

11104009D

**HOUSE BILL NO. 2430**

Offered January 18, 2011

A *BILL to amend the Code of Virginia by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.1 through 40.1-33.7, relating to the requirement of employers to allow employees to take leave for certain purposes; penalties.*

Patrons—Filler-Corn, Englin, Armstrong, Brink, Bulova, Johnson, Kory, Lewis, Scott, J.M. and Sickles

Referred to Committee on Commerce and Labor

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding in Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.1 through 40.1-33.7, as follows:**

*Article 2.1.**Mandatory Employee Leave.**§ 40.1-33.1. Definitions.*

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

*"Covered firefighter" means a firefighter who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty.*

*"Covered law-enforcement officer" means a law-enforcement officer who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty.*

*"Eligible employee" means an employee who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested under this article and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period. "Eligible employee" does not include any officer or employee of the federal government covered under subchapter V of Chapter 63 of Title 5 of the United States Code.*

*"Employee" has the meaning assigned to such term in § 40.1-2.*

*"Employer" has the meaning assigned to such term in 29 U.S.C. § 2611 (4), as amended.*

*"Employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an employee benefit plan.*

*"Firefighter" means a member of any fire company or department or rescue squad that has been recognized by an ordinance or a resolution of the governing body of any county, city or town of the Commonwealth as an integral part of the official safety program of such county, city or town; any Department of Emergency Management hazardous materials officer; any other employee of the Department of Emergency Management who is performing official duties of the agency, when those duties are related to a major disaster or emergency, as defined in § 44-146.16, that has been or is later declared to exist under the authority of the Governor in accordance with § 44-146.28; any employee of any county, city or town performing official emergency management or emergency services duties in cooperation with the Department of Emergency Management, when those duties are related to a major disaster or emergency, as defined in § 44-146.16, that has been or is later declared to exist under the authority of the Governor in accordance with § 44-146.28 or a local emergency, as defined in § 44-146.16, declared by a local governing body; or any nonfirefighter regional hazardous materials emergency response team member.*

*"Health care provider" means any physician, hospital, or other person that is licensed or otherwise authorized in the Commonwealth to furnish health care services.*

*"Law-enforcement officer" means any law-enforcement officer of the Commonwealth or any of its political subdivisions; a correctional officer as defined in § 53.1-1; a jail officer; a regional jail or jail farm superintendent; a sheriff, deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond; a police chaplain; any special agent of the Virginia Alcoholic Beverage Control Board; any regular or special conservation police officer who receives compensation from a county, city or town or from the Commonwealth appointed pursuant to the provisions of § 29.1-200; any commissioned forest warden appointed under the provisions of § 10.1-1135; any member or employee of the Virginia Marine Resources Commission granted the power of arrest pursuant to § 28.2-900; or any conservation officer of the Department of Conservation and Recreation commissioned pursuant to § 10.1-115.*

*"Line of duty" means any action the deceased or disabled person was obligated or authorized to*

INTRODUCED

HB2430

59 perform by rule, regulation, condition of employment or service, or law.

60 "Next of kin," used with respect to an individual, means the nearest blood relative of that individual.

61 "Serious injury or illness," in the case of a law-enforcement officer or firefighter, means an injury or  
62 illness that was incurred by the individual in the line of duty and that may render the individual  
63 medically unfit to perform the duties of the individual's office, grade, rank, or rating.

64 "Service member" means a member of the armed forces, including a member of the Reserves or the  
65 Virginia National Guard or the Virginia State Defense Force while such member is serving in the  
66 Virginia National Guard or the Virginia State Defense Force on official state duty or federal duty under  
67 Title 32 of the United States Code.

68 "Son or daughter" means a biological, adopted, or foster child; a stepchild; a legal ward; or a child  
69 of a person standing in loco parentis, who is (i) under 18 years of age or (ii) 18 years of age or older  
70 and incapable of self-care because of a mental or physical disability.

71 "Spouse" means a husband or wife, as the case may be.

72 § 40.1-33.2. Leave requirement.

73 A. Subject to § 40.1-33.3, an eligible employee who is the spouse, son, daughter, or next of kin of a  
74 covered law-enforcement officer or covered firefighter shall be entitled to a total of 26 workweeks of  
75 leave during a 12-month period to care for the covered law-enforcement officer or covered firefighter.

76 B. Subject to § 40.1-33.3, an eligible employee who is the spouse, son, daughter, or next of kin of a  
77 (i) service member killed while engaged in active service or (ii) law-enforcement officer or firefighter  
78 who is killed in the line of duty, shall be entitled to a total of 10 days of leave to arrange for or attend  
79 funeral or memorial services for the deceased service member, law-enforcement officer, or firefighter.

80 C. During the single 12-month period, an eligible employee shall be entitled to a combined total of  
81 26 workweeks of leave under subsections A and B.

82 D. Leave granted under any of subsections A and B may consist of unpaid leave. However, an  
83 eligible employee may elect, or an employer may require the employee, to substitute any of the accrued  
84 paid vacation leave, personal leave, or family leave of the employee for leave provided under subsection  
85 A or D, except that nothing in this section shall require an employer to provide paid sick leave or paid  
86 medical leave in any situation in which such employer would not normally provide any such paid leave.

