

SUBCOMMITTEE: SUBCOMMITTEE #1

1 HOUSE BILL NO. 898
 2 AMENDMENT IN THE NATURE OF A SUBSTITUTE
 3 (Proposed by the House Committee on Labor and Commerce
 4 on January 28, 2020)
 5 (Patron Prior to Substitute--Delegate Guzman)

6 A BILL to amend the Code of Virginia by adding a section numbered 40.1-27.3 and by adding in Chapter
 7 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.1 through 40.1-
 8 33.13, relating to employees; earned paid sick time; civil penalties.

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

10 **1. That the Code of Virginia is amended by adding a section numbered 40.1-27.3 and by adding in**
 11 **Chapter 3 of Title 40.1 an article numbered 2.1, consisting of sections numbered 40.1-33.1 through**
 12 **40.1-33.13, as follows:**

13 **§ 40.1-27.3. Discharge of employee for taking unpaid sick leave prohibited.**

14 A. No employer shall discharge, demote, or otherwise discriminate against an employee for being
 15 absent from work for any purpose set forth in subdivision A 1, 2, or 3 of § 40.1-33.3. An employer shall
 16 not be held in violation of this section if the employee's absence for such a reason exceeds 16 hours in any
 17 calendar year.

18 B. The provisions of subsection A apply only if the employee is not required to be compensated
 19 for such time off from work.

20 C. An employee who is discharged, demoted, or otherwise discriminated against in violation of
 21 subsection A shall be entitled to bring a civil action in a court of competent jurisdiction against an
 22 employer violating such provisions. Upon prevailing in such an action, the person aggrieved by a violation
 23 of this article shall be entitled to the remedies set out in subsection B of § 40.1-33.9.

24 Article 2.1.
 25 Healthy Working Families Act.

26 **§ 40.1-33.1. Definitions.**

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

28 "Earned paid sick time" means time that is compensated at the same hourly rate and with the same
29 benefits, including health care benefits, as an employee normally earns during hours worked and is
30 provided by an employer to an employee for the purposes described in § 40.1-33.3; however, such hourly
31 rate shall not be less than the minimum wage amount set forth in § 40.1-28.10 without reduction for any
32 tip credit that the employer would otherwise be permitted to claim.

33 "Employer" means any employer as defined in § 40.1-2 that employs 15 or more employees.
34 Notwithstanding § 40.1-2.1, "employer" includes the Commonwealth and its agencies, institutions, and
35 political subdivisions. "Employer" does not include any agency of the federal government.

36 "Family member" means:

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

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

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

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

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

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

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

52 "Retaliatory personnel action" means a denial of any benefit provided pursuant to this article; any
53 threat, discharge, suspension, demotion, reduction of hours, or report of or threat to report an employee's

54 suspected citizenship or immigration status or the suspected citizenship or immigration status of a family
55 member of the employee to an agency of federal, state, or local government; or the taking of any other
56 adverse action against an employee as a result of the employee's exercise of any benefit provided pursuant
57 to this article, including the imposition of any sanction against an employee who is the recipient of public
58 benefits, as a result of the employee's exercise of any benefit provided pursuant to by this article.
59 "Retaliatory personnel action" includes interference with or punishment for in any manner participating
60 in or assisting an investigation, proceeding, or hearing under this article.

61 "Year" means a regular and consecutive 12-month period as determined by the employer, except
62 that for the purposes of §§ 40.1-33.6 and 40.1-33.8, "year" means a calendar year.

63 **§ 40.1-33.2. Accrual of earned paid sick time.**

64 A. All employees shall accrue a minimum of one hour of earned paid sick time for every 30 hours
65 worked. An employee shall not use more than 40 hours of earned paid sick time in a year, unless the
66 employer selects a higher limit.

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

71 C. Earned paid sick time as provided in this section shall begin to accrue at the commencement of
72 employment or on January 1, 2021, whichever is later. An employer may provide all earned paid sick time
73 that an employee is expected to accrue in a year at the beginning of the year.

