

Virginia Updates Overtime Law

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Effective July 1, 2021, Virginia employers must ensure that their pay practices comply with a new stand-alone overtime law called the [Virginia Overtime Wage Act](#) (“VOWA”). VOWA largely tracks the federal Fair Labor Standards Act (“FLSA”) in that it incorporates most FLSA exemptions and requires employers to pay 1.5 times a nonexempt employee’s regular rate of pay for all hours worked in excess of 40 hours each workweek. However, VOWA and the FLSA differ in several ways, which we describe below.

Determining an Employee’s Regular Rate of Pay

VOWA’s most significant divergence from the FLSA is the statute’s formula for calculating a nonexempt employee’s regular rate of pay.

For nonexempt employees paid on an *hourly basis*, the regular rate is the employee’s hourly rate plus other non-overtime wages paid or allocated to that workweek (e.g., commissions or bonuses), minus any applicable [federal exclusions](#) (e.g., gifts, reimbursements for travel expenses, and holiday pay), divided by the total number of hours worked in that workweek.

For nonexempt employees paid on a *salary or other regular basis*, the regular rate of pay is “one-fortieth of all wages paid for that workweek,” which includes the employee’s regular salary plus other non-overtime wages paid or allocated to that week, such as non-discretionary bonuses or commissions.

This formula appears to preclude employers from paying nonexempt employees a fixed salary that covers straight-time wages for hours worked in excess of 40 hours in a workweek, or from using the FLSA’s [“fluctuating workweek” method](#) for calculating overtime. Under the fluctuating workweek method, overtime pay is based on the average hourly rate, produced by dividing the employee’s fixed salary and any non-excludable additional pay (e.g., commissions, bonuses, or hazard pay) by the number of hours actually worked in a specific workweek. Naturally, this means the average hourly rate may change from week to week depending on how many hours the employee actually worked.

VOWA’s new formula for calculating overtime will also result in higher overtime payments. For example, a nonexempt employee paid a fixed weekly salary of \$600 with no bonus

pay who works 50 hours in a workweek would earn the following overtime under each law:

FLSA Fluctuating Workweek:

$(\$600 \text{ Salary} + \$0 \text{ Bonus}) \div 50 = \12 regular rate

$\$12 \text{ regular rate} \times 0.5 = \6 half-time rate

$\$6 \text{ half-time rate} \times 10 \text{ overtime hours worked} = \$60 \text{ of overtime owed}$

$\$600 \text{ salary} + \$60 \text{ overtime} = \mathbf{\$660 \text{ total compensation owed for the week}}$

VOWA:

$(\$600 \text{ Salary} + \$0 \text{ Bonus}) \div 40 \text{ hours} = \15 regular rate

$\$15 \text{ regular rate} \times 1.5 = \$22.50 \text{ per hour overtime rate}$

$\$22.50 \text{ overtime rate} \times 10 \text{ hours of overtime} = \$225 \text{ of overtime owed}$

$\$600 \text{ salary} + \$225 \text{ overtime} = \mathbf{\$825 \text{ total compensation owed for the week}}$

Employers should note that VOWA's formula will necessarily result in larger recoveries for misclassified workers, especially when the higher overtime rate is extrapolated over an entire limitations period or across multiple employees proceeding collectively—an option that is now available to Virginia employees pursuing wage claims thanks to [last year's amendments](#) to the Virginia Wage Payment Act.

Overtime Exemptions Under VOWA

VOWA creates some ambiguity regarding whether Virginia employers may continue to rely on certain FLSA overtime exemptions. Although VOWA's definition of "employee" appears to incorporate most [FLSA overtime exemptions](#), a later section limits the available exemption defenses to *only* the executive, administrative, professional, and outside sales exemptions, and certain transportation-related exemptions (e.g., for local delivery drivers). See Va. Code § 40.1-29.2(A), (D). The latter would effectively eliminate the FLSA's computer professional exemption, among others. Further, although the Virginia Department of Labor and Industry ("DOLI") recently published [frequently asked questions](#) (see Question #3) that suggest the computer professional exemption is available under VOWA, the same guidance contradicts the statute by leaving out the transportation-related exemptions explicitly included in VOWA's definition of "employee."

Extended Statute of Limitations for Overtime Claims

VOWA provides a three-year statute of limitations for aggrieved employees to bring an overtime claim, regardless of the circumstances. In comparison, the FLSA provides a two-year statute of limitations for overtime violations, or three years if the violation was willful.

The extended statute of limitations will not have immediate practical effect, however, because DOLI has [clarified](#) that it cannot investigate claims brought before July 1, 2021.

Expansion of Available Damages and Remedies for Overtime Violations

The FLSA provides liquidated damages equal to the amount of unpaid overtime wages. An employer may avoid such “double damages” if it can show that it acted in “good faith” and that the employer had “reasonable grounds” for believing its actions complied with the requirements of the FLSA.

Under VOWA, however, *all* overtime wage violations are subject to *double damages*, plus pre-judgment interest of 8 percent per year. Further, VOWA does not offer a “good faith” defense, but instead permits *treble damages*, and the same pre-judgment interest and reasonable attorney fees and costs, where the employer (i) had actual knowledge that it failed to pay the overtime wages due or (ii) acted in deliberate ignorance or reckless disregard as to whether it was paying all overtime wages owed.

What Virginia Employers Should Do Now

The increased potential wage and hour liabilities mean that Virginia employers should review their overtime pay practices and exemption classifications. Specifically, Virginia employers should review their employee classifications and consider whether it makes practical sense to pay all nonexempt employees on an hourly, rather than salary basis. Epstein Becker Green will also continue to monitor DOLI for further guidance regarding the available exemptions under VOWA.

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