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HOUSE BILL NO. 348

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on Labor and Commerce
on February 1, 2024)

(Patrons Prior to Substitute—Delegates Ward and Mundon King [HB 256])

A *BILL to amend and reenact §§ 40.1-33.3 through 40.1-33.6 of the Code of Virginia and to amend the Code of Virginia by adding in Article 2.1 of Chapter 3 of Title 40.1 sections numbered 40.1-33.5:1, 40.1-33.5:2, and 40.1-33.6:1, relating to employment; paid sick leave; civil penalties.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 40.1-33.3 through 40.1-33.6 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 2.1 of Chapter 3 of Title 40.1 sections numbered 40.1-33.5:1, 40.1-33.5:2, and 40.1-33.6:1 as follows:

§ 40.1-33.3. Definitions.

As used in this article, unless the context requires a different meaning:

"Domestic violence" has the same meaning as provided in subdivision 7 of § 38.2-508.

"Employee" means a home health worker who works on average at least 20 hours per week or 90 hours per month. ~~"Employee" has the same meaning as provided in § 40.1-2 except that "employee" does not include an individual who (i) is licensed, registered, or certified by a health regulatory board within the Department of Health Professions; (ii) is employed by a hospital licensed by the Department of Health; and (iii) works, on average, no more than 30 hours per month an individual described in 45 U.S.C. § 351(d) who is subject to the federal Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).~~

"Employer" has the same meaning as provided in § 40.1-2. *Notwithstanding the provisions of § 40.1-2.1, "employer" includes the Commonwealth and its agencies, institutions, and political subdivisions.* "Employer" does not include any agency of the federal government.

"Family member" means:

1. Regardless of age, a biological child, adopted or foster child, stepchild, legal ward, child to whom the employee stands in loco parentis, or individual to whom an employee stood in loco parentis when the individual was a minor;

2. A biological parent, foster parent, stepparent, adoptive parent, legal guardian of an employee or an employee's spouse, or individual who stood in loco parentis to an employee when the employee or employee's spouse was a minor child;

3. An individual to whom an employee is legally married under the laws of any state;

4. A grandparent, grandchild, or sibling, whether of a biological, foster, adoptive, or step relationship, of an employee or the employee's spouse;

5. An individual for whom an employee is responsible for providing or arranging *health or safety-related care, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment or ensuring the person is safe following domestic violence, sexual assault, or stalking;* or

6. Any other individual related by blood or affinity whose close association with an employee is the equivalent of a family relationship.

~~"Home health worker" means an individual who provides personal care, respite, or companion services to an individual who receives consumer-directed services under the state plan for medical assistance services.~~

"Paid sick leave" means leave that is compensated at the same hourly rate and with the same benefits, including health care benefits, as an employee normally earns during hours worked and is provided by an employer to an employee for the purposes described in § 40.1-33.5; however, such hourly rate shall not be less than the minimum wage amount set forth in § 40.1-28.10 without reduction for any tip credit that the employer would otherwise be permitted to claim.

"Retaliatory action" means a denial of any benefit provided pursuant to this article; any threat, discharge, suspension, demotion, or reduction of hours; or the taking of any other adverse action against an employee as a result of the employee's exercise of any paid sick leave benefits. "Retaliatory action" includes interference with or punishment for in any manner participating in or assisting an investigation, proceeding, or hearing under this article.

"Sexual assault" means any act prohibited by the provisions of § 18.2-61, 18.2-67.1, 18.2-67.3, or 18.2-67.4.

"Stalking" means conduct prohibited by the provisions of § 18.2-60.3.

"Year" means a regular and consecutive 12-month period as determined by the employer.

§ 40.1-33.4. Accrual of paid sick leave.

A. All employees shall accrue a minimum of one hour of paid sick leave for every 30 hours worked. Paid sick leave shall be carried over to the year following the year in which it was accrued. An employee shall not accrue or use, or carry over more than 40 hours of paid sick leave in a year, unless the employer selects a

60 higher limit.

61 B. Employees who are exempt from overtime requirements under 29 U.S.C. § 213(a)(1) of the federal Fair
62 Labor Standards Act, 29 U.S.C. § 201 et seq., will be assumed to work 40 hours in each workweek for
63 purposes of paid sick leave accrual unless their normal workweek is less than 40 hours, in which case paid
64 sick leave accrues on the basis of that normal workweek.

