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**HOUSE BILL NO. 1133**

Offered January 13, 2016

Prefiled January 13, 2016

A *BILL to amend the Code of Virginia by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.1 through 40.1-33.12, and by adding in Article 13 of Chapter 3 of Title 58.1 a section numbered 58.1-439.12:11, relating to the establishment of a paid sick leave pilot program for certain employers; paid sick leave tax credit.*

Patron—Kory

Referred to Committee on Commerce and Labor

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.1 through 40.1-33.12, and by adding in Article 13 of Chapter 3 of Title 58.1 a section numbered 58.1-439.12:11 as follows:**

*Article 2.1.**Paid Sick Leave Pilot Program.***§ 40.1-33.1. Definitions.**

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

*"Approved plan" means a plan that is approved by the Commissioner as provided by this article.*

*"Employer" means any employer, as such term is defined in § 40.1-2, that employed an average of 50 or fewer employees during the preceding year. "Employer" does not include any state, local, or regional governmental agency or institution.*

*"Family member" means any of the following:*

*1. A child, which for purposes of this article means a biological, adopted, or foster child; a stepchild; a ward; or a child to whom the employee stands in loco parentis. This definition of a child is applicable regardless of age or dependency status;*

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

*3. A spouse;*

*4. A grandparent;*

*5. A grandchild; or*

*6. A sibling.*

*"Employee" means a natural person employed for indefinite duration in a position requiring a minimum of either (i) 35 hours of the employee's time per week for the entire normal year, which "normal year" shall consist of at least 48 weeks, or (ii) 1,680 hours per year.*

*"Health care provider" has the same meaning ascribed to the term in § 38.2-3438.*

*"Minimum work requirement" means the requirement that an employee work an average of 18 hours during each of the weeks comprising the employee's pay period.*

*"Paid sick leave" means time off from work that is provided by a participating employer to an employee pursuant to § 40.1-33.3.*

*"Participating employer" means any employer that has been accepted by the Department as a participant in the program pursuant to an approved plan.*

*"Pay period" means the regular pay period established by the employer in accordance with subsection A of § 40.1-29.*

*"Plan" means a plan submitted by an employer for approval by the Commissioner, under which the employer requests approval to participate in the program.*

*"Program" means the paid sick leave pilot program established pursuant to this article.*

*"Sick leave payment" means a payment by a participating employer to an employee as compensation for paid sick leave taken by the employee pursuant to § 40.1-33.4.*

**§ 40.1-33.2. Paid sick leave pilot program established; participation criteria; applications.**

*A. The Department shall administer the paid sick leave pilot program in accordance with the provisions of this article.*

*B. The Department shall establish a process and timetable by which employers may apply to participate in the program. The Department shall establish a procedure for determining, based on the date of receipt of a completed application, which applying employers will participate in the program if more employers apply to participate than there are positions available. The maximum capacity of the program shall be 5,000 employers in any calendar year.*

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59 C. An employer that wishes to participate in the program shall submit to the Department a signed,  
60 written plan for approval. In addition to such other matters as the Department shall require, the plan  
61 shall (i) identify the paid sick leave that the employer agrees to provide to employees; (ii) include a  
62 certification by the employer that participation in the plan and its implementation is consistent with the  
63 employer's obligations under applicable laws and its current employee benefit program; and (iii) the  
64 effective date and duration of the plan, which shall expire not later than the end of two years after the  
65 plan's effective date.

66 D. The Department shall develop an application form to request approval of a plan and an approval  
67 process.

68 E. The Department shall approve or disapprove a plan in writing within 30 days of its receipt and  
69 promptly communicate the decision to the employer. A decision disapproving the plan shall clearly  
70 identify the reasons for the disapproval. The disapproval shall be final, but the employer shall be  
71 allowed to submit another plan for approval not earlier than 90 days from the date of the disapproval.

72 F. If a plan is revoked by the Department, the plan shall terminate on the date specified in the  
73 Commissioner's written order of revocation. An employer may terminate a plan at any time upon written  
74 notice to the Department. Upon receipt of such notice from the employer, the Department shall promptly  
75 notify each affected employee of the termination date. An employer may submit a new application to  
76 participate in another plan at any time after the expiration or termination date.

