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## SENATE BILL NO. 1639

AMENDMENT IN THE NATURE OF A SUBSTITUTE  
(Proposed by the Senate Committee on Commerce and Labor  
on January 28, 2019)

(Patron Prior to Substitute—Senator Boysko)

A BILL to amend the Code of Virginia by adding in Title 40.1 a chapter numbered 10, consisting of sections numbered 40.1-143 through 40.1-161, relating to the establishment of Paid Family and Medical Leave Program; creation of Office of Paid Family and Medical Leave within the Department of Labor and Industry; financing through payroll taxes.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 40.1 a chapter numbered 10, consisting of sections numbered 40.1-143 through 40.1-161, as follows:

## CHAPTER 10.

## PAID FAMILY AND MEDICAL LEAVE PROGRAM.

## § 40.1-143. 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 § 40.1-155;

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.

"Director" means the Director of the Office of Paid Family and Medical Leave.

"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.

"Employer" 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;

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

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

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

63 "Fund" means the Family and Medical Leave Insurance Fund established under § 40.1-158.

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

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

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

68 "Office" means the Office of Paid Family and Medical Leave established in subsection A of  
69 § 40.1-156.

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

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

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

87 "Work week" means a calendar week.

88 **§ 40.1-144. Eligibility for benefits.**

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

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

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

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

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

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

101 **§ 40.1-145. Duration of benefits.**

102 A. The maximum number of weeks during which family and medical leave insurance benefits are  
103 payable under § 40.1-144 in an application year is 12 weeks. A covered individual is eligible for a  
104 combined maximum of 12 weeks total of family and medical leave insurance benefits in an application  
105 year for a single purpose or a combination of purposes enumerated in subdivisions 1 through 5 of  
106 § 40.1-144.

107 B. Family and medical leave insurance benefits start immediately. There is no waiting period. The  
108 benefits are payable starting the first calendar day in an application year that a covered individual  
109 meets the eligibility requirements of § 40.1-144.

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

112 **§ 40.1-146. Amount of benefits.**

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

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

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

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

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

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

**§ 40.1-147. Contributions.**

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

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

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

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

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

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

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

C. A self-employed individual who is electing coverage under § 40.1-155 shall be responsible for the employee share of contributions set forth in subsection B on that individual's income from self-employment.

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

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

**§ 40.1-148. Reduced leave schedule.**

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

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

C. Nothing in this section shall be construed to entitle a covered individual to more leave than required under § 40.1-145.

**§ 40.1-149. Leave and employment protection; remedies.**

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

B. During any leave taken pursuant to § 40.1-144, the employer shall maintain any health care benefits the covered individual had prior to taking such leave for the duration of the leave as if the covered individual had continued in employment continuously from the date such individual commenced

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

186 C. Any employer who violates this section or § 40.1-150 shall be liable to any eligible employee  
187 affected:

188 1. For damages equal to:

189 a. The amount of:

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

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

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

197 c. An additional amount as liquidated damages equal to the sum of the amount described in  
198 subdivision a and the interest described in subdivision b, except that if an employer who has violated  
199 this section or § 40.1-150 proves to the satisfaction of the court that the act or omission that violated  
200 this section or § 40.1-150 was in good faith and that the employer had reasonable grounds for believing  
201 that the act or omission was not a violation of this section or § 40.1-150, such court may, in its  
202 discretion, reduce the amount of the liability to the amount and interest determined under subdivisions a  
203 and b, respectively; and

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

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

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

213 F. Except as provided in subsection G, an action may be brought for a violation of this section or  
214 § 40.1-150 not later than two years after the date of the last event constituting the alleged violation for  
215 which the action is brought.

216 G. In the case of such action brought for a willful violation of this section or § 40.1-150, such action  
217 may be brought within three years of the date of the last event constituting the alleged violation for  
218 which such action is brought.

