

New Overtime Law Creates Liabilities for Virginia Employers Effective July 1, 2021

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On March 30, 2021, Governor Ralph Northam signed the Virginia Overtime Wage Act (“VOWA”) into law, which will go into effect on July 1, 2021. Like the federal Fair Labor Standards Act (“FLSA”), the VOWA requires employers to pay 1.5 times an employee’s regular rate of pay for hours worked in excess of 40 hours in a workweek. However, while the law mostly resembles federal requirements, some significant differences could create new liabilities for Virginia employers and greater damages for overtime violations in the state. The VOWA goes beyond the FLSA by changing how an employee’s regular rate of pay is calculated, establishing a longer statute of limitations for employees to bring potential claims, and expanding the amount and types of damages for overtime violations.

Rate Calculations

Instead of relying on the FLSA method for calculating a salaried employee’s regular rate of pay – dividing the weekly salary by the number of hours actually worked in a workweek – the VOWA calculates the regular rate of pay by dividing the employee’s weekly salary by 40 hours. This means that for overtime pay purposes, the regular rate for any salaried non-exempt employee typically will be higher under Virginia law than under the FLSA. By calculating the regular rate of pay in this way, the new law will increase the potential liability an employer will face if it is found to have misclassified a salaried employee as exempt from overtime. Additionally, the law makes it less desirable to pay non-exempt workers on a salaried basis, and it appears impossible to pay non-exempt workers under a fluctuating workweek or similar method of payment.

Statute of Limitations

The VOWA imposes a three-year statute of limitations on overtime claims, as opposed to the FLSA’s default two-year limitations period (three years for willful violations).

Liquidated Damages

While the FLSA provides for liquidated damages equal to the amount of unpaid overtime wages in cases of willful violations, an employer may defend against such a damages claim on the basis that it acted in good faith, with reasonable grounds for believing it was complying with the FLSA’s requirements. This defense is unavailable under the VOWA, which instead provides that *all* overtime wage violations are subject to double damages, plus pre-judgment interest at eight percent a year. In addition, the law provides for treble damages for “knowing” violations.

What Should Virginia Employers Do to Get Ready for the VOWA?

Employers are encouraged to review their overtime pay practices to ensure compliance with both the FLSA and the new Virginia law, including auditing their classifications of exempt and non-exempt staff, given the stiffer penalties now available to employees who bring successful misclassification and overtime claims. Employers should also ensure that all non-exempt employees, whether hourly or salaried, accurately record all of the hours they work (whether on or off the employer’s premises) since proper overtime pay calculations will depend on an accurate weekly record of all hours worked.

If you have any questions regarding the topics discussed in this article, please contact **Amy L. Bess** at +1 (202) 312 3361, **Aleksandra Rybicki** at +1 (202) 312 3336 or any Vedder Price attorney with whom you have worked.

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