

# Pennsylvania Supreme Court Will Hear Employer Appeal in State Minimum Wage Act Case

August 2, 2018

On February 2, 2018, we reported that General Nutrition Centers, Inc. (GNC), the employer in a case brought by a class of salaried, nonexempt, current or former Pennsylvania store managers, assistant managers, or senior managers under the Pennsylvania Minimum Wage Act (PMWA) (43 P.S. Secs. 333.101–333.115) had asked the Pennsylvania Supreme Court to hear its appeal of a 2–1 decision issued by the Pennsylvania Superior Court on December 22, 2017.

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The Pennsylvania Superior Court had ruled that the PMWA required payment of one and one-half times the regular rate for each overtime hour worked, instead of the half-time rate allowed under the Federal Fair Labor Standards Act’s (FLSA) fluctuating workweek (FWW) method of overtime payment.

On July 16, 2018, the Pennsylvania Supreme Court [agreed to hear the employer’s appeal](#) of this issue.

## **Why Does the Pennsylvania Supreme Court Want to Hear This Case?**

When the Pennsylvania General Assembly adopted the PMWA in 1968, it delegated to the Pennsylvania Department of Labor and Industry (DLI) the authority to issue regulations providing guidance for the interpretation of the statute. In 1977, the DLI issued regulations, codified at 34 Pa. Code Chapter 231. Sections 231.41, 231.42, and 231.43 are addressed to “rate,” “workweek,” and “regular rate,” respectively.

In the opinion written for the majority in the Pennsylvania Superior Court, Judge H. Geoffrey Moulton Jr. found support in the regulations for a time and one-half interpretation of the PMWA in the context of the FWW. Judge Moulton also stated that the Pennsylvania Superior Court had asked the DLI if it would voluntarily provide the court with its opinion about the correct interpretation of the law before the court issued a decision in this case. The agency respectfully declined.

In addition, Judge Moulton noted that although there had been three FWW decisions issued by federal district courts in Pennsylvania that favored a time-and-a-half interpretation of the PMWA, the decisions were not binding on Pennsylvania state courts and there had been no state appellate court decisions.

Furthermore, on June 23, 2018, the DLI published in the *Pennsylvania Bulletin* (48 Pa.B. 3731) [proposed revisions to its PMWA regulations](#). If adopted, the effect of the revised regulations would be to increase the number of nonexempt salaried workers who would become eligible for overtime. The revisions published by the DLI on June 23, 2018, however, do not address the sections of the Pennsylvania Code dealing with “rate,” “workweek,” or “regular Rate” (i.e., sections 231.41, 231.42 and 231.43).

Lastly, as the employer contends, regulations issued by the U.S. Department of Labor interpreting the FLSA expressly allow for a narrower calculation of FWW overtime. While the PMWA is not preempted by the FLSA—and can be more generous by providing for payment of an additional time and one half for each FWW overtime hour—the Pennsylvania Supreme Court might want to take this opportunity to issue a definitive ruling.

### **What Happens Next?**

The employer’s brief in the case is due by August 28, 2018. The employees’ brief is due 30 days after the employer’s brief is filed. The employer then has 14 days to file a reply brief.

In addition, one or more interested non-parties may seek permission to file briefs as “friends of the court” on behalf of one side or the other.

Once the briefing has been completed, the Pennsylvania Supreme Court will schedule an oral argument, after which it will take the case under advisement. While unlikely, it is also possible that at some point in the process the Pennsylvania Supreme Court might decide to dismiss the appeal as having been improvidently granted, which would leave the Pennsylvania Superior Court’s ruling intact.

Until the Pennsylvania Supreme Court has resolved this appeal, the 2–1 decision of the Pennsylvania Superior Court remains the controlling interpretation of the required method of calculating FWW overtime under the PMWA.

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