times the regular rate" but qualifies it by designating the Secretary of Labor to promulgate regulations. 43 P.S. § 333.104(c).[28] The statutory provision, itself, does little to explain its application to the variety of compensation arrangements.

In 1977, the Department promulgated regulations addressing some aspects of the overtime calculation. 34 Pa. Code §§ 231.41-43. Section 231.41 essentially restates the PMWA's requirement in Section 333.104(c), instructing that (absent the applicability of an exception not relevant to this case), "each employee shall be paid for overtime not less than 1-1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a workweek."[29] Next, Section 231.42 defines a "workweek" as "a period of 7 consecutive days" and states that "[o]vertime shall be compensated on a workweek basis regardless of whether the employee is compensated on an hourly wage, monthly salary, piece rate or other basis."[30]

Finally, and most relevantly, Section 231.43 addresses the "regular rate." Initially, it instructs that "the regular rate at which an employee is employed shall be deemed to include all remuneration for employment paid to or on behalf of the employee." The regulation then excepts seven categories of payment not relevant to the case at bar, including, for example, amounts paid to the employee as gifts, 34 Pa. Code § 231.43[a] (1)-(7).

Subsection 231.43(b) provides explicit instruction on the calculation of overtime for employees paid on a day or job rate basis, dictating that the regular rate "is determined by totaling all the sums received at the day rates or job rates in the workweek and dividing by the total hours actually worked" and that the employee is "then entitled to extra half-time pay at this rate for hours worked in excess of 40 in the workweek."[31] As the parties have emphasized, ***1057** this provision adopts the 0.5 Multiplier for day and job rates. GNC argues that this incorporation demonstrates the Secretary's acceptance of the general concept of the FWW Method, whereas Plaintiffs cite this provision as evidence of the Secretary

intentionally choosing to adopt the Federal Regulation applying the 0.5 Multiplier to day and job rate compensation arrangements, but refusing to adopt it for employees with fixed salaries and fluctuating hours. Plaintiffs emphasize that Pennsylvania adopted federal Section 778.112 verbatim, applying the 0.5 Multiplier to day and job rates, but not Section 778.114 applying it to salaried employees with fluctuating hours.

Subsection 231.43(c) adopts the *Belo* arrangement, with language similar to that present in Section 207(f) of the FLSA and 29 C.F.R. § 778 402 of the Federal Regulations. As do the federal provisions, Subsection 231.43(c) provides a permissible overtime compensation scheme for salaried employees working fluctuating hours."[32] The question then becomes whether the Secretary's adoption of the *Belo* arrangement and its silence in regard to the formula adopted by the High Court in *Missel*, and later incorporated into federal Section 778.114, should be deemed a rejection of the FWW Method for salaried employees working fluctuating hours.

Pennsylvania's Regulation Subsection 231.43(d) expressly approves of an employment arrangement for overtime compensation involving "an agreement or understanding arrived at between the employer and the employee before performance of the work" in the following discrete situations: (1) "an employee employed at piece rates;" (2) an employee "performing two or more kinds of work for which different hourly or piece rates have been established;" or (3) in cases involving an established "basic rate."[33] Each provision requires ***1058** overtime compensation of "1 ½ times" the relevant rate. Notably, the basic rate subsection of Section 231.43(d)(3) was relied upon by the employers in the various federal cases cited by the parties, which ultimately rejected the use of the 0.5 Multiplier. *See* *Verderame*, 31 F.Supp. 3d 702; *Foster*, 285 F.R.D. 343; *Cerutti*, 777 F.Supp. 2d 920.[34]

Conspicuously absent from the Pennsylvania Regulations is any reference, positive or negative, to the use of the FWW Method for salaried employees working fluctuating hours as first approved in *Missel* and later adopted as Section 778.114 of the Federal Regulations. Both parties use the Secretary's silence in this regard as an indication of the adoption of their constructions. As we have noted, both parties have legitimate interpretations of the ambiguity created by the regulatory void. *See supra* at 1051–52. Indeed, as has been repeatedly mentioned throughout this litigation, it would be far more preferable for the General Assembly or the Secretary to clarify the policy of Pennsylvania in this regard. Nevertheless, in the absence of direction from these bodies, this Court is left to interpret the ambiguity in Pennsylvania's laws.

