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HOUSE BILL NO. 2103

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on Labor and Commerce
on January 28, 2021)

(Patron Prior to Substitute—Delegate Reid)

A BILL to amend the Code of Virginia by adding a section numbered 40.1-27.4 and by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.3 through 40.1-33.16, relating to employees; paid time off; civil penalties.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 40.1-27.4 and by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.3 through 40.1-33.16, as follows:

§ 40.1-27.4. 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 or 2 of § 40.1-33.5 or for any purpose set forth in subdivision B 1 or 2 of § 40.1-33.6. An employer shall not be held in violation of this section if the employee's absence for purposes set forth in subdivision A 1 or 2 of § 40.1-33.5 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 is 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 is entitled to the remedies set out in subsection F of § 40.1-33.10.

D. For purposes of this section, "employer" means the same as that term is defined in § 40.1-33.3.

Article 2.1.

Paid Time Off.

§ 40.1-33.3. Definitions.

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

"Carrier" has the same meaning as provided in 45 U.S.C. § 151.

"Earned paid time off" or "paid time off" 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 § 40.1-33.5; however, such hourly rate shall not be less than the minimum wage amount set forth in § 40.1-28.10 without reduction for any tip credit that the employer would otherwise be permitted to claim.

"Eligible employee" means an employee who works on average at least 30 hours per week or 130 hours per month. "Eligible employee" does not include individuals employed in seasonal employment as that term is defined in 5 C.F.R. § 340.401, independent contractors, or individuals who are direct employees of any carrier subject to the federal Railway Labor Act (45 U.S.C. § 151 et seq.).

"Employer" means any employer as defined in § 40.1-2 that employs 35 or more full-time equivalent 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 or any carrier subject to the federal Railway Labor Act (45 U.S.C. § 151 et seq.).

"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 this article. "Retaliatory personnel action" includes interference with or punishment for in any manner participating in or assisting an investigation, proceeding, or hearing under this article.

"Year" means a regular and consecutive 12-month period as determined by the employer, except that for the purposes of §§ 40.1-33.8 and 40.1-33.10, "year" means a calendar year.

§ 40.1-33.4. Accrual of earned paid time off; waiver.

A. Employers shall provide (i) an eligible employee who has been employed by the employer for 12 months or more 40 hours of earned paid time off prorated to the average number of hours the employee

60 has worked per week over the previous year and (ii) an eligible employee who has been employed by
61 the employer for less than 12 months 30 to 40 hours of earned paid time off prorated to the average
62 number of hours the employee is projected by the employer to work in his first 12 months of
63 employment. An eligible employee shall not earn or use more than 40 hours of earned paid time off in a
64 year, unless the employer selects a higher limit.

65 B. Employees who are exempt from overtime requirements under 29 U.S.C. § 213(a)(1) of the federal
66 Fair Labor Standards Act, 29 U.S.C. § 201 et seq., shall be assumed to work 40 hours in each
67 workweek for purposes of earned paid time off eligibility and accrual unless their average workweek is
68 less than 40 hours, in which case earned paid time off accrues on the basis of that average workweek,
69 provided that the 30-hour threshold is met.

70 C. An eligible employee's earned paid time off shall be available for use on the ninetieth calendar
71 day following commencement of employment, unless otherwise permitted by the employer. On and after
72 the ninetieth calendar day of employment, employees may use earned paid time off as it is accrued.

73 D. Earned paid time off remaining unused at the end of the year may, at the employer's discretion,
74 be carried over to the subsequent year. However, any carried-over earned paid time off shall count
75 toward the 40-hour limit on earned paid time off provided for in subsection A, unless the employer
76 selects a higher limit.

77 E. An employer shall be deemed to have satisfied the employer's duties under the provisions of this
78 article and shall not be required to provide additional earned paid time off if such employer has a paid
79 time off policy that (i) is provided to eligible employees in writing, (ii) provides eligible employees with
80 at least 40 hours of paid time off a year that can be used for the purposes set forth in subsection A of
81 § 40.1-33.5, and (iii) includes notice of the information set forth in subdivisions A 3, 4, and 5 of
82 § 40.1-33.7.

83 F. Nothing in this section shall be construed as requiring financial or other reimbursement to an
84 eligible employee from an employer upon the eligible employee's termination, resignation, retirement, or
85 other separation from employment for accrued earned paid time off that has not been used.

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

94 H. When a different employer succeeds or takes the place of an existing employer, all eligible
95 employees of the original employer who remain employed by the successor employer are entitled to all
96 earned paid time off that they accrued when employed by the original employer and to use earned paid
97 time off previously accrued.

98 I. At its discretion, an employer may loan earned paid time off to an eligible employee in advance of
99 accrual of earned paid time off by such eligible employee.

100 **§ 40.1-33.5. Use of earned paid time off.**

101 A. Earned paid time off shall be provided to an eligible employee by an employer for an eligible
102 employee's mental or physical illness, injury, or health condition; an eligible employee's need for
103 medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an
104 eligible employee's need for preventive medical care.

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

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

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

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

119 F. An employer shall not require an eligible employee to work an alternate shift to make up for the
120 use of earned paid time off.

121 G. Upon mutual consent of the eligible employee and the employer, an eligible employee may work

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

H. Earned paid time off 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 time off of three or more consecutive work days, an employer may require reasonable documentation that the earned paid time off 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 time off is necessary shall be considered reasonable documentation for purposes of this subsection. If an employer requires such documentation for the use of an eligible employee's earned paid time off and the employer does not offer health insurance to the eligible employee, then the employer is responsible for paying all out-of-pocket expenses the eligible employee incurs in obtaining the documentation.