77 G. The Department may revoke approval of a plan for good cause at any time. The revocation order  
78 shall be in writing and shall specify the reasons for the revocation and the date the revocation is  
79 effective. The Department may periodically review the operation of each employer's plan to assure that  
80 no good cause exists for revocation of the approval of the plan. Good cause shall include failure to  
81 comply with the assurances given in the plan, conduct or occurrences tending to defeat the intent and  
82 effective operation of the plan, and violation of any criteria on which approval of the plan was based.

83 H. An employer may request a modification of an approved plan by filing a written request to the  
84 Department. The request shall identify the specific provisions proposed to be modified and provide an  
85 explanation of why the proposed modification is appropriate for the plan. The Department shall approve  
86 or disapprove the proposed modification in writing within 30 days of receipt and promptly communicate  
87 the decision to the employer. The Department, in its discretion, may approve a request for modification  
88 of the plan based on conditions that have changed since the plan was approved, provided that the  
89 modification is consistent with and supports the purposes for which the plan was initially approved. A  
90 modification shall not extend the expiration date of the original plan, and the Department shall promptly  
91 notify the employer whether the plan modification has been approved and, if approved, the effective date  
92 of the modification. An employer is not required to request approval of a plan modification from the  
93 Department if the change is not substantial, but the employer shall report every change to the plan to  
94 the Department promptly and in writing. The Department may terminate an employer's plan if the  
95 employer fails to meet this reporting requirement. If the Department determines that the reported change  
96 is substantial, the Department shall require the employer to request a modification to the plan.

97 **§ 40.1-33.3. Accrual and use of paid sick leave.**

98 A. Each approved plan shall provide that a participating employer shall provide paid sick leave to  
99 each employee who satisfies the minimum work requirement for a pay period. The duty to provide paid  
100 sick leave shall start with the first pay period during which an employee satisfied the minimum work  
101 requirement. Paid sick leave shall be provided to such employees at the following rates:

102 1. For each pay period starting in the first year of an employer's participation in the program in  
103 which an employee satisfies the minimum work requirement, the participating employer shall provide the  
104 employee one hour of paid sick leave, or proportionate share thereof, for each 50 hours worked; and

105 2. For each pay period starting in the second year of an employer's participation in the program or  
106 thereafter in which an employee satisfies the minimum work requirement, the participating employer  
107 shall provide the employee one hour of paid sick leave, or proportionate share thereof, for each 30  
108 hours worked.

109 If a participating employer's pay period is less than one month, the participating employer shall  
110 award paid sick leave for each pay period in such amounts that in the aggregate for each month are  
111 equivalent to the monthly paid sick leave required to be awarded pursuant to this subsection.

112 B. Each approved plan shall provide that an employee shall not be eligible to use paid sick leave  
113 that he has accrued under this article until he has been employed by his participating employer for 90  
114 calendar days. If an employee satisfies this 90-day qualification period with a participating employer,  
115 the employee shall not, following a break in continuous employment with the participating employer, be  
116 required to satisfy another qualification period with the participating employer. Following satisfaction of  
117 the qualification period requirement, an employee may use accrued paid sick leave in any pay period  
118 subsequent to the pay period in which it has been earned. Any accrued paid sick leave is forfeited upon  
119 the employee's termination of employment with the participating employer for any reason, and the  
120 employee is not entitled to payment therefor. However, any employee who returns to employment with a

former employer for which the employee has satisfied the 90-day qualification period, no matter how long the break in employment or the reasons therefor, is immediately eligible to use any paid sick leave that accrues after his return to the employer's employment. An employee who returns to employment with a former employer for which the employee has not satisfied the 90-day qualification period shall not be eligible to use any paid sick leave until he has been employed by his employer for 90 calendar days following his return to employment.

C. The amount of time a participating employer provides in any form of paid leave that is used for multiple purposes including use as paid sick leave, such as paid time off or earned time off, shall satisfy the requirements of this article, so long as the rate of accrual of such leave satisfies the requirements of this article for the accrual of paid sick leave. That such leave balances may be reduced by an employee utilizing such leave for other purposes, such as taking a vacation, shall not affect the fact that providing such leave satisfies the requirements of this article regarding the provision of paid sick leave.

**§ 40.1-33.4. Maximum accrual of paid sick leave and increment of use; compensation when paid sick leave taken.**

Each approved plan shall provide that:

1. An employee may accumulate up to a maximum of 72 hours of paid sick leave. An employee's balance of paid sick leave shall be reduced on an hour-for-hour basis for each hour or portion thereof that an employee uses paid sick leave for a purpose authorized pursuant to § 40.1-33.6; and

2. When an employee uses paid sick leave for a purpose set forth in § 40.1-33.6, the participating employer shall compensate the employee for such time used at the same rate as the wage and with the same benefits that the employee would have earned or accrued had the employee worked such time during regular work hours.

