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SENATE BILL NO. 712

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Education and Health
on February 6, 2020)

(Patron Prior to Substitute—Senator McClellan)

A BILL to amend and reenact §§ 2.2-520, 2.2-3901, and 2.2-3903 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 39 of Title 2.2 a section numbered 2.2-3904, relating to the Virginia Human Rights Act; discrimination on the basis of pregnancy, childbirth, or related medical conditions; reasonable accommodation for the known limitations of persons related to pregnancy, childbirth, or related medical conditions.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-520, 2.2-3901, and 2.2-3903 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 39 of Title 2.2 a section numbered 2.2-3904 as follows:

§ 2.2-520. Division of Human Rights created; duties.

A. There is created in the Department of Law a Division of Human Rights (the Division) to assist in the prevention of and relief from alleged unlawful discriminatory practices.

B. The duties of the Division shall be to:

1. Receive, investigate, seek to conciliate, refer to another agency, hold hearings pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq.), and make findings and recommendations upon complaints alleging unlawful discriminatory practices;

2. Adopt, promulgate, amend, and rescind regulations consistent with this article pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq.). However, the Division shall not have the authority to adopt regulations on a substantive matter when another state agency is authorized to adopt such regulations;

3. Inquire into incidents that may constitute unlawful acts of discrimination or unfounded charges of unlawful discrimination under state or federal law and take such action within the Division's authority designed to prevent such acts;

4. Seek through appropriate enforcement authorities, prevention of or relief from an alleged unlawful discriminatory practice;

5. Appoint and compensate qualified hearing officers from the list of hearing officers maintained by the Executive Secretary of the Supreme Court of Virginia;

6. Promote creation of local commissions to aid in effectuating the policies of this article and to enter into cooperative worksharing or other agreements with federal agencies or local commissions, including the deferral of complaints of discrimination to federal agencies or local commissions;

7. Make studies and appoint advisory councils to effectuate the purposes and policies of the article and to make the results thereof available to the public;

8. Accept public grants or private gifts, bequests, or other payments, as appropriate; and

9. Furnish technical assistance upon request of persons subject to this article to further comply with the article or an order issued thereunder; and

10. Develop instructional courses and conduct ongoing educational efforts to inform employers, employees, and applicants of their rights and obligations under § 2.2-3904 related to nondiscrimination in employment on the basis of pregnancy, childbirth, or related medical conditions and the provision of reasonable accommodation to persons with known limitations related to pregnancy, childbirth, or related medical conditions.

§ 2.2-3901. Unlawful discriminatory practice and gender discrimination defined.

Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability shall be an "unlawful discriminatory practice" for the purposes of this chapter.

The terms "because of sex or gender" or "on the basis of sex or gender" or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of pregnancy, childbirth or related medical conditions, *including lactation*. Women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all purposes as persons not so affected but similar in their abilities or disabilities.

For purposes of this chapter, "lactation" means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.

§ 2.2-3903. Causes of action for unlawful discharge on the basis of race, color, religion, national origin, sex, or age; other causes of action not created.

60 A. Nothing in this chapter or in Article 4 (§ 2.2-520 et seq.) of Chapter 5 creates, nor shall it be
61 construed to create, an independent or private cause of action to enforce its provisions, except as
62 specifically provided in subsections B and C and § 2.2-3904.

63 B. No employer employing more than five but less than 15 persons shall discharge any such
64 employee on the basis of race, color, religion, national origin, or sex; pregnancy, childbirth or related
65 medical conditions, including lactation. No employer employing more than five but less than 20 persons
66 shall discharge any such employee on the basis of age if the employee is 40 years of age or older. For
67 the purposes of this section, "lactation" means a condition that may result in the feeding of a child
68 directly from the breast or the expressing of milk from the breast.

69 C. The employee may bring an action in a general district or circuit court having jurisdiction over
70 the employer who allegedly discharged the employee in violation of this section. Any such action shall
71 be brought within 300 days from the date of the discharge or, if the employee has filed a complaint
72 with the Division of Human Rights of the Department of Law or a local human rights or human
73 relations agency or commission within 300 days of the discharge, such action shall be brought within 90
74 days from the date that the Division or a local human rights or human relations agency or commission
75 has rendered a final disposition on the complaint. The court may award up to 12 months' back pay with
76 interest at the judgment rate as provided in § 6.2-302. However, if the court finds that either party
77 engaged in tactics to delay resolution of the complaint, it may (i) diminish the award or (ii) award back
78 pay to the date of judgment without regard to the 12-month limitation.

79 In any case where the employee prevails, the court shall award attorney fees from the amount
80 recovered, not to exceed 25 percent of the back pay awarded. The court shall not award other damages,
81 compensatory or punitive, nor shall it order reinstatement of the employee.

