IslerDare PC
Client Alert

EMPLOYMENT LAW UPDATE

Virginia Overtime Wage Act

Continuing last year's trend of adopting pro-employee measures that will make Virginia a less favorable state in which to conduct business, and that undoubtedly will serve as a trap for unwary small employers, in the 2021 legislative session, the Virginia General Assembly enacted Virginia's first-ever overtime statute. Previously, Virginia did not have a specific overtime law, and employers were simply required to comply with the federal Fair Labor Standards Act ("FLSA"). Beginning July 1, 2021, however, businesses will have to comply with the Virginia Overtime Wage Act ("VOWA" or the "Act") and will face stiffer penalties for noncompliance than under the FLSA.

As explained further below, perhaps the most critical and concerning aspect of this law is its treatment of salaried employees who may later be found to be covered (*i.e.*, not exempted) by the overtime requirements of the Act.

What Does the VOWA Require?

Like the FLSA, the VOWA requires employers to pay overtime to covered employees at a rate of 1.5 times the employee's regular rate of pay for hours worked in excess of 40 hours in a workweek. The full text of the Act can be found at the end of this Alert.

Which Employees Are Covered under the VOWA?

Basically all workers are covered by the new law, except for those explicitly excluded or exempted from the VOWA. Specifically, the Act excludes from the definition of "employee" many – but not all – of the exemptions available under the FLSA, including:

(i) Employees who fall within the exemptions typically known as "white-collar exemptions" (bona fide executive, administrative, and professional employees, certain computer employees, and outside salespersons);

(ii) Some seasonal employees employed by certain amusement or recreational establishments;

(iii) Some seasonal agricultural employees;

(iv) Individuals volunteering solely for religious, humanitarian, or community service purposes for a church, public body, or nonprofit that does not employ the individual; and

(v) Certain drivers whose activities are regulated by the US Secretary of Transportation.

Notably, as written, the new Virginia law *does not exclude* from overtime certain workers who historically have been excluded from the FLSA's overtime requirements. Included amongst those workers who *will be covered* by Virginia's overtime law (even though they have previously been exempted from overtime under federal law), are the following:

(i) Automobile salespersons, service agents, and mechanics;

(ii) Certain agricultural workers;

(iii) Taxicab drivers;

(iv) Live-in domestic service employees; and

(v) Movie theater employees.

How Is the Regular Rate and Overtime Rate Calculated?

For covered employees who are paid on an hourly basis, the VOWA follows the FLSA's calculation method. However, the VOWA utilizes a different (and more employee-friendly) calculation method than the FLSA for covered employees who are paid on a salary or other regular basis.[1]

Calculation for Covered Employees Paid on an Hourly Basis:

Under both the VOWA and the FLSA, if the covered employee is paid on an hourly basis, the regular rate is determined by adding the employee's total hourly wages for the week and any other non-overtime wages paid to the employee (excluding payments that can be excluded under the FLSA), such as production bonuses and incentive pay, and dividing that amount by the number of hours worked in the workweek. The overtime rate, under both laws, is then determined by multiplying the regular rate by 1.5 and then by the number of hours worked in excess of 40 hours.

An example of this calculation is shown in Example Q1 below.

Calculation for Covered Employees Paid on a Salary or Other Regular Basis:

One of the most problematic aspects of the VOWA from the perspective of employers and sound public policy is the VOWA's treatment of workers who have been paid on a salary basis. As employers know, most employees view being paid on a salary basis –

[1] Presumably, this would include piece rates, day rates, etc.

receiving the same amount of compensation week-in and week-out – to be beneficial and even a sign of the employee's value to the company. Typically, the employee appreciates not having to punch a time-clock and being trusted to put in a full week's work without worrying whether he/she worked 37 hours or 43 hours in a workweek. In those situations, the employee understands that he/she is being a paid a salary that is designed to cover all the hours that the employee has worked in a given week.

In recognition of this understanding, in those cases under the FLSA where the employer was found to have erroneously treated a salaried employee as exempt from overtime,[2] the federal courts overseeing the Commonwealth have mandated that the employee's entitlement to past unpaid overtime is limited to the additional "half-time" of the employee's regular rate since arguably the employee has already been paid the "straight time" in the form of the salary received.

The new Virginia overtime law rejects decades of law in this area. Under the VOWA, if an employee has been misclassified as exempt and paid on a salary basis, the hourly regular rate of pay for purposes of calculating overtime must be computed by dividing the salary by 40. The misclassified employee is then entitled to overtime at a rate of 1.5 times that hourly regular rate. This results in a substantial burden and penalty on employers who have paid employees on a salary basis believing (as did the employee) that the salary would cover all the employee's hours.

