

23103114D

**HOUSE BILL NO. 1988**

Offered January 11, 2023

Prefiled January 10, 2023

*A BILL to amend and reenact §§ 40.1-27.3 and 40.1-33.3 through 40.1-33.6 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 40.1-33.5:1 and 40.1-33.5:2 and by adding in Article 2.1 of Chapter 3 of Title 40.1 a section numbered 40.1-33.7, relating to employment; paid sick leave; civil penalties.*

Patrons—Guzman, Adams, D.M., Bennett-Parker, Clark, Hope, Jenkins, Kory, Krizek, Maldonado and Simon

Referred to Committee on Commerce and Energy

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

**1. That §§ 40.1-27.3 and 40.1-33.3 through 40.1-33.6 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 40.1-33.5:1 and 40.1-33.5:2 and by adding in Article 2.1 of Chapter 3 of Title 40.1 a section numbered 40.1-33.7 as follows:**

**§ 40.1-27.3. Retaliatory action against employee prohibited.**

A. An employer shall not 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:

1. Or a person acting on behalf of the employee in good faith reports a violation of any federal or state law or regulation to a supervisor or to any governmental body or law-enforcement official;

2. Is requested by a governmental body or law-enforcement official to participate in an investigation, hearing, or inquiry;

3. Refuses to engage in a criminal act that would subject the employee to criminal liability;

4. Refuses an employer's order to perform an action that violates any federal or state law or regulation and the employee informs the employer that the order is being refused for that reason; or

5. Exercises rights provided pursuant to Article 2.1 (§ 40.1-33.3 et seq.); or

6. Provides information to or testifies before any governmental body or law-enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

B. This section does not:

1. Authorize an employee to make a disclosure of data otherwise protected by law or any legal privilege;

2. Permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth; or

3. Permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law.

C. A person who alleges a violation of this section may bring a civil action in a court of competent jurisdiction within one year of the employer's prohibited retaliatory action. The court may order as a remedy to the employee (i) an injunction to restrain continued violation of this section, (ii) the reinstatement of the employee to the same position held before the retaliatory action or to an equivalent position, and (iii) compensation for lost wages, benefits, and other remuneration, together with interest thereon, as well as reasonable attorney fees and costs.

**§ 40.1-33.3. Definitions.**

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

"Employee" means a home health worker who works on average at least 20 hours per week or 90 hours per month. "Employee" does not include an individual who (i) is licensed, registered, or certified by a health regulatory board within the Department of Health Professions; (ii) is employed by a hospital licensed by the Department of Health; and (iii) works, on average, no more than 30 hours per month.

"Employer" has the same meaning as provided in § 40.1-2. Notwithstanding the provisions of § 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.

"Family member" means:

1. Regardless of age, a biological child, adopted or foster child, stepchild, legal ward, child to whom the employee stands in loco parentis, or individual to whom an employee stood in loco parentis when the individual was a minor;

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58 2. A biological parent, foster parent, stepparent, adoptive parent, legal guardian of an employee or an  
59 employee's spouse, or individual who stood in loco parentis to an employee when the employee or  
60 employee's spouse was a minor child;

61 3. An individual to whom an employee is legally married under the laws of any state;

62 4. A grandparent, grandchild, or sibling, whether of a biological, foster, adoptive, or step relationship,  
63 of an employee or the employee's spouse;

64 5. An individual for whom an employee is responsible for providing or arranging care, including  
65 helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment; or

66 6. Any other individual related by blood or affinity whose close association with an employee is the  
67 equivalent of a family relationship.

68 *"Health care professional" means any person licensed under federal or state law to provide medical  
69 or emergency services, including physicians, nurses, and emergency room personnel.*

70 *"Home health worker" means an individual who provides personal care, respite, or companion  
71 services to an individual who receives consumer-directed services under the state plan for medical  
72 assistance services.*

73 *"Paid sick leave" means leave that is compensated at the same hourly rate and with the same  
74 benefits, including health care benefits, as an employee normally earns during hours worked and is  
75 provided by an employer to an employee for the purposes described in § 40.1-33.5; however, such  
76 hourly rate shall not be less than the minimum wage amount set forth in § 40.1-28.10 without reduction  
77 for any tip credit that the employer would otherwise be permitted to claim.*

