

FACT SHEET



OPPOSE the Fluctuating Work Week Loophole

Problem: The Virginia Senate has approved budget amendment 21300242A regarding the Fluctuating Work Week (FWW) that would significantly underpay workers for overtime hours worked.

Solution: Remove budget amendment 21300242A and protect workers.

Background: During the 2021 General Assembly regular session in January, Virginia approved the Virginia Overtime Wage Act (VOWA), essentially an overtime law that most states have, which also (like 7 other states) disallowed use of the FWW. The Senate amendment that took place during the 2021 special session in August rescinds that portion of the VOWA and allows use of the FWW loophole.

What is an FWW loophole? The FWW loophole allows employers to calculate a different rate of pay depending on how many hours an employee works, rather than having a set hourly rate of pay. This results in a “diminishing overtime calculation” that reduces hourly pay for workers who put in overtime. FWW means employees get paid a lower rate for every minute of overtime they work.

Is this allowed under the Fair Labor Standards Act (FLSA)? Yes. The FLSA allows the FWW loophole for employees who sometimes work more and sometimes less than 40 hours per week to even out their income. The result is that employees are paid less than they are owed for overtime. Via its “savings clause” (FLSA, 29 U.S.C. § 218(a)), the FLSA expressly invites states to do as Virginia has done with the VOWA and provide more generous protections to its workers.

Does this practice benefit workers? No. The FWW undermines the concept that overtime is supposed to cost more and thus discourage employers from working employees too many hours. The results of the FWW are disastrous for some of the most vulnerable workers who work on piece or day rates, and non-exempt office employees who are paid a low salary but work long hours. Under this law, it is cheaper to have one employee work 80 hours than to have two employees each work 40 hours. It also incentivizes employers’ intentional misclassification of nonexempt employees as exempt employees because the penalty is so much less than the wages saved.

What does this look like in practice? Let’s imagine a worker with a regular salary of \$600 per week. The person works 50 hours one week and is due overtime compensation. Here are the two calculations.

1. FWW Calculation (Diminishing Halftime):

$\$600 / 50 \text{ hours} = \$12/\text{hr}$ (“regular rate”) $\$12/\text{hr} * .5 = \$6/\text{hr}$ (diminishing overtime rate) $50 \text{ hours} - 40 \text{ hours} = 10 \text{ hours of overtime}$ $10 \text{ hours} * \$6/\text{hr} = \mathbf{\$60.00}$ in overtime wages
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2. VOWA Calculation (True Overtime):

$\$600 / 40 \text{ hours} = \$15/\text{hr}$ (VOWA “regular rate”) $\$15/\text{hr} * 1.5 = \$22.50/\text{hr}$ (VOWA overtime rate) $50 \text{ hours} - 40 \text{ hours} = 10 \text{ hours of overtime}$ $10 \text{ hrs} * \$22.50/\text{hr} = \mathbf{\$225.00}$ in overtime wages
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Hourly workers deserve to be paid the “real” overtime amount for hours worked over 40 hours. Remove budget amendment 21300242A from the budget.