74 D. Employees shall not be entitled to use accrued earned paid sick time until the ninetieth calendar
75 day following commencement of their employment, unless otherwise permitted by the employer. On and
76 after the ninetieth calendar day of employment, employees may use earned paid sick time as it is accrued.

77 E. Earned paid sick time shall be carried over to the year following the year in which it was accrued.
78 Alternatively, in lieu of carryover of unused earned paid sick time from one year to the following year, an
79 employer may pay an employee for unused earned paid sick time at the end of a year and provide the

80 employee with an amount of earned paid sick time that meets or exceeds the requirements of this article
81 that is available for the employee's immediate use at the beginning of the subsequent year.

82 F. Any employer with a paid leave policy, such as a paid time off policy, that makes available an
83 amount of paid leave sufficient to meet the requirements of this section to provide employees with at least
84 40 hours of paid sick time a year and that may be used for the same purposes and under the same conditions
85 as earned paid sick time under this article is not required to provide additional paid sick time or allow
86 carryover of unused sick time.

87 G. Nothing in this section shall be construed as requiring financial or other reimbursement to an
88 employee from an employer upon the employee's termination, resignation, retirement, or other separation
89 from employment for accrued earned paid sick time that has not been used.

90 H. If an employee is transferred to a separate division, entity, or location, but remains employed
91 by the same employer, the employee is entitled to all earned paid sick time accrued at the prior division,
92 entity, or location and is entitled to use all earned paid sick time as provided in this section. If an employee
93 is separated from employment with an employer and the employee is rehired within 12 months of
94 separation by the same employer, previously accrued earned paid sick time that had not been used shall
95 be reinstated. Further, the employee shall be entitled to use accrued earned paid sick time and accrue
96 additional earned paid sick time at the recommencement of employment.

97 I. When a different employer succeeds or takes the place of an existing employer, all employees
98 of the original employer who remain employed by the successor employer are entitled to all earned paid
99 sick time that they accrued when employed by the original employer, and to use earned paid sick time
100 previously accrued.

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

103 **§ 40.1-33.3. Use of earned paid sick time.**

104 A. Earned paid sick time shall be provided to an employee by an employer for:

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

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

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

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

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

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

129 E. An employer may not require, as a condition of an employee's taking earned paid sick time, that
130 an employee search for or find a replacement worker to cover the hours during which the employee is
131 using earned paid sick time.

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

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

140 H. Earned paid sick time may be used in the smaller of hourly increments or the smallest increment
141 that the employer's payroll system uses to account for absences or use of other time.

142 I. For earned paid sick time of three or more consecutive work days, an employer may require
143 reasonable documentation that the earned paid sick time has been used for a purpose for which such leave
144 is required to be provided as set forth in subsection A. Documentation signed by a health care professional
145 indicating that earned paid sick time is necessary shall be considered reasonable documentation for
146 purposes of this subsection. If an employer requires such documentation for the use of an employee's
147 earned paid sick time and the employer does not offer health insurance to the employee, then the employer
148 is responsible for paying all out-of-pocket expenses the employee incurs in obtaining the documentation.

149 J. Employees may donate accrued sick time to another employee if the other employee uses the
150 donated sick time for the purpose specified in this section and the employer has a policy that allows an
151 employee to donate sick time to a coworker for the purpose specified in this section.

152 **§ 40.1-33.4. Exercise of rights protected; retaliation prohibited.**

153 A. Neither an employer nor any other person shall interfere with, restrain, or deny the exercise of,
154 or the attempt to exercise, any benefit provided pursuant to this article.

155 B. An employer shall not take retaliatory personnel action or discriminate against an employee or
156 former employee because the person has requested or used earned paid sick time provided pursuant to this
157 article; filed a complaint with the Commissioner or a court or informed any person about any employer's
158 alleged violation of this article; participated in an investigation, hearing, or proceeding or cooperated with

159 or assisted the Commissioner in investigations of any alleged violation of this article; or informed any
160 individual of such individual's potential benefits under this article.

