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HOUSE BILL NO. 40

Offered January 10, 2018

Prefiled November 29, 2017

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 60.2-813, relating to a family and medical leave insurance program; funding by employee and employer taxes.

Patrons—Levine, Boysko, Convirs-Fowler, Delaney, Gooditis, Guzman, Hope, Hurst, Jones, J.C., Lopez, Murphy, Rodman, Roem, Simon, Tyler and VanValkenburg

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 Title 60.2 a chapter numbered 8, consisting of sections numbered 60.2-800 through 60.2-813, as follows:

CHAPTER 8.**FAMILY AND MEDICAL LEAVE INSURANCE PROGRAM.****§ 60.2-800. Definitions.**

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

"Caregiving day" means, with respect to an individual, a calendar day in which the individual engaged in qualified caregiving.

"Family and medical leave insurance benefit" means the wage replacement payments provided under this chapter to an employee who is taking family leave.

"Fund" means the Family and Medical Leave Insurance Fund established pursuant to § 60.2-811.

"Initial waiting period" means a period beginning with the first caregiving day of an individual occurring during the individual's benefit period and ending after the earlier of:

1. The fifth caregiving day of the individual occurring during the benefit period; or

2. The month preceding the first month in the benefit period during which there occurs not fewer than 15 caregiving days of the individual.

"Program" means the Family and Medical Leave Insurance Program established pursuant to this chapter.

"Qualified caregiving" means any activity engaged in by an individual, other than regular employment, for a reason for which an eligible employee would be entitled to leave under subparagraphs (A) through (E) of paragraph (1) of § 102(a) of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a).

"Sixty-day limitation period" means a period:

1. Beginning with the first caregiving day of an individual occurring during the individual's benefit period and after the expiration of the individual's five-day waiting period, if applicable; and

2. Ending with the sixtieth caregiving day of the individual occurring during the benefit period and after the expiration of the five-day waiting period, disregarding any caregiving day of the individual occurring during any month in the benefit period after the first 20 caregiving days of the individual occurring during such month.

§ 60.2-801. Family and medical leave insurance benefit payments.

A. To the extent that sufficient moneys in the Fund are available for such purpose, every individual shall be entitled to a family and medical leave insurance benefit for each month in the benefit period specified in subsection C, not to exceed 60 caregiving days per benefit period, if the individual:

1. Is insured for disability insurance benefits as determined under § 223(c) of the Social Security Act, 42 U.S.C. § 423(c), at the time such individual's application is filed;

2. Has earned income from employment during the 12 months prior to the month in which the application is filed;

3. Has filed an application for a family and medical leave insurance benefit in accordance with subsection D; and

4. Was engaged in qualified caregiving, or anticipates being so engaged, during the period that begins 90 days before the date on which such application is filed or within 30 days after such date.

B. Except as otherwise provided in this subsection, the family and medical leave insurance benefit amount to which an individual is entitled under this section for a month shall be an amount equal to the greater of:

1. The lesser of one-eighteenth of the wages and self-employment income of the individual for the calendar year in which such wages and self-employment income are the highest among the most recent

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58 *three calendar years, or the maximum benefit amount determined under subsection C; or*

59 *2. The minimum benefit amount determined under subsection C, multiplied by the quotient (not*
60 *greater than one) obtained by dividing the number of caregiving days of the individual in such month by*
61 *20.*

62 *C. For individuals who initially become eligible for family and medical leave insurance benefits in:*

63 *1. The first full calendar year after the date of enactment of this act, the maximum monthly benefit*
64 *amount and the minimum monthly benefit amount shall be \$4,000 and \$580, respectively; or*

65 *2. Any calendar year after such first full calendar year the maximum benefit amount and the*
66 *minimum benefit amount shall be, respectively, the product of the corresponding amount determined*
67 *with respect to the first calendar year under subdivision C 1 and the quotient obtained by dividing:*

68 *a. The national average wage index as defined in § 209(k)(1) of the Social Security Act, 42 U.S.C.*
69 *§ 409(k)(1), for the second calendar year preceding the first calendar year for which the determination*
70 *is made, by;*

