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SENATE BILL NO. 770

Offered January 8, 2020

Prefiled January 8, 2020

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 60.2-819, relating to the establishment of family and medical leave insurance program; financing through payroll taxes.*

Patrons—Boysko, Hashmi, McClellan, McPike and Morrissey

Referred to Committee on Finance and Appropriations

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 60.2-819, 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 § 60.2-813;

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

3. Submits an application.

"Covered service member" 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.

"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

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SB770

59 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 Trust Fund established under § 60.2-816.

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

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

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

85 "Work week" means a calendar week.

86 **§ 60.2-801. Eligibility for benefits.**

87 Beginning January 1, 2023, family and medical leave insurance benefits are payable to any covered
88 individual who either:

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

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

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

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

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

99 **§ 60.2-802. Duration of benefits.**

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

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

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

110 **§ 60.2-803. Amount of benefits.**

111 A. The weekly benefit shall be 80 percent of the covered individual's average weekly wages during
112 the 12 months preceding submission of the application, or the average weekly wages during the time the
113 covered individual worked if less than 12 months, up to a maximum set in subsection C.

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

116 C. The maximum weekly benefit shall be 80 percent of the state average weekly wage, as defined in
117 subsection B of § 65.2-500. By September 30 of each year, the Commission shall adjust the maximum
118 weekly benefit to reflect any changes in such state average weekly wage. The adjusted maximum weekly
119 benefit amount takes effect on the following January 1.

120 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.

§ 60.2-804. Contributions.

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

B. Beginning on January 1, 2022, for each employee, an employer shall remit to the Fund contributions in the form and manner determined by the Commission. Annually, not later than October 1, the Commissioner shall fix the contribution rate for the coming calendar year in the manner described in this subsection, taking into account the reimbursement requirement provided for in subsection D of § 60.2-816. For calendar years 2022 and 2023, the Commissioner shall do so based on sound actuarial principles. For calendar year 2024 and thereafter, the Commissioner shall first certify and publish the following information:

1. The total amount of family and medical leave insurance benefits paid by the Commission 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 Commissioner'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 § 60.2-813 shall be responsible for the employee share of contributions set forth in subsection B on that individual's income from self-employment.

D. Each employer shall (i) deduct from each employee's wages an amount equal to 50 percent, or such lesser percentage as may be agreed upon by the employer and employee, of the contribution required for the employee by subsection B and (ii) remit the full contribution required under subsection B to the Commission for deposit in the Fund.

§ 60.2-805. 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 § 60.2-802.

§ 60.2-806. 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 at the commencement of leave.

B. During any leave taken pursuant to § 60.2-801, 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 the leave until the date the family and medical leave insurance benefits terminate; however, the covered individual shall continue to pay the covered individual's share of the cost of health benefits as required prior to the commencement of the leave.

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

182 affected:

183 1. For damages equal to:

184 a. The amount of:

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

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

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

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

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

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

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

208 F. Except as provided in subsection G, an action may be brought for a violation of this section or §
209 60.2-807 not later than two years after the date of the last event constituting the alleged violation for
210 which the action is brought.

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

214 **§ 60.2-807. Retaliatory personnel actions prohibited.**

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

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

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

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

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

233 **§ 60.2-808. Coordination of benefits.**

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

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

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

242 1. A collective bargaining agreement;

243 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, 2021. Any agreement by an individual to waive the individual's rights under this chapter is void as against public policy.

§ 60.2-809. 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 § 60.2-801. 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 § 60.2-806; (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 § 60.2-807; 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 Commission. The Commissioner 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.

§ 60.2-810. Appeals.

A. The Commissioner shall establish a system for appeals in the case of a denial of family and medical leave insurance benefits. In establishing such system, the Commissioner 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 Commissioner.

C. The Commissioner 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.

§ 60.2-811. Enforcement.

A. Contributions under § 60.2-804 unpaid on the date on which they are due and payable, as prescribed by the Commissioner under this chapter, shall bear interest at the rate of one and one-half percent per month from and after such date until payment plus accrued interest is received by the Commission. Interest collected pursuant to this chapter shall be paid into the Fund. An employer who fails to timely remit a contribution or any portion thereof under § 60.2-804 shall be solely responsible for the interest due under this section.

