

Here's the rule: If someone works more than 40 hours, their salary covers the first 40 hours and overtime is to be factored at that salaried rate.

But employers often try to reduce their costs by using what is called a "fluctuating work week," in which workers receive their salary over the entire week -- no matter how many hours long that week is -- and then overtime is calculated on one hour of that longer week.

Two recent federal cases, however, have helped tilt the playing field in favor of Pennsylvania workers and the traditional overtime calculation.

Here's how the math shakes out: If a worker gets a weekly salary of \$400, under Pennsylvania law that means the wage is \$10 an hour for a 40 hour week. So the worker who earns \$400 a week, and works 10 hours of overtime, should be paid an extra \$150 (time and a half) for the extra 10 hours, for a total of \$550 that week.

Under the same scenario, with a fluctuating work week, that base salary would be tabulated \$8 an hour -- \$400, divided by 50 hours worked. Overtime would then be calculated at a time-and-a-half rate, or 150 percent of the \$8 hourly rate, meaning overtime wages are \$12 an hour, not \$15. The result is that an employee on a "fluctuating work week" would be paid \$440 total -- \$320 in "regular" wages, and \$120 in overtime, but just \$40 "extra" that week.

Drivers for Frito-Lay, those people who move the bags of Doritos into the stores and arrange the shelves, were being paid by the fluctuating workweek standard, and sued claiming that Frito-Lay violated the Pennsylvania Minimum Wage Act of 1968.

The case was heard by U.S. District Judge Joy Flower Conti, who ruled in 2011 that the workers were covered by Pennsylvania Minimum Wage Law that prohibits the fluctuating workweek for workers who aren't paid by the job or the day.

And Judge Conti's decision was cited in an August 2012 decision by U.S. District Judge Cathy Bisson in a case against Kraft Foods Global Inc., in which Kraft admitted to paying employees only half-time for extra hours work with that half being the determined by the base pay divided by the total number of hours worked that week.

Joe Fieschko, the attorney who represented the Frito-Lay workers, said the fluctuating workweek model is popular among employers who want to save money.

"The thing about this fluctuating workweek is the longer you work, the less you are paid," he said.

Under the fluctuating workweek model, if an employee is paid \$400 for the week, then for a 40 hour week his compensation would be \$10 an hour. But, once that employee works more, the base hourly rate goes down.

At 50 hours that base rate drops to \$8. And if the employee worked double an average week -- 80 hours -- the compensation would conceivably drop to base rate of \$5 an hour (which would be

below the minimum wage of \$7.25 an hour) for all of the hours. The overtime pay would be \$7.50 an hour (an extra \$2.50 tacked on to the second 40 hours) for a total of \$500 for the week.

The fluctuating workweek is allowed under the U.S. Fair Labor Standards Act, which used to cover the drivers when they were under the Federal Motor Carrier Act. That law still covers long-haul truckers and drivers of large trucks, but it no longer applies to short-route drivers of smaller delivery trucks.

While federal law allows employers to use the fluctuating workweek model, Judge Bisson was clear that Pennsylvania law does not.

"Had the Pennsylvania regulatory body wished to authorize one-half-time payment under [the law], it certainly knew how to do so," she wrote.

It's not just trucking companies that have tried to use fluctuating workweeks to reduce overtime costs.

Mr. Fieschko also has successfully represented insurance adjusters, warehouse workers and park rangers who worked at Fort Necessity and at the Friendship Hill National Historic Site's Albert Gallatin house.

This isn't a new technique -- employers have been trying to make workers put in more hours, for less money, for decades. Mr. Fieschko said a lot of the case law goes back to 1938, 1939 and 1940, as courts ruled against the employers of that day who were testing the original version of the Fair Labor Standards Act.

By Ann Belser, Pittsburgh Post-Gazette