

**REPORT OF THE SECRETARY OF LABOR**

**2022 OVERTIME WORK GROUP  
(HOUSE BILL 1173, SENATE BILL 631)**

**TO THE GOVERNOR AND CHAIRMEN OF THE HOUSE COMMITTEES ON  
APPROPRIATIONS AND COMMERCE AND ENERGY AND THE SENATE  
COMMITTEES ON FINANCE AND APPROPRIATIONS AND COMMERCE  
AND LABOR**



**COMMONWEALTH OF VIRGINIA  
RICHMOND  
NOVEMBER 1, 2022**

## **Preface**

- Senate Bill 631 (Barker) and House Bill 1173 (Ware) directs the Secretary of Labor to convene a work group to review overtime issues in the Code.
- The legislation states the work group shall include “representatives from the business, labor, and legal sectors and state and local governments.” The work group shall also include two members of the Senate and House each.
- The work group shall submit a report on its findings and recommendations to the Governor and the Chairmen of the House Committees on Appropriations and Commerce and Energy and the Senate Committees on Finance and Appropriations and Commerce and Labor by November 1, 2022.

## **Background**

Senate Bill 631 and House Bill 1173 were introduced to amend the 2021 General Assembly’s Overtime Wage Act. The goal of the 2021 Overtime Wage Act was to codify the federal overtime provisions under the Fair Labor Standards Act and provide a private cause of action for an employee to file a lawsuit in state court related to employer violations.

However, after it went into effect in July 2021, it was determined the Overtime Wage Act did not fully align with federal overtime provisions including the omission of a number of exemptions for specific industries, how overtime was calculated, etc.

Senate Bill 631 and House Bill 1173 replaced provisions of the 2021 Virginia Overtime Wage Act to align Virginia’s overtime law with the federal Fair Labor Standards Act, including all applicable exemptions, overtime calculation methods, methods of overtime payment, or other overtime provisions within the federal Fair Labor Standards Act.

It retains the private cause of action for an employee to file a case in state court.

## **OVERTIME WORK GROUP Meeting, August 5, 2022**

The Overtime Work Group held its first meeting on August 5, 2022. Secretary of Labor G. Bryan Slater convened the work group to review overtime issues under § 40.1-29.2 of the Code with representatives of business, labor, and state and local governments — both in person and virtually. Members of the Senate and the House of Delegates also participated in the initial meeting. Members of the work group each presented their issues and concerns during the meeting with some brief discussion of the items raised. The following issues for discussion were identified at the meeting. Secretary Slater would like to gather input for the public on these items. Additional meetings are set for September 12 or 13th and October 7 to discuss these issues and produce the report due by November 1, 2022.

## Issues Discussed During August 5, 2022 Meeting

1. Currently, the Department of Labor and Industry (DOLI) does not have authority to collect the overtime premium for hours worked over 40 hours in a week. DOLI can collect employees' straight time pay for weekly hours over 40 but DOLI cannot collect the 50% overtime premium.

Should DOLI's Labor Law Division be allowed to collect the overtime premium on behalf of claimants that come to it for collection of wages owed?

2. Under the Fair Labor Standards Act provisions included in Virginia Law by § 40.1-29.2, employees are entitled to liquidated damages if they prevail on a claim for unpaid overtime. Employers who show they acted in "good faith" and had "reasonable grounds" for believing that the act or omission was not a violation of the FLSA have been excused from having to pay the liquidated damages under federal law (Portal to Portal Act of 1947). As quoted from the Congressional Record and a federal court decision, "*Good faith* requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry."

Should definition of "good faith exception" and "reasonable grounds" be included in Virginia Code to guide state decisions on liquidated damages?

3. Section 40.1-29.2 makes employers liable to the employee for the remedies, damages, or other relief available under the federal Fair Labor Standards Act. Under § 40.1-29.G for payment of wage cases brought by DOLI, employees are entitled to liquidated damages without reduction for the employers good faith. Under § 40.1-29(J) employees are entitled to liquidated damages without reduction if they prevail in a payment of wage case they brought — as well an additional amount equal to the wages owed if the court finds willful conduct on the part of the employer. The potential for confusion between these two penalty schemes exists particularly where an employee brings a case for both unpaid regular hours and overtime. The issue of the proper penalty could be raised in litigation of these cases.