**§ 40.1-33.5. Employee to provide notice of intent to use paid sick leave.**

Employees of participating employers shall make reasonable efforts to schedule paid sick leave when possible with the participating employer in a manner that does not unduly disrupt the participating employer's operations. Whenever such scheduling is impossible or impracticable, employees shall provide their employers with reasonable written or verbal advance notice of their need to use paid sick leave. Such requests shall include a reason for the absence involved and the expected duration of the leave. Where the requirement for the leave is foreseeable, the employee shall provide such notice at least seven days in advance of such leave or, if giving seven days' advance notice is not possible, notice as soon as practicable after the employee becomes aware of the need to take such leave. Where the requirement for the leave is unforeseeable, the employee shall provide notice as soon as practicable after the employee becomes aware of the need to take such leave.

**§ 40.1-33.6. Authorized use of paid sick leave.**

Each approved plan shall provide that employees of participating employers may use paid sick leave for any of the following purposes or reasons:

1. To attend to the needs of the employee or a family member of the employee when such individual is suffering from a physical or mental illness, injury, or medical condition or has a need for dental care;

2. To obtain professional medical, mental health, or dental diagnosis or care, or preventative medical, mental health, or dental care, for the employee or a family member of the employee; or

3. To participate in any civil or criminal legal proceeding related to or resulting from the employee or a family member of the employee being the victim of domestic or sexual violence.

**§ 40.1-33.7. Participating employer may require documentation.**

A participating employer may require that a request to use paid sick leave that is either anticipated to last more than three consecutive days or that actually lasts for more than three consecutive days be supported by documentation, issued by a health care provider, certifying that the employee or the employee's family member qualified for the use of paid sick leave pursuant to subdivision 1 or 2 of § 40.1-33.6 or appropriate court records establishing the employee's eligibility to use paid sick leave pursuant to subdivision 3 of § 40.1-33.6. The employee shall provide such documentation to the participating employer in a timely manner, not later than 30 days after the first day of the paid sick leave. The participating employer shall not delay the commencement of the leave or withhold payment of wages for such leave period on the basis that the participating employer has not yet received such documentation. If a participating employer requires such documentation and the employee is not covered by a policy of health insurance that would cover the full medical and direct ancillary costs associated with obtaining such documentation, the participating employer shall reimburse such employee for any out-of-pocket expenses incurred in obtaining such documentation. A participating employer may require an employee to provide evidence documenting such unreimbursed medical and direct ancillary costs before reimbursing the employee for such expenses.

**§ 40.1-33.8. Participating employer may offer rescheduled work hours in lieu of paid sick leave.**

A. Each approved plan shall provide that if an employee notifies his participating employer of intent

182 to use accrued paid sick leave, the employer, at its option, may offer the employee the opportunity to  
183 reschedule the work hours for which the employee seeks to use the accrued paid sick leave. The  
184 participating employer shall make such rescheduled work hours available within either the same pay  
185 period or within two weeks of the hours for which the employee sought to use accrued paid sick leave.  
186 An employee may not unreasonably refuse such an offer of rescheduled work hours; an employee who  
187 unreasonably refuses such an offer of rescheduled work hours is not eligible to use accrued paid sick  
188 leave for those hours he originally notified his participating employer that he was requesting to use  
189 accrued paid sick leave.

190 B. In determining whether an employee unreasonably refused an offer of rescheduled hours, the  
191 Department shall consider the nature of the employment, whether the participating employer made a  
192 good faith effort to consider the nature of the employment, whether the employer made a good faith  
193 offer of the proposed rescheduled hours, whether the employee made a good faith effort to accommodate  
194 the employer's request that the employee work the rescheduled hours, and whether the rescheduled  
195 hours would have been an undue hardship upon the employee. A refusal to work is not unreasonable if  
196 working the hours offered by the employer would cause an undue hardship for the employee.

197 C. An undue hardship includes any situation where the proposed rescheduled hours would (i) cause  
198 the employee to work more than 40 hours per week; (ii) conflict with other previously scheduled  
199 employment or scheduled psychological, medical, or dental appointments of the employee or a family  
200 member of the employee; (iii) conflict with educational classes; (iv) conflict with court proceedings or  
201 appointments with legal counsel; (v) conflict with any court-ordered program, process, or event; (vi)  
202 present a hardship because of the employee's disability or medical condition; or (vii) cause child care  
203 coverage problems.