78 *"Retaliatory personnel action" means a denial of any benefit provided pursuant to this article; any  
79 threat, discharge, suspension, demotion, or reduction of hours; any report of or threat to report an  
80 employee's suspected citizenship or immigration status or the suspected citizenship or immigration status  
81 of a family member of the employee to an agency of federal, state, or local government; or the taking of  
82 any other adverse action against an employee as a result of the employee's exercise of any paid sick  
83 leave benefits, including the imposition of any sanction against an employee who is the recipient of  
84 public benefits, as a result of the employee's exercise of any benefit provided pursuant to this article.  
85 "Retaliatory personnel action" includes interference with or punishment for in any manner participating  
86 in or assisting an investigation, proceeding, or hearing under this article.*

87 **§ 40.1-33.4. Accrual of paid sick leave.**

88 A. All employees shall accrue a minimum of one hour of paid sick leave for every 30 hours worked.  
89 Paid sick leave shall be carried over to the year following the year in which it was accrued. An  
90 employee shall not accrue or use more than 40 hours of paid sick leave in a year, unless the employer  
91 selects a higher limit.

92 B. Employees who are exempt from overtime requirements under 29 U.S.C. § 213(a)(1) of the  
93 federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq., will be assumed to work 40 hours in each  
94 workweek for purposes of paid sick leave accrual unless their normal workweek is less than 40 hours, in  
95 which case paid sick leave accrues on the basis of that normal workweek.

96 C. Paid sick leave as provided in this section shall begin to accrue at the commencement of  
97 employment. An employer may provide all paid sick leave that an employee is expected to accrue in a  
98 year at the beginning of the year.

99 D. Any employer with a paid leave policy, such as a paid time off policy, that provides an employee  
100 an amount of paid leave sufficient to meet the requirements of this section and that may be used for the  
101 same purposes and under the same conditions as paid sick leave under this article shall not be required  
102 to provide additional paid sick leave to any employee that is eligible for paid leave under the policy.

103 E. *Paid sick leave may be carried over to the year following the year in which it was accrued.*

104 F. Any employer that has entered into a bona fide collective bargaining agreement that requires the  
105 employer to provide an amount of paid leave sufficient to meet the requirements of this section and that  
106 may be used for the same purposes and under the same conditions as paid sick leave under this article  
107 shall not be required to provide additional paid sick leave to any employee covered by such collective  
108 bargaining agreement.

109 G. *Nothing in this section shall be construed as requiring financial or other reimbursement to an  
110 employee from an employer upon the employee's termination, resignation, retirement, or other  
111 separation from employment for accrued paid sick leave that has not been used.*

112 H. *If an employee is transferred to a separate division, entity, or location but remains employed by  
113 the same employer, the employee is entitled to all paid sick leave accrued at the prior division, entity,  
114 or location and is entitled to use all paid sick leave as provided in this section. If an employee is  
115 separated from employment with an employer and the employee is rehired within 12 months of  
116 separation by the same employer, previously accrued paid sick leave that had not been used shall be  
117 reinstated. Further, the employee shall be entitled to use accrued paid sick leave and accrue additional  
118 paid sick leave at the recommencement of employment.*

119 I. *When a different employer succeeds or takes the place of an existing employer, all employees of*

the original employer who remain employed by the successor employer are entitled to all paid sick leave that they accrued when employed by the original employer and to use paid sick leave previously accrued.

J. At its discretion, an employer may loan paid sick leave to an employee in advance of accrual of paid sick leave by such employee.

K. Nothing in this article shall be construed to discourage or prohibit an employer from the adoption or retention of a more generous paid sick leave policy than outlined herein, and nothing in this article shall be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater accrual or use by employees of paid sick leave or that extends other protections to employees.

#### **§ 40.1-33.5. Use of paid sick leave.**

A. Paid sick leave shall be provided to an employee by an employer for:

1. An employee's mental or physical illness, injury, or health condition; an employee's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an employee's need for preventive medical care; or

2. Care of a family member with a mental or physical illness, injury, or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or care of a family member who needs preventive medical care; or

3. Closure of the employee's place of business by order of a public official due to a public health emergency or an employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency, or care for oneself or a family member when it has been determined by the health authorities having jurisdiction or by a health care professional that the employee's or family member's presence in the community may jeopardize the health of others because of his exposure to a communicable disease, whether or not the employee or family member has actually contracted the communicable disease.

