

Déjà Vu: Virginia Returns to FLSA Overtime Standards

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Wage and Hour

Overtime standards in Virginia will return to federal standards beginning July 1, 2022.

On July 1, 2021, the Virginia Overtime Wage Act (VOWA) went into effect, significantly deviating the state's overtime pay laws from its long-standing reliance on the standards set forth in the federal Fair Labor Standards Act (FLSA). As a result of [House Bill \(HB\) 1173](#), signed by Governor Glenn Youngkin on April 11, 2022, exactly one year later, in almost all respects, Virginia will return to the overtime standards that applied prior to VOWA. HB 1173 provides that any employer who violates the state's overtime pay requirements "shall be liable to the employee for the applicable remedies, damages, or other relief available under the [FLSA]." HB 1173 goes into effect on July 1, 2022.

Regular Rate Calculations

Generally, the FLSA requires that non-exempt employees be paid overtime at a rate of one and one-half times their "regular rate of pay" for all hours worked in excess of 40 hours in a workweek. Under the FLSA, the regular rate of pay is the sum of an employee's compensation for a given workweek (barring certain statutory exclusions) divided by the total hours worked by the employee during that workweek. Under the [original VOWA](#), if a non-exempt employee was paid on a salary basis, their regular rate of pay was calculated by dividing that same compensation by *40 hours* rather than actual hours worked, resulting in a higher regular rate.

HB 1173 eliminated this difference and returns to the FLSA's regular rate calculation method entirely. In so doing, Virginia employers once again should be able to use the "fluctuating workweek" (FWW) method of paying traditionally non-exempt employees a fixed salary to cover wages for hours in excess of 40 in a workweek. Under the FLSA's FWW pay method, if a non-exempt employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all "straight time" (non-overtime) hours the employee works, the employer satisfies the FLSA's overtime pay requirements if, in addition to the salary amount, it pays at least one-half of the "regular rate" of pay for any hours worked in excess of 40. The salary must remain fixed and be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a "clear and mutual understanding" that the salary will remain the same regardless of the hours worked each week. As originally enacted, VOWA's regular rate calculation requirements effectively precluded use of the FWW pay method. Now that the FLSA's regular rate calculation standards will again apply, so should the availability of the FWW pay method.

Similarly, a return to the FLSA standards should alleviate some of the risks Virginia employers faced under VOWA for misclassifying employees as exempt. In FLSA claims, employers often 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. By explicitly requiring that all

salaried employees were entitled to one and one-half times their regular rate for hours worked over 40 in a workweek, VOWA originally precluded that contention.

Exempt Classifications

Based on the definition of “employee” set forth in VOWA, arguably some of the FLSA’s exemptions from overtime were no longer available under state law. A return to the FLSA’s standards ensures that all overtime exemptions available under federal law likewise will be available under Virginia law.

Statute of Limitations

As originally enacted, VOWA provided for a three-year statute of limitations in all overtime wage payment disputes. By contrast, the FLSA generally provides for a *two-year* limitations period, while allowing a three-year limitations period only if a claimant can demonstrate that the employer’s actions in violating the FLSA were “willful.” HB 1173 returns Virginia’s limitations periods for overtime claims to parallel those asserted under the FLSA.

Liquidated Damages

VOWA originally provided that all established overtime wage violations were automatically subject to liquidated (double) damages, plus pre-judgment interest at eight percent a year, with no defense available to mitigate the liquidated damages. In addition, VOWA provided for treble damages for “knowing” violations.

With a return to the FLSA’s remedies, while a claimant may still recover liquidated damages equal to the amount of unpaid overtime wages, the treble damages provision is eliminated and an employer once again may defend against a claim for liquidated damages by demonstrating that it acted in good faith, with reasonable grounds for believing it acted in compliance with the FLSA’s requirements.

Collective Actions Still Available

Prior to VOWA, Virginia law rarely authorized claimants to bring their overtime disputes as class or collective actions. However, the original VOWA specifically authorized collective overtime wage payment claims *and HB 1173 does not alter this authorization*. Just as with the FLSA, claimants may bring their overtime wage payment claims as collective actions under Virginia law.

Takeaway

HB 1173’s significant revisions to VOWA should come as welcome news and enable employers to better comply with both federal and state overtime law. However, employers should be mindful that VOWA was *not* entirely rescinded. Prior to VOWA, employees could assert overtime pay claims only in federal court under the FLSA. VOWA in part enabled employees to alternatively bring such claims in state court, under arguably more employee-friendly state law standards. While HB 1173 eliminated those differing standards, employees may still pursue their overtime claims in state court, whether under state law, federal law, or both.

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

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