> An example of the difference that this dramatic change in the law makes is shown in Example Q2 below.

What Are the Penalties for Non-Compliance Under the VOWA?

Employers who violate the VOWA are liable to the employee for the following: (i) wages owed; (ii) liquidated damages equal to the wages owed; (iii) prejudgment interest; (iv) reasonable attorneys' fees; and (v) costs. Notably, the VOWA makes liquidated damages *automatic and nondiscretionary*. This result is in contrast to the long-established precedent under the federal FLSA, under which an employer can present a "good faith" defense to avoid such an award.

Perhaps as significant, if the court finds the employer "*knowingly*" violated the VOWA, the court *must* award the employee an amount equal to 3x the amount of wages owed

[2] Regrettably, many small and midsize employers continue to believe that if an employee is being paid on a salary basis, the employee is not entitled overtime, regardless of the employee's duties. This is categorically incorrect. Whether an employee is, or is not, entitled to overtime under federal law is dictated first and foremost by the employee's *primary duties*, which must be exempt in nature.

(treble damages) and reasonable attorneys' fees and costs. Treble damages are not available under the FLSA.

The VOWA's statute of limitations is three years from the cause of action, as contrasted with the FLSA, which has a two year statute of limitations (unless the employee can demonstrate a "willful" violation, in which case the statute of limitation increases to three years).

Anticipated Questions

Q1. I operate a small shipping business and pay the employees who pack boxes an hourly rate of pay of $10.00 and a bonus of $20 at the end of the week if they pack more than 500 boxes. Can you provide an example of how their regular rate and overtime rate should be calculated under the VOWA if they work 45 hours in a workweek and pack 550 boxes?

Step 1 (Calculate regular wages):	$450 ($10 x 45 hours)
Step 2 (Add any additional pay):	$470 ($450 + $20 bonus)
Step 3 (Calculate regular rate):	$10.44 / hour ($470 ÷ 45 hours)
Step 4 (Calculate overtime rate):	$15.66 ($10.44 x 1.5)
Step 5 (Calculate overtime pay):	$78.30 ($15.66 x 5 hours)

Q2. Bob is employed as a project manager for Acme Corporation. He does not typically manage any employees on an ongoing basis, but only when they are assigned to help with a project. Acme treats Bob as an "exempt" employee and pays him a salary of $52,000 annually ($1,000 a week). Bob typically works a 50 hour workweek.

If Bob later challenges his exempt classification and a court determines that Bob should have been treated as "non-exempt" and thus eligible for overtime, how would Bob's damages be calculated differently under federal law (FLSA) and state law (VOWA)?

FLSA. Under the FLSA, Bob's regular rate of pay is derived by dividing Bob's weekly salary of $1,000 by the number of hours he works weekly (50 hours), which means that Bob's regular rate of pay is $20 per hour. Since it has been determined that Bob is entitled to 1.5 times that regular rate for any hours worked in excess of 40 hours in a week, and since he has already been paid the straight time (1.0) for those hours, he is entitled to be paid the additional half-time as follows:

Regular Rate:	$20/hour ($1,000 ÷ 50)
Overtime Rate:	$10/hour ($20 x 0.5)
Overtime Pay:	$100 ($10 x 10 hours)

VOWA. Under the new Virginia overtime law, it is assumed by statute that the salary that Acme paid Bob *only covered his first 40 hours* of work, and therefore he is entitled to time and a half for hours worked in excess of 40 (despite the weekly salary he received). Thus, under the VOWA, Bob's overtime compensation is calculated as follows:

Regular Rate:	$25/hour ($1,000 ÷ 40)
Overtime Rate:	$37.50 ($25 x 1.5)
Overtime Pay:	$375 ($37.50 x 10 hours)

As can be seen from this example, this modification to the Virginia law means that Virginia employers who have mistakenly treated salaried employees as exempt will now be required to pay catch-up overtime that is more than three times the amount that would be payable under federal law.

Q3. What should I do if I have non-exempt employees being paid on a salary basis?

Given the likelihood of significantly increased overtime damages under the VOWA, we recommend converting salaried, non-exempt employees to an hourly pay structure immediately. We recognize that a number of employees will likely push back, because many workers, as noted, appreciate the simplicity of being paid a weekly salary and not being required to track their hours each day. However, unless a strong argument can be made that the employee is exempted from overtime under federal and state law, the convenience and preferences of the employee must be set aside.