71 *b. The national average wage index for 2017.*

72 *D. Any calendar day during an individual's benefit period that occurs:*

73 *1. Before the expiration of an initial waiting period shall not be taken into account under this*
74 *subsection as a caregiving day of the individual; or*

75 *2. After the expiration of a 60-day limitation period shall not be taken into account under this*
76 *subsection as a caregiving day of the individual.*

77 *E. A benefit under this section for a month shall be reduced by the amount, if any, in periodic*
78 *benefits received by the individual pursuant to Chapter 6 (§ 60.2-600 et seq.) or Title 65.2.*

79 **§ 60.2-802. Benefit period.**

80 *A. Except as provided in subsection B, the benefit period shall begin on the first day of the first*
81 *month in which the individual meets the criteria specified in subsections A, B, and C of § 60.2-801 and*
82 *shall end on the date that is 365 days after the first day of the benefit period.*

83 *B. In the case of an application for benefits under this chapter for qualified caregiving in which the*
84 *individual was engaged at any time during the 90-day period preceding the date on which such*
85 *application is submitted, the benefit period shall begin on the later of:*

86 *1. The first day of the first month in which the individual engaged in such qualified caregiving; or*

87 *2. The first day of the first month that begins during such 90-day period, and shall end on the date*
88 *that is 365 days after the first day of the benefit period.*

89 **§ 60.2-803. Application for benefits.**

90 *An application for a family and medical leave insurance benefit shall include:*

91 *1. A statement that the individual was engaged in qualified caregiving, or anticipates being so*
92 *engaged, during the period that begins 90 days before the date on which the application is submitted or*
93 *within 30 days after such date;*

94 *2. If the qualified caregiving described in the statement in subdivision 1 is engaged in by the*
95 *individual because of a serious health condition of the individual or a relative of the individual, a*
96 *certification, issued by the health care provider treating such serious health condition, that affirms the*
97 *information specified in subdivision 1 and contains such information as the Commission shall specify in*
98 *regulations, which shall be no more than the information that is required to be stated under § 103(b) of*
99 *the Family and Medical Leave Act of 1993, 29 U.S.C. § 2613(b);*

100 *3. If such qualified caregiving is engaged in by the individual for any other authorized reason, a*
101 *certification, issued by a relevant authority determined under regulations issued by the Commissioner,*
102 *that affirms the circumstances giving rise to such reason; and*

103 *4. An attestation from the applicant that his employer has been provided with written notice of the*
104 *individual's intention to take family or medical leave, if the individual has an employer, or to the*
105 *Commission in all other cases.*

106 **§ 60.2-804. Ineligibility; disqualification.**

107 *A. An individual shall be ineligible for a benefit under this section for any month for which the*
108 *individual is entitled to benefits under § 202 or 223 of the Social Security Act, 42 U.S.C. § 402 or 423,*
109 *or benefits under title XVI of the Social Security Act, 42 U.S.C. § 1381 et seq., based on such*
110 *individual's status as a disabled individual as determined under § 1614 of the Social Security Act, 42*
111 *U.S.C. § 1382c.*

112 *B. An individual who has been convicted of a violation under § 208 of the Social Security Act, 42*
113 *U.S.C. § 408, or who has been found to have used false statements to secure benefits under this chapter,*
114 *shall be ineligible for benefits under this section for a one-year period following the date of such*
115 *conviction.*

116 **§ 60.2-805. Review of eligibility and benefit payment determinations.**

117 *A. The Commission shall provide notice to an individual applying for benefits under this chapter of*
118 *the initial determination of eligibility for such benefits, and the estimated benefit amount for a month in*
119 *which one caregiving day of the individual occurs, as soon as practicable after the application is*

received.

B. An individual may request review of an initial adverse determination with respect to such application at any time before the end of the 20-day period that begins on the date notice of such determination is received, except that such 20-day period may be extended for good cause. As soon as practicable after the individual requests review of the determination, the Commission shall provide notice to the individual of a final determination of eligibility for benefits under this chapter.