Should the penalty regimes in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

4. The current statute of limitations for bringing suit for an employer's failure to pay regular wages is three years under § 40.1-29.L. For overtime pay, Virginia's statute follows the FLSA statute of limitations at two years — unless there is willful conduct on the part of the employer, in which case the employee gets an extra year to file their case. The potential for confusion between these two statutes of limitation exists particularly where an employee brings a case for both unpaid regular hours and overtime. The issue of the proper time to file would be a particular issue if a case were filed in federal court after the two-year federal statute has passed. This could be raised in litigation of these cases.

Should the statute of limitation in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

5. Certain employees are exempt from overtime when doing agricultural work under provisions of 29 U.S. Code § 213(a)(6) — for example employees traditionally paid piece rate, made applicable in Virginia by § 40.1-29.2.

Should this exemption be continued or eliminated from Virginia law?

6. Certain domestic service employees providing companion care services are exempt from overtime under 29 U.S. Code § 213(a)(15), made applicable in Virginia by § 40.1-29.2.

Should this exemption be continued or eliminated from Virginia law?

There was much discussion about how the law as it currently stands should be preserved and that the law should be as easy and clear to understand as possible. Many of the attendees wanted to maintain the language and exemptions contained in the current law, such as the provision of compensatory leave for local and state government employees, the new language on overtime for derivative carriers and exemptions for employees of auto dealers.

Comments concerning the maintenance or removal of other exemptions are welcomed.

## Overtime Work Group Member List

### **The Honorable G. Bryan Slater, Secretary of Labor**

The Honorable George L. Barker, Senate of Virginia  
The Honorable Adam P. Ebbin, Senate of Virginia  
The Honorable Lee Ware, Virginia House of Delegates  
The Honorable Michael J. Webert, Virginia House of Delegates  
Jeremy Bennett, Virginia Association of Counties  
Natalie Brannon, Department of Human Resource Management  
Brad Copenhaver, Meadowview Strategies<sup>1</sup>  
Doris Crouse-Mays, Virginia AFL-CIO  
Brett Daniel, Ogletree Deakins<sup>2</sup>  
Karen Elliot, Eckert Seamans  
Anne Gambardella, Virginia Auto Dealers Association  
Michelle Gowdy, Virginia Municipal League,  
Judy Hacker, Virginia Assisted Living Association  
Julia Hammond, National Federation of Independent Business Inc.  
Keith Hare, Virginia Health Care Association  
Kevin Holden, Jackson Lewis  
Charlie Jackson, Jackson-West Consulting<sup>3</sup>  
Zach Jacobs, Virginia Farm Bureau  
Scott Johnson, Hancock Daniel  
Josh Laws, Office of the Attorney General<sup>4</sup>  
Keith Martin, Virginia Chamber of Commerce  
Robert Melvin, Virginia Restaurant, Lodging, Travel Association  
Tracy Montross, American Airlines  
Brent Rawlings, Virginia Hospital & Healthcare Association  
The Honorable Nicole Riley, Deputy Secretary of Commerce and Trade  
Jodi Roth, Virginia Retail Federation<sup>5</sup>  
Michele Satterlund, McGuire Woods<sup>6</sup>  
Kyle Shreeve, Virginia Agribusiness Council<sup>7</sup>  
Brett Vassey, Virginia Manufacturers Association

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<sup>1</sup> Replaced Kyle Shreeve as Virginia Agribusiness Council Representative

<sup>2</sup> Representative for Virginia Beverage Association

<sup>3</sup> Representative for Service Employees International Union

<sup>4</sup> Work Group Counsel and Parliamentarian

<sup>5</sup> Nancy Thomas attended August 5<sup>th</sup>, meeting on behalf of the Virginia Retail Federation

<sup>6</sup> Also counsel for American Airlines

<sup>7</sup> Resigned as of August 19, 2022

## Placeholder for Public Comments

**Full Name:** [REDACTED]

**Full Name:** Tracy Montross

**Email:** [REDACTED]

**Organization Name:** American Airlines

**Work Group:** Overtime Work Group

**Public Comment:** I am writing on behalf of American Airlines to provide comment on the 2022 Overtime Work Group Report dated November 1, 2022. American Airlines is proud to provide commercial air service access in the Commonwealth of Virginia for the communities of Northern Virginia, Charlottesville, Lynchburg, Newport News, Norfolk, Richmond, and Roanoke with daily air service. National Airport (DCA) also serves as an important hub for American, serving more than 11.5 million passengers per year with 253 daily flights to 65 unique destinations in 4 countries. American Airlines and our nearly 3,000 employees in the Commonwealth contribute more than \$4.7 billion to the state's economy from payroll, induced and indirect (passenger non-airline spend) economic output. American Airlines supports the language in SB631(Barker) and HB 1173 (Ware) as passed by the 2022 Virginia General Assembly Session. These bills were passed after multiple years of discussion, and reflect significant stakeholder input and compromise. If stakeholders outside of the commercial airlines industry need further clarification on any language in the legislation, we would ask the Department of Labor and Industry to consider providing formal guidance rather than a re-write of the carefully crafted compromise that is now reflected in statute.

