

VIRGINIA WAGE LAW CHANGES A REMINDER TO ALL DEALERSHIPS

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The implementation of the Virginia Overtime Wage Act (VOWA) on July 1 serves as a reminder to all dealerships across the country to consider federal, state, and local law when classifying employees for wage and hour purposes. Prior to July 1, Virginia dealerships were simply governed by federal wage and hour law and were not required to pay overtime premium for hours worked over 40 in a workweek to salespersons, service advisors, technicians and partsmen who meet the exemption's duty requirements. But we now live in a different era, and dealerships must adjust. You should use Virginia's changes to be the spark that pushes you to review your wage and hour policies regardless of your dealership's location.

What Changed in Virginia?

Absent further clarification from the Virginia Department of Labor and Industry to the contrary, the VOWA now requires Virginia dealerships to pay overtime premium for hours worked in excess of 40 in a workweek to classifications of employees who are not eligible for overtime pay under federal law. VOWA is unclear as to the continued availability of the federal "commission-paid" overtime exemption.

The new law also sets forth how Virginia employers are required to calculate the "regular rate" for overtime purposes – a method that is different than the one used under federal law. Under Virginia law, the regular rate calculation depends on whether the employee is paid on a salaried or hourly basis. For salaried employees, the regular rate is one-fortieth of wages paid for the workweek. For hourly employees, the regular rate is the hourly rate in

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addition to other non-overtime wages (not including any amounts excluded by the federal Fair Labor Standards Act) paid for the workweek, divided by the total number of hours worked in the workweek.

Good Reminder for ALL Dealerships

Although this new law only impacts dealerships in Virginia, the enactment of VOWA serves as a reminder to all dealerships – regardless of your location – to ensure compliance with all applicable federal, state, and local laws. Where there are differences between applicable laws, the law that is most favorable to the employee controls.

For example, under federal law, someone employed by a “nonmanufacturing establishment” primarily engaged in selling automobiles and/or trucks to ultimate purchasers AND whose primary duty is selling automobiles and/or trucks qualifies for the overtime exemption for salespersons. This federal overtime exemption has no specific pay component, but dealerships are required to pay employees in these positions at least minimum wage for all hours worked and maintain accurate and complete time records for each employee.

If this same employee performed the exact same duties in a state with its own wage and hour laws that were more favorable to the employee, this employee would not be overtime exempt unless both state and federal requirements were met. For example, if this employee worked in New York, they would not be overtime exempt unless they earned at least New York minimum wage for the first 40 hours worked in the workweek and time and one half of the New York minimum wage for all hours worked in excess of 40 in that workweek. Similarly, service advisors who are overtime exempt under federal law are not overtime exempt under New Jersey law unless they receive at least 50% of their compensation in the form of commissions and receive total weekly compensation of not less than \$400. In both situations, if these earning requirements are not met, these employees are entitled to overtime pay under state law for hours worked in excess of 40 in a workweek even though the employees would be exempt under federal law standing alone.

Final Reminders

In all situations, the employer has the burden of establishing that employees qualify for the exemptions claimed. Job titles and job descriptions do not control – actual primary job duties do. That means that not all employees involved in the sales process are exempt as salespersons (e.g., finance managers). Not all employees turning wrenches are exempt as technicians (e.g., lube techs). Not all employees with important job positions qualify for “white collar” exemptions. The law analyzes each situation individually.

For several reasons, including the federal government’s announced initiative to focus on wage and hour compliance, we recommend that all dealerships audit their compliance with all applicable federal, state, and local wage and hour laws. The audit should include a determination as to whether employees are properly classified and properly paid. The good news is that we can help with the audit.

For further information on the Virginia law, or questions about wage and hour law, please contact your Fisher Phillips attorney or any member of our [Automotive Dealership Industry Practice Group](#).