

Employers Face Increased Exposure under Virginia's New Overtime Wage Act

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Until recently, Virginia did not have a law requiring overtime compensation for hours worked over 40 in a week. Instead, Virginia relied on the overtime provisions in the federal Fair Labor Standards Act. Effective July 1, 2021, the new Virginia Overtime Wage Act (VOWA) breaks from the FLSA and adopts more stringent – and employee-friendly – overtime requirements.

Overtime Calculations

Under the VOWA, any hours worked by an employee in excess of 40 in any one workweek must be paid at a rate not less than one and one-half times the employee's regular rate (this is the same as the FLSA). For employees paid on an **hourly** basis, the regular rate is the hourly rate of pay plus any other non-overtime wages paid for that workweek, excluding any amounts that are excluded from the regular rate by the FLSA, divided by the total number of hours worked in that workweek.

For employees paid on a **salary** or other regular basis, however, under VOWA the regular rate is one-fortieth of all wages paid for that workweek. This is different than the FLSA, and appears to prohibit paying non-exempt employees a fixed salary covering straight-time wages over 40 in a workweek, or from using the fluctuating workweek to calculate overtime.

The VOWA's new method of calculating the regular rate for salaried employees will result in larger damages awards for misclassified employees. First, employers are precluded from claiming that a misclassified employee's salary already covered the straight-time wages for all hours worked, and so only an additional "half time" premium is owed for hours worked over 40. This means misclassified employees will be entitled to 1.5 times their regular rate for any hours worked over 40 in a workweek. Second, because the divisor used to calculate the regular rate is 40, the base rate used to determine overtime liability will be higher as well.

To understand how an employer's exposure for misclassification increases under the VOWA, assume an employee making \$1,000 a week and working 50 hours in a workweek is misclassified as an exempt employee and is now owed overtime compensation. Under the FLSA, the employee's overtime wages would be calculated as:

- $\$1000 \div 50 \text{ hours} = \20 per hour regular rate
- One half the \$20 regular rate = \$10 per hour.
- 10 overtime hours x \$10 per hour = **\$100 in overtime wages owed.**

However, under the VOWA, the employee would receive considerably more:

- $\$1000 \div 40 \text{ hours} = \25 per hour regular rate
- Time and a half the \$17.50 regular rate = \$37.50 per hour.
- 10 overtime hours x \$37.50 per hour = **\$375 in overtime wages owed.**

Statute of Limitations

The VOWA expands the statute of limitations applicable to overtime claims to three years. By contrast, under the FLSA, the default statute of limitations is two years, which is expanded to three years only if the employee can demonstrate that the employer's violation was "willful." So now, even if an employer's violation under the FLSA was not willful, the employer is still subject to three years of liability under Virginia law.

Liquidated Damages

Under the FLSA, an employee can recover liquidated (double) damages equal to the amount of his or her unpaid overtime wages, unless the employer can prove its violation was made in good faith and with reasonable grounds for believing its actions complied with the FLSA.

The VOWA significantly expands an employee's potential damages award. Under the VOWA, all overtime wage violations are subject to double damages (plus pre-judgment interest). Further, there is no "good faith" defense as under the FLSA. Instead, the VOWA permits treble damages for "knowing" violations. This means employees are entitled to triple the amount of overtime wages if the employer had actual knowledge that it failed to pay the wages due and acted in deliberate ignorance or reckless disregard as to whether it was paying all the wages owed.

Conclusion

Employers should review their payroll processes to ensure that overtime compensation for salaried, non-exempt employees is being properly calculated under the VOWA's requirements. An employer's exposure exponentially increases when employees proceed in a collective action under Virginia law. Given the increased exposure in Virginia from misclassified employees, employers should also ensure that their employees are properly classified as exempt. Contact your Vorys lawyer if you have questions about pay practices or for assistance in conducting a wage-hour audit.