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HOUSE BILL NO. 2120

Offered January 9, 2019

Prefiled January 8, 2019

A BILL to amend the Code of Virginia by adding in Title 60.2 a chapter numbered 8, consisting of sections numbered 60.2-800 through 60.2-818, relating to the establishment of Paid Family and Medical Leave Program; financing through payroll taxes.

Patrons—Carroll Foy, Levine, Guzman and 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 Title 60.2 a chapter numbered 8, consisting of sections numbered 60.2-800 through 60.2-818, as follows:

CHAPTER 8.

PAID FAMILY AND MEDICAL LEAVE PROGRAM.

§ 60.2-800. Definitions.

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

"Application year" means the 12-month period beginning on the first day of the calendar week in which an individual files an application for family and medical leave insurance benefits.

"Armed Forces" means the Armed Forces of the United States, the Reserves of the Armed Forces of the United States, or the Virginia National Guard.

"Child" includes a child of any age, including an adult child.

"Covered individual" means any individual who:

1. Either:

a. Meets the monetary eligibility criteria set forth in subdivision 1 of § 60.2-612; or

b. Is self-employed, elects coverage, and meets the requirements of § 60.2-812;

2. Meets the administrative requirements outlined in this chapter and in regulations; and

3. Submits an application.

"Covered servicemember" means either (i) a member of the Armed Forces who is (a) undergoing medical treatment, recuperation, or therapy; (b) otherwise in outpatient status; or (c) otherwise on the temporary disability retired list for a serious injury or illness that was incurred by the member in the line of duty while on active duty in the Armed Forces, or a serious injury or illness that existed before the beginning of the member's active duty and was aggravated by service in the line of duty while on active duty in the Armed Forces, or (ii) a former member of the Armed Forces who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness that was incurred by the member in the line of duty while on active duty in the Armed Forces, or a serious injury or illness that existed before the beginning of the member's active duty and was aggravated by service in the line of duty while on active duty in the Armed Forces and manifested before or after the member was discharged or released from service.

"Domestic partner" is a person not less than 18 years of age who (i) is dependent upon the covered individual for support as shown by either unilateral dependence or mutual interdependence that is evidenced by a nexus of factors, including but not limited to: (a) common ownership of real or personal property, (b) common householding, (c) children in common, (d) signs of intent to marry, (e) shared budgeting, and (f) the length of the personal relationship with the covered individual, or (ii) has registered as the domestic partner of the covered individual with any registry of domestic partnerships maintained by the employer of either party, or in any state, county, city, town, or village in the United States.

"Employee" means any individual employed by an employer.

"Employer" has the meaning ascribed thereto in § 60.2-210 and includes the Commonwealth and all agencies and political subdivisions, including school boards, thereof.

"Family and medical leave insurance benefits" means the benefits provided under the terms of this chapter.

"Family member" means:

1. A biological, adopted, or foster child, a stepchild or legal ward, a child of a domestic partner, or a child to whom the covered individual stands in loco parentis;

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

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59 3. A person to whom the covered individual is legally married under the laws of any state, or a
60 domestic partner of a covered individual; or

61 4. A grandparent, grandchild, or sibling, whether through a biological, foster, adoptive, or step
62 relationship, of the covered individual or the covered individual's spouse or domestic partner.

63 "FMLA" means the federal Family and Medical Leave Act, 29 U.S.C. § 2601 et seq.

64 "Fund" means the Family and Medical Leave Insurance Fund established under § 60.2-815.

65 "Health care provider" means a person licensed under federal or Virginia law to provide medical or
66 emergency services, including doctors, nurses, emergency room personnel, or certified midwives.

67 "Military member" means a member of the Armed Forces.

68 "Next of kin" has the meaning ascribed thereto in § 101(17) of the FMLA, 29 U.S.C. § 2611(17).

