

OVERTIME UPDATE: CHANGES TO THE VIRGINIA OVERTIME WAGE ACT AND THE FAIR LABOR STANDARDS ACT'S WHITE-COLLAR EXEMPTION SALARY THRESHOLD

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Under the Fair Labor Standards Act (“FLSA”) employees must generally be paid at least federal minimum wage for all hours worked and overtime at a rate of one and a half times their “regular rate of pay” for all hours worked in excess of forty (40) hours in a workweek. However, white-collar – executive, administrative, and professional – employees are exempt from these minimum wage and overtime requirements. Employers should be aware that recent changes in Virginia law will affect overtime calculations. In addition, the federal government is expected to propose changes to the salary threshold for white-collar exemptions.

VIRGINIA

During the summer of 2021, the Virginia General Assembly enacted the Virginia Overtime Wage Act (“VOWA”), which significantly changed the state’s wage and hour law. As the VOWA was passed during the midst of the COVID-19 pandemic, it flew under the radar for many Virginia health care employers. Yet the VOWA included numerous provisions that differed from federal wage and hour law. Specifically, the VOWA created unique methods for calculating overtime compensation; imposed higher penalties for violations than the FLSA; and established a three (3)-year statute of limitations, which is a year longer than the statute of limitations under the FLSA for violations that are not willful. These differences from the FLSA, as well as the timing of the passage of the Act, resulted in confusion regarding overtime law in Virginia during the past year.

This session, the Virginia legislature proposed [House Bill \(HB\) 1173](#) and [Senate Bill \(SB\) 631](#) in order to substantially return the state to the overtime standards that applied prior to the passage of the VOWA. This legislation was signed by Governor Glenn Youngkin on April 11, 2022, and will become effective July 1, 2022. With the passage of these bills, Virginia employers who violate the FLSA and any regulations, guidance, or rules adopted pursuant to the overtime pay provisions of FLSA or any related governing case law are “liable to the employee for the applicable remedies, damages, or other relief available under the federal [FLSA]....”

Regular Rate Calculations

The VOWA carried over many of the white-collar exemptions to minimum wage and overtime requirements, such as those applying to certain administrative, executive, and professional employees, but imposed unique methods of calculating overtime compensation for non-exempt employees compensated using a salary or other alternative formula.

Under the FLSA, non-exempt employees must be paid overtime at a rate of one and a half times their “regular rate of pay” for all hours worked in excess of forty (40) hours in a workweek. The regular rate of pay is calculated by dividing the workweek’s total compensation paid by all hours worked. However, the VOWA required that the regular rate of pay be calculated by dividing all compensation for a workweek by forty (40), not the number of hours actually worked. Thus, the VOWA created the potential for significant differences in overtime pay depending on which calculation was used. With the reversal of the VOWA, employers can again rely on the FLSA’s overtime calculation method.

Additionally, employers may once again utilize the federal fluctuating workweek (“FWW”) method of overtime calculation, which was effectively outlawed under the VOWA. Under the FWW method, a non-exempt employee receives a weekly salary (no matter how many hours worked) plus overtime pay when the employee works more than forty (40) hours during a workweek. Overtime pay is based on the employee’s average hourly rate, which is calculated by dividing the

employee's fixed salary and any additional non-excludable pay (e.g., commissions, bonuses, or hazard pay) by the number of hours actually worked that week. For time worked in excess of forty (40) hours, the employee receives an additional 0.5 times that average hourly rate. Because an employee's regular rate of pay is calculated based on the number of hours worked, rather than a forty (40) hour workweek, the FWW method of calculation was not allowable under the VOWA.

The VOWA also brought into question whether Virginia employers could utilize either day rates or piece rates (a set amount for a unit of work completed), as these methods of payment were not addressed in the VOWA, nor did the Virginia Department of Labor provide any guidance regarding these methods. Under these methods of calculation, an employee receives a flat rate per day or job and their regular rate of pay is calculated by dividing the total compensation received in a workweek by the hours they actually worked. For time worked beyond forty (40) hours in a workweek, the employee is paid an additional 0.5 times that hourly rate. With the rescission of the VOWA, employees can once again utilize these methods of payment.

