WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 3159

By Delegate Young

[Introduced January 30, 2023; Referred to the Committee on Finance]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §20-20-1, relating to providing Covid-19 supplemental sick leave; defining terms; and establishing entitlement to Covid-19 supplemental sick leave;

Be it enacted by the Legislature of West Virginia:

Article 20. COVID-19 Supplemental Sick Leave.

§20-20-1. COVID-19 Supplemental Sick Leave.

(a) As used in this section:

(1) "Covered employee" means an employee who is unable to work or telework for an employer because of a reason listed under subdivision (1), subsection (b) of this section.

(2) "COVID-19 supplemental paid sick leave" means supplemental paid sick leave provided pursuant to this section.

(3) "Employer" means any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities, that employs more than five employees.

(4) "Family member" means any of the following:

(A) A child, which for purposes of this article means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis. This definition of a child is applicable regardless of age or dependency status.

(B) A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee’s spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child.

(C) A spouse.

(D) A domestic partner.

(E) A grandparent.

(F) A grandchild.

(G) A sibling.

(b) A covered employee shall be entitled to COVID-19 supplemental paid sick leave as follows:

(1) An employer shall provide COVID-19 supplemental paid sick leave to each covered employee if that covered employee is unable to work or telework due to any of the following reasons:

(A) The covered employee is subject to a quarantine or isolation period related to COVID-19 as defined by an order or guidance of the Department of Health and Human Resources, Public Health, the federal Centers for Disease Control and Prevention, or a local public health officer who has jurisdiction over the workplace. If the covered employee is subject to more than one of the foregoing, the covered employee shall be permitted to use COVID-19 supplemental paid sick leave for the minimum quarantine or isolation period under the order or guidance that provides for the longest such minimum period.

(B) The covered employee has been advised by a health care provider to isolate or quarantine due to COVID-19.

(C) The covered employee is attending an appointment for themselves or a family member to receive a vaccine or a vaccine booster for protection against COVID-19, subject to the limitation in clause (ii) of subparagraph (D).

(D)(i) The covered employee is experiencing symptoms, or caring for a family member experiencing symptoms, related to a COVID-19 vaccine or vaccine booster that prevent the employee from being able to work or telework.

(ii) For each vaccination or vaccine booster, an employer may limit the total COVID-19 supplemental paid sick leave to 3 days or 24 hours unless the employee provides verification from a health care provider that the covered employee or their family member is continuing to experience symptoms related to a COVID-19 vaccine or vaccine booster. The three day or 24-hour limitation applied to each vaccine or vaccine booster includes the time used under subparagraph (C) to get the vaccine or vaccine booster.

(E) The covered employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(F) The covered employee is caring for a family member who is subject to an order or guidance described in subparagraph (A) or who has been advised to isolate or quarantine, as described in subparagraph (B).

(G) The covered employee is caring for a child, as in subsection (a) of this section, whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

(2) A covered employee shall be entitled to the following number of hours of COVID-19 supplemental paid sick leave:

(A) A covered employee is entitled to 80 hours of COVID-19 supplemental paid sick leave, if the covered employee satisfies either of the following criteria:

(i) The employer considers the covered employee to work full time.

(ii) The covered employee worked or was scheduled to work, on average, at least 40 hours per week for the employer in the two weeks preceding the date the covered employee took COVID-19 supplemental paid sick leave.

(B) A covered employee who does not satisfy the criteria in subparagraph (A) is entitled to an amount of COVID-19 supplemental paid sick leave as follows:

(i) If the covered employee has a normal weekly schedule, the total number of hours the covered employee is normally scheduled to work for the employer over one week.

(ii) If the covered employee works a variable number of hours, seven times the average number of hours the covered employee worked each day for the employer in the six months preceding the date the covered employee took COVID-19 supplemental paid sick leave. If the covered employee has worked for the employer over a period of fewer than six months but more than seven days, this calculation shall instead be made over the entire period the covered employee has worked for the employer.

(iii) If the covered employee works a variable number of hours and has worked for the employer over a period of seven days or fewer, the total number of hours the covered employee has worked for that employer.

(C) (i) A covered employee is entitled to additional COVID-19 supplemental paid sick leave in an amount not to exceed that which the covered employee was entitled to under subparagraph (A), (B), or (C), as applicable, if the covered employee, or a family member for whom the covered employee is providing care, tests positive for COVID-19.

