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SENATE BILL NO. 1069

Offered January 17, 2020

A BILL to amend the Code of Virginia by adding a section numbered 40.1-27.3 and by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.1 through 40.1-33.13, relating to employees; earned paid sick time; civil penalties.

Patron—Barker

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 a section numbered 40.1-27.3 and by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.1 through 40.1-33.13, as follows:

§ 40.1-27.3. Discharge of employee for taking unpaid sick leave prohibited.

A. No employer shall discharge, demote, or otherwise discriminate against an employee for being absent from work for any purpose set forth in subdivision A 1, 2, or 3 of § 40.1-33.3. An employer shall not be held in violation of this section if the employee's absence for such a reason exceeds 16 hours in any calendar year.

B. The provisions of subsection A apply only if the employee is not required to be compensated for such time off from work.

C. An employee who is discharged, demoted, or otherwise discriminated against in violation of subsection A shall be entitled to bring a civil action in a court of competent jurisdiction against an employer violating such provisions. Upon prevailing in such an action, the person aggrieved by a violation of this article shall be entitled to the remedies set out in subsection B of § 40.1-33.9.

Article 2.1.

Healthy Working Families Act.

§ 40.1-33.1. Definitions.

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

"Earned paid sick time" means time 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 § 40.1-33.3.

"Employer" means any employer as defined in § 40.1-2 that employs 25 or more employees. Notwithstanding § 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 care, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment; or

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

"Health care professional" means any person licensed under federal or state law to provide medical or emergency services, including physicians, nurses, and emergency room personnel.

"Retaliatory personnel action" means a denial of any benefit provided pursuant to this article; any threat, discharge, suspension, demotion, reduction of hours, or report of or threat to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of a family member of the employee to an agency of federal, state, or local government; or the taking of any other adverse action against an employee as a result of the employee's exercise of any benefit provided pursuant to this article, including the imposition of any sanction against an employee who is the recipient of public benefits, as a result of the employee's exercise of any benefit provided pursuant to by this article. "Retaliatory personnel action" includes interference with or punishment for in any

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59 manner participating in or assisting an investigation, proceeding, or hearing under this article.

60 "Year" means a regular and consecutive 12-month period as determined by the employer, except that
61 for the purposes of §§ 40.1-33.6 and 40.1-33.8, "year" means a calendar year.

62 **§ 40.1-33.2. Accrual of earned paid sick time.**

63 A. All employees shall accrue a minimum of one hour of earned paid sick time for every 30 hours
64 worked. An employee shall not use more than 40 hours of earned paid sick time in a year, unless the
65 employer selects a higher limit.

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

70 C. Earned paid sick time as provided in this section shall begin to accrue at the commencement of
71 employment or on January 1, 2021, whichever is later. An employer may provide all earned paid sick
72 time that an employee is expected to accrue in a year at the beginning of the year.

73 D. Employees shall not be entitled to use accrued earned paid sick time until the ninetieth calendar
74 day following commencement of their employment, unless otherwise permitted by the employer. On and
75 after the ninetieth calendar day of employment, employees may use earned paid sick time as it is
76 accrued.

77 E. Earned paid sick time may be carried over to the year following the year in which it was
78 accrued. Alternatively, in lieu of carryover of unused earned paid sick time from one year to the
79 following year, an employer may pay an employee for unused earned paid sick time at the end of a year
80 and provide the employee with an amount of earned paid sick time that meets or exceeds the
81 requirements of this article that is available for the employee's immediate use at the beginning of the
82 subsequent year.

83 F. Any employer with a paid leave policy, such as a paid time off policy, that makes available an
84 amount of paid leave sufficient to meet the accrual requirements of this section and that may be used
85 for the same purposes and under the same conditions as earned paid sick time under this article is not
86 required to provide additional paid sick time.

87 G. Nothing in this section shall be construed as requiring financial or other reimbursement to an
88 employee from an employer upon the employee's termination, resignation, retirement, or other
89 separation from employment for accrued earned paid sick time that has not been used.

90 H. If an employee is transferred to a separate division, entity, or location, but remains employed by
91 the same employer, the employee is entitled to all earned paid sick time accrued at the prior division,
92 entity, or location and is entitled to use all earned paid sick time as provided in this section. If an
93 employee is separated from employment with an employer and the employee is rehired within 12 months
94 of separation by the same employer, previously accrued earned paid sick time that had not been used
95 shall be reinstated. Further, the employee shall be entitled to use accrued earned paid sick time and
96 accrue additional earned paid sick time at the recommencement of employment.