65 C. *Employees who are employed and compensated on a fee-for-service basis shall accrue paid sick leave*
66 *in accordance with regulations adopted by the Commissioner. The Commissioner shall promulgate such*
67 *regulations, which shall provide for the accrual of paid sick leave for such employees that is consistent with*
68 *the provisions of this section.*

69 D. Paid sick leave as provided in this section shall begin to accrue at the commencement of employment.
70 An employer may provide all paid sick leave that an employee is expected to accrue in a year at the
71 beginning of the year.

72 ~~D.~~ E. Any employer with a paid leave policy, such as a paid time off policy, that provides an employee an
73 amount of paid leave sufficient to meet the requirements of this section and that may be used for the same
74 purposes and under the same conditions as paid sick leave under this article shall not be required to provide
75 additional paid sick leave to any employee that is eligible for paid leave under the policy.

76 ~~E.~~ F. Any employer that has entered into a bona fide collective bargaining agreement that requires the
77 employer to provide an amount of paid leave sufficient to meet the requirements of this section and that may
78 be used for the same purposes and under the same conditions as paid sick leave under this article shall not be
79 required to provide additional paid sick leave to any employee covered by such collective bargaining
80 agreement.

81 G. *Nothing in this section shall be construed as requiring financial or other reimbursement to an*
82 *employee from an employer upon the employee's termination, resignation, retirement, or other separation*
83 *from employment for accrued paid sick leave that has not been used.*

84 H. *If an employee is transferred to a separate division, entity, or location but remains employed by the*
85 *same employer, the employee is entitled to all paid sick leave accrued at the prior division, entity, or location*
86 *and is entitled to use all paid sick leave as provided in this section. If an employee is separated from*
87 *employment with an employer and the employee is rehired within 12 months of separation by the same*
88 *employer, previously accrued paid sick leave that had not been used shall be reinstated. Further, the*
89 *employee shall be entitled to use accrued paid sick leave and accrue additional paid sick leave at the*
90 *recommencement of employment.*

91 I. *When a different employer succeeds or takes the place of an existing employer, all employees of the*
92 *original employer who remain employed by the successor employer are entitled to all paid sick leave that*
93 *they accrued when employed by the original employer and to use paid sick leave previously accrued.*

94 J. *At its discretion, an employer may loan paid sick leave to an employee in advance of accrual of paid*
95 *sick leave by such employee.*

96 K. *Nothing in this article shall be construed (i) to discourage or prohibit an employer from the adoption*
97 *or retention of a more generous paid sick leave policy than outlined herein, and nothing in this article shall*
98 *be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement,*
99 *policy, or standard that provides for greater accrual or use by employees of paid sick leave or that extends*
100 *other protections to employees, or (ii) as diminishing the rights of public employees regarding paid sick leave*
101 *or the use of paid sick leave as provided under any applicable law.*

102 **§ 40.1-33.5. Use of paid sick leave.**

103 A. Paid sick leave shall be provided to an employee by an employer for:

104 1. An employee's mental or physical illness, injury, or health condition; an employee's need for medical
105 diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an employee's need
106 for preventive medical care; ~~or~~

107 2. Care of a family member with a mental or physical illness, injury, or health condition; care of a family
108 member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health
109 condition; or care of a family member who needs preventive medical care; *or*

110 3. *Absence due to domestic violence, sexual assault, or stalking, provided the leave is to allow the*
111 *employee to seek or obtain medical care, mental health care, counseling, legal services, relocation or*
112 *securing of an existing home, or other victim services for the employee or the employee's family member.*

113 B. Paid sick leave shall be provided upon the request of an employee. Such request may be made orally, in
114 writing, by electronic means, or by any other means acceptable to the employer. When possible, the request
115 shall include the expected duration of the absence.

116 C. When the use of paid sick leave is foreseeable, the employee shall make a good faith effort to provide
117 notice of the need for such leave to the employer in advance of the use of the paid sick leave and shall make a
118 reasonable effort to schedule the use of paid sick leave in a manner that does not unduly disrupt the
119 operations of the employer.

120 D. An employer that requires notice of the need to use paid sick leave shall provide a written policy that

121 contains procedures for its employees to provide notice. An employer that has not provided to an employee a
 122 copy of its written policy for providing such notice shall not deny paid sick leave to the employee based on
 123 noncompliance with such a policy.