69 "Qualifying exigency leave" means leave based on a need arising out of a covered individual's family
70 member's active duty service or notice of an impending call or order to active duty in the Armed
71 Forces, including providing for the care or other needs of the military member's child or other family
72 member, making financial or legal arrangements for the military member, attending counseling,
73 attending military events or ceremonies, spending time with the military member during a rest and
74 recuperation leave or following return from deployment, or making arrangements following the death of
75 the military member.

76 "Retaliatory personnel action" means denial of any right guaranteed under this chapter, including
77 but not limited to any threat, discharge, suspension, demotion, or reduction of hours, any other adverse
78 action against an employee for the exercise of any right guaranteed herein, or reporting or threatening
79 to report an employee's suspected citizenship or immigration status or the suspected citizenship or
80 immigration status of a family member of the employee to a federal, state, or local agency. "Retaliatory
81 personnel action" also includes interference with or punishment for in any manner participating in or
82 assisting an investigation, proceeding, or hearing under this chapter.

83 "Serious health condition" means an illness, injury, impairment, pregnancy, recovery from childbirth,
84 or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical
85 care facility or continuing treatment by a health care provider.

86 "Work week" means a calendar week.

87 **§ 60.2-801. Eligibility for benefits.**

88 Beginning January 1, 2022, family and medical leave insurance benefits are payable to any covered
89 individual who either:

90 1. Because of birth, adoption, or placement through foster care, is caring for a new child during the
91 first year after the birth, adoption, or placement of that child;

92 2. Is caring for a family member with a serious health condition;

93 3. Has a serious health condition that makes the covered individual unable to perform the functions
94 of the position of such employee;

95 4. Is caring for a covered servicemember who is the covered individual's next of kin or other family
96 member; or

97 5. Is eligible for qualifying exigency leave arising out of the fact that a family member of the
98 covered individual is on active duty, or has been notified of an impending call or order to active duty,
99 in the Armed Forces.

100 **§ 60.2-802. Duration of benefits.**

101 A. The maximum number of weeks during which family and medical leave insurance benefits are
102 payable under § 60.2-801 in an application year is 12 weeks. A covered individual is eligible for a
103 combined maximum of 12 weeks total of family and medical leave insurance benefits in an application
104 year for a single purpose or a combination of purposes enumerated in subdivisions 1 through 5 of
105 § 60.2-801.

106 B. Family and medical leave insurance benefits start immediately. There is no waiting period. The
107 benefits are payable starting the first calendar day in an application year that a covered individual
108 meets the eligibility requirements of § 60.2-801.

109 C. The first payment of benefits shall be made to an individual within two weeks after the claim is
110 filed and subsequent payments shall be made every two weeks thereafter.

111 **§ 60.2-803. Amount of benefits.**

112 A. The amount of family and medical leave insurance benefits shall be determined as follows:

113 1. The weekly benefit shall be 70 percent of the covered individual's average weekly wages during
114 the 12 months preceding submission of the application, or the average weekly wages during the time the
115 covered individual worked if it was less than 12 months, up to a maximum set in subsection C.

116 B. The minimum weekly benefit shall not be less than \$100 per week except that if the employee's
117 average weekly wage is less than \$100 per week, the weekly benefit shall be the employee's full wage.

118 C. The maximum weekly benefit for family and medical leave that occurs on or after January 1,
119 2022, shall be \$850. By September 30, 2022, and by each subsequent September 30, the Commission
120 shall adjust the maximum weekly benefit amount to 80 percent of the state average weekly wage, as

121 defined in subsection B of § 65.2-500. The adjusted maximum weekly benefit amount takes effect on the
122 following January 1.

123 D. Family and medical leave insurance benefits are not payable for less than eight hours of family
124 and medical leave taken in one work week.

125 **§ 60.2-804. Contributions.**

126 A. Payroll contributions shall be authorized in order to finance the payment of benefits under the
127 family and medical leave insurance program.