Keith Martin

Executive Vice President of Public Policy & Government Relations,  
and General Counsel, Virginia Chamber of Commerce  
Executive Director, Virginia Chamber Foundation

I have submitted the Virginia Chamber's comments online. However, since the spacing seemed off, I have also provided the Virginia Chamber's comments via email below.

On behalf of the Virginia Chamber of Commerce, please see our responses below to the Overtime Work Group draft report questions.

1. Should DOLI be allowed to collect the overtime premium on behalf of claimants that come to it for collection of wages owed?

The Virginia Chamber of Commerce does not have a position on this issue.

2. Should definitions of "good faith exception" and "reasonable grounds" be included in the Virginia Code to guide state decisions on liquidated damages?

Va. Code section 40.1-29.2 creates a state cause of action for violations of the overtime pay requirements of the federal Fair Labor Standards Act ("FLSA"), as amended, and "any regulations, guidance, or rules adopted pursuant to the overtime pay provisions of such federal act or any related governing case law" apply to an action brought in Virginia pursuant to that section. As such, a Virginia court considering a state claim brought pursuant to the Virginia Code section would necessarily look to how terms of art or standards, such as "good faith" and "reasonable grounds," are understood under the FLSA in order to apply those terms under the state act, rendering the addition of these definitions in state law unnecessary. Of course, judicial understanding of various standards and terms of art utilized by the FLSA are also subject to change and, thus, codifying a current definition might then render Virginia's statute out-of-step with any future evolution in the federal standard terms or standards.

As such, the Virginia Chamber of Commerce does not support opening up the Virginia Code to add these definitions. If there is confusion regarding their current meaning, DOLI could consider guidance referencing the applicable federal definitions for clarity.

3. Should the penalty regimes in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

As DOLI and others in the work group have pointed out, it is clear that the standards for damages, statute of limitations, etc. for regular wages are not the same as those which apply to a cause of action for overtime in Virginia. Specifically, provisions related to regular wages were not changed by the overtime legislation in 2021 and 2022 and, thus, remain out of step with the FLSA in certain respects, as they were prior to 2021. By contrast, those provisions relevant to a state cause of action for overtime wages now (following the 2022 legislation), align with the FLSA. As such, Virginia Chamber of Commerce does not support amending the overtime provisions (Va. Code § 40.1-29.2).

The Chamber would support guidance from DOLI to ensure that its investigators, courts, and others were clear as to which standard applies to regular wages and which applies to overtime, to avoid any potential for confusion.

4. Should the statute of limitation in the payment of wage statute and the overtime wage statute be harmonized to avoid confusion?

As DOLI and others in the work group have pointed out, it is clear that the standards for damages, statute of limitations, etc. for regular wages are not the same as those which apply to a cause of action for overtime in Virginia. Specifically, provisions related to regular wages were not changed by the overtime legislation in 2021 and 2022 and, thus, remain out of step with the FLSA in certain respects, as they were prior to 2021. By contrast, those provisions relevant to a state cause of action for overtime wages now (following the 2022 legislation), align with the FLSA. As such, Virginia Chamber of Commerce does not support amending the overtime provisions (Va. Code § 40.1-29.2).

The Chamber would support guidance from DOLI to ensure that its investigators, courts, and others were clear as to which standard applies to regular wages and which applies to overtime, to avoid any potential for confusion.

5. Should this exemption be continued or eliminated from Virginia law?

The Virginia Chamber of Commerce believes that the state cause of action and any other Virginia overtime provisions should align with the FLSA in all substantive respects. As a result, the Chamber would not support any change that would bring Virginia's statute out of alignment with its federal corollary.

6. Should this exemption be continued or eliminated from Virginia law?

The Virginia Chamber of Commerce believes that the state cause of action and any other Virginia overtime provisions should align with the FLSA in all substantive respects. As a result, the Chamber would not support any change that would bring Virginia's statute out of alignment with its federal corollary.



Anne Gambardella, Esq.

Virginia Automobile Dealers Assn

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[REDACTED]

[REDACTED]

[REDACTED]

The Virginia Automobile Dealers Association represents the interests of Virginia's franchised motor vehicle dealers in attempts to influence passage or enforcement of laws. As such, we have been closely involved in recent legislative activities related to overtime wages and the work of the 2022 Overtime Work Group.