161 C. An employer's absence control policy shall not count earned paid sick time taken under this
162 article as an absence that may lead to or result in discipline, discharge, demotion, suspension, or any other
163 adverse action.

164 D. Protections of this section shall apply to any person who mistakenly but in good faith alleges a
165 violation of any provision of this article.

166 E. There shall be a rebuttable presumption of unlawful retaliatory personnel action under this
167 section whenever an employer takes adverse action against an individual within 90 days of when that
168 individual:

169 1. Files a complaint with the Commissioner or a court alleging a violation of any provision of this
170 article;

171 2. Informs any person about an employer's alleged violation of this article;

172 3. Cooperates with or assists the Commissioner or other persons in the investigation or prosecution
173 of any alleged violation of this article;

174 4. Opposes any policy, practice, or act that is unlawful under this article; or

175 5. Informs any individual of benefits provided to that individual under this article.

176 **§ 40.1-33.5. Notice and posting.**

177 A. Each employer shall give its employees written notice of the following information at the
178 commencement of employment or by March 1, 2021, whichever is later:

179 1. That employees are entitled to earned paid sick time and the amount of earned paid sick time;

180 2. The terms of the use of earned paid sick time provided under this article;

181 3. That retaliatory personnel action against employees who request or use earned paid sick time is
182 prohibited;

183 4. That each employee has the right to file a complaint or bring a civil action if earned paid sick
184 time as required by this article is denied by the employer or the employee is subjected to retaliatory
185 personnel action for requesting or taking earned paid sick time; and

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

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

191 C. The amount of earned paid sick time available to the employee, the amount of earned paid sick
192 time taken by the employee to date in the year, and the amount of pay the employee has received as earned
193 paid sick time shall be recorded in, or on an attachment to, the employee's regular statement of earnings
194 provided under § 40.1-29.

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

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

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

205 **§ 40.1-33.6. Employer records.**

206 Each employer shall retain records documenting the number of hours worked by employees and
207 earned paid sick time taken by employees, for a period of three years, and shall allow the Department
208 access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance
209 with the requirements of this article. When an issue arises as to an employee's entitlement to earned paid
210 sick time under this article, if the employer does not maintain or retain adequate records documenting
211 hours worked by the employee and earned paid sick time taken by the employee, or does not allow the

212 Commissioner reasonable access to such records, it shall be presumed that the employer has violated this
213 article, absent clear and convincing evidence otherwise.

214 **§ 40.1-33.7. Regulations.**

215 The Commissioner shall adopt appropriate regulations for the implementation and enforcement of
216 this article.

217 **§ 40.1-33.8. Enforcement; civil penalties; actions to recover amounts on behalf of employees.**

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

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

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

236 D. The Commissioner shall notify any employer who he alleges has violated any provision of this
237 article by certified mail. Such notice shall contain a description of the alleged violation. Within 15 days

238 of receipt of notice of the alleged violation, the employer may request an informal conference with the
239 Commissioner regarding such violation.

240 E. Any such employer who knowingly violates this article shall be subject to a civil penalty not to
241 exceed \$150 for the first violation and, for subsequent violations that occur within two years of any
242 previous violation, not to exceed \$300 for the second violation and not to exceed \$500 for each successive
243 violation. In determining the amount of any civil penalty to be imposed, the Commissioner shall consider
244 the size of the business of the employer charged and the gravity of the violation. The decision of the
245 Commissioner shall be final.