B. If, after notice, any employer defaults in any payment of contributions or interest the amount due shall be collected by civil action in the name of the Commissioner. The employer adjudged in default shall pay the fees and costs of such action. Civil actions brought under this article to collect contributions or interest or any penalty from an employer shall be heard by the court at the earliest possible date. Such civil actions may be brought against any officer, employee, or agent of a corporation or partnership in his individual, personal capacity when that person willfully fails to cause the employer to pay the appropriate contributions or interest and he had the authority to do so. No person shall be subject to this section unless it is proved (i) that such person had knowledge of the failure or attempt to make such payment and (ii) that such person had authority to prevent such failure or attempt. In addition to the foregoing remedies, the Commissioner shall have such other remedies as are available to the State Tax Commissioner and county and city treasurers for the collection of taxes generally. The Commissioner is authorized to compromise, settle, and adjust any contributions, including interest, or any penalty assessed against any employer where in the judgment of the Commissioner the best interests of the Commonwealth will be promoted or served. The Commissioner may in such cases accept in full settlement of the contributions assessed an amount less than that assessed.

C. When an unsatisfied execution has been returned by an officer, and the employer against whom the judgment has been obtained on which the execution was issued continues in default of payment of contributions, or any portion thereof, such employer may be enjoined from operating and doing business in the Commonwealth until such contributions have been paid. The Circuit Court of the City of Richmond shall have exclusive original jurisdiction to grant such injunction upon the complaint of the Commissioner. Notice of the time and place when the application for the injunction will be made shall

be served on the employer, and a copy of the bill of complaint shall be served with the notice.

§ 60.2-812. 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 Commissioner 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 Commission may seek repayment of benefits from the recipient. The Commissioner 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.

§ 60.2-813. 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 Commissioner, as required by the Commission. 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 Commission 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 Commissioner may prescribe by rule, by filing written notice with the Commissioner, such withdrawal to take effect not sooner than 30 days after filing the notice.

§ 60.2-814. Family and medical leave insurance program.

A. By January 1, 2022, the Commission shall establish and administer a family and medical leave insurance program and begin collecting contributions as specified in this chapter. By January 1, 2023, the Commission shall start receiving claims from and paying family and medical leave insurance benefits to covered individuals.

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

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

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

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

F. The Commissioner shall adopt regulations as necessary to implement this chapter.

§ 60.2-815. Federal income tax.

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

1. The Internal Revenue Service has determined that benefits are subject to federal income tax;
2. Requirements exist pertaining to estimated tax payments;
3. The individual may elect to have federal income tax deducted and withheld from the individual's payment of benefits in the amount specified in the federal Internal Revenue Code; and
4. The individual is permitted to change a previously elected withholding status.

§ 60.2-816. Family and Medical Leave Insurance Trust Fund; establishment; prohibition on appropriation; reimbursement.

A. There is hereby created in the state treasury a special nonreverting fund to be known as the Family and Medical Leave Insurance Trust Fund, referred to in this section as "the Fund." The Fund shall be established on the books of the Comptroller. All payroll contributions remitted pursuant to this chapter, all funds appropriated for the purposes of the Fund and any gifts, donations, grants, bequests, and other shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund.

B. Moneys in the Fund shall be used solely for the payment of benefits under the family and medical leave insurance program established by the Commission pursuant to this chapter, the administration of such program, and any start-up costs associated with such program, including general fund

reimbursement as provided in subsection D.

C. The General Assembly shall not appropriate or transfer any of the payroll contributions remitted to the Fund for any purpose other than purposes provided for in this section.

D. Any moneys appropriated and expended from the general fund for the purposes of establishing the paid family and medical leave insurance program shall be reimbursed from the Fund to the general fund by January 1, 2024.

E. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Commissioner or his designee.

§ 60.2-817. Reports.

Beginning January 1, 2024, the Commission shall report to the General Assembly by April 1 of each year on projected and actual program participation by purpose listed in § 60.2-801, gender of beneficiary, race and ethnicity of beneficiary, age of beneficiary, amount of benefits paid to each beneficiary per week, premium rates, fund balances, outreach efforts, and, for leaves taken under subdivision 2 of § 60.2-801, family members for whom leave was taken to provide care.

§ 60.2-818. Public education.

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

§ 60.2-819. Sharing technology.

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

2. That the Virginia Employment Commission shall promulgate all rules and regulations necessary for implementation of the first enactment of this act by July 1, 2021.