

VIRGINIA ACTS OF ASSEMBLY -- 2023 RECONVENED SESSION

CHAPTER 751

An Act to amend the Code of Virginia by adding in Chapter 3 of Title 40.1 an article numbered 2.2, consisting of sections numbered 40.1-33.7 through 40.1-33.12, relating to unpaid organ donation leave; required; civil penalty.

[S 1086]

Approved April 12, 2023

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 2.2, consisting of sections numbered 40.1-33.7 through 40.1-33.12, as follows:

Article 2.2.

Organ Donation Leave.

§ 40.1-33.7. Definitions.

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

"Eligible employee" means an individual who has requested that an employer provide organ donation leave and who, as of the date that the requested organ donation leave begins, will have been employed by that employer for at least (i) a 12-month period and (ii) 1,250 hours during the previous 12 months.

"Employer" means any employer as defined in § 40.1-2 that employs 50 or more 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.

"Organ donation leave" means leave of an eligible employee for the purpose of donating one or more of such employee's human organs, including bone marrow, to be medically transplanted into the body of another individual.

§ 40.1-33.8. Organ donation leave.

A. An employer shall provide an eligible employee (i) up to 60 business days of unpaid organ donation leave in any 12-month period to serve as an organ donor and (ii) up to 30 business days of unpaid organ donation leave in any 12-month period to serve as a bone marrow donor.

B. To receive organ donation leave, the eligible employee shall provide written physician verification to the employer that (i) the eligible employee is an organ donor or a bone marrow donor and (ii) there is a medical necessity for the donation of the organ or bone marrow.

C. No employee shall take organ donation leave concurrently with leave taken under the federal Family and Medical Leave Act (29 U.S.C. § 2601 et seq.).

D. Nothing in this article shall be construed to:

1. Discourage an employer from adopting or retaining leave policies more generous than required by this article;

2. Except as provided in subsection C, prohibit an employee from taking paid sick leave or other paid time off to which the employee is otherwise entitled in addition to or in lieu of organ donation leave; or

3. Diminish the obligation of an employer to comply with a collective bargaining agreement or an employment benefit program or plan that provides an amount of organ donation leave sufficient to meet the requirements of this article and that may be used for the same purposes and under the same conditions as organ donation leave under this article.

§ 40.1-33.9. Employee's right to benefits; restoration of position.

A. No employer shall consider any period of time during which an eligible employee takes organ donation leave to be a break in the eligible employee's continuous service for the purpose of the eligible employee's right to salary adjustments, sick leave, vacation, paid time off, annual leave, seniority, or other employee benefits.

B. An eligible employee who returns to work after taking organ donation leave shall be entitled to restoration by the employer of (i) the position of employment held by the eligible employee when the organ donation leave began or (ii) an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. An employer may deny restoration of the eligible employee's position of employment under this subsection because of conditions unrelated to the exercise of rights established under this article.

§ 40.1-33.10. Health benefit plan; commission.

A. During any period that an eligible employee takes organ donation leave, an employer shall maintain coverage of a health benefit plan for the duration of the organ donation leave and in the same manner that coverage would have been provided if the eligible employee had continued in employment continuously for the duration of the organ donation leave.

B. If an eligible employee works on a commission basis, an employer shall pay to the eligible employee during any period of organ donation leave any commission that becomes due because of work the eligible employee performed before taking organ donation leave.

§ 40.1-33.11. Retaliatory action prohibited.

No employer shall discharge, discipline, threaten, discriminate against, or penalize an employee, or take other retaliatory action regarding an employee's compensation, terms, conditions, location, or privileges of employment, because the employee (i) has requested or exercised the benefits provided for in this article or (ii) has alleged a violation of this article.

§ 40.1-33.12. Enforcement; civil penalty.

A. The Commissioner shall enforce the provisions of this article and shall adopt appropriate guidance for the implementation and enforcement of this article.

B. Any person alleging a violation of this article shall have the right to file a complaint with the Commissioner within one year of the date the person knew or should have known of the alleged violation. The Commissioner shall encourage reporting pursuant to this subsection by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the employee or other person reporting the violation, provided, however, that with the authorization of such person, the Commissioner may disclose the person's name and identifying information as necessary to enforce this article or for other appropriate purposes.

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

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

E. Any such employer who knowingly violates this article shall be subject to a civil penalty not to exceed \$1,000 for the first violation and, for subsequent violations that occur within two years of any previous violation, not to exceed \$2,500 for the second violation and not to exceed \$5,000 for each successive violation. In determining the amount of any civil penalty to be imposed, the Commissioner shall consider the size of the business of the employer charged and the gravity of the violation. The decision of the Commissioner shall be final.

F. 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.