246 F. The Commissioner, with the written and signed consent of an employee, may institute a
247 proceeding in a court of competent jurisdiction on behalf of an employee to enforce compliance with this
248 article and to collect the following amounts from the employer that violated this article, which amounts
249 shall be paid to the employee entitled thereto:

250 1. In each instance of earned paid sick time taken by an employee but unlawfully not compensated
251 by the employer, for three times the wages that should have been paid under this article;

252 2. In each instance of earned paid sick time requested by an employee but unlawfully denied by
253 the employer and not taken by the employee or unlawfully conditioned upon searching for or finding a
254 replacement worker, for \$250;

255 3. In each instance of unlawful retaliation not including discharge from employment, for full
256 compensation including wages and benefits lost, an additional amount of at least \$500, and equitable relief
257 as appropriate; and

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

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

264 H. The Commissioner shall annually report on its website the number and nature of the complaints
265 received pursuant to this article; the results of investigations undertaken pursuant to this article, including
266 the number of complaints not substantiated and the number of notices of violations issued; the number
267 and nature of adjudications pursuant to this article; and the average time for a complaint to be resolved
268 pursuant to this chapter.

269 I. Any person aggrieved by a violation of this article may file a complaint with the Attorney
270 General. The filing of a complaint with the Attorney General will not preclude the filing of a civil action
271 under § 40.1-33.9. The Attorney General may bring a civil action to enforce the provisions of this article,
272 in which action the Attorney General may seek injunctive relief of the imposition of civil penalties in such
273 amounts as are authorized under this section.

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

280 **§ 40.1-33.9. Civil actions.**

281 A. Any person aggrieved by a violation of this article, or any entity a member of which is aggrieved
282 by a violation of this article, may bring a civil action in a court of competent jurisdiction against an
283 employer violating this article. Such action may be brought by a person aggrieved by a violation of this
284 article without first filing an administrative complaint; however, a recovery under this section shall be in
285 lieu of any recovery under subsection F of § 40.1-33.8.

286 B. Upon prevailing in an action brought pursuant to this section, a person aggrieved by a violation
287 of this article shall:

288 1. Recover (i) a sum equal to twice the total of (a) the amount of any unpaid earned sick time and
289 (b) the amount of any actual damages suffered as the result of the employer's violation of this article and
290 (ii) reasonable attorney fees; and

291 2. Be entitled to such legal or equitable relief as may be appropriate to remedy the violation,
292 including, without limitation, reinstatement to employment, back pay, and injunctive relief.

293 C. The statute of limitations for a civil action brought pursuant to this section shall be for a period
294 of two years from the date the alleged violation occurred or the date the person aggrieved by a violation
295 of this article knew or should have known of the violation.

296 **§ 40.1-33.10. Confidentiality and nondisclosure.**

297 An employer may not require disclosure of the details of an employee's or an employee's family
298 member's health information as a condition of providing earned paid sick time under this article. If an
299 employer possesses health information about an employee or employee's family member, such
300 information shall be treated as confidential and not disclosed except to the affected employee or with the
301 permission of the affected employee.

302 **§ 40.1-33.11. Encouragement of more generous earned paid sick time policies; no effect on**
303 **more generous policies or laws.**

304 A. Nothing in this article shall be construed to discourage or prohibit an employer from the
305 adoption or retention of an earned paid sick time policy more generous than the one required by this article.

306 B. Nothing in this article shall be construed as diminishing the obligation of an employer to comply
307 with any contract, collective bargaining agreement, employment benefit plan, or other agreement
308 providing more generous earned paid sick time to an employee than required by this article. Nothing in
309 this article shall be construed as diminishing the rights of public employees regarding earned paid sick
310 time or use of earned paid sick time as provided in any law pertaining to public employees.

311 C. Nothing in this article shall be construed to supersede any provision of any local law that
312 provides greater rights to earned paid sick time than the rights established under this article.

313 **§ 40.1-33.12. Effect on other requirements.**

314 This article provides minimum requirements pertaining to earned paid sick time and shall not be
315 construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement,
316 policy, or standard that provides for greater accrual or use by employees of earned paid sick time or that
317 extends other protections to employees.