204 **§ 40.1-33.9. Income tax credit.**

205 A. A participating employer may be eligible for a refundable tax credit as provided in  
206 § 58.1-439.12:11. The Department, in cooperation with the Department of Taxation, shall establish  
207 guidelines and procedures to facilitate the efforts of participating employers to apply for such tax  
208 credits.

209 **§ 40.1-33.10. Participation voluntary.**

210 No employer shall be required to participate in the program.

211 **§ 40.1-33.11. Paid sick leave statements.**

212 A participating employer, upon request of his employee, shall furnish the employee a written  
213 statement of the paid sick leave earned by the employee during any pay period, any amounts deducted  
214 therefrom during the pay period, and the balance of the employee's paid sick leave.

215 **§ 40.1-33.12. Application of article.**

216 A. Nothing in this article shall be construed to discourage or prohibit an employer from the adoption  
217 or retention of a paid sick leave policy more generous than the provisions required to be eligible to  
218 participate in the program.

219 B. Nothing in this article shall be construed to lessen the obligation of an employer to comply with a  
220 contract, collective bargaining agreement, employee benefit plan, or other agreement providing more  
221 generous paid sick leave to an employee than required to be eligible to participate in the program.

222 **§ 58.1-439.12:11. Paid sick leave tax credit.**

223 A. As used in this section:

224 "Commissioner" means the Commissioner of Labor and Industry.

225 "Employee" means an employee, as such term is defined in § 40.1-33.1, of a participating employer.

226 "Participating employer" means any employer, as such term is defined in § 40.1-33.1, that has been  
227 accepted by the Department as a participant in the program pursuant to an approved plan.

228 "Program" means the paid sick leave pilot program established pursuant to Article 2.1 (§ 40.1-33.1  
229 et seq.) of Chapter 3 of Title 40.1.

230 "Qualifying expense" means the amount paid by a participating employer to its employees as sick  
231 leave payments, as defined in § 40.1-33.1, excluding sick leave payments for the first 80 hours of paid  
232 sick leave for which the participating employer paid sick leave payments in any taxable year. A  
233 participating employer's qualifying expense in any taxable year shall not exceed the product obtained by  
234 multiplying the average number of employees employed by the participating employer during the taxable  
235 year by \$100. For purposes of determining a participating employer's qualifying expense in any taxable  
236 year, the amount paid by a participating employer as sick leave payments shall be expressed as an  
237 hourly wage determined by dividing the total amount of sick leave payments by the number of hours of  
238 paid sick leave for which sick leave payments were made.

239 B. For taxable years beginning on and after January 1, 2017, but prior to January 1, 2023, any  
240 participating employer with qualifying expenses shall be allowed a refundable credit against the taxes  
241 imposed by § 58.1-320 or 58.1-400 in an amount equal to 30 percent of the participating employer's  
242 qualifying expenses in the taxable year. The refundable tax credits allowed under this section are for  
243 one tax year only. The grant of a refundable tax credit for paid sick leave does not create a

244 *presumption that the participating employer will receive a refundable tax credit for subsequent tax*  
245 *years.*

246 *C. The issuance of refundable tax credits under this section shall be in accordance with procedures,*  
247 *qualifying criteria, and deadlines established by the Commissioner and the Department.*

248 *D. A taxpayer allowed a credit under this section shall maintain and make available for inspection*  
249 *any information or records required by the Tax Commissioner. The taxpayer has the burden of proving*  
250 *eligibility for a credit and the amount of the credit. The Tax Commissioner shall consult with the*  
251 *Commissioner in order to determine the amount of qualifying expenses.*

252 *E. For purposes of this section, the amount of any credit attributable to a partnership, electing small*  
253 *business corporation (S corporation), or limited liability company may be allocated to the individual*  
254 *partners, shareholders, or members, respectively, in proportion to their ownership or interest in such*  
255 *business entities.*

256 *F. The total amount of credits allocated to all taxpayers under this section shall not exceed \$12.5*  
257 *million in any fiscal year.*

258 *G. The Tax Commissioner shall develop guidelines implementing the provisions of this section,*  
259 *including but not limited to the definition of "qualifying expense" and setting forth the recordkeeping*  
260 *requirements applicable to participating employers claiming this credit. Such guidelines shall be exempt*  
261 *from the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).*