As noted above, the language of the regulation provides that "each employee shall be paid for overtime not less than 1-1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a workweek." 34 Pa. Code § 231.41(c). This language, when mechanically applied, comports with Plaintiffs' analysis as it requires "all hours in excess of 40" to be paid at 1.5 times the regular rate, regardless of whether the regular rate was calculated based upon the actual hours worked. Considering this application in light of the unmistakable intent of the General Assembly to use the Commonwealth's police power to increase wages to combat the "evils of unreasonable and unfair wages," 43 P.S. § 333.101, we conclude that the rules of statutory construction favor Plaintiffs' interpretation requiring application of the 1.5 Multiplier. 1 Pa.C.S. § 1921(c) (instructing courts faced with ambiguity to consider, *inter alia*, "[t]he occasion and necessity for the statute" and "[t]he object to be obtained").

This interpretation is further supported by the Secretary's overt application of the 0.5 Multiplier for day and job rate compensation arrangements by adopting Section 778.112 of the Federal Regulations verbatim but not adopting Section 778.114, ***1059** which applies the FWW Method's 0.5 Multiplier to salaried employees working fluctuating hours. We are similarly guided by the regulatory decision to allow the use of *Belo* contracts in 34 Pa. Code. § 231.43(c), which approves of a different overtime compensation method for salaried employees working fluctuating hours, but not adopting the FWW Method approved in *Missel*. The incorporation of these provisions gives additional credence to the conclusion that the Secretary intentionally adopted some but not all of the calculation methods elaborated in the Federal Regulations. Thus, we view the Secretary's silence as an intent to reject the 0.5 Multiplier of the FWW Method in favor of the 1.5 Multiplier.

Accordingly, we affirm the Superior Court's decision rejecting GNC's use of the FWW Method for calculating Plaintiffs' overtime compensation to the extent it utilizes

a 0.5 Multiplier.

Justices Todd, Dougherty and Wecht join the opinion.

Justice Mundy files a concurring opinion.

Chief Justice Saylor and Justice Donohue file concurring and dissenting opinions.

JUSTICE MUNDY, Concurring

Subject to certain exceptions not relevant here, the Pennsylvania Minimum Wage Act (PMWA) requires, "[e]mploye[e]s shall be paid for overtime not less than one and one-half times the employe[e]'s regular rate as prescribed in regulations promulgated by the secretary[.]" 43 P.S. § 333.104(c). In this case, we granted allowance of appeal to consider whether an employer satisfies its obligation under the PMWA by compensating an employee at an additional one-half times the employee's regular rate for all hours worked in excess of 40, in addition to the employee's salary, when the regular rate "is determined by dividing the employee's salary by all hours worked in a week[.]" *Chevalier v. General Nutrition Centers, Inc.*, 647 Pa. 330, 189 A.3d 386 (2018).

The Majority points out that, at this stage, the parties agree with the Superior Court that the regular rate should be calculated by using the actual hours worked method. Maj. Op. at 1051–52. Accordingly, for the purpose of this decision, we must assume that the "actual hours worked" formula is permissible under the PMWA. As the issue is not before this Court, I acknowledge that a future case may present the issue, and this Court may reach a contrary result.

In this case, the trial court astutely observed that under this paradigm of calculating an employee's regular rate, "for each extra hour of overtime the employee works, the hourly rate declines." Trial Court Op., 10/20/14, at 19. Given this calculation serves to diminish an employee's earnings, I agree with the Majority and Justice Donohue that the use of the 1.5 multiplier best effectuates the stated intent of the PMWA to increase the wages of workers in this Commonwealth as a matter of statutory construction. *See* Majority Op. at 1055–56; Concurring and Dissenting Op., Donohue, J. at 1060; *accord* 1 Pa.C.S. § 1921 (a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly."); 43 P.S. § 333.101 (Declaration of policy). Accordingly, I join the Majority's analysis in that regard. However, I share Justice Donohue's view to the extent that the silence by the Secretary on this question and the absence of a clarifying regulation is not evidence of the intent of the Department of Labor and Industry to apply the 1.5 multiplier.