J. Eligible employees may donate accrued earned paid time off to another employee if the other employee uses the donated earned paid time off for the purpose specified in this section and the employer has a policy that allows an eligible employee to donate earned paid time off to a coworker for the purpose specified in this section.

K. An employer may implement reasonable earned paid time off policies to address potential misuse, provided that such policies are consistent with this article.

§ 40.1-33.6. 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 time off 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 time off 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.

§ 40.1-33.7. Notice and posting; civil penalty.

A. Each employer shall give its eligible employees written notice of the following information at the commencement of employment or by March 1, 2023, whichever is later:

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

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

3. That retaliatory personnel action against eligible employees who request or use earned paid time off is prohibited;

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

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

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

183 C. The amount of earned paid time off available to the eligible employee, the amount of earned paid
184 time off taken by the eligible employee to date in the year, and the amount of pay the eligible employee
185 has received as earned paid time off shall be recorded in, or on an attachment to, the eligible
186 employee's regular statement of earnings provided under the requirements of § 40.1-29.

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

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

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

198 **§ 40.1-33.8. Employer records.**

199 Each employer shall retain records documenting the number of hours worked by eligible employees
200 and earned paid time off taken by eligible employees for a period of three years and shall allow the
201 Department access to such records, with appropriate notice and at a mutually agreeable time, to
202 monitor compliance with the requirements of this article. When an issue arises as to an eligible
203 employee's entitlement to earned paid time off under this article, if the employer does not maintain or
204 retain adequate records documenting hours worked by the eligible employee and earned paid time off
205 taken by the eligible employee, or does not allow the Commissioner reasonable access to such records,
206 it shall be presumed that the employer has violated this article, absent clear and convincing evidence
207 otherwise.

208 **§ 40.1-33.9. Regulations.**

209 The Commissioner shall adopt appropriate regulations for the implementation and enforcement of
210 this article.

211 **§ 40.1-33.10. Enforcement; civil penalties; actions to recover amounts on behalf of employees.**

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

216 B. Any person who alleges a violation of this article may seek redress through the employer's human
217 resources department. If the alleged violation is unable to be resolved through the employer's human
218 resources department, such person shall have the right to file a complaint with the Commissioner within
219 one year of the date the person knew or should have known of the alleged violation or to bring a civil
220 action in a court of competent jurisdiction pursuant to § 40.1-33.11.

221 C. The Commissioner shall encourage reporting pursuant to this subsection by keeping confidential,
222 to the maximum extent permitted by applicable laws, the name and other identifying information of the
223 employee or other person reporting the violation, provided, however, that with the authorization of such
224 person, the Commissioner may disclose the person's name and identifying information as necessary to
225 enforce this article or for other appropriate purposes.

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

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

237 F. Any such employer who knowingly violates this article shall be subject to a civil penalty not to
238 exceed \$150 for the first violation and, for subsequent violations that occur within two years of any
239 previous violation, not to exceed \$300 for the second violation and not to exceed \$500 for each
240 successive violation. In determining the amount of any civil penalty to be imposed, the Commissioner
241 shall consider the size of the business of the employer charged and the gravity of the violation. The
242 decision of the Commissioner shall be final.

243 G. The Commissioner, with the written and signed consent of an employee, may institute a
244 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 time off 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 time off requested by an eligible employee but unlawfully denied by the employer and not taken by the eligible 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.

H. 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.

I. 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 article.

J. 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 shall not preclude the filing of a civil action under § 40.1-33.11. 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.

K. 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.

§ 40.1-33.11. 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, following an attempt to resolve the alleged violation through the employer's human resources department pursuant to subsection B of § 40.1-33.10, 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 § 40.1-33.10.

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

1. Shall recover (i) a sum equal to twice the total of (a) the amount of any unpaid earned time off 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. Shall 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.

§ 40.1-33.12. Confidentiality and nondisclosure.

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

§ 40.1-33.13. Encouragement of more generous earned paid time off policies; no effect on more generous policies or laws.

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

B. Nothing in this article shall be construed as diminishing the obligation of an employer to comply with any contract, collective bargaining agreement, employment benefit plan, or other agreement

306 providing more generous earned paid time off to an employee than required by this article. Nothing in
307 this article shall be construed as diminishing the rights of public employees regarding earned paid time
308 off or use of earned paid time off as provided in any law pertaining to public employees.

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

311 **§ 40.1-33.14. Effect on other requirements.**

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

316 **§ 40.1-33.15. Public education and outreach.**

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

323 **§ 40.1-33.16. Hardship waiver.**

324 The Commissioner shall provide a waiver from the provisions of this article to any employer that
325 provides, in a form and manner satisfactory to the Commissioner, evidence demonstrating that providing
326 paid sick leave threatens the financial viability of the employer, jeopardizes the ability of the employer
327 to sustain operations, significantly degrades the quality of the employer's business operations, or creates
328 a significant negative financial impact on the employer. The Commissioner shall establish procedures
329 and requirements for an employer to qualify for a hardship waiver.

330 2. That the provisions of this act shall become effective on January 1, 2023.

331 3. That, beginning January 1 of the year following a year in which the Virginia unemployment
332 rate is four percent or less for two consecutive quarters, and notwithstanding the provisions of
333 § 40.1-33.3 of the Code of Virginia, as created by this act, for the purposes of Article 2.1
334 (§ 40.1-33.3 et seq.) of Chapter 3 of Title 40.1 of the Code of Virginia, as created by this act, the
335 provisions of this act shall apply to an employer as defined by § 40.1-2 that employs 25 or more
336 full-time equivalent employees and is not otherwise exempted from the provisions of this act.