128 B. Beginning on January 1, 2021, for each employee, an employer shall remit to the Fund
129 contributions in the form and manner determined by the Commission. Annually, not later than October
130 1, the Commissioner shall fix the contribution rate for the coming calendar year in the manner
131 described in this subsection. For calendar years 2021 and 2022, the Commissioner shall do so based on
132 sound actuarial principles. For calendar year 2023 and thereafter, the Commissioner shall first certify
133 and publish the following information:

134 1. The total amount of family and medical leave insurance benefits paid by the Commission during
135 the previous fiscal year;

136 2. The total amount remaining in the Fund at the close of such fiscal year;

137 3. The total amount equal to 140 percent of the previous fiscal year's expenditure for family and
138 medical leave insurance benefits paid and for the administration of the family and medical leave
139 insurance program;

140 4. The amount by which the total amount remaining in the Fund at the close of the previous fiscal
141 year is less than or greater than 140 percent of the previous fiscal year's expenditure for family and
142 medical leave insurance benefits paid and for the administration of the family and medical leave
143 insurance program; and

144 5. The amount by which the contribution rate shall be adjusted to ensure that the Fund shall
145 maintain or achieve an annualized amount of not less than 140 percent of the previous fiscal year's
146 expenditure for family and medical leave insurance benefits paid and for the administration of the
147 family and medical leave insurance program. The contribution rate adjustment, if any, made as the
148 result of the Commissioner's certification and report under this subsection shall supersede the rate
149 previously set forth and shall become effective on January 1 of the following calendar year.

150 C. A self-employed individual who is electing coverage under § 60.2-812 shall be responsible for the
151 employee share of contributions set forth in subsection B on that individual's income from
152 self-employment.

153 D. For medical leave, an employer shall not deduct more than 50 percent of the contribution
154 required for an employee by subsection B from that employee's wages and shall remit the full
155 contribution required under subsection B to the Fund.

156 E. For family leave, an employer shall deduct not more than 50 percent of the contribution required
157 for an employee by subsection B from that employee's wages and shall remit the full contribution
158 required under subsection B to the Fund.

159 **§ 60.2-805. Reduced leave schedule.**

160 A. A covered individual shall be entitled, at the option of the covered individual, to take paid family
161 and medical leave on an intermittent or reduced leave schedule in which all of the leave authorized
162 under this chapter is not taken sequentially. Family and medical leave insurance benefits for intermittent
163 or reduced leave schedules shall be prorated.

164 B. The covered individual shall make a reasonable effort to schedule paid family and medical leave
165 under this section so as not to unduly disrupt the operations of the employer. The covered individual
166 shall provide the employer with prior notice of the schedule on which the covered individual will be
167 taking the leave, to the extent practicable. Paid family and medical leave taken under this section shall
168 not result in a reduction of the total amount of leave to which an employee is entitled beyond the
169 amount of leave actually taken.

170 C. Nothing in this section shall be construed to entitle a covered individual to more leave than
171 required under § 60.2-802.

172 **§ 60.2-806. Leave and employment protection; remedies.**

173 A. Any covered individual who exercises the covered individual's right to family and medical leave
174 insurance benefits shall, upon the expiration of that leave, be entitled to be restored by the employer to
175 the position held by the covered individual when the leave commenced, or to a position with equivalent
176 seniority, status, employment benefits, pay, and other terms and conditions of employment, including
177 fringe benefits and service credits, that the covered individual had been entitled to at the commencement
178 of leave.

179 B. During any leave taken pursuant to § 60.2-801, the employer shall maintain any health care
180 benefits the covered individual had prior to taking such leave for the duration of the leave as if the
181 covered individual had continued in employment continuously from the date such individual commenced

182 *the leave until the date the family and medical leave insurance benefits terminate; however, the covered*
183 *individual shall continue to pay the covered individual's share of the cost of health benefits as required*
184 *prior to the commencement of the leave.*

185 *C. Any employer who violates this section or § 60.2-807 shall be liable to any eligible employee*
186 *affected:*