***1060** For these reasons, I respectfully concur in the result reached by the Majority.

CHIEF JUSTICE SAYLOR, concurring in part dissenting in part

I agree with the reasoning set forth in the concurring and dissenting opinion in the Superior Court, authored by Judge Solano, and would adopt that position here. *See* *Chevalier v. Gen. Nutrition Ctrs., Inc.*, 177 A.3d 280, 303-08 (Pa. Super. 2017) (Solano, J., concurring and dissenting).

JUSTICE DONOHUE, Concurring in part dissenting in part

Section 4(c) of the Minimum Wage Act of 1968 ("MWA") provides, in relevant part, that "[e]mploye[e]s shall be paid for overtime not less than one and one-half times the employe[e]'s regular rate **as prescribed in regulations promulgated by the secretary**." 43 P.S. § 333.104(c) (emphasis added).[1] The statute is explicit in its direction to the secretary of the Department of Labor and Industry ("the Department") to establish regulations detailing the calculation of overtime compensation for the employees that fall within the ambit of this provision, including salaried employees who work fluctuating schedules, like Appellees here. Despite the decades that have passed since this provision's enactment, the Department has not fulfilled this legislative mandate. While the Department has promulgated a regulation that provides specific guidance for overtime compensation

calculations in the case of day and job rate calculations, *see* 34 Pa. Code § 231.43(b), it has not done so for employees that work under other compensation agreements, like Appellees.

Instead of promulgating regulations to provide guidance to industry and labor, the Department promulgated opaque regulations that merely echo the statutory language without providing any additional detail or guidance. *See* 34 Pa. Code §§ 231.41, 231.43(c). It is agreed by all parties that for employees with compensation arrangements like Appellees, the statute and regulation are ambiguous as to how to determine the employee's "regular rate" and whether the regular rate shall be multiplied by 0.5 or 1.5 for purposes of calculating overtime compensation. Majority Op. at 1051–52.

As to the first facet of this inquiry, i.e., the definition of "regular rate," the parties agree with the Superior Court's unappealed holding that Appellees' regular rate should be based upon the actual hours worked. The Majority notes this agreement. *Id.* I emphasize that in light of this agreement, our disposition should not be read as adopting, as a settled principle, that the "actual hours worked" formula is the proper variable for this equation. As the Majority observes, the question of whether the regular rate should be based on actual hours worked or a forty-hour work week is not before us. *Id.* at 1045 n.12.

As to the determination of the appropriate multiplier (0.5 or 1.5), the Majority recognizes that the Department has promulgated scant regulations to guide the calculation of overtime compensation in general, and that the few existing regulations contain no guidance for cases involving salaried employees like Appellees. Majority Op. at 1055–57. In light of that void, the Majority appropriately looks to the intent and purpose of the MWA and adopts the use of the 1.5 multiplier because it will always result in greater compensation for the worker than the use of the 0.5 multiplier, and therefore effectuate the General Assembly's intent, as expressed ***1061** in the Declaration of Policy,[2] to increase employee wages. *Id.* at 1058. I agree with this analysis.

The Majority then attempts to bolster its decision by explaining that its conclusion is "supported by" the Department's intent that the 1.5 multiplier be used in this instance. *Id.* at 1058–59. The Majority divines this intent from the Department's failure to promulgate an appropriate regulation. *See id.* at 1058 (citing the express adoption of the 0.5 multiplier for other classes of employees as support for its conclusion that the 1.5 multiplier applies here); *id.* at 1059 ("[W]e view the Secretary's silence as an intent to reject the 0.5 [m]ultiplier of the FFW Method in favor of the 1.5 [m]ultiplier."). I acknowledge that statutory interpretation requires listening acutely to words not used by the General Assembly as well as to the words chosen. *See* *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 567 Pa. 514, 788 A.2d 955, 962 (2001). However, I know of no instance, nor has my research revealed any such instance, in which this Court has equated an administrative agency's silence – its failure to act (as directed by the General Assembly) – with the interpretive precept of attention to "words not chosen." Yet, that is what the Majority does here, as it purports to glean the Department's intent from its failure to follow a legislative directive to enact regulations detailing the manner in which overtime compensation is to be calculated. In my view, this inference is unsound jurisprudentially. There is nothing for this Court to glean from the Department's abdication of the responsibility conferred on it by the General Assembly, other than that it did so abdicate. Further, the Majority's effort to divine the intent of the Department is all the more puzzling where, as here, the Department has affirmatively refused to assert a position on the ambiguities created by its failure to adopt clarifying regulations. *See* *Chevalier v. General Nutrition Centers*, 177 A.3d 280, 289 (Pa. Super. 2017) (explaining the Department's refusal to accept the Superior Court's request to explain its views on the proper method for overtime calculation).

