



Virginia's New Overtime Law Likely To Create New Employer Headaches

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On July 1, 2021, a new Virginia state overtime law went into effect that provides more stringent overtime requirements for Virginia employers than those contained in the federal Fair Labor Standards Act (FLSA). On March 31, 2021, Governor Ralph Northam signed the **Virginia Overtime Wage Act** into law. Like the FLSA, the new Virginia law obligates employers to pay 1.5 times a non-exempt employee's regular rate of pay for all hours worked in excess of 40 hours in each workweek. Unlike the FLSA, the Virginia law now specifies exactly how that regular rate and overtime rate are to be calculated for hourly and salaried non-exempt workers, effectively eliminating certain payment arrangements available under the FLSA. The new law also provides a three-year statute of limitations for aggrieved employees to bring claims under the Virginia Wage Payment Act, unlike the FLSA which applies a three-year limitations period only if the employee proves the alleged wage violation was willful, and, otherwise, the limitations period is two years.

The new overtime changes for 2021 may catch employers off-guard because, on their face, they appear to track the FLSA, but there are nuanced changes for which employers must get prepared. One of the ways the Virginia law differs from the FLSA is with respect to how "regular rate" of pay is calculated for purposes of determining overtime compensation. For employees paid on an hourly basis, the regular rate is the employee's hourly payrate plus other wages, such as commissions or non-discretionary bonuses^[1] paid or allocated during that workweek, minus applicable FLSA exclusions (if any), divided by "the total number of hours worked in that workweek." If that employee worked over 40 hours in that fixed workweek (defined as seven consecutive 24-hour periods), then the worker must receive 1.5 times that calculated regular rate of pay for all hours worked by the employee over 40 hours.

For non-exempt employees paid on a salary or other regular basis, the change in the Virginia Overtime Wage Act is even more significant. A salaried non-exempt worker's regular rate is defined by statute as one-fortieth of all wages paid for that workweek (again, to include wages, commissions, and non-discretionary bonuses). The statute provides that the overtime payment can be no less than 1.5 times

that regular rate of pay. In order to calculate possible overtime payments for a salaried non-exempt worker, each workweek, the employer must take all of the employee's wage compensation earned in that workweek, divide it by 40 (arriving at the $\frac{1}{40}$ th rate), and then, for any hours worked by the employee over 40 in that workweek, pay 1.5 times that calculated regular rate for all overtime hours[2].

Accordingly, this new overtime law precludes employers in Virginia from paying FLSA non-exempt employees using the fixed salary or "fluctuating workweek" method of calculating overtime under the FLSA, instead requiring a separate hourly rate calculation for overtime purposes and payment of overtime at 1.5 times that hourly rate. As a reminder, under the FLSA fluctuating workweek method, the employee is paid the same flat salary for all hours worked in a week. But, if that employee works over 40 hours, he is paid an overtime premium. The overtime premium rate is calculated by first dividing the weekly salary by the total number of hours worked in that week to arrive at the regular rate of pay. Then, the overtime premium rate is $\frac{1}{2}$ of that regular rate of pay for the workweek multiplied by the number of hours worked over 40. This fluctuating workweek or other fixed overtime payment models would appear to conflict with the plain language of the new Virginia statute. Therefore, employers will need to evaluate, and likely change, how they compensate non-exempt workers in Virginia. Because the hours worked in a week are critical to a proper overtime calculation, employers also must ensure that all non-exempt employees, whether hourly or salaried, clock in and out of work (including time worked for the benefit of the employer but off employer premises), if they had not previously done so. With accurate time-keeping records, employers will be in a better position to defend themselves against wage and hour and employee misclassification lawsuits.

This new Virginia Overtime Wage Act, combined with the changes made to the Virginia Wage Payment Act in 2020, provide enhanced wage and hour benefits to workers, including a change in how overtime is calculated; a longer three-year statute of limitations period; increased likelihood to obtain liquidated damages, 8% interest, attorney's fees and costs; and higher minimum wage requirements. Plus, since July 2020, Virginia employees can now bring a private action in Virginia state court, either individually or collectively on behalf of similarly situated workers. As a result, Virginia is quickly becoming an attractive jurisdiction for employee-side attorneys seeking to file wage and hour lawsuits. Virginia employers should review their timekeeping and overtime policies to ensure compliance with the Virginia Wage Payment Act and the Virginia Overtime Wage Act.

[1] While it remains unclear whether discretionary bonuses will be factored into the regular rate calculation, historically, the Virginia Department of Labor and Industry has taken the position that true discretionary bonuses are not considered "wages," and thus are not subject certain requirements of Virginia wage laws, such as Virginia's Wage Payment Act.

[2] Example 1:

- \$1,000 weekly salary.

- Take 1/40 of that salary which is \$25.
- Worked 50 hours in the workweek.
- Overtime rate is \$37.50 (1.5 x \$25).
- Overtime pay is \$375 (10 OT hours x \$37.50).
- Total weekly pay is \$1,375 (\$1,000 + \$375).

Example 2:

- \$1,000 weekly salary plus \$500 in commission (total weekly pay \$1,500).
- Take 1/40 of that which is \$37.50.
- Worked 50 hours in the workweek.
- Overtime rate is \$56.25 (1.5 x \$37.50).
- Overtime pay is \$562.50 (10 OT hours x \$56.25).
- Total weekly pay is \$2,062.50 (\$1,500 + \$562.50).

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