

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 120

BY SENATOR KESSLER

[Introduced January 13, 2016;

Referred to the Committee on Labor; and then to the

Committee on the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §21-1E-1, §21-1E-2, §21-1E-3, §21-1E-4, §21-1E-5, §21-1E-6, §21-1E-7,
 3 §21-1E-8, §21-1E-9, §21-1E-10, §21-1E-11, §21-1E-12 and §21-1E-13, all relating to
 4 creating Earned Sick Time Act; requiring employers to provide paid sick leave; stating
 5 legislative purpose; defining terms; setting standards for use and accrual of earned sick
 6 time; distinguishing between unpaid and paid sick time for certain employees based on
 7 size of employer; excepting more generous employer policies; requiring certain
 8 certification; excepting collective bargaining agreements; requiring notice and posting
 9 requirements; setting forth duties of Commissioner of Labor; providing rule-making
 10 authority; requiring employers retain certain documents; creating penalties and
 11 enforcement measures; creating misdemeanor offense; noting lack of an intent to
 12 preempt, limit or affect other requirements; and providing an effective date.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
 2 article, designated §21-1E-1, §21-1E-2, §21-1E-3 §21-1E-4, §21-1E-5, §21-1E-6, §21-1E-7, §21-
 3 1E-8, §21-1E-9, §21-1E-10, §21-1E-11, §21-1E-12 and §21-1E-13, all to read as follows:

ARTICLE 1E. EARNED SICK TIME ACT.

§21-1E-1. Purposes.

1 The purposes of the article are:

2 (1) To ensure that all workers in West Virginia can address their own health and safety
 3 needs and the health and safety needs of their families by requiring employers to provide a
 4 minimum amount of earned sick time, including time for the care of family members.

5 (2) To reduce public and private health care costs and promote preventive health services
 6 in West Virginia by enabling workers to seek early and routine medical care for themselves and
 7 their family members.

8 (3) To protect the public's health in West Virginia by reducing the risk of contagion.

9 (4) To promote the economic stability of workers and their families.

10 (5) To protect employees in West Virginia from losing their jobs or facing workplace
11 discipline while they use sick and safe time to care for themselves or their families.

12 (6) To assist victims of domestic violence by providing them and their family members with
13 job-protected time away from work to receive treatment and to take the necessary steps to ensure
14 their protection.

15 (7) To benefit businesses by reducing worker turnover due to the lack of earned sick time
16 and decreasing "presenteeism" where workers come to work with illnesses and health conditions
17 that reduce their productivity.

18 (8) To safeguard the public welfare, health, safety, and prosperity of the people of West
19 Virginia.

20 (9) To accomplish the purposes described in this section in a manner that is feasible for
21 employers.

§21-1E-2. Definitions.

1 As used in this article:

2 "Commissioner" means the Commissioner of Labor or his or her duly authorized
3 representatives.

4 "Domestic violence" has the same meaning as defined in section two hundred two, article
5 twenty-seven, chapter forty-eight of this code.

6 "Earned sick time" means time that is provided by an employer to an employee for the
7 purposes described in section three of this article, whether or not compensation is required
8 pursuant to this article.

9 "Employ" means to hire or permit to work.

10 "Employee" includes any individual employed by an employer within West Virginia, except
11 that "Employee" does not include: (A) A bona fide independent contractor; (B) a worker subject
12 to a collective bargaining agreement; or (C) an individual employed by: (i) The United States

13 government; (ii) the State of West Virginia, including any office, department, division, agency,
14 authority, bureau, board, council or other unit of state government, including the legislature and
15 the judiciary, or (iii) any local government, county or municipality.

16 "Employer" includes any private partnership, association, corporation, or any person or
17 group of persons acting directly or indirectly in the interest of any employer in relation to an
18 employee. "Employer" does not include: (A) The United States government; (B) the State of West
19 Virginia, including any office, department, division, agency, authority, bureau, board, council or
20 other unit of state government, including the Legislature and the judiciary; or (C) any local
21 government, county or municipality.

22 "Family member" means:

23 (A) A biological, adopted or foster child, a stepchild or legal ward, or a child to whom the
24 employee stands in loco parentis.

25 (B) A biological, foster, stepparent or adoptive parent or legal guardian of an employee or
26 an employee's spouse or a person who stood in loco parentis when the employee was a minor
27 child.

28 (C) A person to whom the employee is legally married under the laws of any state;

29 (D) A grandparent or spouse of a grandparent;

30 (E) A grandchild;

31 (F) A biological, foster, or adopted sibling or spouse of a biological, foster or adopted
32 sibling; or

33 (G) Any other individual related by blood or affinity whose close association with the
34 employee is the equivalent of a family relationship.