124 E. An employer shall not require, as a condition of an employee's taking paid sick leave, that an employee
 125 search for or find a replacement worker to cover the hours during which the employee is using paid sick
 126 leave. An employer shall not require an employee to work an alternate shift to make up for the use of sick
 127 leave.

128 F. *Paid sick leave shall be used in hourly increments unless the employer allows paid sick leave to be*
 129 *taken in smaller increments.*

130 G. *An employer shall not require disclosure of details of health information about an employee or an*
 131 *employee's family member or details of domestic violence, sexual assault, or stalking, as a condition of*
 132 *providing paid sick leave under this article. Unless otherwise required by law, an employer who possesses*
 133 *health, domestic violence, sexual assault, or stalking information about an employee or an employee's family*
 134 *member shall treat such information as confidential and shall not disclose such information except to the*
 135 *employee or with the consent of the employee.*

136 H. For paid sick leave of three or more consecutive work days, an employer may require reasonable
 137 documentation that the paid sick leave has been used for a purpose for which such leave is required to be
 138 provided as set forth in subsection A. *For the use of paid sick leave related to subdivision A 1 or 2,*
 139 *documentation signed by a health care professional indicating that paid sick leave is necessary shall be*
 140 *considered reasonable documentation for purposes of this subsection. For the use of paid sick leave related*
 141 *to subdivision A 3, (i) a police report indicating domestic violence, sexual assault, or stalking; (ii) a court*
 142 *document indicating the employee is involved in legal action related to domestic violence, sexual assault, or*
 143 *stalking; (iii) documentation from a victim services advocate, the employee's attorney, a member of the*
 144 *clergy, or a health care professional that the employee is or was receiving services related to domestic*
 145 *violence, sexual assault, or stalking; or (iv) an employee's written statement that the use of paid sick leave is*
 146 *for one of the purposes described in subdivision A 3 shall be considered reasonable documentation for*
 147 *purposes of this subsection.*

148 **§ 40.1-33.5:1. Certain health care workers; waiver; exception.**

149 A. *An employee who (i) is licensed, registered, or certified by a health regulatory board within the*
 150 *Department of Health Professions; (ii) is employed by a hospital licensed by the Department of Health; and*
 151 *(iii) works, on average, no more than 30 hours per month may waive the right to accrue and use paid sick*
 152 *leave under the provisions of this article. Such waiver shall be in writing and signed by the employee and the*
 153 *employer. If an employee waives his rights in accordance with this subsection, the employer shall be deemed*
 154 *to have satisfied the provisions of this article with respect to such employee.*

155 B. *Notwithstanding the provisions of this article, an employer shall not be required to provide paid sick*
 156 *leave under the provisions of this article to any employee who is employed on a pro re nata, or as-needed,*
 157 *basis, regardless of the number of hours worked in the month and who is (i) licensed, registered, or certified*
 158 *by a health regulatory board within the Department of Health Professions; (ii) employed by a facility*
 159 *licensed by the Department of Health; or (iii) employed by the University of Virginia Medical Center or*
 160 *Virginia Commonwealth University Health System Authority.*

161 **§ 40.1-33.5:2. Notice and recordkeeping; regulations.**

162 *The Commissioner shall promulgate regulations for employee notice and employer recordkeeping,*
 163 *including requirements for employers:*

164 1. *To notify employees of their rights under this article, both in writing and through required posting,*
 165 *including their right to file a complaint or bring a civil action for violations of this article;*

166 2. *To establish and maintain recordkeeping systems regarding the use and accrual of paid sick leave,*
 167 *including the requirement to retain records for three years; and*

168 3. *To ensure the confidentiality of any protected health information or information regarding domestic*
 169 *violence, sexual assault, or stalking that the employer possesses about an employee or an employee's family*
 170 *member.*

171 **§ 40.1-33.6. Retaliatory action prohibited.**

172 A. No employer shall discharge, discipline, threaten, discriminate against, or penalize an employee, or
 173 take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges
 174 of employment, because the employee (i) has requested or exercised the benefits provided for in this article or
 175 ; (ii) has alleged a violation of this article; (iii) has participated in an investigation, hearing, or proceeding or
 176 cooperated with or assisted the Commissioner in investigations of any alleged violation of this article; or (iv)
 177 has informed any individual of such individual's potential benefits under this article.