B. Paid sick leave shall be provided upon the request of an employee. Such request may be made orally, in writing, by electronic means, or by any other means acceptable to the employer. When possible, the request shall include the expected duration of the absence.

C. When the use of paid sick leave is foreseeable, the employee shall make a good faith effort to provide notice of the need for such leave to the employer in advance of the use of the paid sick leave and shall make a reasonable effort to schedule the use of paid sick leave in a manner that does not unduly disrupt the operations of the employer.

D. An employer that requires notice of the need to use paid sick leave shall provide a written policy that contains procedures for its employees to provide notice. An employer that has not provided to an employee a copy of its written policy for providing such notice shall not deny paid sick leave to the employee based on noncompliance with such a policy.

E. An employer shall not require, as a condition of an employee's taking paid sick leave, that an employee search for or find a replacement worker to cover the hours during which the employee is using paid sick leave. An employer shall not require an employee to work an alternate shift to make up for the use of sick leave.

F. An employer may not require an employee to work an alternate shift to make up for the use of sick leave.

G. Upon mutual consent by the employee and the employer, an employee may work additional hours or shifts to compensate for hours or shifts during which the employee was absent from work without using accrued sick leave for the hours or shifts missed. However, the employer may not require the employee to work additional hours or shifts authorized by this subsection. If the employee works additional hours or shifts, the employer shall comply with any applicable federal, state, or local laws regarding overtime pay.

H. Paid sick leave 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. Employees may donate accrued sick leave to another employee if the other employee uses the donated sick leave for the purposes specified in this section and the employer has a policy that allows an employee to donate sick leave to a coworker for the purposes specified in this section.

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

#### **§ 40.1-33.5:1. Notice and posting; civil penalty.**

181 A. Each employer shall give its employees written notice of the following information at the  
182 commencement of employment:

183 1. That employees are entitled to paid sick leave and the amount of paid sick leave;

184 2. The terms of the use of paid sick leave provided under this article;

185 3. That retaliatory personnel action against employees who request or use paid sick leave is  
186 prohibited;

187 4. That each employee has the right to file a complaint or bring a civil action if paid sick leave as  
188 required by this article is denied by the employer or the employee is subjected to retaliatory personnel  
189 action for requesting or taking paid sick leave; and

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

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

195 C. The amount of paid sick leave available to the employee, the amount of paid sick leave taken by  
196 the employee to date in the year, and the amount of pay the employee has received as paid sick leave  
197 shall be recorded in, or on an attachment to, the employee's regular statement of earnings provided  
198 under § 40.1-29.

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

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

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

209 **§ 40.1-33.5:2. Employer records; confidentiality.**

210 A. Each employer shall retain records documenting the number of hours worked by employees and  
211 paid sick leave taken by employees for a period of three years and shall allow the Department access to  
212 such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the  
213 requirements of this article. When an issue arises as to an employee's entitlement to paid sick leave  
214 under this article, if the employer does not maintain or retain adequate records documenting hours  
215 worked by the employee and paid sick leave taken by the employee, or does not allow the Commissioner  
216 reasonable access to such records, it shall be presumed that the employer has violated this article,  
217 absent clear and convincing evidence otherwise.

218 B. An employer may not require disclosure of details of health information about an employee or an  
219 employee's family member as a condition of providing paid sick leave under this article. If an employer  
220 possesses health information about an employee or an employee's family member, such information shall  
221 be treated as confidential and not disclosed except to the affected employee or with the permission of  
222 the affected employee.

223 **§ 40.1-33.6. Retaliatory action prohibited; civil actions.**

224 A. No employer shall discharge, discipline, threaten, discriminate against, or penalize an employee, or  
225 take other retaliatory action regarding an employee's compensation, terms, conditions, location, or  
226 privileges of employment, because the employee (i) has requested or exercised the benefits provided for  
227 in this article or; (ii) has alleged a violation of this article; (iii) has participated in an investigation,  
228 hearing, or proceeding or cooperated with or assisted the Commissioner in investigations of any alleged  
229 violation of this article; or (iv) has informed any individual of such individual's potential benefits under  
230 this article.

