

Federal Court Holds that FLSA's "Fluctuating Workweek" Method Violates Pennsylvania Law

Article By:

Maria L. H. Lewis

A recent decision out of the Western District of Pennsylvania, **Foster v. Kraft Foods Global, Inc.**, Civ. No. 09-453 (W.D.Pa. August 27, 2012), highlights the **challenges employers face in simultaneously complying with both local and national wage and hour regulations**. In *Foster*, the court held that the **"fluctuating workweek" method of overtime compensation – which is expressly permitted by the FLSA – is not permitted under Pennsylvania law**.

Under the fluctuating workweek method, an employer pays a nonexempt employee a fixed weekly salary, regardless of the number of non-overtime hours worked. This method is generally used in industries in which an employee's hours change unpredictably from week to week based on factors such as customer demand or seasonal variation – e.g., lawn maintenance companies, golf courses, or the travel industry. In using this method, the employer benefits from significant cost savings over traditional methods of overtime calculation and the employee benefits from the stability of a fixed weekly salary.

There are five requirements for using the fluctuating workweek method. The employee's hours must fluctuate from week to week; the employee must receive a fixed salary that does not vary with the number of hours worked (excluding overtime); the salary must be high enough that the employee's regular rate of pay is at least the minimum wage; the employer and employee must have a clear mutual understanding that the salary is fixed; and the employee must receive overtime compensation equal to at least **one-half** the regular rate for all hours worked over forty.

In *Foster*, the court's analysis focused on this last requirement. The court held that "the payment of overtime under the FWW method, at any rate less than **one and one-half** times the 'regular' or 'basic' rate," is impermissible under the Pennsylvania Minimum Wage Law. We'll be watching this decision (if appealed) and subsequent cases closely, because if this interpretation of the Minimum Wage Act is upheld, the primary advantage to the employer in utilizing the fluctuating workweek method is eliminated. In the meantime, Pennsylvania employers who use this method to compensate nonexempt employees should reconsider their policies, given that it may no longer result in cost savings. Moreover, this case should serve as a reminder that, although many local wage and hour regulations are modeled after (and in some respects identical to) the FLSA, compliance with the FLSA does not guarantee compliance with local statutes.

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