187 *1. For damages equal to:*

188 *a. The amount of:*

189 *(1) Any wages, salary, employment benefits, or other compensation denied or lost to such employee*
190 *by reason of the violation; or*

191 *(2) In a case in which wages, salary, employment benefits, or other compensation have not been*
192 *denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result*
193 *of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary*
194 *for the employee;*

195 *b. Interest on the amount described in subdivision a calculated at the legal rate; and*

196 *c. An additional amount as liquidated damages equal to the sum of the amount described in*
197 *subdivision a and the interest described in subdivision b, except that if an employer who has violated*
198 *this section or § 60.2-807 proves to the satisfaction of the court that the act or omission that violated*
199 *this section or § 60.2-807 was in good faith and that the employer had reasonable grounds for believing*
200 *that the act or omission was not a violation of this section or § 60.2-807, such court may, in its*
201 *discretion, reduce the amount of the liability to the amount and interest determined under subdivisions a*
202 *and b, respectively; and*

203 *2. For such equitable relief as may be appropriate, including employment, reinstatement, and*
204 *promotion.*

205 *D. An action to recover the damages or equitable relief prescribed in subsection C may be*
206 *maintained against any employer, including a public agency, in any federal or state court of competent*
207 *jurisdiction by any one or more employees for and on behalf of the employees or the employees and*
208 *other employees similarly situated.*

209 *E. The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow*
210 *reasonable attorney fees, reasonable expert witness fees, and other costs of the action to be paid by the*
211 *defendant.*

212 *F. Except as provided in subsection G, an action may be brought for a violation of this section or*
213 *§ 60.2-807 not later than two years after the date of the last event constituting the alleged violation for*
214 *which the action is brought.*

215 *G. In the case of such action brought for a willful violation of this section or § 60.2-807, such action*
216 *may be brought within three years of the date of the last event constituting the alleged violation for*
217 *which such action is brought.*

218 **§ 60.2-807. Retaliatory personnel actions prohibited.**

219 *A. It is unlawful for an employer or any other person to interfere with, restrain, or deny the exercise*
220 *of, or the attempt to exercise, any right protected under this chapter.*

221 *B. An employer, temporary help company, employment agency, employee organization, or other*
222 *person shall not take retaliatory personnel action or otherwise discriminate against an individual*
223 *because the individual exercised rights protected under this chapter. Such rights include the right to*
224 *request, file for, apply for, or use benefits provided for under this chapter; the right to communicate to*
225 *the employer or any other person or entity an intent to file a claim, a complaint with the Commission or*
226 *courts, or an appeal, or has testified or is about to testify or has assisted in any investigation, hearing,*
227 *or proceeding under this chapter, at any time, including during the waiting period and the period in*
228 *which the person receives family and medical leave insurance benefits under this chapter; the right to*
229 *inform any person about any employer's alleged violation of this chapter; and the right to inform any*
230 *individual of the individual's rights under this chapter.*

231 *C. It is unlawful for an employer's absence control policy to count paid family and medical leave*
232 *taken under this chapter as an absence that may lead to or result in discipline, discharge, demotion,*
233 *suspension, or any other adverse action.*

234 *D. Protections of this section shall apply to any person who mistakenly but in good faith alleges*
235 *violations of this chapter.*

236 *E. This section shall be enforced as provided in subsections C through G of § 60.2-806.*

237 **§ 60.2-808. Coordination of benefits.**

238 *A. Leave taken with wage replacement under this chapter that also qualifies as leave under the*
239 *FMLA shall run concurrently with leave taken under the FMLA.*

240 *B. An employer may require that payment made pursuant to this chapter be made concurrently or*
241 *otherwise coordinated with payment made or leave allowed under the terms of disability or family care*
242 *leave under a collective bargaining agreement or employer policy. The employer shall give employees*
243 *written notice of this requirement.*

244 C. This chapter does not diminish an employer's obligation to comply with any of the following that
245 provide more generous leave:

- 246 1. A collective bargaining agreement;
247 2. An employer policy; or
248 3. Any law.