We supported legislation in 2022, House Bill 1173 and Senate Bill 631, to ensure Virginia's overtime requirements mirrored those of the federal Fair Labor Standards Act (FLSA).

The draft report of the Overtime Work group identifies several issues related to the applicability of certain exemptions as well as differences between statute of limitations and remedies in actions to recover regular wages and overtime.

We take no position on the issue of the consideration of exemptions under the FLSA but feel any exclusion of an FLSA exemption should only be done with serious consideration of all affected parties.

In so far as the differences identified in the report between actions for regular pay and overtime pay, we support the legislation as passed making a state cause of action for overtime wages consistent with the FLSA. Rather than revising a statute reflecting a careful balance of all interest, any confusion would be best addressed by guidance from the Department.

Thank you.

September 19, 2022

The Honorable George “Bryan” Slater  
Secretary  
Department of Labor  
P.O. Box 1475  
Richmond, VA 23218

Dear Secretary Slater,

The Virginia Farm Bureau Federation (VFBF) and the Virginia Agribusiness Council appreciate the opportunity to submit comments to the Department of Labor on the 2022 Overtime Workgroup Draft Report.

Virginia Farm Bureau is the Commonwealth’s largest general farm organization, representing more than 35,000 farmers of nearly every type of crop and livestock across Virginia. Farm Bureau and its members have worked together to build a sustainable future of safe and abundant food, fiber, and renewable fuel for the United States and the world.

The Virginia Agribusiness Council represents over 40,000 farmers and agribusinesses and the entire agriculture and forestry industry supply chain, which is responsible for a \$91 billion total economic impact to the Commonwealth annually, making agriculture Virginia’s largest private sector industry.

The impact of eliminating the agricultural overtime exemption would likely be felt differently between smaller and larger producers. Larger farms and agribusinesses are likely to have more employees, greater payroll expenses, and possibly greater impact due to increased wages. They may be able to absorb these increases, and/or take steps to mitigate them, such as spreading hours out among more workers, cutting worker shifts or other practices. However, it is likely that smaller farms, especially those that rely upon a greater percentage of family labor will be more severely impacted. But the impact to the entire agriculture industry would be substantial.

Importantly, a significant increase in labor costs would serve as a disincentive to growing the agricultural sector, and in some cases, if farms cease operations or shift to less labor-intensive crops, jobs could be lost both in production agriculture, as well as related processing and marketing businesses which rely on farm output and generate employment and economic activity.

The Virginia Farm Bureau Federation and Virginia Agribusiness Council respectfully submit these comments. We appreciate the Administration’s attention to this issue and look forward to continuing to serve on the Overtime Workgroup.

Sincerely,

R. Zachary Jacobs

Legislative Specialist, Government Relations

Virginia Farm Bureau Federation

Brad Copenhaver

Principal, Meadowview Strategies

on behalf of the Virginia Agribusiness Council

Kristin Donovan

Staff Attorney

Legal Aid Justice Center

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Dear Secretary Slater,

In 2021, Virginia passed historic overtime legislation. While VOWA initially covered most agricultural workers, the law was amended in 2022 to mirror the Fair Labor Standards Act (FLSA), which exempts farmworkers from overtime. The FLSA’s overtime exemption is a vestige of Jim Crow-era racism that has no place in today’s world. Farmworkers are essential workers who perform some of the most difficult and dangerous jobs in the country. They work long hours, which increases their risk of injury and illness. Their continued exclusion from basic labor protections cannot be justified. The values of Virginians today do not align with the values that shaped the FLSA eighty-four years ago. By perpetuating a racist exemption, Virginia is turning its back on some of the most marginalized workers in the state – workers who are overwhelming Black and Latino. VOWA should be amended again to protect farmworkers.

**I. The Exclusion of Farmworkers from Overtime Pay Is a Legacy of Jim Crow Era Racism**

The FLSA’s exclusion of farmworkers from overtime protections is a legacy of New Deal legislation that intentionally excluded southern Black farmworkers. The FLSA became law in 1938, a time when Blacks in the South were subjected to Jim Crow laws, lynchings, and exclusion from the political process. To pass New Deal legislation, Congress excluded Black farmworkers to placate Southern representatives who feared that equal pay for Blacks would undermine the South’s racial caste system. *See* Marc Linder, *Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States* 127-132 (1992); *Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc.*, 475 P.3d 164, 176 (Wash, 2020) (Gonzalez, J., concurring). Representative Wilcox of Florida expressed this vile sentiment during congressional debates: “There has always been a difference in the wage scale of white and colored labor. . . . You cannot put the Negro and the white man on the same basis and get away with it.” Linder, at 150.