97 I. When a different employer succeeds or takes the place of an existing employer, all employees of
98 the original employer who remain employed by the successor employer are entitled to all earned paid
99 sick time that they accrued when employed by the original employer, and to use earned paid sick time
100 previously accrued.

101 J. At its discretion, an employer may loan earned paid sick time to an employee in advance of
102 accrual of earned paid sick time by such employee.

103 **§ 40.1-33.3. Use of earned paid sick time.**

104 A. Earned paid sick time shall be provided to an employee by an employer for:

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

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

111 3. Closure of the employee's place of business by order of a public official due to a public health
112 emergency or an employee's need to care for a child whose school or place of care has been closed by
113 order of a public official due to a public health emergency, or care for oneself or a family member
114 when it has been determined by the health authorities having jurisdiction or by a health care provider
115 that the employee's or family member's presence in the community may jeopardize the health of others
116 because of his or her exposure to a communicable disease, whether or not the employee or family
117 member has actually contracted the communicable disease.

118 B. Earned paid sick time shall be provided upon the request of an employee. Such request may be
119 made orally, in writing, by electronic means, or by any other means acceptable to the employer. When
120 possible, the request shall include the expected duration of the absence.

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

D. An employer that requires notice of the need to use earned paid sick time shall provide a written policy that contains procedures for its employees to provide notice. An employer that has not provided to an employee a copy of its written policy for providing such notice shall not deny earned paid sick time to the employee based on noncompliance with such a policy.

E. An employer may not require, as a condition of an employee's taking earned paid sick time, that an employee search for or find a replacement worker to cover the hours during which the employee is using earned paid sick time.

F. An employer may not require an employee to work an alternate shift to make up for the use of sick time.

G. Upon mutual consent by the employee and the employer, an employee may work additional hours or shifts to compensate for hours or shifts during which the employee was absent from work without using accrued sick time for the hours or shifts missed. However, the employer may not require the employee to work additional hours or shifts authorized by this subsection. If the employee works additional hours or shifts, the employer shall comply with any applicable federal, state, or local laws regarding overtime pay.

H. Earned paid sick time may be used in the smaller of hourly increments or the smallest increment that the employer's payroll system uses to account for absences or use of other time.

I. For earned paid sick time of three or more consecutive work days, an employer may require reasonable documentation that the earned paid sick time has been used for a purpose for which such leave is required to be provided as set forth in subsection A. Documentation signed by a health care professional indicating that earned paid sick time is necessary shall be considered reasonable documentation for purposes of this subsection. If an employer requires such documentation for the use of an employee's earned paid sick time and the employer does not offer health insurance to the employee, then the employer is responsible for paying all out-of-pocket expenses the employee incurs in obtaining the documentation.

J. Employees may donate accrued sick time to another employee if the other employee uses the donated sick time for the purpose specified in this section and the employer has a policy that allows an employee to donate sick time to a coworker for the purpose specified in this section.

§ 40.1-33.4. Exercise of rights protected; retaliation prohibited.

A. Neither an employer nor any other person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any benefit provided pursuant to this article.

B. An employer shall not take retaliatory personnel action or discriminate against an employee or former employee because the person has requested or used earned paid sick time provided pursuant to this article; filed a complaint with the Commissioner or a court or informed any person about any employer's alleged violation of this article; participated in an investigation, hearing, or proceeding or cooperated with or assisted the Commissioner in investigations of any alleged violation of this article; or informed any individual of such individual's potential benefits under this article.

C. An employer's absence control policy shall not count earned paid sick time taken under this article as an absence that may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action.

D. Protections of this section shall apply to any person who mistakenly but in good faith alleges a violation of any provision of this article.

E. There shall be a rebuttable presumption of unlawful retaliatory personnel action under this section whenever an employer takes adverse action against an individual within 90 days of when that individual:

1. Files a complaint with the Commissioner or a court alleging a violation of any provision of this article;

2. Informs any person about an employer's alleged violation of this article;

3. Cooperates with or assists the Commissioner or other persons in the investigation or prosecution of any alleged violation of this article;

4. Opposes any policy, practice, or act that is unlawful under this article; or

5. Informs any individual of benefits provided to that individual under this article.

§ 40.1-33.5. Notice and posting.