Finally, the VOWA did not include an explicit exception for hospitals and other healthcare entities covered by 29 U.S.C. § 207(j) that use the 8/80 Rule to determine overtime compensation. 29 U.S.C. § 207(j) allows employers and employees to agree to use a period of fourteen (14) consecutive days for the workweek rather than a seven (7)-day workweek. Employees are then paid 1.5 times their regular rate of pay when they work more than eighty (80) hours in a fourteen (14)-day workweek or more than eight (8) hours on any given workday. After the VOWA provisions regarding overtime calculation are repealed on July 1, 2022, hospitals and other healthcare facilities can resume using the 8/80 Rule.

Statute of Limitations and Damages

While the FLSA has a two (2)-year statute of limitations period for violations that are not willful and a three (3)-year statute of limitations for willful violations, the VOWA established a three (3)-year statute of limitations for all violations. Following the rescission of this provision of the VOWA, the FLSA two (2)-year statute of limitations will again apply for non-willful violations.

However, the VOWA's imposition of double damages and possible treble damages for a knowing violation remains in place. This may continue to incentivize employees to pursue their claims in state court, which can be a favorable forum for plaintiffs' attorneys because Virginia's procedural rules make it difficult to resolve a matter without a full jury trial.

FEDERAL

Meanwhile, the [U.S. Department of Labor](#) ("DOL") is expected to publish soon a proposed overtime rule. It is anticipated that this rule will recommend higher salary level thresholds for the FLSA's white-collar exemptions to its wage and overtime requirements. To be classified as a white-collar employee, an employee must meet certain tests regarding their job duties, as well as a salary threshold. The [tests for the white-collar exemptions](#) vary, as summarized below:

- **Executive Exemption:** The employee's primary duty must be managing the enterprise or a customarily recognized department or subdivision of the enterprise. An executive must customarily and regularly direct the work of at least two full-time employees and have the authority to hire or fire other employees or the executive's suggestions and recommendations regarding hiring, firing, advancement, promotion, or other change of status of other employees is given particular weight.
- **Administrative Exemption:** The primary duty of an administrative employee must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. Additionally, the employee must exercise discretion and independent judgment with respect to matters of significance.
- **Professional Exemption:** The employee's primary duty must be the performance of work requiring advanced knowledge (work which is predominately intellectual in character and which includes work requiring the consistent exercise of discretion and judgment). The advanced knowledge must be in a field of science or learning and customarily acquired by a prolonged course of specialized intellectual instruction.

While these white-collar exemptions all have slightly different criteria, the salary threshold for all white-collar exemptions is the same. Currently, the salary level is \$684 per week or \$35,568 per year. This threshold went into effect in 2020. The Biden administration is expected to raise the salary threshold, which will result in more employees

being subject to FLSA's wage and overtime requirements. However, significant increases in the salary threshold or automatic increases may face legal challenges.

In 2016, the Obama administration proposed to raise the threshold for white-collar exemptions to \$913 per week or \$47,476 per year, as well as automatically increase the salary threshold every three (3) years. This rule was [blocked](#) from going into effect by a federal judge who stated, "this significant increase to the salary level creates essentially a de facto salary-only test." It remains uncertain whether the Biden administration will seek to raise the salary threshold or whether it will propose an automatic increase.

While awaiting the DOL's proposed overtime rule, employers should review the tests for white-collar exemptions to ensure that their employees' duties are consistent with any exemptions that are being relied on. Additionally, employers who modified their method of calculating overtime compensation to conform to the VOWA will again need to modify their overtime calculations to comply with the FLSA in light of the legislature's changes to the VOWA this year.

If you have questions or need assistance regarding changes to overtime and other employment laws, please contact a member of Hancock Daniel's [Labor & Employment](#) team.

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