35 "Health Care Professional" means any person licensed under federal or West Virginia law
36 to provide health care services, including, but not limited to, nurses, doctors and emergency room
37 personnel.

38 "Paid earned sick time" means time that is compensated at the same hourly rate and with

39 the same benefits, including health care benefits, as the employee normally earns during hours
40 worked and is provided by an employer to an employee for the purposes described in section
41 three of this article, but in no case may the hourly rate be less than that provided under West
42 Virginia's Minimum Wage and Maximum Hours Standards For Employees, section two, article
43 five-c of this chapter.

44 "Retaliation" means denial of any right guaranteed under this article and any threat,
45 discharge, suspension, demotion, reduction of hours, or any other adverse action against
46 employees for the exercise of any right guaranteed herein, including any sanctions against an
47 employee who is a recipient of benefits or rights under this article. Retaliation also includes
48 interference with or punishment for participating in any manner in an investigation, proceeding or
49 hearing under this article.

§21-1E-3. Use and accrual.

1 (a) Employees of an employer with fewer than twenty-five employees shall accrue a
2 minimum of one hour of unpaid earned sick time for every forty hours worked. Employees may
3 not accrue more than forty hours of unpaid earned sick time per year, unless an employer provides
4 for a greater number of hours.

5 (b) Employees of an employer with twenty-five or more employees shall accrue a minimum
6 of one hour of paid earned sick time for every forty hours worked. Employees may not accrue
7 more than forty hours of paid earned sick time per year, unless an employer provides for a greater
8 number of hours.

9 (c) In determining the number of employees performing work for an employer for
10 compensation during a given week, all employees performing work for compensation on a full-
11 time, part-time or temporary basis shall be counted. In situations in which the number of
12 employees who work for an employer for compensation per week fluctuates above and below
13 twenty-five employees per week over the course of the year, an employer is required to provide
14 paid earned sick time pursuant to subsection (b) of this section if it maintained twenty-five or more

15 employees on the payroll for some portion of a day in each of twenty different calendar weeks,
16 whether or not the weeks were consecutive, in either the current or the preceding calendar year
17 (irrespective of whether the same individuals were in employment in each day).

18 (d) All employees accrue earned sick time as follows:

19 (1) Earned sick time as provided in this section shall begin to accrue on the effective date
20 of this ordinance, as to an employee who is employed as of the effective date. An employee who
21 becomes employed after the effective date shall begin to accrue paid sick time at the
22 commencement of his or her employment.

23 (2) Employees may use accrued earned sick time beginning on the ninetieth calendar day
24 following commencement of their employment whether their employment commenced prior to the
25 effective date of this ordinance or following the effective date of this ordinance. After the ninetieth
26 calendar day of employment, employees may use earned sick time as it is accrued.

27 (3) Employees who are exempt from overtime requirements under 29 U.S.C. §213(a)(1)
28 of the federal Fair Labor Standards article will be assumed to work forty hours in each work week
29 for the purposes of earned sick time accrual unless their normal work week is less than forty
30 hours, in which case earned sick time accrues based on that normal work week.

31 (4) Accrued earned sick time shall carry over from year to year but this article does not
32 require an employer to permit an employee to earn or use more than forty hours of earned sick
33 time per year.

34 (5) Nothing in this section may be construed as requiring financial or other reimbursement
35 to an employee from an employer upon the employee's termination, resignation, retirement, or
36 other separation from employment for accrued earned sick time that has not been used.

37 (6) If an employee is transferred to a separate division, entity or location, but remains
38 employed by the same employer, the employee is entitled to all earned sick time accrued at the
39 prior division, entity or location and is entitled to use all earned sick time as provided in this
40 section. When there is a separation from employment, and the employee is rehired within twelve

41 months of separation by the same employer, previously accrued earned sick time that has not
42 been used shall be reinstated. Further, the employee may use accrued earned sick time and
43 accrue additional earned sick time at the recommencement of employment.

44 (7) When a different employer succeeds or takes the place of an existing employer, all
45 employees of the original employer who remain employed by the successor employer are entitled
46 to all earned sick time accrued when employed by the original employer and are entitled to use
47 all earned sick time previously accrued.