Today, “[f]armworkers remain some of the most impoverished and socially excluded members of our society.” 475 P.3d at 177 (Gonzalez, J., concurring). Excluded from the National Labor Relations Act, they do not have the right to bargain collectively and take concerted action to improve working conditions. In Virginia, as in the rest of the U.S., most farmworkers are Black and Latino.

In 2020, the Washington Supreme Court held that exempting farmworkers from the state’s overtime law violated the state’s constitution, which, like the Virginia constitution, prohibits granting privileges or immunities to certain groups. *Id.* at 164. In his concurrence, one judge explained that “[t]he exclusion of farmworkers from overtime pay deprives them of an important health and safety protection that is afforded to other workers” and that “the desire to spare employers in one industry from costs cannot, by itself, justify excluding some workers from the health and safety protections afforded to others.” *Id.* at 177.

## **II. Agriculture Is a Dangerous Industry and Overtime Work Makes It More Dangerous**

“[A]griculture ranks among the most hazardous industries.” *Agricultural Safety*, NIOSH, CDC. In 2020, there were 11,880 work-related injuries that required days away from work and 368 farmworkers died from a work-related injury. *Id.* Farmworkers face a myriad of chronic and acute health risks, including exposure to pesticides, toxic gases, high levels of dust, and mold; risk of heat stroke; and injury from farm equipment and livestock. *Rural Agricultural Health and Safety*, Rural Health Information Hub.

Overtime work exacerbates risks associated with agriculture. The CDC and NIOSH “found that overtime was associated with poorer perceived general health, increased injury rates, increased illnesses, and increased mortality.” Krista Brockwood et al., *Mandated, But Not Compensated: Explore the Multifaceted Impacts of Overtime on Farm Workers’ Health, Safety, and Well-being* 8 (2021). Working in a job with overtime hours results in a 61 percent higher injury hazard rate. *Id.* at 9. Accordingly, overtime pay is one of our nation’s key safeguards against excessive hours and the risk of injuries that comes with it.

## **III. Agriculture Is Not a Unique Industry**

There is no special justification for excluding farmworkers from overtime protections. While many farms have a seasonally intense need for labor, so do other non-exempt industries, including construction, tourism, education, retail, and landscaping. That the hours of work in agriculture can be influenced by the weather does not set it apart. Construction and landscaping workers also have unpredictable schedules influenced by the weather, yet they are not excluded from overtime protections. Agriculture is not the only sector where workers travel between states to work. Many employers, including construction and landscaping companies, send workers to various states and must deal with differing labor laws. The agriculture industry is not unique: it has simply grown accustomed to a staffing model based on overwork and substandard pay.

#### **IV. Other States Have Successfully Implemented Overtime Protections for Farmworkers**

California, Colorado, Hawaii, Minnesota, New York, Washington, Oregon, and Maryland have all adopted some form of overtime protection laws for agricultural workers. Since the California legislation took effect in 2019, economic indicators for the state's agricultural economy have remained steady. Daniel Costa, *Testimony before the NY State Department of Labor's Farm Laborers Wage Board, Economic Policy Institute*, Jan. 20, 2022. There is no evidence of increased farm closures in California, as the number of agricultural establishments has remained constant since the overtime provision took effect. *Id.* Farmworker employment has held strong with a 71% increase of H-2A workers working in the state since the legislation was instituted. *Id.*

In conclusion, by adopting the FLSA's agricultural overtime exemption, Virginia is continuing an arbitrary Jim Crow-era exemption rooted in racism. Virginia's farmworkers perform difficult, dangerous, and vital work and deserve basic labor protections. Other states that have extended overtime protections to farmworkers continue to have thriving agricultural industries. It is time for Virginia to follow suit and bring its overtime law back into the modern era.

Thank you for the opportunity to submit these comments.

Sincerely,

Kristin Donovan

End of comments received.

**THE DEPARTMENT OF LABOR AND INDUSTRY PROVIDED  
STAFFING TO THE WORK GROUP**

Gary Pan, Commissioner  
Harold Pyon, Deputy Commissioner  
Willis Morris, Deputy Commissioner  
Richard F. White, III, Director, Information Technology  
Wendy Inge, Director, Labor Law  
Robert Feild, Legislative Liaison  
Princy Doss, Director, Policy & Analysis  
Stephen Clausing, Executive Liaison

DRAFT