249 D. An individual's right to leave under this chapter may not be diminished by a collective bargaining
250 agreement entered into or renewed, or an employer policy adopted or retained, after January 1, 2020.
251 Any agreement by an individual to waive the individual's rights under this chapter is void as against
252 public policy.

253 **§ 60.2-809. Notice.**

254 A. Each employer shall provide written notice as prescribed in this subsection to each employee
255 upon hiring and annually thereafter. An employer shall also provide such written notice to an employee
256 when the employee requests leave under this chapter, or when the employer acquires knowledge that an
257 employee's leave may be for a qualifying reason under § 60.2-801. Such notice shall include (i) the
258 employee's right to family and medical leave insurance benefits under this chapter and the terms under
259 which it may be used; (ii) the amount of family and medical leave insurance benefits; (iii) the procedure
260 for filing a claim for family and medical leave insurance benefits; (iv) the right to job protection and
261 benefits continuation under § 60.2-806; (v) that discrimination and retaliatory personnel actions against
262 a person for requesting, applying for, or using family and medical leave insurance benefits is prohibited
263 under § 60.2-807; and (vi) that the employee has a right to file a complaint for violations of this
264 chapter. An employer shall also display and maintain a poster in a conspicuous place accessible to
265 employees at the employer's place of business that contains the information required by this section in
266 English, Spanish, and any language that is the first language spoken by at least five percent of the
267 employer's workforce, provided that such poster has been provided by the Commission. The
268 Commissioner may adopt regulations to establish additional requirements concerning the means by
269 which employers shall provide such notice.

270 B. Employees shall provide notice to their employers as soon as practicable of their intention to take
271 leave under this chapter.

272 **§ 60.2-810. Enforcement.**

273 A. The Commissioner shall establish a system for appeals in the case of a denial of family and
274 medical leave insurance benefits. In establishing such system, the Commissioner may utilize any and all
275 procedures and appeals mechanisms established under §§ 60.2-619 through 60.2-631.

276 B. Judicial review of any decision with respect to family and medical leave insurance benefits shall
277 be permitted in a court of competent jurisdiction after a party aggrieved thereby has exhausted all
278 administrative remedies established by the Commissioner.

279 C. The Commissioner shall implement procedures to ensure confidentiality of all information related
280 to any claims filed or appeals taken to the maximum extent permitted by applicable laws.

281 **§ 60.2-811. Erroneous payments and disqualification for benefits.**

282 A. A covered individual is disqualified from family and medical leave insurance benefits for one year
283 if the individual is determined by the Commissioner to have willfully made a false statement or
284 misrepresentation regarding a material fact, or willfully failed to report a material fact, to obtain
285 benefits under this chapter.

286 B. If family and medical leave insurance benefits are paid erroneously or as a result of willful
287 misrepresentation, or if a claim for family and medical leave insurance benefits is rejected after benefits
288 are paid, the Commission may seek repayment of benefits from the recipient. The Commissioner shall
289 exercise his discretion to waive, in whole or in part, the amount of any such payments where the
290 recovery would be against equity and good conscience.

291 **§ 60.2-812. Elective coverage.**

292 A. A self-employed person, including a sole proprietor, partner, or joint venturer, may elect coverage
293 under this chapter for an initial period of not less than three years. The self-employed person shall file
294 a notice of election in writing with the Commissioner, as required by the Commission. The election
295 becomes effective on the date the notice is filed. As a condition of election, the self-employed person is
296 required to agree to supply any information concerning income that the Commission deems necessary.

297 B. A self-employed person who has elected coverage may withdraw from coverage within 30 days
298 after the end of the three-year period of coverage, or at such other times as the Commissioner may
299 prescribe by rule, by filing written notice with the Commissioner, such withdrawal to take effect not
300 sooner than 30 days after filing the notice.