178 B. *Neither an employer nor any other person shall interfere with, restrain, or deny the exercise of, or the*
 179 *attempt to exercise, any benefit provided pursuant to this article. An employer's absence control policy shall*
 180 *not count paid sick leave taken under this article as an absence that may lead to or result in discipline,*
 181 *discharge, demotion, suspension, or any other adverse action. Protections of this section shall apply to any*

182 person who mistakenly but in good faith alleges a violation of the provisions of this article.

183 **§ 40.1-33.6:1. Enforcement; civil penalties; civil actions.**

184 A. The Commissioner shall promulgate regulations for implementation and enforcement of this article.

185 B. The Commissioner shall enforce the provisions of this article. In effectuating such enforcement, the
186 Commissioner shall establish a system utilizing multiple means of communication to receive complaints
187 regarding noncompliance with this article and to investigate complaints received by the Commissioner in a
188 timely manner.

189 C. Any person alleging a violation of this article shall have the right to file a complaint with the
190 Commissioner within one year of the date the person knew or should have known of the alleged violation. The
191 Commissioner shall encourage reporting pursuant to this section by keeping confidential, to the maximum
192 extent permitted by applicable laws, the name and other identifying information of the employee or other
193 person reporting the violation, provided, however, that with the authorization of such person, the
194 Commissioner may disclose the person's name and identifying information as necessary to enforce this article
195 or for other appropriate purposes.

196 D. Upon receiving a complaint alleging a violation of this article, the Commissioner shall investigate
197 such complaint and attempt to resolve it through mediation between the complainant and the subject of the
198 complaint or other means. The Commissioner shall keep the complainant notified regarding the status of his
199 complaint and any resultant investigation. If the Commissioner believes that a violation has occurred, he
200 shall issue to the offending person or employer a notice of violation and the relief required of the offending
201 person or entity. The Commissioner shall prescribe the form and wording of such notices of violation,
202 including any method of appealing a decision of the Commissioner.

203 E. The Commissioner shall notify any employer who he alleges has violated any provision of this article
204 by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days of receipt of
205 notice of the alleged violation, the employer may request an informal conference with the Commissioner
206 regarding such violation.

207 F. Any such employer who knowingly violates this article shall be subject to a civil penalty not to exceed
208 \$150 for the first violation and, for subsequent violations that occur within two years of any previous
209 violation, not to exceed \$300 for the second violation and not to exceed \$500 for each successive violation. In
210 determining the amount of any civil penalty to be imposed, the Commissioner shall consider the size of the
211 business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be
212 final.

213 G. The Commissioner, with the written and signed consent of an employee, may institute proceedings on
214 behalf of an employee to enforce compliance with this article, to grant equitable relief as appropriate and
215 permitted by law, and to collect the amount of any uncompensated sick leave that shall be paid to the
216 employee entitled thereto. Upon entry of a final order of the Commissioner, or upon entry of a judgment
217 against the employer, the Commissioner or the court shall assess attorney fees of one-third the amount set
218 forth in the final order or judgment.

219 H. In addition to any civil penalties provided by this section, and without regard to any exhaustion of
220 alternative administrative remedies provided for in this section, an employee who alleges a violation of this
221 article may bring a civil action in a court of competent jurisdiction against an employer violating this article.
222 Such action may be brought by a person aggrieved by a violation of this article without first filing an
223 administrative complaint. Upon prevailing in an action brought pursuant to this section, the court shall order
224 as a remedy to the employee (i) twice the amount of any uncompensated sick leave; (ii) twice the amount of
225 any actual damages suffered as the result of an employer's violation of this article; (iii) injunctive relief as
226 appropriate to restrain continued violation of this article; (iv) such legal or equitable relief as may be
227 appropriate to remedy the violation, including the reinstatement of the employee to the same position held
228 before the retaliatory action or to an equivalent position; and (v) compensation for any lost wages, benefits,
229 and other remuneration, together with interest thereon and reasonable attorney fees and costs. The statute of
230 limitations for a civil action brought pursuant to this section shall be for a period of two years from the date
231 the alleged violation occurred or the date the aggrieved employee knew or should have known of the
232 violation.

233 I. Civil penalties owed under this article shall be paid to the Commissioner for deposit into the general
234 fund. The Commissioner shall prescribe procedures for the payment of proposed assessments of civil
235 penalties that are not contested by employers. Such procedures shall include provisions for an employer to
236 consent to abatement of the alleged violation and to pay a proposed civil penalty or a negotiated sum in lieu
237 of such civil penalty without admission of any civil liability arising from such alleged violation.

238 **2. That the provisions of this act shall become effective on January 1, 2025.**