



## Virginia Overtime Wage Act

Beginning July 1, Virginia employers will be subject to the [Virginia Overtime Wage Act](#) (“Overtime Act”), which adds new state overtime pay requirements. Previously, Virginia employers applied the overtime pay requirements of the federal Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, et seq. Like the FLSA, the Overtime Act obligates employers to pay one and one-half times an employee’s regular rate of pay for hours physically worked in excess of 40 in a workweek. Differences from the federal law include how the regular rate of pay is calculated for salaried nonexempt employees, a longer statute of limitations to bring potential claims, and the possible damages available. The Overtime Act also waives sovereign immunity for the Commonwealth.

### I. 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 FLSA makes clear that this calculation includes “the total number of hours actually worked”. Thus, the FLSA makes no distinction in calculating the regular rate of pay for hourly and salaried workers.

The **calculation for hourly employees does not change from the FLSA**: 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 physically worked in the workweek.

The **Overtime Act employs a different calculation for nonexempt salaried employees**. 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—not counting the same items that would be [excluded from the FLSA calculation](#)—for the workweek regardless of the number of hours the employee worked. Overtime calculations still apply to hours actually worked in excess of 40; vacation or sick leave hours continue to be excluded from the 40 hour threshold.

*\* See page 2 for a rate calculation example.*

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 over 40. **The Overtime Act eliminates this defense**, providing instead that all salaried (nonexempt) employees are entitled to one and one-half times their regular rate for any hours worked over 40.

Lastly, **employers cannot provide compensatory leave or overtime leave instead of overtime pay** except for Law Enforcement and Fire Suppression employees as set forth in subsection A of § 9.1-701. The Overtime Act states “wages” are defined the same as in § 40.1-28.9. Overtime wages must be paid in “legal tender of the United States or checks or drafts on banks negotiable into cash on demand or upon acceptance at full value.”

**Rate Calculation Example:**

Semi-Monthly (S/M)	\$1500	Total Hours Worked	42
S/M Standard Hours	86.67	Work Cycle Hours	40
		Hourly Rate	\$17.31
Addl. Comp Subject to Inclusion in OT Rate – Semi-Monthly Rate	\$500	Addl. Comp Subject to Inclusion in OT Rate – Weekly Rate	\$230.77

		New Calculation		Old Calculation		
Straight Time for Hours Worked	40 Hours @ Hourly Rate	\$17.31	\$692.28	42	\$17.31	\$726.90
Plus Weekly Equivalent SP 1			\$230.77			\$230.77
Equals Total straight time remuneration for the Work Cycle			\$923.05			\$957.66
Divided by 1/40			0.025	Divided by 1/42		0.024
Equals Regular Rate			\$23.08			\$22.80
Multiplied by .5 Equals Premium Overtime Rate			\$11.54			\$11.40
Multiplied by number of Premium OT Hrs	2		\$23.08	2		\$22.80
Plus Straight Time for Premium OT Hrs	2 Hours @ Hourly Rate	\$23.08	\$46.15	2	\$17.31	\$34.61
Total Overtime Due for Work Week:			<b>\$69.23</b>			<b>\$57.42</b>

**II. IMPACT ON FIREFIGHTER AND POLICE OFFICERS**

Currently, political subdivisions of the Commonwealth must pay fire fighters and police officers on forces with 100 or more officers overtime pursuant to Va. Code § 9.1-701. This closes the “gap” created by the employee’s regular schedule of employment and the 86–hour federal overtime trigger established by 29 U.S.C. § 207(k) (FLSA). See *Rogers v. City of Richmond*, 851 F. Supp. 2d at 986-987 (E.D. Va. 2012) (“Simply put, an employee who works more than their normal hours, but less than the FLSA maximum, is entitled to overtime under state, but not federal, law.”). **Thus, the practice of paying “straight time” rather than a premium rate for the “gap” of hours worked between 80 and 86 in a 14–day work cycle violates § 9.1–700 et seq. of the Virginia Code.**

The Overtime Act does not impact those that comply with Code § 9.1-701. The Overtime Act specifically states that any agency or public body that complies with the requirements of 29 U.S.C. §

207(k) and § 9.1-701 will not have violated the provisions of the Overtime Act “with respect to fire suppression or law-enforcement employees covered by such statutes.”

Thus, the **Overtime Act does not impose any additional obligation on public sector employers to pay overtime to fire suppression and law-enforcement employees for those public employers in compliance with § 9.1-701.**

### III. **SOVEREIGN IMMUNITY**

In defining “person,” the Overtime Act waives the Commonwealth’s sovereign immunity.

*“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.*

Meaning, **state agencies can now be sued under the Overtime Act.**

### IV. **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**, rather than the FLSA’s default two-year limitations period (three years for willful violations). Claims under the Overtime Act will not apply to violations that occurred prior to the effective date of the law: July 1, 2021.

### V. **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” (willful) violations.**

### VI. **COLLECTIVE ACTIONS (CLASS ACTION)**

The Overtime Act amends existing sections of the Virginia Code accompanying the new law to authorize collective actions “consistent with the collective action procedures of the Fair Labor Standards Act” for violations under the Overtime Act. Thus, state agencies face the possibility of **defending overtime claims of multiple employees in a collective lawsuit covering workweeks up to a three-year period.**

## **IMPACTS TO DHRM POLICY**

Current [Overtime Leave](#) and [Compensatory Leave](#) Policies will be updated subject to the changes to this bill. The amended policies will be published in advance of the effective date of July 1st.

## **ADDITIONAL RESOURCES**

This bill was assigned to the Virginia Department of Labor & Industry (DOLI) for review during the General Assembly session. DOLI has developed related FAQs and posted them on their website.

<https://www.doli.virginia.gov/labor-law/faqs-virginia-overtime-law/>

For questions regarding the Virginia Overtime Wage Act, please contact the [Compensation Group](#).