C. The Commission shall make any monthly benefit payment to an individual claiming benefits for a month under this chapter, or provide notice of the reason such payment will not be made if the Commissioner determines that the individual is not entitled to payment for such month, not later than 20 days after the individual's monthly benefit claim report for such month is received. Such monthly report shall be filed with the Commission not later than 15 days after the end of each month.

D. If the Commission determines that payment will not be made to an individual for a month, or if the Commission determines that payment shall be made based on a number of caregiving days in the month inconsistent with the number of caregiving days in the monthly benefit claim report of the individual for such month, the individual may request review of such determination at any time before the end of the 20-day period that begins on the date notice of such determination is received, except that such 20-day period may be extended for good cause. Not later than 20 days after the individual requests review of the determination, the Commission shall provide notice to the individual of a final determination of payment for such month, and shall make payment to the individual of any additional amount not included in the initial payment to the individual for such month to which the Commission determines the individual is entitled.

E. An application for benefits under this chapter and a monthly benefit claim report of an individual shall each be presumed to be true and accurate, unless the Commission demonstrates by a preponderance of the evidence that information contained in the application is false.

F. As used in this section, "monthly benefit claim report" means, with respect to an individual for a month, the individual's report to the Commission of the number of caregiving days of the individual in such month, which shall be filed no later than 15 days after the end of each month.

G. All final determinations of the Commission under this section shall be reviewable according to the procedures in the Administrative Process Act (§ 2.2-4000 et seq.).

§ 60.2-806. Relationship with employer benefits.

Nothing in this chapter shall be construed to diminish the obligation of an employer to comply with any contract, collective bargaining agreement, or employment benefit program or plan that provides greater paid leave or other leave rights to employees than the rights established under this chapter.

§ 60.2-807. Prohibited conduct; enforcement.

A. No person shall discharge or in any other manner discriminate against an individual because the individual has applied for, indicated an intent to apply for, or received family and medical leave insurance benefits under this chapter.

B. A person who is discharged or otherwise discriminated against in violation of subsection A may bring an action in a circuit court having jurisdiction over the employer or person who allegedly discharged or otherwise discriminated against the employee in violation of this section. The court shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief, including actual damages and attorney fees to successful claimants and the rehiring or reinstatement of the employee, with back pay plus interest at the judgment rate as provided in § 6.2-302.

§ 60.2-808. Powers and duties.

The Commissioner shall have the following powers and duties:

1. To promulgate regulations relative to the operation of the Program;
2. To create all necessary applications and certificates to fulfill the purposes of this chapter;
3. To disseminate information regarding the Program to employers and carry out a public education program to inform employees and employers about the availability of benefits under the Program; and
4. To inform employees of the benefits available under the Program. The Commissioner shall require each employer to post and maintain information regarding the Program.

§ 60.2-809. Fraud and misrepresentation of benefits; penalty.

If the Commissioner finds that any employee falsely certifies any information provided to the Commission in order to obtain family leave insurance benefits, with the intent to defraud, the Commissioner shall assess a penalty against the employee in the amount of 25 percent of the benefits paid as a result of the false certification.

§ 60.2-810. Receipt of federal funds.

To the extent that funds are made available by the federal government under Title III of the Social Security Act (42 U.S.C. § 501 et seq.), or otherwise for such purpose, the expenses of administering this chapter shall be paid from those funds, provided that this section shall not be considered to permit any expenditure of funds from the employment security administration account contrary to applicable law. In

181 *the event that the Social Security Act is amended to permit funds granted under Title III to be used to*
182 *pay expenses of administering a family leave program, then from and after the effective date of that*
183 *amendment, the expenses of administering this chapter shall be paid out of the employment security*
184 *administration account or any other account or fund in which funds granted under Title III are*
185 *deposited.*