Given the VOWA's steep penalties for noncompliance, we do *not* recommend simply reclassifying potentially affected employees as salaried exempt employees without first undergoing a careful analysis (using external counsel as necessary) to ensure the exemption is applicable.

Action Items for Employers

Of the many employment law changes enacted by the General Assembly over the past two sessions, the enactment of the VOWA stands out as being particularly perilous for employers. The peril arises not from employers' knowing disregard of the law, but from the difficulty that even the most well-meaning companies face in trying to ascertain which employees should be exempted from overtime. While the consequences for getting it wrong have always existed under federal law, those consequences have become particularly draconian under the VOWA, especially with respect to those employees who are being paid on a salary basis (either because the employer believed the employee was

performing exempt duties or because the employer mistakenly thought that by paying the employee a salary, the employer did not need to pay overtime).

In light of the new Act, every employing entity should conduct a complete audit of any worker who is being paid on a salary basis and who is not *clearly* serving in an exempt position. Employers may face some challenges with their employees who are being converted to hourly paid employees, but the short-term pain of making such conversion far outweighs the more significant long-term pain of an overtime lawsuit down the road.

IslerDare has self-audit materials to enable employers to begin the process by conducting a self-audit of their various positions. If you are interested in having the self-audit exempt vs. non-exempt kit sent to you, please reach out to any of the attorneys listed below.

More Questions?
We are here to help.

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Our benefits team would be glad to assist

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§ 40.1-29.2. Virginia Overtime Wage Act.

A. As used in this section:

"Employ" includes to permit or suffer to work.

"Employee" means any individual employed by an employer, including employees of derivative carriers within the meaning of the federal Railway Labor Act, 45 U.S.C. § 151 et seq. "Employee" does not include the following:

(i) any individual who volunteers solely for humanitarian, religious, or community service purposes for a public body, church, or nonprofit organization that does not otherwise employ such individual,

(ii) any person who is exempt from the federal overtime wage pursuant to 29 U.S.C. § 213(a), and

(iii) any person who meets the exemptions set forth in 29 U.S.C. §§ 213(b)(1) or 213(b)(11).

"Employer" means any person acting directly or indirectly in the interest of an employer in relation to an employee. "Employer" does not include any labor organization, other than when acting as an employer; anyone acting in the capacity of officer or agent of such labor organization; or any carrier subject to the federal Railway Labor Act, 45 U.S.C. §§ 151 through 188, except derivative carriers within the meaning of the federal Railway Labor Act.

"Person" means an individual, partnership, association, corporation, business trust, legal representative, any organized group of persons, or the Commonwealth, any of its constitutional officers, agencies, institutions, or political subdivisions, or any public body. This definition constitutes a waiver of sovereign immunity by the Commonwealth.

"Wages" means the same as that term is defined in § 40.1-28.9.

"Workweek" means a fixed and regularly occurring period of 168 hours or seven consecutive 24-hour periods. It need not coincide with the calendar week and may begin on any day and at any hour. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of this section.

B. For any hours worked by an employee in excess of 40 hours in any one workweek, an employer shall pay such employee an overtime premium at a rate not less than one and one-half times the employee's regular rate, pursuant to 29 U.S.C. § 207. An employee's regular rate shall be calculated as follows:

1. For employees paid on an hourly basis, the regular rate is the hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that are excluded from the regular rate by the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and its implementing regulations, divided by the total number of hours worked in that workweek.

2. For employees paid on a salary or other regular basis, the regular rate is one-fortieth of all wages paid for that workweek.

C. For fire protection or law-enforcement employees of any public sector employer for whom 29 U.S.C. § 207(k) applies, such employer shall pay an overtime premium as set forth in this section

for (i) all hours worked in excess of the threshold set forth in 20 U.S.C. § 207(k) and (ii) any additional hours such employee worked or received as paid leave as set forth in subsection A of § 9.1-701.

D. An employer may assert an exemption to the overtime requirement of this section for employees who meet the exemptions set forth in 29 U.S.C. § 213(a)(1) or for employees who meet the exemptions set forth in 29 U.S.C. §§ 213(b)(1) or 213(b)(11).

E. No agency, institution, political subdivision, or public body that complies with the requirements of 29 U.S.C. § 207(k) and § 9.1-701 shall be deemed to have violated subsection B with respect to fire suppression or law-enforcement employees covered by such statutes.

F. Any employer that violates the overtime wage requirements of this section shall be liable to the employee for all remedies, damages, or other relief available in an action brought under subsection J of § 40.1-29.

G. Any action pursuant to this section shall be commenced within three years after the cause of action accrues.