219 **§ 40.1-150. Retaliatory personnel actions prohibited.**

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

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

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

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

237 E. This section shall be enforced as provided in subsections C through G of § 40.1-149.

238 **§ 40.1-151. Coordination of benefits.**

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

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

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

1. A collective bargaining agreement;
2. An employer policy; or
3. Any law.

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

**§ 40.1-152. Notice.**

A. Each employer shall provide written notice as prescribed in this subsection to each employee upon hiring and annually thereafter. An employer shall also provide such written notice to an employee when the employee requests leave under this chapter, or when the employer acquires knowledge that an employee's leave may be for a qualifying reason under § 40.1-144. Such notice shall include (i) the employee's right to family and medical leave insurance benefits under this chapter and the terms under which it may be used; (ii) the amount of family and medical leave insurance benefits; (iii) the procedure for filing a claim for family and medical leave insurance benefits; (iv) the right to job protection and benefits continuation under § 40.1-149; (v) that discrimination and retaliatory personnel actions against a person for requesting, applying for, or using family and medical leave insurance benefits is prohibited under § 40.1-150; and (vi) that the employee has a right to file a complaint for violations of this chapter. An employer shall also display and maintain a poster in a conspicuous place accessible to employees at the employer's place of business that contains the information required by this section in English, Spanish, and any language that is the first language spoken by at least five percent of the employer's workforce, provided that such poster has been provided by the Office. The Director may adopt regulations to establish additional requirements concerning the means by which employers shall provide such notice.

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

**§ 40.1-153. Enforcement.**

A. The Director shall establish a system for appeals in the case of a denial of family and medical leave insurance benefits. In establishing such system, the Director may utilize any and all procedures and appeals mechanisms established under this title.

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

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

**§ 40.1-154. Erroneous payments and disqualification for benefits.**

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

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

**§ 40.1-155. Elective coverage.**

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

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

**§ 40.1-156. Family and medical leave insurance program; Office of Paid Family and Medical Leave.**

A. There is hereby established within the Department the Office of Paid Family and Medical Leave for the purpose of administering the provisions of this chapter.

306 B. By January 1, 2021, the Office shall establish and administer a family and medical leave  
307 insurance program and begin collecting contributions as specified in this chapter. By January 1, 2022,  
308 the Office shall start receiving claims from and paying family and medical leave insurance benefits to  
309 covered individuals.

310 C. The Office shall establish reasonable procedures and forms for filing claims for benefits under  
311 this chapter and shall specify what supporting documentation is necessary to support a claim for  
312 benefits, including any documentation required from a health care provider for proof of a serious health  
313 condition.

314 D. The Office shall notify the employer within five business days of a claim being filed pursuant to  
315 this chapter.

316 E. The Office shall use information sharing and integration technology to facilitate the disclosure of  
317 relevant information or records provided an individual consents to the disclosure.

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

323 G. The Director shall adopt regulations as necessary to implement this chapter.

324 **§ 40.1-157. Federal income tax.**

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

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

329 2. Requirements exist pertaining to estimated tax payments;

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

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

333 **§ 40.1-158. Family and Medical Leave Insurance Fund; establishment; investments.**

334 A. The Family and Medical Leave Insurance Fund is created in the custody of the Office.  
335 Expenditures from the Fund may be used only for the purposes of the family and medical leave  
336 insurance benefits program. Only the Director or the Director's designee may authorize expenditures  
337 from the Fund.

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

343 **§ 40.1-159. Reports.**

344 Beginning January 1, 2023, the Office shall report to the General Assembly by April 1 of each year  
345 on projected and actual program participation by purpose listed in § 40.1-144, gender of beneficiary,  
346 race and ethnicity of beneficiary, age of beneficiary, amount of benefits paid to each beneficiary per  
347 week, premium rates, fund balances, outreach efforts, and, for leaves taken under subdivision 2 of  
348 § 40.1-144, family members for whom leave was taken to provide care.

349 **§ 40.1-160. Public education.**

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

354 **§ 40.1-161. Sharing technology.**

355 The Office is encouraged to use state data collection and technology to the extent possible and to  
356 integrate the provisions of this chapter with existing state policies.

357 2. That the Office of Paid Family and Medical Leave shall promulgate all rules and regulations  
358 necessary for implementation of the first enactment of this act by July 1, 2020.