87 E. In any case in which the necessity for leave under subsection A is foreseeable based on planned  
88 medical treatment, the employee:

89 1. Shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the  
90 operations of the employer, subject to the approval of the health care provider of the employee or the  
91 health care provider of the covered service member, as appropriate; and

92 2. Shall provide the employer with not less than 30 days' notice before the date the leave is to begin  
93 of the employee's intention to take leave under such subsection, except that if the date of the treatment  
94 requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

95 § 40.1-33.3. Certification.

96 A. An employer may require that a request for leave under subsection A of § 40.1-33.2 be supported  
97 by a certification issued by the health care provider of the individual to whom an employee has  
98 caregiving responsibilities. The employee shall provide, in a timely manner, a copy of such certification  
99 to the employer. Certification provided under this subsection shall be sufficient if it satisfies the  
100 corresponding requirements of 29 U.S.C. § 2613(b).

101 B. In any case in which the employer has reason to doubt the validity of the certification provided  
102 under subsection A, the employer may require, at the expense of the employer, that the eligible employee  
103 obtain the opinion of a second health care provider designated or approved by the employer concerning  
104 any information certified for such leave.

105 C. A health care provider designated or approved under subsection A or B shall not be employed on  
106 a regular basis by the employer.

107 D. In any case in which the second opinion described in subsection B differs from the opinion in the  
108 original certification provided under subsection A, the employer may require, at the expense of the  
109 employer, that the employee obtain the opinion of a third health care provider designated or approved  
110 jointly by the employer and the employee concerning the information certified. The opinion of the third  
111 health care provider concerning the information certified shall be considered to be final and shall be  
112 binding on the employer and the employee. The employer may require that the eligible employee obtain  
113 subsequent recertifications on a reasonable basis.

114 E. An employer may require that a request for leave under subsection B of § 40.1-33.2 be supported  
115 by a certification issued at such time and in such manner as the Commissioner may by regulation  
116 prescribe. If the Commissioner issues a regulation requiring such certification, the employee shall  
117 provide, in a timely manner, a copy of such certification to the employer.

118 § 40.1-33.4. Employment and benefits protection.

119 A. Except as provided in subsection C, any eligible employee who takes leave under § 40.1-33.2 for  
120 the intended purpose of the leave shall be entitled, on return from such leave:

1. To be restored by the employer to the position of employment held by the employee when the leave commenced; or

2. To be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

B. The taking of leave under § 40.1-33.2 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

C. Nothing in this section shall be construed to entitle any restored employee to:

1. The accrual of any seniority or employment benefits during any period of leave; or

2. Any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

D. Nothing in this section shall be construed to prohibit an employer from requiring an employee on leave under § 40.1-33.2 to report periodically to the employer on the status and intention of the employee to return to work.

E. During any period that an eligible employee takes leave under § 40.1-33.2, the employer shall maintain coverage under any group health plan, as defined in 26 U.S.C. § 5000(b)(1), for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave. However, the employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under § 40.1-33.2 if the employee fails to return from such leave after the period of leave to which the employee is entitled has expired.

§ 40.1-33.5. Prohibited acts.

A. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this article.

B. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this article.

C. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual:

1. Has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this article;

2. Has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this article; or

3. Has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this article.

§ 40.1-33.6. Enforcement of article; civil penalties.

A. Any employer who commits any act prohibited pursuant to § 40.1-33.5 shall be subject to a civil penalty of up to \$1,000 for an initial violation and \$5,000 for each subsequent violation.

B. All procedural rights guaranteed to employers pursuant to § 40.1-49.4 shall apply to the penalties set under this section.

C. Investigation and enforcement for violations of this article shall be carried out by the Department of Labor and Industry. Prosecutions under this article shall be the responsibility of the Office of the Attorney General. Civil penalties imposed for violation of this article shall be paid into the general fund.

§ 40.1-33.7. Private right of action.

A. Any employer who commits any act prohibited pursuant to § 40.1-33.5 shall be liable to any eligible employee affected for damages equal to:

1. The amount of:

a. Any wages, salary, employment benefits, or other compensation denied to or lost by such employee by reason of the violation; or

b. In a case in which wages, salary, employment benefits, or other compensation has not been denied to or lost by the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks, or 26 weeks in a case involving leave under subsection B or C of § 40.1-33.2, of wages or salary for the employee;

2. The interest on the amount described in subdivision 1 calculated at the legal rate; and

3. An additional amount as liquidated damages equal to the sum of the amount described in subdivision 1 and the interest described in subdivision 2, except that if the employer proves to the satisfaction of the court that the act or omission that violated § 40.1-33.5 was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of § 40.1-33.5, the court may, in its discretion, reduce the amount of the liability to the amount and interest determined under subdivisions 1 and 2, respectively.

An eligible employee affected by his employer's violation shall also be entitled to such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

**182**     *B. An action to recover the damages or equitable relief prescribed in subsection A may be*  
**183**     *maintained against any employer, including a public agency, in any court of competent jurisdiction. The*  
**184**     *court in such an action shall, in addition to any judgment awarded to the plaintiff, allow reasonable*  
**185**     *attorney fees, reasonable expert witness fees, and other costs of the action to be paid by the defendant.*