82 D. Causes of action based upon the public policies reflected in this chapter shall be exclusively
83 limited to those actions, procedures, and remedies, if any, afforded by applicable federal or state civil
84 rights statutes or local ordinances. Nothing in this section or § 2.2-3900 or 2.2-3904 shall be deemed to
85 alter, supersede, or otherwise modify the authority of the Division or of any local human rights or
86 human relations commissions established pursuant to § 15.2-853 or 15.2-965.

87 **§ 2.2-3904. Causes of action for unlawful discrimination related to pregnancy, childbirth, or**
88 **related medical conditions.**

89 A. As used in this section:

90 "Employer" means any person, or agent of such person, employing five or more employees for each
91 working day in each of 20 or more calendar weeks in the current or preceding calendar year.

92 "Lactation" means lactation as defined in § 2.2-3901.

93 "Reasonable accommodation" includes more frequent or longer bathroom breaks, breaks to express
94 breast milk, access to a private location other than a bathroom for the expression of breast milk,
95 acquisition or modification of equipment or access to or modification of employee seating, a temporary
96 transfer to a less strenuous or hazardous position, assistance with manual labor, job restructuring, a
97 modified work schedule, light duty assignments, and leave to recover from childbirth.

98 "Related medical conditions" includes lactation.

99 B. No employer shall:

100 1. Fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to
101 such individual's compensation, terms, conditions, or privileges of employment on the basis of
102 pregnancy, childbirth, or related medical conditions.

103 2. Refuse to make reasonable accommodation to the known limitations of a person related to
104 pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the
105 accommodation would impose an undue hardship on the employer.

106 a. In determining whether an accommodation would constitute an undue hardship on the employer,
107 the following shall be considered:

108 (1) Hardship on the conduct of the employer's business, considering the nature of the employer's
109 operation, including composition and structure of the employer's workforce;

110 (2) The size of the facility where employment occurs; and

111 (3) The nature and cost of the accommodations needed.

112 b. The fact that the employer provides or would be required to provide a similar accommodation to
113 other classes of employees shall create a rebuttable presumption that the accommodation does not
114 impose an undue hardship on the employer.

115 3. Take adverse action against an employee who requests or uses a reasonable accommodation
116 pursuant to this section. As used in this subdivision, "adverse action" includes failure to reinstate any
117 such employee to her previous position or an equivalent position with equivalent pay, seniority, and
118 other benefits when her need for a reasonable accommodation ceases.

119 4. Deny employment or promotion opportunities to an otherwise qualified applicant or employee
120 because such employer will be required to make reasonable accommodation to the known limitations of
121 such applicant or employee related to pregnancy, childbirth, or related medical conditions.

122 5. Require an employee to take leave if another reasonable accommodation can be provided to the
123 known limitations related to the pregnancy, childbirth, or related medical conditions of such employee.

124 C. Each employer shall engage in a timely, good faith interactive process with an employee who has
125 requested an accommodation pursuant to this section to determine if the requested accommodation is
126 reasonable and, if such accommodation is determined not to be reasonable, discuss alternative
127 accommodations that may be provided.

128 D. An employer shall post in a conspicuous location and include in any employee handbook
129 information concerning (i) the prohibition against unlawful discrimination on the basis of pregnancy,
130 childbirth, or related medical conditions and (ii) an employee's rights to reasonable accommodation for
131 known limitations related to pregnancy, childbirth, or related medical conditions. Such information shall
132 also be directly provided to (a) new employees upon commencement of their employment and (b) any
133 employee within 10 days of such employee's providing notice to the employer that she is pregnant.

134 E. An employee or applicant who has been denied any of the rights afforded under subsection B may
135 bring an action in a general district or circuit court having jurisdiction over the employer that allegedly
136 denied such rights. Any such action shall be brought within two years from the date of the unlawful
137 denial of rights, or, if the employee or applicant has filed a complaint with the Division of Human
138 Rights of the Department of Law or a local human rights or human relations agency or commission
139 within two years of the unlawful denial of rights, such action shall be brought within 90 days from the
140 date that the Division or a local human rights or human relations agency or commission has rendered a
141 final disposition on the complaint.

142 If the court or jury finds that an unlawful denial of rights afforded under subsection B has occurred,
143 the court or jury may award to the plaintiff, as the prevailing party, compensatory damages, back pay,
144 and other equitable relief. The court may also award reasonable attorney fees and costs and may grant
145 as relief any permanent or temporary injunction, temporary restraining order, or other order, including
146 an order enjoining the defendant from engaging in such practice, or order such affirmative action as
147 may be appropriate.

148 F. The provisions of this section regarding the provision of reasonable accommodation for known
149 limitations related to pregnancy, childbirth, and related medical conditions shall not be construed to
150 affect any other provision of law relating to discrimination on the basis of sex or pregnancy.

151 **2. That all employers shall provide the notice required by subsection D of § 2.2-3904 of the Code**
152 **of Virginia, as created by this act, to all existing employees of such employer within 120 days of**
153 **the effective date of this act.**