48 (e) Employees may use earned sick time:

49 (1) For an employee's mental or physical illness, injury or health condition; an employee's
50 need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health
51 condition; an employee's need for preventive medical care;

52 (2) For care of a family member with a mental or physical illness, injury or health condition;
53 care of a family member who needs medical diagnosis, care, or treatment of a mental or physical
54 illness, injury or health condition; care of a family member who needs preventive medical care;

55 (3) For closure of the employee's place of business by order of a public official due to a
56 public health emergency; for an employee's need to care for a child whose school or place of care
57 has been closed by order of a public official due to a public health emergency; or when it has
58 been determined by the health authorities having jurisdiction or by a health care provider that the
59 employee's or employee's family member's presence in the community would jeopardize the
60 health of others because of the employee's or family member's exposure to a communicable
61 disease, whether or not the employee or family member has actually contracted the
62 communicable disease;

63 (4) For absence necessary due to domestic violence against the employee or employee's
64 family member, provided the time is to allow the employee to obtain for the employee or the
65 employee's family member;

66 (A) Medical attention needed to recover from the physical or psychological injury or

67 disability caused by domestic violence;

68 (B) Services from a domestic violence program or victim services organization;

69 (C) Psychological or other counseling;

70 (D) Relocation due to the domestic violence; or

71 (E) Legal services, including preparing for or participating in any civil or criminal legal
72 proceeding related to or resulting from the domestic violence;

73 (5) Earned sick time shall be provided upon the oral request of an employee. When
74 possible, the request shall include the expected duration of the absence;

75 (6) When the use of earned sick time is foreseeable, the employee shall make a good faith
76 effort to provide notice of the need for the time to the employer in advance of the use of the earned
77 sick time and shall make a reasonable effort to schedule the use of earned sick time in a manner
78 that does not unduly disrupt the operations of the employer;

79 (7) An employer may not require, as a condition of an employee's taking earned sick time,
80 that the employee search for or find a replacement worker to cover the hours during which the
81 employee is using earned sick time; or

82 (8) Earned sick time may be used in the smaller of hourly increments or the smallest
83 increment that the employee's payroll system uses to account for absences or use of other time.

§21-1E-4. More generous earned sick time policy.

1 Any employer with an earned sick time policy, such as a paid time off policy, who makes
2 available an amount of earned sick time sufficient to meet the accrual requirements of this section
3 that may be used for the same purposes and under the same conditions as earned sick time
4 under this article is not required to provide additional earned sick time.

§21-1E-5. Certification.

1 (a) For use of earned sick time of more than three consecutive days, an employer may
2 require reasonable documentation that the earned sick time has been used for a purpose covered
3 by section three of this article. Documentation signed by a health care professional indicating

4 that the amount of earned sick time taken is necessary shall be considered reasonable. A police
5 report indicating that the employee or employee's family member was a victim of domestic
6 violence; a protective order as defined in section two hundred nine, article twenty-seven, chapter
7 forty-eight of this code or a general court order; a signed statement from a domestic violence
8 program or victim services organization affirming that the employee is receiving services related
9 to domestic violence; or a signed statement from a victim and witness advocate affirming that the
10 employee is involved in legal action or relocation related to domestic violence shall also be
11 considered reasonable documentation.

12 (b) An employee must provide certification upon request to the employer in a timely
13 manner. The employer shall not delay the commencement of earned sick time on the basis that
14 the employer has not yet received certification.

15 (c) An employer may not require that the certification explain the nature of the employee
16 or employee's family member's illness or the details of the domestic violence. Any health or safety
17 information possessed by an employer regarding an employee or employee's family member
18 must:

19 (1) Be maintained on a separate form and in a separate file from other personnel
20 information;

21 (2) Be treated as confidential medical records; and

22 (3) Not be disclosed except to the affected employee or with the express permission of
23 the affected employee.

§21-1E-6. Collective bargaining agreements.

1 All or any portion of the applicable requirements of this article does not apply to employees
2 covered by a collective bargaining agreement, to the extent that the requirements are expressly
3 waived in the collective bargaining agreement in clear and unambiguous terms.

§21-1E-7. Notice and posting requirements.

1 (a) An employer shall give written notice to an employee at the commencement of

2 employment of the employee's right to earned sick time, the amount of earned sick time, whether
3 it is paid or unpaid, the terms of its use guaranteed under this article, that retaliation against
4 employees is prohibited and each employee has the right to file a complaint with the commissioner
5 if earned sick time as required by this section is denied by the employer or the employee is
6 retaliated against as defined in section two of this article. An employer shall provide notice to
7 employees employed on the effective date of this article as soon as practicable after that date.

8 (b) The notice shall be in English and in any language that is the first language spoken by
9 at least ten percent of the employer's workforce that contains the information required by
10 subsection (a) of this section, as long as the commissioner has translated the notice into that
11 language.

12 (c) Employers shall also display a poster in a conspicuous and accessible place in each
13 establishment where employees are employed. The poster displayed should be in English and
14 in any language that is the first language spoken by at least ten percent of the employer's
15 workforce that contains the information required in subsection (a) of this section, as long as the
16 commissioner has translated the poster into that language.

