

Anti-Worker S.B. 803 Would Gut Worker Protections In Pennsylvania And Must Be Opposed

Business interests in Pennsylvania are pushing a change in the law that would **abandon** the protections specially provided to our workforce under the 1968 Pennsylvania Minimum Wage Act (“PMWA”)¹ and instead would require PA employers to follow the federal Fair Labor Standards Act (“FLSA”).² They pretend it’s for “simplicity,” but it’s actually an attempt to cut workers’ wages, and undo hard-won rights. In fact, the FLSA regulations are much more complex than what we have in PA!

Background on the Law

1) The PMWA was enacted in 1968 to address the many deficiencies in the antiquated FLSA. The Republican majority³ in the PA Senate in 1968 recognized the shortcomings and passed the bi-partisan supported 1968 PMWA in a unified effort to improve the conditions facing Pennsylvania’s workforce, a goal that the current Republican majority in our Senate now seeks to undo.

2) By throwing out the protections of the PMWA and instead relying solely on the FLSA, SB 803 completely ignores the fact that the FLSA was only designed to address national problems that had reached the tipping point in 1938. The entire idea behind the FLSA was to provide minimal protections that applied across the country and that the individual states, such as Pennsylvania, would enact laws that addressed the problems facing their respective workers. That is exactly what happened in 1968, when Pennsylvania Republicans and Democrats cooperated and passed the PMWA.

3) The Courts in Pennsylvania have also supported the PMWA and its goals and recognized that the protections it gives our workers are over and above the FLSA. The Pennsylvania Supreme Court has repeatedly held that the PMWA provides Pennsylvania workers with wage and overtime

¹ See 43 P.S. §§ 333.101, *et seq.*

² See 29 U.S.C. §§ 201, *et seq.*

³ <https://staffweb.wilkes.edu/harold.cox/legis/151S.pdf>.

protections that **exceed** those available under the federal FLSA.⁴ These holdings were the result of tireless advocacy by the Pennsylvania Department of Labor & Industry (“the L&I Department”) in addition to workers’ rights lawyers and advocates, labor unions. In the blink of an eye, SB 803 would reverse these hard-fought victories.

SB 803 is an attempt to legislatively overturn the following PA Supreme Court Decisions:

- The 2021 PA Supreme Court case, *Heimbach v. Amazon*, that workers forced to undergo employer required security screenings at the factory must be paid for the time they spend on these and other types of both pre-shift and post-shift work activities that are not considered paid time under the federal FLSA.⁵ While normally all work time for your employer must be paid, under the FLSA, the employer was granted an exception and was able to do this at their factory, without pay.
- The 2019 PA Supreme Court case, *Chevalier v. GNC*, that ruled that the FLSA’s “Fluctuating Work Week (FWW)” rule was illegal in Pennsylvania. The FLSA permits employers to pay a dramatically reduced overtime rate that literally lowers the hourly overtime rate the more an employee works. This rule was in effect when the FLSA was passed roughly 90 years ago. Our legislators recognized that the FLSA was simply behind the times with this draconian rule and passed the PMWA, requiring employers here to pay overtime at time and one-half.⁶ Under the federal FLSA, employers who must

⁴ See, e.g., *Heimbach v. Amazon.com, Inc.*, 255 A.3d 191, 200-01 (Pa. 2021); *Chevalier v. General Nutrition Centers Inc.*, 220 A.3d 1038, 1055-56 (Pa. 2019); *Bayada Nurses Inc. v. Commonwealth of Pennsylvania*, 8 A.3d 866, 882-83 (Pa. 2010).

⁵ See *Heimbach*, *supra*; see, e.g., *Smith v. Allegheny Technologies, Inc.*, 754 Fed. Appx. 136, 141 (3d Cir. 2018); *Bonds v. GMS Mine Repair & Maintenance, Inc.*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622 (Pa. Com. Pl., Washington Cnty. Dec. 12, 2017).

⁶ See *Chevalier*, *supra*. It is noteworthy that GNC, the employer in the *Chevalier* case filed for bankruptcy rather than pay its workers one dime

provide extra overtime pay to salaried employees usually can get away with calculating the extra pay based on a “half-time” methodology. This half-time method is horrible for salaried workers. Here’s an example of how the half-time method works: Ann is an Assistant Manager at a convenience store and is paid a salary of \$800 per week. On a particular week, she works a total of 50 hours. So now the boss needs to determine how much extra overtime pay is owed to Ann. Under the FLSA’s half-time method, the boss first divides Ann’s \$800 salary by her 50 hours of work to convert her salary to a regular pay rate of \$16/hour. Then, the boss is allowed to assume that Ann *already* received \$18 for each of her 10 overtime hours. Thus, the boss is merely required to provide Ann with extra half-time pay for her 10 overtime hours. In other words, Ann receives an extra **\$80** (\$8 X 10 hours) for her 10 hours of overtime work.