Despite my reservations about this aspect of the lead opinion, I concur in the result reached by the Majority. This case is fundamentally one of statutory interpretation, and so our task is to give effect to the intent of the General Assembly. 1 Pa.C.S. § 1921(a). As explained by the Majority, the General Assembly included a policy statement in the MWA, in which it clearly articulates that it intends the Act to benefit ***1062** workers and to increase their wages. *See* Majority Op. at 1055–56 (discussing 43 P.S. § 333.101). The use of the 1.5 multiplier undoubtedly achieves that purpose.

All Citations

220 A.3d 1038, 170 Lab.Cas. P 62,009, 2019 Wage & Hour Cas.2d (BNA) 445,912

Footnotes

1 GNC operates stores in Pennsylvania selling health and wellness products.

2 Section 333.104(c) is set forth *infra* at 1056 n.28.

3 Apparently, a similar class action was filed in Philadelphia Court of Common Pleas in December 2013, *Hines v. GNC*, Philadelphia Court of Common Pleas, Case No. 131202213. GNC filed a motion to coordinate the cases or to stay the Philadelphia case. The trial court stayed the *Hines* action on March 14, 2014.

4 See *infra* at 1055 n. 27 and 1056 n.28, respectively, for the full text of these provisions.

5 A comprehensive discussion of the distinctions between the federal and state regulations related to this issue is set forth *infra* at 1053–58.

6 Section 778.114, entitled "Fixed salary for fluctuating hours," explains the FWW Method. While we do not reproduce the full provision due to its length, the following portion explains the logic of the FWW Method:

> Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

29 C.F.R. § 778.114.

7 Plaintiffs were paid based upon a set weekly salary plus commissions. The parties, however, have focused on the "weekly salary" aspect of the payment and referred to the total payment as "weekly wages." The dispute in this case does not involve the commission aspect but rather whether the 0.5 Multiplier or the 1.5 Multiplier should be applied to the regular rate as calculated from the total weekly wages, including both salary and commissions.

8 While the parties stipulated to the facts relevant to the question before this Court, factual disputes existed as to whether GNC, Inc. could be considered an employer and whether assistant managers were subject to the FWW method of overtime compensation. Pls.' Mot. for Partial Summ. J. at 1 n.1.

9 The Basic Rate Provision is discussed *infra* at 1057.

10 The trial court extensively reviewed the similarities between the FLSA and the PMWA and related regulations, which will be detailed *infra* at 1053–58. Tr. Ct. Op. at 14-15.

[11] Plaintiffs initially argued for the use of forty hours as the denominator to calculate the regular rate, which the trial court adopted. Plaintiffs have since conceded that the regular rate should be calculated by dividing the total weekly wages by the number of hours actually worked during the week. Pls.' Brief at 1-2.

[12] As indicated above, this conclusion is not challenged on appeal.

[13] This Court granted review of the following issue as phrased by GNC in its Petition for Allowance of Appeal:

> When an employee's weekly salary is paid as compensation for all hours worked in a week, and the employee's "regular rate" is determined by dividing the employee's salary by all hours worked in the week, does an employer satisfy its obligation under Section 4(c) of the Pennsylvania Minimum Wage Act of 1968 by paying the employee an additional one-half times the employee's regular rate for all hours worked in excess of 40, in addition to the employee's salary?

Chevalier v. General Nutrition Centers, Inc., 647 Pa. 330, 189 A.3d 386 (2018).

[14] GNC contrasts Pennsylvania's silence in regard to the FWW Method with states that have overtly adopted statutes or regulations forbidding the use of the FWW Method. GNC Brief at 29-30.