17 (d) The commissioner shall create and make available to employers posters in English
18 and any other languages deemed appropriate by the commissioner that contain the information
19 required under subsection (a) of this section for employers' use in complying with this subsection.

§21-1E-8. Duties and powers of the commissioner.

1 The commissioner is authorized to coordinate implementation and enforcement of this
2 section and shall promulgate appropriate guidelines or regulations for these purposes.

§21-1E-9. Employer shall retain documentation.

1 Employers shall retain records documenting hours worked by employees and earned sick
2 time taken by employees for a period of three years.

§21-1E-10. Enforcement and penalties.

1 (a) Any employer who does not allow an employee to use or accrue earned sick time to

2 which the employee is entitled under this article, or who engages in retaliation against an
3 employee as defined in section two of this article, is liable to the employee for damages equal to
4 the amount of any wages, salary, employment benefits or other compensation denied or lost to
5 the employee by reason of the violation. In cases in which wages, salary, employment benefits
6 or other compensation has not been denied or lost by the employee, the employer is liable to the
7 employee for any actual monetary losses sustained by the employee as a direct result of the
8 violation up to a sum equal to ten days of wages or salary for the employee. Any interest on the
9 amount the employer is liable for is to be paid to the employee. Any additional amount as treble
10 damages and reasonable attorney fees due to intentional or willful violations are also to be paid
11 to the employee. In addition, the employee is entitled to equitable relief as may be appropriate,
12 including but not limited to, reinstatement and promotion.

13 (b) The commissioner or his or her designated representative, upon the request of any
14 person who has not been provided earned sick time in accord with this article or has been
15 retaliated against as defined in section two of this article, may bring any legal action in a court of
16 competent jurisdiction necessary to pursue a claim under this article. With the consent of the
17 employee, the commissioner may settle and adjust any claim to the same extent as might the
18 employee in a court of competent jurisdiction.

19 (c) Any employer who willfully hinders or delays the commissioner in the performance of
20 the commissioner's duties in the enforcement of this article, or refuses to admit the commissioner
21 to any place of employment, or fails to make, keep and preserve any records as required under
22 this article, or falsifies any of those records, or refuses to make them accessible to the
23 commissioner upon demand, or refuses to furnish them or any other information required for the
24 proper enforcement of the article to the commissioner upon demand is guilty of a misdemeanor
25 and, upon conviction thereof, shall be fined not less than \$100 nor more than \$500 per violation.

26 (d) An employer who willfully violates the notice and posting requirements of section six
27 of this article is subject to a civil fine in an amount not to exceed \$100 for each separate offense.

28 (e) Any agreement to provide earned sick time less than the amount applicable in this
 29 article is hereby declared by the Legislature to be against public policy and unenforceable.

30 (f) An employer may not otherwise violate this article, or any rule adopted thereunder.
 31 Each violation constitutes a separate offense.

32 (g) The statute of limitations for a civil action brought pursuant to this section three years
 33 from the date the alleged violation occurred.

34 (h) The commissioner may develop and implement an outreach and education program
 35 to inform employees of their rights under this article.

§21-1E-11. Severability.

1 If any provision of this article or application thereof to any person or circumstance is judged
 2 invalid, the invalidity does not affect other provisions or applications of the article that can be given
 3 effect without the invalid provision or application, and to this end the provisions of this article are
 4 declared severable.

§21-1E-12. Other legal requirements.

1 This article provides minimum requirements pertaining to earned sick time and does not
 2 preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy,
 3 or standard, including collective bargaining agreements, that provides for greater accrual or use
 4 by employees of earned sick time, whether paid or unpaid, or that extends other protections to
 5 employees.

§21-1E-13. Effective date.

1 This article takes effect on January 1, 2017, except that in the case of employees covered
 2 by a collective bargaining agreement in effect on that date, this article applies on the date of
 3 expiration of the agreement.

NOTE: The purpose of this bill is to create the Earned Sick Time Act. The bill requires employers to provide paid sick leave. The bill sets standards for the use and accrual of the earned sick time. The bill distinguishes between unpaid and paid sick time for certain employees based on size of employer. The bill excepts more generous employer policies. The bill requires certain certification. The bill excepts collective bargaining agreements.

The bill requires notice and posting requirements. The bill sets forth the duties of the Commissioner of Labor. The bill provides rule-making authority. The bill requires employers retain certain documents. The bill creates penalties and enforcement measures. The bill creates misdemeanor offense. The bill notes lack of an intent to preempt, limit or affect other requirements. The bill establishes an effective date.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.