186 **§ 60.2-811. Family and Medical Leave Insurance Fund.**

187 A. There is hereby created in the state treasury a special nonreverting fund to be known as the
188 Family and Medical Leave Insurance Fund. The Fund shall be established on the books of the
189 Comptroller. All assessments and other moneys required by this chapter to be paid to the Fund and
190 collected by the Commission, and any interest or earnings upon any moneys or property belonging to
191 the Fund shall, promptly upon collection, be paid into the state treasury and credited to the Fund. Any
192 moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert
193 to the general fund but shall remain in the Fund. Moneys in the Fund shall be used solely for the
194 purposes of paying family and medical leave insurance benefits to individuals as provided pursuant to
195 this chapter or for administration of the Fund. Refunds may be paid from the Fund. Family and medical
196 leave insurance benefits shall not be paid from any source other than the Fund.

197 B. Moneys shall be requisitioned from the Fund solely for the payment of family and medical leave
198 insurance benefits and in accordance with regulations prescribed by the Commission. All benefits shall
199 be paid through public employment offices provided for in this title.

200 C. All payments and disbursements from the Fund shall be made by the State Treasurer upon
201 warrants of the Comptroller issued upon vouchers signed by the Commissioner or by such other person
202 as the Commissioner may designate for that purpose.

203 **§ 60.2-812. Employee and employer tax assessed; collection.**

204 A. In addition to other taxes, there is hereby imposed on the income of every individual a tax equal
205 to 0.2 percent of the wages received by the individual with respect to employment.

206 B. In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect
207 to having individuals in his employ, equal to 0.2 percent of the wages paid in any calendar year by the
208 employer with respect to their employment.

209 C. Employers shall report, collect, and remit to the Commission any tax assessed pursuant to this
210 chapter in the manner that employers are required to report, collect, and remit taxes pursuant to
211 Articles 2 (§ 60.2-511 et seq.) and 3 (§ 60.2-519 et seq.) of Chapter 5.

212 D. All taxes assessed pursuant to this chapter withheld by any employer from employees in
213 accordance with the provisions of this chapter, and all assessments payable by any employer, shall
214 constitute a trust fund for the Commonwealth until paid to the Commissioner. That trust shall be
215 enforceable against (i) the employer; (ii) any officer, agent, servant, or employee of any corporate
216 employer responsible for either the withholding or payment, or both, of the assessment; and (iii) any
217 person receiving any part of the Fund without consideration, or knowing that the employer or any
218 officer, agent, servant, or employee of any corporate employer is committing a breach of trust.

219 **§ 60.2-813. Application of other provisions, mutatis mutandis.**

220 The provisions of §§ 60.2-206, 60.2-500, 60.2-508, 60.2-509, and 60.2-514, Article 3 (§ 60.2-519 et
221 seq.) of Chapter 5, §§ 60.2-600, 60.2-605, 60.2-606, 60.2-608, 60.2-608.1, 60.2-608.2, 60.2-614,
222 60.2-615, and 60.2-616, and Articles 5 (§ 60.2-619 et seq.) and 6 (§ 60.2-632 et seq.) of Chapter 6 shall
223 apply to this chapter, mutatis mutandis, except as provided in this chapter and except that whenever the
224 term (i) "benefit" is used in the sections, the term shall include money payments payable to an employee
225 with respect to family and medical leave insurance benefits provided pursuant to this chapter and (ii)
226 "taxes" is used in the sections, the term shall include taxes payable pursuant to § 60.2-812. The
227 Commissioner shall promulgate regulations to interpret and clarify the applicability of the provisions of
228 §§ 60.2-206, 60.2-500, 60.2-508, 60.2-509, and 60.2-514, Article 3 (§ 60.2-519 et seq.) of Chapter 5,
229 §§ 60.2-600, 60.2-605, 60.2-606, 60.2-608, 60.2-608.1, 60.2-608.2, 60.2-614, 60.2-615, and 60.2-616,
230 and Articles 5 (§ 60.2-619 et seq.) and 6 (§ 60.2-632 et seq.) of Chapter 6 to the provisions of this
231 chapter.

232 **2. That the provisions of this act shall become effective on January 1, 2019.**