



# Traps for the Unwary Under the PMWA

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November 13, 2018

# Background

- Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. §§ 201, et seq.
  - minimum wage and overtime pay standards
  - establishes only a national “floor”
  - state law may impose requirements that exceed those of the FLSA
- Pennsylvania Minimum Wage Act of 1968 (“PMWA”), 43 P.S. §§ 333.101, et seq.
  - minimum wage and overtime pay standards
  - authorizes Secretary of Department of Labor & Industry to issue regulations
    - 34 Pa. Code Chapter 231
  - Initially covered only those employees not already covered by the FLSA
    - amended in 1988 to apply to all employees

## *Two roads diverged in a yellow wood ... Or did they?*

- When PMWA “substantially parallels” FLSA, courts look to FLSA for guidance
  - *Espinoza v. Atlas Railroad Construction, LLC*, No. 16-1413 (3rd Cir. 2016)
  - *Commonwealth v. Stuber*, 822 A.2d 870 (Pa. Cmwlth. Ct. 2003),  
*aff’d*, 859 A.2d 1253 (Pa. 2004)
- When the two acts diverge, courts do not defer to FLSA to interpret PMWA
  - *Bayada Nurses, Inc. v. Pa. Dep’t of Labor & Indus.*, 8 A.3d 866 (Pa. 2010)

# Examples of Divergence

- Work performed outside United States
  - FLSA expressly exempts work performed outside the United States
  - PMWA does not include that exception
    - *Truman v. DeWolff, Boberg & Assocs., Inc.*, 2009 WL 2015126 (W.D. Pa. July 7, 2009)
- The “8/80” overtime plan for hospitals, nursing homes, etc.
  - FLSA expressly authorized it as an exception to the 40-hour workweek
  - PMWA did not include it
    - *Turner v. Mercy Health System*, 2010 Phila Ct. Com. Pl. LEXIS 146 (Mar. 10, 2010)
    - Act of July 5, 2012 (P.L. 987 No. 109), 43 P.S. § 333.105(b)(8)

# TRAP 1: Hours Worked

- FLSA: 1947 Portal-to-Portal Act amended FLSA; clarified certain “preliminary” and “postliminary” activities were not compensable hours worked.
  - *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014): Time going through security after clocking out was not compensable; it was “postliminary” and not integral and indispensable to principal work activities.
- PMWA: Enacted in 1968 without expressly addressing Portal-to-Portal Act
  - *Bonds v. GMS Mine Repair*, No. 2015-6310 (Pa. Common Pleas, Washington Cty. Dec. 13, 2017): Portal-to-Portal Act “inapplicable” to PMWA claim.
  - *In re: Amazon.com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litig.*, MDL Docket No. 2504 (W.D. Ky. Aug. 30, 2018): Portal-to-Portal Act “clarified” meaning of “hours worked” and thus relevant to subsequently-passed PMWA (on appeal).

## TRAP 2: One and One-Half Times the Regular Rate

- FLSA: Overtime 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).
  - *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942):
    - Regular rate equals total weekly wages divided by the total number of hours compensated by those wages (whether fixed or variable).
    - To the extent those weekly wages provide compensation for hours over 40, they count toward the “one and one-half time” obligation.
  - 29 C.F.R. Part 778 (1968): Interpretive Bulletin includes examples of different employment arrangements and the proper method for complying with the FLSA for each type of arrangement.

## TRAP 2: One and One-Half Times the Regular Rate

- PMWA: Overtime at a rate not less than “one and one-half times the employee’s regular rate as prescribed in regulations promulgated by the [S]ecretary.” 43 P.S. § 333.104(c).
  - 34 Pa. Code § 231.41: repeats “1-1/2 times the employee’s regular rate”
  - PMWA regulations include some – but not all – of the examples from the FLSA’s interpretive bulletin (e.g., includes “day rate” example but not “fluctuating workweek” example).