[15] GNC likewise faults the federal decisions in *Foster*, *Cerutti*, and *Verderame* that have held the FWW Method unlawful as applied to "basic rate" compensation under Section 231.43(d)(3). It argues that these cases "all mistakenly assumed that the FWW method results in payment of overtime compensation at a rate of only one-half times the employee's regular rate, rather than at one and one-half times the employee's regular rate." GNC Brief at 53.

[16] GNC highlights that the United States Court of Appeals for the First Circuit recently approved GNC's application of the FWW Method to compensate its salaried workers. *Lalli v. General Nutrition Centers, Inc.*, 814 F.3d 1 (1st Cir. 2016). It also catalogues a number of decisions from across the county approving of the FWW Method for calculating overtime for salaried employees working fluctuating hours and interpreting state provisions consistently with the federal FLSA. GNC Brief at 22-23, 26-27.

[17] GNC is supported by a joint *amici curiae* brief filed by the Pennsylvania Chamber of Business and Industry, The National Federation of Independent Business, The Pennsylvania Restaurant and Lodging Association, The Pennsylvania Manufactures' Association, and the Pennsylvania Retailers' Association.

[18] The so-called "*Belo* contract" is described *infra* at 1054–55.

[19] GNC retorts that in these three states, the FWW Method has been specifically rejected in the states' statutes or regulations, in contrast to the silence in Pennsylvania's provisions. GNC Reply Brief at 23.

[20] Western Pennsylvania Employment Lawyers Association and NELA-Eastern Pennsylvania filed a joint *amici curiae* brief in support of Plaintiffs. A separate *amici curiae* brief in support of Plaintiffs was filed by the Pennsylvania AFL-CIO, the National Employment Law Project, Community Legal Services, Inc., The Women's Law Project, The Keystone Research Center, and Pathways PA.

[21] This compensation agreement is in apparent contrast to employees who earn a set salary based upon a predetermined number of hours worked per week. *Compare* 29 C.F.R. § 778.113(a) (entitled "Salaried employees - general" and providing: "If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay,

on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate.") with § 778.114 (entitled "Fixed salary for fluctuating hours" and adopting the FWW Method for employees fitting within the following description: "An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.").

22 Citing the record in this case, GNC contends that, in a sample report of forty-eight weeks, the employees worked less than forty hours in thirty percent of the cases, less that fifty hours in ninety percent of the cases, and less than sixty hours in all cases. GNC Reply Brief at 4.

23 Section 202, entitled "Congressional finding and declaration of policy," includes the following language:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

29 U.S.C. § 202.

24 Subparagraph (a)(1) to Section 207 entitled "Maximum hours," provides in full as follows:

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (emphasis added).

25 The Federal Regulations first defined the "regular rate" generally: "The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109. The provisions following Section 778.109 set forth examples of permissible calculation methods. See 29 C.F.R. § 778.110 (Hourly Rate Employee); § 778.111 (Pieceworker); § 778.112 (Day Rates and Job Rates); § 778.113 (Salaried Employees - General); § 778.114 (Fixed Salary for Fluctuating Hours); § 778.115 (Employees Working at Two or More Rates); § 778.116 (Payments Other than Cash); § 778.117 (Commission Payments - General); § 778.118 (Commission Paid on a Workweek Basis); § 778.119 (Deferred Commission Payments - General Rules); § 778.120 (Deferred Commission Payments Not Identifiable as Earned in Particular Workweeks); § 778.121 (Commission Payments - Delayed Credits and Debits); § 778.122 (Computation of Overtime for Commission Employees on Established Basic Rate).

Additionally, the Federal Regulations provide exceptions from the regular rate principles. Those exceptions are set forth at 29 C.F.R. §§ 778.400 - .421, and include so-called *Belo* contracts, 29 C.F.R. § 778.402.

[26] The PMWA, however, specifically exempts various categories of employees, including farm laborers and those employed "in a bona fide executive, administrative or professional capacity." 43 P.S. § 333.105.

[27] Indeed, the Federal Regulations explicitly contemplate more stringent state regulations:

> [V]arious federal, state and local laws require the payment of minimum hourly, daily or weekly wages different from the minimum set forth in the [FLSA] and the payment of overtime compensation computed on bases different from those set forth in the [FLSA]. Where such legislation is applicable and does not contravene the requirements of the [FLSA], nothing in the act, the regulations or the interpretations announced by the administrator should be taken to override or nullify the provisions of these laws.