A. Each employer shall give its employees written notice of the following information at the commencement of employment or by March 1, 2021, whichever is later:

1. That employees are entitled to earned paid sick time and the amount of earned paid sick time;

2. The terms of the use of earned paid sick time provided under this article;

182 3. That retaliatory personnel action against employees who request or use earned paid sick time is
183 prohibited;

184 4. That each employee has the right to file a complaint or bring a civil action if earned paid sick
185 time as required by this article is denied by the employer or the employee is subjected to retaliatory
186 personnel action for requesting or taking earned paid sick time; and

187 5. Contact information for the Department where questions about rights and responsibilities under
188 this article can be answered.

189 B. The notice required by subsection A shall be in English, Spanish, and any language that is the
190 first language spoken by at least 10 percent of the employer's workforce, provided that such notice has
191 been provided by the Department.

192 C. The amount of earned paid sick time available to the employee, the amount of earned paid sick
193 time taken by the employee to date in the year, and the amount of pay the employee has received as
194 earned paid sick time shall be recorded in, or on an attachment to, the employee's regular statement of
195 earnings provided under § 40.1-29.

196 D. Employers shall display a poster that contains the information required by subsection A in a
197 conspicuous and accessible place in each establishment where such employees are employed. The poster
198 displayed shall be in English, Spanish, and any language that is the first language spoken by at least 10
199 percent of the employer's workforce, provided that such poster has been provided by the Department.

200 E. The Department shall create and make available to employers, in all languages spoken by more
201 than 10 percent of the Commonwealth's workforce and any language deemed appropriate by the
202 Department, model notices and posters that contain the information required under subsection A for
203 employers' use in complying with subsections A and D.

204 F. An employer that willfully violates the notice and posting requirements of this section shall be
205 subject to a civil penalty in an amount not to exceed \$100 for each separate offense.

206 **§ 40.1-33.6. Employer records.**

207 Each employer shall retain records documenting the number of hours worked by employees and
208 earned paid sick time taken by employees, for a period of three years, and shall allow the Department
209 access to such records, with appropriate notice and at a mutually agreeable time, to monitor
210 compliance with the requirements of this article. When an issue arises as to an employee's entitlement to
211 earned paid sick time under this article, if the employer does not maintain or retain adequate records
212 documenting hours worked by the employee and earned paid sick time taken by the employee, or does
213 not allow the Commissioner reasonable access to such records, it shall be presumed that the employer
214 has violated this article, absent clear and convincing evidence otherwise.

215 **§ 40.1-33.7. Regulations.**

216 The Commissioner shall adopt appropriate regulations for the implementation and enforcement of
217 this article.

218 **§ 40.1-33.8. Enforcement; civil penalties; actions to recover amounts on behalf of employees.**

219 A. The Commissioner shall enforce the provisions of this article. In effectuating such enforcement,
220 the Commissioner shall establish a system utilizing multiple means of communication to receive
221 complaints regarding noncompliance with this article and to investigate complaints received by the
222 Commissioner in a timely manner.

223 B. Any person alleging a violation of this article shall have the right to file a complaint with the
224 Commissioner within one year of the date the person knew or should have known of the alleged
225 violation. The Commissioner shall encourage reporting pursuant to this subsection by keeping
226 confidential, to the maximum extent permitted by applicable laws, the name and other identifying
227 information of the employee or other person reporting the violation; provided, however, that with the
228 authorization of such person, the Commissioner may disclose the person's name and identifying
229 information as necessary to enforce this article or for other appropriate purposes.

230 C. Upon receiving a complaint alleging a violation of this article, the Commissioner shall investigate
231 such complaint and attempt to resolve it through mediation between the complainant and the subject of
232 the complaint, or other means. The Commissioner shall keep complainants notified regarding the status
233 of their complaint and any resultant investigation. If the Commissioner believes that a violation has
234 occurred, he shall issue to the offending person or employer a notice of violation and the relief required
235 of the offending person or entity. The Commissioner shall prescribe the form and wording of such
236 notices of violation including any method of appealing a decision of the Commissioner.

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

241 E. Any such employer who knowingly violates this article shall be subject to a civil penalty not to
242 exceed \$150 for the first violation and, for subsequent violations that occur within two years of any
243 previous violation, not to exceed \$300 for the second violation and not to exceed \$500 for each

successive violation. In determining the amount of any civil penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be final.

