

Comply or Get Swamped: New Virginia Laws That All Businesses Must Understand For July 2021

On July 1, 2021, several new Virginia laws go into effect that every employer must understand. This legal update highlights some of the most important new changes in Virginia employment laws this summer including:

- Wage & Hour - Overtime
- Disability, Domestic Workers, & Military Status
- Cannabis
- General Contractor Certificates

Wage and Hour

Virginia Overtime Wage Act (“VOWA”)

VIRGINIA CODE §40.1-29.2

EFFECTIVE JULY 1, 2021

VOWA creates significant new liability for employers who fail to properly pay overtime wages to employees. Virginia employers must now carefully consider VOWA in assessing their pay policies.

- VOWA overrides the FLSA and severely limits the available overtime exemptions.
- All non-exempt employees must receive 1.5 x a state calculation for regular rate for overtime. (No more fluctuating workweek.)
- VOWA has its own calculation for regular rate. It changes (from the FLSA) how employers calculate overtime for nonexempt salaried employees—potentially causing higher overtime premiums for those employees. Virginia employers who pay regular bonuses and incentives need to reassess whether paying any nonexempt employees by salary—as opposed to by the hour—is still a good business decision.
- The statute of limitations under VOWA is always 3 years.
- Damages under VOWA are greater than under FLSA.
- State collective action lawsuits are now allowed.

There is some ambiguity regarding key provisions of VOWA. Some of this ambiguity may be clarified by Virginia Department of Labor and Industry regulations in the coming weeks or by amendments from the General Assembly in the next legislative session. For now, employers and counsel must work with the statute as written, and err on the side of caution.

Now, every Virginia employer must assess its pay policies under both state wage and hour law (VOWA and the Virginia Minimum Wage Act) as well as the FLSA.

NOT ALL FLSA EXEMPTIONS ARE RECOGNIZED UNDER VOWA

Virginia employers need to reassess all employee categorizations under VOWA.

The FLSA enumerates categories of employees who are exempt (29 U.S.C. §§ 213(a) and (b)). VOWA eliminates most of the FLSA categories of exemptions. The **only** types of employees VOWA specifically enumerates as **permissibly exempt** from its overtime requirements are:

- Employees employed in a bona fide executive, professional or administrative capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (plus some exceptions for certain retail or service employees who may qualify as executive or administrative exempt under certain circumstances).
- Certain employees regulated by the Department of Transportation (i.e. commercial drivers)
- Certain local drivers paid per trip.

(For a full description, please refer to the statute referenced above.)

All other employees do not qualify as exempt, even if they qualify under an FLSA exemption. Of note, this means that computer programmers / systems analysts, recreational employees, auto mechanics, and railroad workers do not qualify as exempt under VOWA. There is some ambiguity in the text of VOWA regarding the §213(a) exemptions, however, that leads to some confusion as to application. Until the VDOLI regulations or the General Assembly provide clarity, employers should speak with counsel before determining that an employee remains exempt.

ALL NONEXEMPT EMPLOYEES IN VIRGINIA RECEIVE 1.5 x THEIR REGULAR RATE AS AN OVERTIME PREMIUM

- **NEW RULE:** Every nonexempt employee in Virginia must be paid a 1.5 x a regular rate premium for every hour worked in excess of 40 hours in any given workweek.

This rule applies to both nonexempt hourly and nonexempt salaried employees.

The state has its own calculation for regular rate.

CALCULATING THE REGULAR RATE UNDER VOWA

NONEXEMPT HOURLY EMPLOYEES –

- Under VOWA, nonexempt hourly employees are entitled to overtime for all hours worked in excess of 40 in any given work week.
- VOWA provides that the regular rate of pay is the hourly rate of pay plus any other non-overtime wages paid or allocated for that workweek, excluding any amounts that are allowed to be excluded by the FLSA, divided by the total hours worked that week.

NONEXEMPT SALARIED EMPLOYEES – SIGNIFICANT CHANGE

- Under VOWA, nonexempt salaried employees are entitled to overtime for all hours worked in excess of 40 in any given work week.
- To calculate the regular rate for salaried non-exempt workers, divide all wages paid by **40 hours**.

- Therefore, unlike the calculation method for nonexempt hourly workers, salaried workers always divide their wages by the fixed 40 hours to determine regular rate.
- Under the FLSA, employers are permitted to use several different methods to calculate overtime premiums for salaried nonexempt employees that resulted in the overtime rate being lower the more hours the salaried employee worked. That is no longer the case in Virginia.

ALTERNATE PAY METHODS PERMITTED UNDER THE FLSA ARE INCONSISTANT WITH VOWA

VOWA effectively results in only two categories of employees for Virginia workers: exempt and hourly non-exempt because VOWA requires a time-and-one-half premium be paid to all non-exempt employees regardless of the pay method. It therefore eliminates the FLSA's approved payment of the .5 overtime premium for non-exempt workers paid on a salary basis, and also effectively eliminates the option for Virginia employers to pay employees under any alternative FLSA method that does not compensate for a full 1.5 x the regular rate premium (i.e. fluctuating workweek).