29 C.F.R. § 778.5.

[28] Section 4(c) provides:

> (c) Employe[e]s shall be paid for overtime not less than one and one-half times the employe[e]'s regular rate as prescribed in regulations promulgated by the secretary: Provided, That students employed in seasonal occupations as defined and delimited by regulations promulgated by the secretary may, by such regulations, be excluded from the overtime provisions of this act: And provided further, That the secretary shall promulgate regulations with respect to overtime subject to the limitations that no pay for overtime in addition to the regular rate shall be required except for hours in excess of forty hours in a workweek. An employer shall not be in violation of this subsection if the employer is entitled to utilize, and acts consistently with, section 7(j) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. § 207(j)) and regulations promulgated under that provision.

43 P.S. § 333.104(c) (emphasis added).

[29] In full, Section 231.41, entitled "Rate" provides:

> Except as otherwise provided in section 5(a)-(c) of the act (43 P.S. § 333.105(a)-(c)), each employee shall be paid for overtime not less than 1-1/2 times the employee's regular rate of pay for all hours in excess of 40 hours in a workweek.

34 Pa. Code § 231.41.

[30] In full, Section 231.42, entitled "Workweek" provides:

> The term workweek shall mean a period of 7 consecutive days starting on any day selected by the employer. Overtime shall be compensated on a workweek basis regardless of whether the employee is compensated on an hourly wage, monthly salary, piece rate or other basis. Overtime hours worked in a workweek may not be offset by compensatory time off in any prior or subsequent workweek.

34 Pa. Code § 231.42.

[31] Section 231.43(b) provides:

> (b) If the employee is paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked in the day or at the job and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at the day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for hours worked in excess of 40 in the workweek.

34 Pa. Code § 231.43.

[32] Subsection 234.43(c) provides the following "example" of such a contract, with instructions on the calculation of overtime:

> For example, where neither the employee nor the employer can either control or anticipate with a degree of

certainty the number of hours the employee must work from week to week, where the duties of the employee necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours, or where the substantially irregular hours of work are not attributable to vacation periods, holidays, illness, failure of the employer to provide sufficient work, or other similar causes, and the contract or agreement:

(1) Specifies a regular rate of pay of not less than the minimum hourly rate and compensation at not less than 1 1/2 times the rate for hours worked in excess of the maximum workweek.

(2) Provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.

34 Pa. Code. § 231.43(c). Notably, this provision essentially caps the potential spreading of the agreed upon salary at sixty hours.

33 In full, Subsection 231.43(d) provides as follows

§ 231.43. Regular rate.

* * * *

(d) No employer may be deemed to have violated these §§ 231.41 - 231.43 by employing an employee for a workweek in excess of the maximum workweek applicable to the employee under § 231.41 if, under an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in the workweek in excess of the maximum workweek applicable to the employee under § 231.41:

(1) In the case of an employee employed at piece rates, is computed at piece rates not less than 1 1/2 times the bona fide piece rates applicable to the same work when performed during nonovertime hours.

(2) In the case of an employee's performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than 1 1/2 times the bona fide rate applicable to the same work when performed during nonovertime hours.

(3) Is computed at a rate not less than 1 1/2 times the rate established by the agreement or understanding as the basic rate to be used in computing overtime compensation thereunder; and if the average hourly earnings of the employee for the workweek, exclusive of payments described in subsection (a)(1)-(7), are not less than the minimum hourly rate required by applicable law and if extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

34 Pa. Code § 231.43(d).

34 Additionally, subsection 231.43(e) addresses extra compensation, and subsection (f) relates to employees in retail or service establishments where more than half the compensation is based upon commissions. The parties do not assert that these provisions are applicable to the questions before the Court.

1 Act of Jan. 17, 1968, P.L. 11, as amended, 43 P.S. § 333.104.

2 The MWA Declaration of Policy provides as follows:

Employe[e]s are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Employe[e]s employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are often found to bear no relation to the fair value of the services rendered. In the absence of effective minimum fair wage rates for employe[e]s, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of the economy. The evils of unreasonable and unfair wages as they affect

> some employe[e]s employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employe[e]s employed therein and of the public interest of the community at large.

43 P.S. § 333.101.

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