F. The Commissioner, with the written and signed consent of an employee, may institute a proceeding in a court of competent jurisdiction on behalf of an employee to enforce compliance with this article and to collect the following amounts from the employer that violated this article, which amounts shall be paid to the employee entitled thereto:

1. In each instance of earned paid sick time taken by an employee but unlawfully not compensated by the employer, for three times the wages that should have been paid under this article;

2. In each instance of earned paid sick time requested by an employee but unlawfully denied by the employer and not taken by the employee or unlawfully conditioned upon searching for or finding a replacement worker, for \$250;

3. In each instance of unlawful retaliation not including discharge from employment, for full compensation including wages and benefits lost, an additional amount of at least \$500, and equitable relief as appropriate; and

4. In each instance of unlawful discharge from employment, for full compensation including wages and benefits lost, an additional amount of \$1,500, and equitable relief, including reinstatement, as appropriate.

G. Upon entry of a final order of the Commissioner, or upon entry of a judgment of a court of competent jurisdiction, against the employer, the Commissioner or the court shall assess reasonable attorney fees.

H. The Commissioner shall annually report on its website the number and nature of the complaints received pursuant to this article; the results of investigations undertaken pursuant to this article, including the number of complaints not substantiated and the number of notices of violations issued; the number and nature of adjudications pursuant to this article; and the average time for a complaint to be resolved pursuant to this chapter.

I. Any person aggrieved by a violation of this article may file a complaint with the Attorney General. The filing of a complaint with the Attorney General will not preclude the filing of a civil action under § 40.1-33.9. The Attorney General may bring a civil action to enforce the provisions of this article, in which action the Attorney General may seek injunctive relief of the imposition of civil penalties in such amounts as are authorized under this section.

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

§ 40.1-33.9. Civil actions.

A. Any person aggrieved by a violation of this article, or any entity a member of which is aggrieved by a violation of this article, may bring a civil action in a court of competent jurisdiction against an employer violating this article. Such action may be brought by a person aggrieved by a violation of this article without first filing an administrative complaint; however, a recovery under this section shall be in lieu of any recovery under subsection F of § 40.1-33.8.

B. Upon prevailing in an action brought pursuant to this section, a person aggrieved by a violation of this article shall:

1. Recover (i) a sum equal to twice the total of (a) the amount of any unpaid earned sick time and (b) the amount of any actual damages suffered as the result of the employer's violation of this article and (ii) reasonable attorney fees; and

2. Be entitled to such legal or equitable relief as may be appropriate to remedy the violation, including, without limitation, reinstatement to employment, back pay, and injunctive relief.

C. The statute of limitations for a civil action brought pursuant to this section shall be for a period of two years from the date the alleged violation occurred or the date the person aggrieved by a violation of this article knew or should have known of the violation.

§ 40.1-33.10. Confidentiality and nondisclosure.

An employer may not require disclosure of the details of an employee's or an employee's family member's health information as a condition of providing earned paid sick time under this article. If an employer possesses health information about an employee or employee's family member, such information shall be treated as confidential and not disclosed except to the affected employee or with the permission of the affected employee.

§ 40.1-33.11. Encouragement of more generous earned paid sick time policies; no effect on more generous policies or laws.

305 A. Nothing in this article shall be construed to discourage or prohibit an employer from the adoption
306 or retention of an earned paid sick time policy more generous than the one required by this article.

307 B. Nothing in this article shall be construed as diminishing the obligation of an employer to comply
308 with any contract, collective bargaining agreement, employment benefit plan, or other agreement
309 providing more generous earned paid sick time to an employee than required by this article. Nothing in
310 this article shall be construed as diminishing the rights of public employees regarding earned paid sick
311 time or use of earned paid sick time as provided in any law pertaining to public employees.

312 C. Nothing in this article shall be construed to supersede any provision of any local law that
313 provides greater rights to earned paid sick time than the rights established under this article.

314 **§ 40.1-33.12. Effect on other requirements.**

315 This article provides minimum requirements pertaining to earned paid sick time and shall not be
316 construed to preempt, limit, or otherwise affect the applicability of any other law, regulation,
317 requirement, policy, or standard that provides for greater accrual or use by employees of earned paid
318 sick time or that extends other protections to employees.

319 **§ 40.1-33.13. Public education and outreach.**

320 The Department shall develop and implement a multilingual outreach program to inform employees,
321 parents, and persons who are under the care of a health care provider about the availability of earned
322 paid sick time required to be provided pursuant to this article. This program shall include the
323 distribution of notices and other written materials in English, Spanish, and any language that is the first
324 language spoken by at least 10 percent of the Commonwealth's population to all child care and elder
325 care providers, schools, hospitals, community health centers, and other health care providers.

326 **2. That the provisions of this act shall become effective on January 1, 2021.**