



## SHOW ME THE MONEY: PAYING YOUR EMPLOYEES CORRECTLY UNDER VIRGINIA'S NEW OVERTIME LAW

July 6, 2021

On July 1, 2021, the new Virginia Overtime Wage Act (VOWA) went into effect significantly modifying longstanding Virginia employment laws. See Virginia Code § 40.1-29.2. Many Virginia employers who previously only needed to focus on compliance with federal wage and hour laws now must evaluate whether longstanding federal overtime exemptions remain available. The failure to review pay practices will create a risk of overtime violations and higher penalties under the VOWA. Specifically, employers who have utilized certain popular alternative wage calculation methods may be required to revise their compensation practices to comply with the VOWA.

### TRADITIONAL MINIMUM WAGE AND OVERTIME LAW IN VIRGINIA

For years, wage and hour requirements for Virginia employers have been largely dictated by the federal Fair Labor Standards Act (FLSA) as Virginia law was silent on these issues. The FLSA's requirements establish a federal minimum wage and mandatory premium rates to be paid for overtime work. Specifically, the FLSA mandates that for time worked in excess of 40 hours in a single workweek, employees are entitled to overtime compensation at 1.5 times their "regular rate of pay" as the statute defines that term. The regular rate is generally calculated by dividing total compensation paid for the workweek by the total hours worked during the workweek.

The FLSA and its regulations also establish a number of exemptions to the minimum wage and overtime rate requirements. The overtime exemptions include the administrative, executive, and professional exemptions which are often referred to as the "white collar exemptions." For employees who do not satisfy the duties and salary requirements for white collar or other exemptions, the FLSA and its regulations detail the various acceptable methods to calculate overtime pay.

The FLSA permits states to adopt their own wage and hour laws provided the state versions are *more generous* to employees. Until this year, the Virginia General Assembly chose to rely on the FLSA's overtime requirements for covered employers.

### VIRGINIA'S NEW OVERTIME LAW

For some Virginia employers, the VOWA will have little effect on the wages and overtime pay employees receive. Economic pressures have incentivized employers to raise hourly rates of pay well above the federal minimum wage

(\$7.25/hour) and the current Virginia minimum wage (\$9.50/hour). The minimum wage is scheduled to increase to \$11.00 per hour on January 1, 2022.

Employees who are properly classified as exempt under the FLSA's white collar exemptions (bona fide executive, administrative, or professional) and others exempted under 29 U.S.C. § 213(a) such as outside salespersons or under § 213(b)(1) (the Motor Carrier exemption) or (b)(13) (employees employed in agriculture) also will not be impacted as they are not covered by the VOWA. However, the VOWA has added coverage for other previously exempted employees such as home care providers, domestic service employees, and babysitters who work more than 10 hours per week. See Virginia Code § 40.1-28.9.

Employers are in compliance with the VOWA when they compensate hourly paid employees at least the applicable minimum wage for each hour worked and 1.5 times their regular rate of pay for time worked in excess of 40 hours in a single workweek. Employers that pay their non-exempt employees a salary or using other alternative formula should take heed that such arrangements should be adjusted or, in some cases, completely reworked.

#### A. Salaried Non-Exempt Employees

The FLSA permits non-exempt employees to be paid a salary provided they are compensated at least the minimum wage for all hours worked. To calculate overtime for these employees under the federal formula, their regular rate of pay is calculated by dividing that workweek's total compensation paid by all hours worked. The VOWA may require employers to revise this formula as it specifies that the regular rate must be calculated by multiplying all compensation for a workweek by 1/40<sup>th</sup>. Depending on the number of hours worked by a salaried non-exempt employee, the VOWA calculation method will result in a higher regular rate (and thus significantly higher overtime pay). To ensure compliance with both the VOWA and the FLSA, employers paying non-exempt employees a salary must ensure that they are using the regular rate calculation method under the FLSA or the VOWA that nets the more generous overtime premium for each employee who worked overtime during that workweek. Alternatively, employers may consider limiting the hours that salaried, non-exempt employees may work or revising their method of pay to hourly.

#### B. Employees Paid Using Fluctuating Workweek Method, 8/80 Rule, Daily Rates or Piece Rates

The same regular rate calculation changes described above prohibit continued use of the federal fluctuating workweek (FWW) method of overtime calculation for Virginia employees. The FWW method, permissible under the FLSA, permits a non-exempt employee to receive a fixed weekly salary (no matter how many hours are worked) plus overtime pay based on the employee's average hourly rate. The average hourly rate for this method is determined by dividing the fixed salary and non-excludible additional pay (such as commissions and bonuses) by the number of hours worked that week. For time worked in excess of 40 hours, the employee receives an additional 0.5 times that average hourly rate. Because the VOWA provides that a non-exempt employee may be paid a salary only if their regular rate is calculated by multiplying a workweek's compensation by 1/40<sup>th</sup>, the FWW overtime compensation method no longer is permitted in Virginia. Therefore, employers using the FWW method should adopt a more traditional payment arrangement for impacted employees.

For hospitals and other health care entities that are covered by 29 U.S.C. 207(j) and have used the 8/80 Rule to determine overtime compensation owed, the VOWA will require modifying this practice. Federal law previously allowed a covered employer to enter into an agreement with its employees to use a period of fourteen consecutive days for the workweek rather than a seven day workweek. Overtime then was owed at 1.5 times the regular rate of pay when an employee worked in excess of eight hours in any workday and in excess of eighty hours in any fourteen day workweek. Because the Virginia General Assembly did not incorporate this exemption into the VOWA, covered employers must transition the overtime formula used for employees previously paid under the 8/80 Rule to comply with Virginia's revised wage and hour laws.

Finally, the VOWA appears to allow an employee only to be paid an hourly rate or a salary. The statute does not address how overtime may be calculated for non-exempt employees previously paid a daily rate or a piece rate (a set amount for a unit of work completed). Although these methods are specifically permitted under the FLSA, the VOWA omits them completely. In light of the omission of daily rates and piece rates from the VOWA and lack of any available judicial or administrative guidance from the Virginia Department of Labor and Industry suggesting they still may be utilized, Virginia employers should consider adopting a new compensation arrangement to mitigate the risk of an overtime violation.

The remedies available to aggrieved employees under the VOWA also are more expansive than those previously established by federal law. Under the VOWA, a three-year statute of limitations applies, which is one year longer than the statute of limitations under the FLSA for violations that are not willful. The VOWA adopts the harsher penalties adopted last year by the General Assembly for other wage violations. As a result, employers are subject to automatic double damages and possible treble damages for violations. Further, the VOWA incentivizes employees to pursue their claims in state, rather than federal court, when they are pursuing overtime claims. Plaintiff's attorneys often find state courts to be a preferable forum for employment claims because Virginia's procedural rules make it extremely difficult to resolve matters short of a full jury trial.

## ACTIONS FOR EMPLOYERS

Virginia employers should carefully review their compensation arrangements to ensure employees are being paid in compliance with both the FLSA and the VOWA. In particular, employers utilizing alternative compensation methods for non-exempt employees, such as salaries, FWW, the 8/80 Rule, piece rates, and day rates, should modify or eliminate those arrangements entirely to avoid violations and the enhanced penalties established by the VOWA.

If you have questions or need assistance regarding compliance with the VOWA, and other employment laws, please contact a member of Hancock Daniel's [Labor & Employment](#) team. Additional information about Hancock, Daniel & Johnson, P.C. is available on the firm's website, [www.hancockdaniel.com](http://www.hancockdaniel.com).

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