231 B. Neither an employer nor any other person shall interfere with, restrain, or deny the exercise of,  
232 or the attempt to exercise, any benefit provided pursuant to this article. An employer's absence control  
233 policy shall not count earned paid sick time taken under this article as an absence that may lead to or  
234 result in discipline, discharge, demotion, suspension, or any other adverse action. Protections of this  
235 section shall apply to any person who mistakenly but in good faith alleges a violation of the provisions  
236 of this article.

237 C. An employee who is discharged, disciplined, threatened, discriminated against, or penalized or  
238 against whom other retaliatory action is taken in violation of this article shall be entitled to bring a  
239 civil action in a court of competent jurisdiction against an employer violating such provisions as  
240 provided by § 40.1-27.3. Such action may be brought by a person aggrieved by a violation of this  
241 article without first filing an administrative complaint; however, a recovery under this section shall be  
242 in lieu of any recovery under § 40.1-33.7. Upon prevailing in such an action, the employee aggrieved by

a violation of this article shall be entitled to any remedy ordered by the court under subsection C of § 40.1-27.3 and the following:

1. To recover (i) a sum equal to twice the total of (a) the amount of any paid sick leave and (b) the amount of any actual damages suffered as the result of an employer's violation of this article and (ii) reasonable attorney fees; and

2. 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.

D. 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.

E. 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 aggrieved employee knew or should have known of the violation.

**§ 40.1-33.7. Enforcement; civil penalties; actions to recover amounts on behalf of employees.**

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

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 section 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 the complainant notified regarding the status of his 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 \$150 for the first violation and, for subsequent violations that occur within two years of any previous violation, not to exceed \$300 for the second violation and not to exceed \$500 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. The Commissioner, with the written and signed consent of an employee, may institute a 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 paid sick leave 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 paid sick leave requested by an employee but unlawfully denied by the employer and not taken by the 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

304 4. In each instance of unlawful discharge from employment, for full compensation, including wages  
305 and benefits lost, an additional amount of \$1,500, and equitable relief, including reinstatement, as  
306 appropriate.

307 G. Upon entry of a final order of the Commissioner, or upon entry of a judgment of a court of  
308 competent jurisdiction, against the employer, the Commissioner or the court shall assess reasonable  
309 attorney fees.

310 H. The Department shall annually report on its website the number and nature of the complaints  
311 received pursuant to this article; the results of investigations undertaken pursuant to this article,  
312 including the number of complaints not substantiated and the number of notices of violations issued; the  
313 number and nature of adjudications pursuant to this article; and the average time for a complaint to be  
314 resolved pursuant to this article.

315 I. Any person aggrieved by a violation of this article may file a complaint with the Attorney General.  
316 The filing of a complaint with the Attorney General will not preclude the filing of a civil action under  
317 § 40.1-33.6. The Attorney General may bring a civil action to enforce the provisions of this article, in  
318 which action the Attorney General may seek injunctive relief of the imposition of civil penalties in such  
319 amounts as are authorized under this section.

320 J. Civil penalties owed under this article shall be paid to the Commissioner for deposit into the  
321 general fund. The Commissioner shall prescribe procedures for the payment of proposed assessments of  
322 civil penalties that are not contested by employers. Such procedures shall include provisions for an  
323 employer to consent to abatement of the alleged violation and to pay a proposed civil penalty or a  
324 negotiated sum in lieu of such civil penalty without admission of any civil liability arising from such  
325 alleged violation.

326 2. That the Department of Labor and Industry shall develop and implement a multilingual  
327 outreach program to inform employees, parents, and persons who are under the care of a health  
328 care professional about the availability of paid sick leave required to be provided pursuant to  
329 Article 2.1 (§ 40.1-33.3 et seq.) of Chapter 3 of Title 40.1 of the Code of Virginia, as amended by  
330 this act. This program shall include the distribution of notices and other written materials in  
331 English, Spanish, and any language that is the first language spoken by at least 10 percent of the  
332 Commonwealth's population to all child care and elder care providers, schools, and hospitals,  
333 community health centers, and other health care professionals.

334 3. That the provisions of this act shall become effective on January 1, 2024.