301 **§ 60.2-813. Family and medical leave insurance program.**

302 A. By January 1, 2021, the Commission shall establish and administer a family and medical leave
303 insurance program and begin collecting contributions as specified in this chapter. By January 1, 2022,
304 the Commission shall start receiving claims from and paying family and medical leave insurance

305 *benefits to covered individuals.*

306 *B. The Commission shall establish reasonable procedures and forms for filing claims for benefits*
307 *under this chapter and shall specify what supporting documentation is necessary to support a claim for*
308 *benefits, including any documentation required from a health care provider for proof of a serious health*
309 *condition.*

310 *C. The Commission shall notify the employer within five business days of a claim being filed*
311 *pursuant to this chapter.*

312 *D. The Commission shall use information sharing and integration technology to facilitate the*
313 *disclosure of relevant information or records provided an individual consents to the disclosure.*

314 *E. Information contained in the files and records pertaining to an individual under this chapter are*
315 *confidential and not open to public inspection, other than to public employees in the performance of*
316 *their official duties. However, the individual or an authorized representative of an individual may review*
317 *the records or receive specific information from the records upon the presentation of the individual's*
318 *signed authorization.*

319 *F. The Commissioner shall adopt rules as necessary to implement this chapter.*

320 **§ 60.2-814. Federal income tax.**

321 *If the Internal Revenue Service determines that family and medical leave insurance benefits under*
322 *this chapter are subject to federal income tax, the Commission shall advise an individual filing a new*
323 *claim for family and medical leave insurance benefits, at the time of filing such claim, that:*

324 *1. The Internal Revenue Service has determined that benefits are subject to federal income tax;*

325 *2. Requirements exist pertaining to estimated tax payments;*

326 *3. The individual may elect to have federal income tax deducted and withheld from the individual's*
327 *payment of benefits in the amount specified in the federal Internal Revenue Code; and*

328 *4. The individual is permitted to change a previously elected withholding status.*

329 **§ 60.2-815. Family and Medical Leave Insurance Fund; establishment; investments.**

330 *A. The Family and Medical Leave Insurance Fund is created in the custody of the Commission.*
331 *Expenditures from the Fund may be used only for the purposes of the family and medical leave*
332 *insurance benefits program. Only the Commissioner or the Commissioner's designee may authorize*
333 *expenditures from the Fund.*

334 *B. Whenever, in the judgment of the State Treasurer, there is in the Fund an amount of funds in*
335 *excess of that amount deemed by the State Treasurer to be sufficient to meet the current expenditures*
336 *properly payable therefrom, the State Treasurer shall have full power to invest, reinvest, manage,*
337 *contract, sell, or exchange investments acquired with such excess funds in the manner prescribed by*
338 *state law.*

339 **§ 60.2-816. Reports.**

340 *Beginning January 1, 2023, the Commission shall report to the General Assembly by April 1 of each*
341 *year on projected and actual program participation by purpose listed in § 60.2-801, gender of*
342 *beneficiary, race and ethnicity of beneficiary, age of beneficiary, amount of benefits paid to each*
343 *beneficiary per week, premium rates, fund balances, outreach efforts, and, for leaves taken under*
344 *subdivision 2 of § 60.2-801, family members for whom leave was taken to provide care.*

345 **§ 60.2-817. Public education.**

346 *The Commission shall conduct a public education campaign to inform workers and employers*
347 *regarding the availability of family and medical leave insurance benefits. Outreach information shall be*
348 *available in English, Spanish, Korean, Tagalog, Vietnamese, Urdu, Arabic, and other languages spoken*
349 *by more than five percent of the Commonwealth's population.*

350 **§ 60.2-818. Sharing technology.**

351 *The Commission is encouraged to use state data collection and technology to the extent possible and*
352 *to integrate the provisions of this chapter with existing state policies.*

353 **2. That the provisions of this act shall become effective on January 1, 2020.**

354 **3. That the Virginia Employment Commission shall promulgate all rules and regulations necessary**
355 **for implementation of the first enactment of this act by July 1, 2020.**