As set out above, non-exempt employees may still be paid a predictable salary, but employers will pay a higher overtime rate for keeping employees on a salary basis. Effectively, VOWA takes away any incentive for Virginia employers to pay non-exempt employees a predictable weekly salary. If employers reclassify non-exempt salaried employees to hourly, remember that Va. Code §40.1-29A requires hourly workers to be paid every two weeks or twice each month.

AVAILABLE REMEDIES

VOWA adopts the increased pay violation remedies passed in 2020, which include:

- Private cause of action (i.e., direct lawsuit by the employee).
- A three-year statute of limitations regardless of willfulness compared to the FLSA which applies a two-year statute of limitations generally and three-years only upon proof of willfulness.
- Liquidated damages (one times the wages owed) plus interest at the rate of 8% annually from the date the wages were due, whereas under the FLSA employers can present a good faith defense to liquidated damages, and interest is not a favored damage.
- Treble damages for knowingly failing to comply with the Virginia payroll code, which damages are not available under the FLSA.
- Attorneys' fees (available under FLSA).
- Collective actions allowed (available under FLSA).

DON'T FORGET 2020/19 WAGE AND HOUR CHANGES

- [2020] Minimum wage increases again in January 2022 to \$11.00 per hour (currently \$9.50)
 - Private cause of action for failure to pay wages
 - Wage retaliation claim
 - Pay Transparency (sharing of wages ok)
 - Misclassification of Independent Contractors
- [2019] Written pay statements required

Disability, Domestic Workers, & Military Status Added to VHRA

Disability

“Disability” was added as a protected category to the Virginia Human Rights Act (“VHRA”). [Va. Code §2.2-3900-3909](#). Complying with the VHRA’s disability protections is very similar to complying with the Americans with Disabilities Act (“ADA”) but Virginia has added significant notice requirements regarding reasonable accommodation not required by the ADA.

NOTICE OF RIGHTS TO ACCOMODATION UNDER THE VHRA

Employers with **more than 5** employees are required to provide **several** different types of notice to employees:

NOTICE OF RIGHTS TO ALL EMPLOYEES UPON HIRE

- Provide new employees with a copy of their disability accommodation rights upon hire.

POSTERS

- Post notice of disability accommodation rights.
- The Virginia Division of Human Rights presumably will issue another poster for general disability rights (likely right before or on July 1, 2021).

HANDBOOK LANGUAGE

- Place notice of accommodation rights in company handbook.

PROVIDE ANOTHER COPY OF ACCOMODATION RIGHTS UPON NOTICE OF DISABILITY

- Include notice of accommodation rights within **10 days** of the employee providing notice that such employee has a disability.
- Employers should be cautious about not “regarding” employees as having a disability through this process.

Domestic Workers

As of July 1, 2021, domestic workers may now (i) sue any person compensating them for discrimination (other than age) and unlawful discharge under the Virginia Human Rights Act, (ii) sue any person compensating them for wage and overtime claims pursuant to the Virginia payroll statutes, and (iii) report any person compensating them for unsafe workplaces, which will allow the state to enter without delay to perform a safety inspection. Domestic workers are those performing work in a private home such as babysitters, maids, nannies, nurses, caretakers, handymen, home health aides, gardeners, and chauffeurs, for example.

Military Status

The VHRA removed the term status “as a veteran” and changed it to “military” status, with a full definition provided for military status which includes dependents. Handbooks that contain EEO statements based on “veteran” status need to be updated to include “military” status.

Virginia Marijuana Laws as of July 1, 2021

The Medicinal Cannabis Process

[Va. Code Section 54.1-3408.3](#)

Effective prior to July 1, 2021

The cannabis oil certification process:

- Individuals may obtain written certification from a practitioner for cannabis oil to treat a medical condition. Cannabis oil can be in any formulation using the oil, not just oil itself.
 - The practitioner needs to be licensed and registered with the Board of Pharmacy to provide a cannabis certification.
 - The individual needs to register with the Board of Pharmacy to receive and use the certification.
- The individual takes the certification to a legal dispensary and is allowed to purchase up to a 90-day supply of cannabis oil (i.e. tinctures, oil for vaping, or edibles)
- The Virginia Board of Pharmacy issued regulations that govern this process. [18 VAC110-60-10 through 110-60-330](#).
- "Cannabis oil" means any formulation of processed Cannabis plant extract, which may include oil from industrial hemp extract acquired by a pharmaceutical processor pursuant to § [54.1-3442.6](#), or a dilution of the resin of the Cannabis plant that contains at least five milligrams of cannabidiol (CBD) or tetrahydrocannabinolic acid (THC-A) and no more than 10 milligrams of delta-9-tetrahydrocannabinol per dose. "Cannabis oil" does not include industrial hemp, as defined in § [3.2-4112](#), that is grown, dealt, or processed in compliance with state or federal law, unless it has been acquired and formulated with cannabis plant extract by a pharmaceutical processor.

No Discrimination, Discipline or Discharge as of July 1, 2021

[Va. § Code 40.1-27.4](#)

Effective July 1, 2021

As of July 1, employers may not "discharge, discipline, or discriminate against an employee for the employee's lawful use of cannabis oil pursuant to a valid written certification issued by a practitioner... pursuant to [the medicinal cannabis certification process set forth in Va. Code § 54.1-3408.3.]"

