

# Virginia Enacts Overtime Wage Law

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Beginning July 1, 2021, Virginia employers will be subject to new state overtime pay requirements. Virginia Governor Ralph Northam signed into law the [Virginia Overtime Wage Act](#) on March 31, 2021. Previously, Virginia had been content to rely on the overtime pay requirements of the federal Fair Labor Standards Act (FLSA).

While they differ in certain respects, as with the FLSA, the Virginia Overtime Wage Act obligates employers to pay one and one-half times an employee's regular rate of pay for hours worked in excess of 40 in a workweek. Departures from the federal law include how the regular rate of pay is calculated, a longer statute of limitations to bring potential claims, and the possible damages available.

## Rate Calculations

Under the FLSA, an employee's regular rate of pay is the sum of all remuneration for employment (barring certain statutory exclusions) divided by total hours worked in a workweek.

The state law employs a different calculation that depends on whether the employee is paid on an hourly or a salary basis. For hourly employees, the regular rate of pay is the hourly rate plus any other non-overtime wages paid or allocated for the workweek — not counting the same items that would be excluded from the FLSA calculation — and then divided by the total number of hours worked in the workweek. For employees who are salaried or paid on some other regular basis, the regular rate of pay is one-fortieth (0.025) of all wages paid for the workweek.

Significantly, the new standard for salaried and other regularly paid employees appears to preclude employers from paying traditionally non-exempt employees a fixed salary to cover wages for hours in excess of 40 in a workweek (including on a fluctuating workweek basis), requiring instead an hourly rate calculation for overtime pay for even these employees in most circumstances.

Employers also may face greater liability for misclassifying employees as exempt under the new law. Under federal law, employers commonly argue that a misclassified employee's salary already covers the employee's straight-time wages for all hours worked and, therefore, only the additional "half-time" amount is owed for hours in excess of 40. The Virginia Overtime Wage Act eliminates this argument, providing instead that *all* salaried employees are entitled to one and one-half times their regular rate for any hours worked over 40. In addition to the overtime premium under the FLSA, Virginia employers will need to account for time-and-a-half pay under the new law.

## Statute of Limitations

The new law provides that an employee's overtime claim may include workweeks in a total span of up to three years. It imposes a three-year statute of limitations on overtime claims, rather than 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, an employer may defend against such a damages claim on the basis that it acted in good faith, with reasonable grounds for believing it acted in compliance with the FLSA's requirements. This defense is unavailable under the new law, providing instead 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.

## Collective Actions

Virginia law typically does not authorize class or collective actions. There are exceptions, and the Virginia Overtime Wage Act is now one of them. Amendments to existing sections of the Virginia Code accompanying the new law authorize collective actions "consistent with the collective action procedures of the Fair Labor Standards Act" for violations under the Virginia Overtime Wage Act. Thus, Virginia employers face the possibility of defending overtime claims of multiple employees in a collective lawsuit covering workweeks up to a three-year period.

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## Practices

Wage and Hour

## Takeaway

The Virginia Overtime Wage Act creates the potential for significant liability to employers who fail to properly classify and compensate their employees. Employers are encouraged to review their overtime pay practices to ensure compliance with both the FLSA and the new Virginia law.

If you have any questions about the Virginia Overtime Wage Act or any other wage and hour issue, please consult a Jackson Lewis attorney.

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