



Staff Recommendation

Significant Overtime Rule Changes in Virginia That May Affect Automobile Dealerships

Beginning July 1, 2021, Virginia employers will be subject to new state overtime pay requirements under the Virginia Overtime Wage Act (VOWA). Previously, Virginia had been content to rely on the overtime pay requirements of the federal Fair Labor Standards Act (FLSA). As with the FLSA, the VOWA 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 FLSA will include:

- **For salaried non-exempt pay plans, the regular rate of pay is calculated for overtime purposes based on 40 hours, not actual hours worked.**
- The Fluctuating Workweek method of payment is now prohibited.
- Automatic three (3) years of back pay with liquated damages, and treble damages for willful violations.
- An 8% pre-judgement interest penalty.
- Employers pay the employee's attorney's fees.

In light of the VOWA, we recommend dealerships in Virginia consider changing pay plans to comply with the Retail 7(i) Exemption.

Changes to Regular Rate Calculations for Salaried Non-exempt Employees

Generally, under the FLSA, the same basic formula is used to determine each employee's regular rate—all compensation for employment divided by all hours worked in the workweek. The VOWA, however, establishes a new formula for regular rate calculations for salaried non-exempt employees.

For non-exempt employees paid on a salary or other regular basis, the regular rate will be calculated as "one-fortieth of all wages paid for that workweek." This may impact positions such as Title Clerk, internal Accounting/Office, Reception, Cashier etc.

As a result, the VOWA will prohibit employers from paying non-exempt employees a fixed salary that covers straight-time wages for hours in excess of 40 hours in a workweek, or from utilizing the Fluctuating Workweek method of payment.

For example, imagine an employee who is paid \$700 a week and who worked 50 hours in a workweek.

Under the FLSA, the unpaid overtime wages owed to the employee would be calculated in the following manner:

- $\$700 \div 50 \text{ hours} = \$14 \text{ per hour regular rate}$
- One half the \$14 regular rate = \$7 per hour.
- 10 overtime hours x \$7 per hour = **\$70 in overtime owed.**

That same employee's overtime under the VOWA, however, would be calculated in the following manner:

- $\$700 \div 40 \text{ hours} = \$17.50 \text{ per hour regular rate}$
- Time and a half the \$17.50 regular rate = \$26.25 per hour.
- 10 overtime hours x \$26.25 per hour = **\$262.50 in overtime owed.**

Statute of Limitations Expanded

The VOWA 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).

Automatic 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 VOWA, **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.**

Dealerships Must Make Changes for Certain Production Based Positions

Under VOWA, the federal partial Automotive 13(b)10 exemption **may** no longer apply to employees in Virginia; however, **it is much too early to definitively tell**. Impacted positions include:

- Sales
- Mechanics (Wrench in Hand) i.e., Service Technicians
- Parts Counter
- Service Advisors

As such, the following positions within the dealership may be due overtime if a change in pay plan structure and wording does not occur on or before July 1, 2021. In summary, it may be possible that 13b10 will no longer be recognized in Virginia under the new Act and the availability of the Retail 7(i) exemption will be clarified based on regulations from DOLI.

Retail 7(i) Exemption

Under Section 7(i) of the FLSA, employees who meet the following conditions may be exempt from the FLSA’s overtime — but not minimum wage and recordkeeping — requirements:

- The employee is employed by a retail or service establishment (75% of the company’s sales is to the ultimate customer);
- The regular rate of pay for such employee exceeds one and one-half times the applicable minimum wage (*\$9.50 x 1-1/2 = \$14.25 in 2021*); and
- More than half (51%) of the employee's compensation for a representative period (not less than one month) constitutes commissions earned.
- The employee maintains an accurate record of all hours worked.

Retail or Service Establishment.

There is no question that dealerships qualify as a retail or service establishment. As such, all employees of dealerships may be considered for the Retail 7(i) Exemption. **For Sales, Service Technicians, Parts Counter and Service Advisors, this will be the best option to partially exempt these positions from overtime** until DOLI can further clarify compliant pay options under VOWA.

Employees Must Receive At Least Time and a Half of Minimum Wage for All Hours Worked.

As of May 1, 2021, the minimum wage in Virginia is \$9.50 per hour. Remember, the hourly minimum wage will increase in phases:

- \$11.00, effective January 1, 2022, and
- \$12.00, effective January 1, 2023.

The legislature must act by June 30, 2024, for the last two minimum wage increases to take effect, raising the \$12.00 hourly minimum wage in effect in 2023 to:

- \$13.50 on January 1, 2025; and

- \$15.00 on January 1, 2026.

If the legislature does not act by June 30, 2024, the \$12.00 hourly minimum wage is to remain in effect, and, effective January 1, 2025, the hourly minimum wage will be adjusted to reflect increases in the consumer price index.

For January 1, 2027, and thereafter, the hourly minimum wage will be adjusted to reflect increases in the consumer price index.

More Than Half (51%) of the Employee's Compensation for a Representative Period (Not Less Than One Month) Constitutes Commissions Earned.

Currently in Virginia, what can constitute a “commission” is broad. Options for compliant pay plans may include a salary plus commission, draw against commission with monthly settle up, full commission and/or flat rate pay. That said, it is important you verify proposed changes to the pay plan structure with your employment attorney and/or human resource consultant to ensure full compliance with partial Retail 7i under the FLSA.

The partial Retail 7i exemption also requires that commissioned pay plans include a representative period of time in which the commissions will be reviewed for compliance. Please update all pay plans for those individuals identified above as Retail 7i with the following verbiage:

“The organization will confirm that the individual earnings are derived from commissions and the average hourly wage rate equals or exceeds one and one half (1 ½) times minimum wage. This assessment will be conducted over a representative period time, no less than 30-day increments and no more than twelve (12) months.”

We strongly encourage that the dealership utilizes a 12-month representative period of time.

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- *SESCO Compliance Publication – “How to Comply with Wage and Hour Regulations” (\$35.00 for retainer clients / \$55.00 for non-retainer clients). Contact SESCO to order.*
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About the Author – Jamie Hasty is the Vice President of SESCO Management Consultants. SESCO is the preferred human resource consulting firm of VADA, providing results-oriented human resource consulting services to its members. SESCO provides a special “retainer” relationship that provides a free “hotline” to discuss day-to-day employment issues such as policy development, employee challenges such as disciplinary actions, terminations, or workers' compensation issues, compliance to federal and state employment regulations, and many other management and human resource matters. Please feel free to contact Ms. Hasty by calling 423-

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