Employers may still take adverse action if an employee, during work hours: (i) possesses cannabis oil, or (ii) is impaired.

This means that a positive drug test for applicants or current employees is not, in and of itself, grounds for failure to hire, discipline, or termination. THC metabolizes in the body more slowly than alcohol or other drugs like cocaine. This means that an applicant or employee may test positive on a drug test for THC, days or even weeks after being impaired. As a result of this new law, employers must be able to prove the employee possessed cannabis oil at work or was impaired during work hours.

Employers should therefore consider creating a new process to assess impairment for employees the employer reasonably suspects are impaired.

EXCEPTIONS:

- Employers do not have to take any action that will cause them to violate federal law or lose a federal contract. Marijuana remains illegal under federal law, and federal contracts may require drug tests and

prohibit workers who test positive from working on a project. Note that there may be some similar state law requirements, but the statute is silent as to state law conflicts.

- Certain “defense” contractors do not have to hire applicants who test positive for THC.
- Federal Drug Free Workplace Act requires federal contractors to make a “good faith effort” to maintain a drug free workplace. But note that the Act does not require testing. Some employers test as part of the “good faith effort.” However, at least one court has stated that the Act does not require testing, nor does it prohibit federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law. The court noted that a zero tolerance drug testing policy designed to maintain a drug free work environment does not mean that the policy was actually required by federal law or required to obtain federal funding.
- Employers may prohibit the use of medical marijuana if the job requires use of a CDL license, vehicles, or heavy equipment if such use is governed by DOT or other federal laws.

What does this mean for employers?

- Employers need to decide whether drug testing for THC still makes sense. Employers need to consider the following questions:
 - What is the justification for testing applicants for THC when medical cannabis and certain marijuana possession/usage is legal in Virginia?
 - Is it important to continue to test employees on a random basis for the presence of THC?
 - Is it important to test employees for reasonable suspicion or THC post-accident? Consider whether it is required for workers’ compensation premium reduction. Consider whether you have sufficient evidence of impairment?
- If any applicant/employee tests positive on a drug test, employers must determine if the employee has a valid cannabis certification.
- Employers must revise their substance abuse, drug testing, and disability accommodation process policies to reflect the prohibition against firing employees with a medicinal cannabis certification.
- Employers need to consider developing a process for determining “impairment,” including sending supervisors to training to perform physical assessments.

Legalization of Recreational Marijuana in Virginia.

[Va. Code Section 18.251.1 \(and other sections enacted in Senate Bill 1406\)](#)

Effective July 1, 2021.

On April 7, 2021, Virginia legalized recreational marijuana effective July 1, 2021. Retail sales will commence in 2024—although it seems likely that date will also be pushed forward.

- As of July 1, 2021, it is legal in Virginia for a person 21 years of age or older to:
 - Possess up to 1 ounce of marijuana (sandwich baggie); and
 - Households may “cultivate” up to 4 marijuana plants – out of the view of public and reach of children, and subject to other rules.
- Smoking marijuana in public is illegal.
- Possessing more than 1 ounce but less than 1 pound of marijuana (a gallon-sized bag) is illegal, but will only result in a \$25 fine.
- Possessing more than 1 pound of marijuana is a felony punishable by up to 10 years in jail.

- Gifting marijuana from person to person is legal under certain circumstances (e.g., if you grow it, you may be able to give some away).
- Using marijuana as a passenger or driver in a car is illegal. Individuals may not have an “open container” (i.e., marijuana in a plastic baggy) while driving.

Marijuana conviction expungement.

Effective July 1, 2021

- All past marijuana convictions for simple possession will be expunged no later than 2025 (although agencies are directed to move as fast as possible).

Asking about marijuana convictions on job applications.

[Va. Code Section 19.2-389.3](#)

Effective Now.

- Employers are still banned from inquiring about arrests, criminal charges or convictions for simple possession (1 oz. or less without intent to distribute) of marijuana on job applications.
- Employers may not use a third-party to inquire about such arrests/convictions.

General Contractor Safe Harbor

A Virginia statute that went into effect in 2020 provides an employee the mechanism to assert that a general contractor is jointly and severally liable if their subcontractor fails to pay wages. [Va. Code § 11-4.6](#)

- As of July 2021, GCs may request a payment certification from subcontractors. This certification is a “safe harbor” to protect the GCs from joint liability for unpaid wages.
- GCs need to get a certificate of payment from subcontractors each pay period to protect against claims for the payment of wage claims.
- GC’s subcontracts should include a provision mandating this certificate for every pay period.

Please see the Eckert Seamans Legal Updates: [“New Employment Laws in Virginia Increase Employer Exposure to Liability,”](#) [“Virginia Employment Law Checklist for 2021,”](#) [“New Virginia Laws Seek to Convert Independent Contractors to Employees”](#) and article [The New Pitfalls of Employment Misclassification for Virginia Employers](#) for additional information and analysis of recent changes to employment laws in Virginia.