The PMWA is far more generous to salaried employees. To demonstrate, let’s turn our attention back to Ann, our convenience store Assistant Manager who earns an \$800 salary and works 50 hours during a particular week. Under the PMWA, the boss must divide Ann’s \$800 salary by 40 to convert her salary to a regular pay rate of \$20/hour. Next, Anne is compensated for her 10 overtime hours at a full “time and one-half” rate of \$30/hour (\$20 X 1.5). This brings Ann’s total extra overtime pay to **\$300** (\$30 X 10 hours) rather than the skimpy \$80 she was entitled to under the FLSA’s half-time method.

- The 2008 PA Supreme Court case, *Bayada Nurses v. Commonwealth of Pennsylvania*, holding that home health aides placed in private homes are required to be paid overtime and that the “domestic services” exemption under

of the overtime they earned. Additionally, and contrary to the SB 803 drafters “Co-Sponsorship Memoranda”, three Pennsylvania federal courts that ruled upon the legality of the FWW in Pennsylvania prior to the decision in *Chevalier* as early as 2011 reached the same conclusion as did the Pennsylvania Supreme Court, that the FWW was illegal in Pennsylvania, see: *Cerutti v. Frito Lay*, 777 F. Supp. 2d 920 (W.D. PA, 2011), *Foster v. Kraft Foods*, 285 F.R.D. 343 (W.D. PA, 2012), *Verderame v. Radio Shack Corp.*, 31 F. Supp. 3d 702 (M.D. PA, 2014).

the FLSA does not apply.⁷ The PA L&I Department challenged a large employer's practice of not paying overtime to home health aides. The employer claimed an employer friendly FLSA exemption that did not require overtime wages to be paid. Our Court held specifically that the PMWA provided more worker protections than the FLSA and that overtime was required to be paid to these workers under PA law.

SB 803 would eliminate the following regulations enacted by the PA L&I Department:

- It would eliminate the 2022 PMWA regulation that mandates that overtime-eligible salaried employees are to receive time and one-half overtime calculated based on their hourly rate and would permit employers to pay half-time overtime as is described above.⁸
- It would eliminate the 2022 PMWA regulations that updated pay practices for restaurant workers and servers. These regulations, among other things, give workers protections including how to treat tips paid via credit card and prevent the employer passing along credit card company “charges” or processing fees” to the workers⁹, or where workers are paid a share of employer service fees passed along to customers, these must be included in the tipped worker's regular rate as opposed to being considered “tips”¹⁰, and restricts how employers can use tips paid to employees in the calculation of the tipped worker's hourly wages.
- It would add to the PMWA the many complicated and lengthy FLSA regulations that exempt employers from

⁷ *Bayada Nurses, Inc. v. Commonwealth of Pennsylvania Department of L&I*, 958 A.2d 1050 (PA, 2008).

⁸ See 34 Pa. Code § 231.43(g).

⁹ See 34 Pa. Code. § 231.13.

¹⁰ See 34 Pa. Code § 231.114.

paying overtime to various types of professional, executive and administrative personnel, and would make it easier for employers to avoid payment of overtime to these workers.

- It would make it much more difficult for employees to use the judicial process to pursue their rights by grafting the more onerous FLSA procedural requirements onto the PMWA by eliminating the ability of workers to bring class actions to remedy hourly wage violations and would require the PMWA to follow the FLSA's interpretations of wage and hour law.
- It would take away the express authority given to the L&I Department to implement regulations in the future, hampering the Department's enforcement ability for all future administrations.

For all of the above reasons, the signatories below urge you to reject this anti-worker proposal and say NO to SB 803.

PA Legal Aid Network (PLAN)

Community Legal Services (CLS)

Justice At Work-Pennsylvania

**Western Pennsylvania Employment Lawyers Association
(WPELA)**

**National Employment Lawyers Association-Eastern PA
(NELA-EPa)**

Pennsylvania Policy Center

Community Justice Project