## TRAP 2: One and One-Half Times the Regular Rate

- Department of Labor and Industry Deputy Chief Counsel Letter (1998)
  - FWW allowed under PMWA
- *Foster v. Kraft Foods Global, Inc.*, 285 F.R.D. 343 (W.D. Pa. 2012)
  - FWW not allowed under PMWA
- *Lalli v. General Nutrition Centers, Inc.*, 814 F.3d 1 (1st Cir. Feb. 12, 2016)
  - GNC's FWW plan lawful under FLSA



## TRAP 2: One and One-Half Times the Regular Rate

- *Chevalier v. General Nutrition Centers, Inc.*, 42 Pa. D. & C.5th 1 (2014)
  - GNC’s FWW plan unlawful under PMWA
    - regular rate = weekly wages divided by 40
    - employer owed an extra 1.5 times that regular rate
- *Chevalier v. General Nutrition Centers, Inc.*, 177 A.3d 280 (2017)
  - Reversed as to first part of FWW calculation; affirmed as to second part
    - regular rate = weekly wages divided by all hours worked
    - employer owed an extra 1.5 times that regular rate
- *Chevalier v. General Nutrition Centers, Inc.*, No. 22 WAP 2018 (pending)

# TRAP 3: Exemptions

- FLSA regulations: Periodically updated; streamlined in 2004; proposed regulations expected Q1 (~March) 2019.
- PMWA regulations: Not updated since 1977. Thus, PMWA does not:
  - expressly include “concurrent performance” provision.
    - Compare 29 C.F.R. § 541.106;
  - provide guidance regarding what it means to be paid on a “salary or fee basis”—including whether deductions from an exempt employee’s salary are authorized to the same extent they are permitted under the FLSA (29 C.F.R. § 541.602 - .606);

# TRAP 3: Exemptions

The PMWA does not (cont.):

- include any version of the FLSA’s regulation exempting computer professionals who are paid on an hourly basis (29 C.F.R. § 541.400);
- align outside sales exemption with FLSA (29 C.F.R. § 541.500);
- incorporate FLSA regulation exempting teachers, physicians and lawyers from the salary requirements (29 C.F.R. §§ 541.303(d) & .304(d));
- extend administrative exemption to administrative functions related to academic instruction in educational establishment (29 C.F.R. § 541.204);

## TRAP 3: Exemptions

The PMWA does not (cont.):

- adopt the streamlined “highly compensated” employees test for those with total annual compensation of at least \$100,000 (29 C.F.R. § 541.601); or
- extend professional exemption to employees with a primary duty of teaching at an educational establishment (29 C.F.R. § 541.303).

## TRAP 3: Exemptions – Update

- June 23, 2018: Notice of proposed rulemaking to amend tests for qualifying as exempt executive, administrative, or professional employee.
- Proposes to move from the current salary thresholds (currently \$155-\$170 / week under the “long” test and \$250 / week under the “short” test) to:
  - \$610 per week (\$31,720 annually);
  - \$766 per week (\$39,832 annually) one year later; and
  - \$921 per week (\$47,892 annually) one year later.
- Automatic reset every three years thereafter.
- Up to 10 percent of the salary threshold may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions that are paid quarterly or more frequently.

## TRAP 3: Exemptions – Update

- Proposed rulemaking aspires to amend executive, administrative and professional exemption duties tests to “align” them (and make them “consistent”) with FLSA counterparts.
- HOWEVER,
  - The proposed regulations make only two changes to the duties tests (adding definitions of “general operation” and “management” to the regulations).
  - They do not address any of the differences noted above.
- Therefore, the proposed rules do not align or make consistent the PMWA with the FLSA.

# Strategic Considerations

- Plaintiff's Perspective
  - FLSA only, PMWA only, or Hybrid FLSA/PMWA?
  - Individual versus class/collective
    - Impact of different procedures (class v. collective)
  - Federal court or state court?
- Defendant's Perspective
  - Remove to federal court?
  - Impact of differences (if any) on dispositive motions and litigation strategy
  - Collective 2-step certification process or Rule 23 process.



# Questions





# Thank You!

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