(ii) If the employee tested positive as described in clause (i), an employer may require the employee to submit to a diagnostic test on or after the fifth day after the test described in clause (i) was taken and provide documentation of those results. The employer shall make such a test available at no cost to the employee.

(iii) If the employee requests to use additional leave pursuant to this subparagraph because a family member for whom they are providing care tests positive for COVID-19, the employer may require that the employee provide documentation of that family member’s test results before paying the additional leave.

(iv) The employer has no obligation to provide additional COVID-19 supplemental paid sick leave under this subparagraph for an employee who refuses to provide documentation of the results of the test described in clause (i) upon the request of the employer.

(v) The employee does not need to exhaust the leave to which they are entitled under paragraphs (A), (B), or (C) of this subdivision, before using the additional leave provided for in this subparagraph.

(D) The total maximum amount of COVID-19 supplemental paid sick leave a covered employee is entitled to pursuant to this section shall not exceed 80 hours for the period between January 1, 2023, and September 30, 2023.

(E) The total number of hours of COVID-19 supplemental paid sick leave to which a covered employee is entitled pursuant to paragraphs (A), (B), or (C) of this subdivision, and the total number of hours of additional COVID-19 supplemental paid sick leave to which a covered employee is entitled pursuant to paragraph (D) of this subdivision, shall be in addition to any paid sick leave that may be available to the covered employee.

(F) A covered employee may determine how many hours of COVID-19 supplemental paid sick leave to use, up to the total number of hours to which the covered employee is entitled pursuant to paragraphs (A), (B), (C), or (D) of this subdivision. The employer shall make COVID-19 supplemental paid sick leave available for immediate use by the covered employee, upon the oral or written request of the covered employee to the employer.

(G) An employer is not required to provide a covered employee more than the total number of hours of COVID-19 supplemental paid sick leave to which the covered employee is entitled pursuant to paragraphs (A), (B), or (C) of this subdivision, or more than the total number of hours of additional COVID-19 supplemental paid sick leave to which the covered employee is entitled pursuant to subparagraph (D).

(3)(A) Each hour of COVID-19 supplemental paid sick leave shall be compensated at a rate equal to the following:

(i) For nonexempt covered employees, by one of the following:

(I) Calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.

(II) Calculated by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total nonovertime hours worked in the full pay periods occurring within the prior 90 days of employment: *Provided*, That for nonexempt employees paid by piece rate, commission or other method that uses all hours to determine the regular rate of pay, total wages, not including overtime premium pay, shall be divided by all hours, to determine the correct amount of COVID-19 supplemental paid sick leave under this subdivision.

(ii) COVID-19 supplemental paid sick leave for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

(B) Notwithstanding the provisions of paragraph (A) of this subdivision, a covered employee who is entitled to an amount of COVID-19 supplemental paid sick leave under paragraph (B), subdivision (2) of this subsection, shall be compensated for each hour of COVID-19 supplemental paid sick leave at the regular rate of pay to which the covered employee would be entitled as if the covered employee had been scheduled to work those hours, pursuant to existing law or an applicable collective bargaining agreement.

(C) Notwithstanding the provisions of paragraphs (A) or (B) of this subdivision, an employer shall not be required to pay more than five hundred eleven dollars ($511) per day and five thousand one hundred ten dollars ($5,110) in the aggregate to a covered employee for COVID-19 supplemental paid sick leave taken by the covered employee unless federal legislation is enacted that increases these amounts beyond the amounts that were included in the Emergency Paid Sick Leave Act established by the federal Families First Coronavirus Response Act (Public Law 116-127), in which case the new federal dollar amounts shall apply to this section as of the date the new amounts are applicable under the federal law. Nothing in this subparagraph shall prevent a covered employee who has reached the maximum amounts, as set forth herein, from choosing to utilize other paid leave that is available to the covered employee in order to fully compensate the covered employee for leave taken.

(4) An employer shall not require a covered employee to use any other paid or unpaid leave, paid time off, or vacation time provided by the employer to the covered employee before the covered employee uses COVID-19 supplemental paid sick leave or in lieu of COVID-19 supplemental paid sick leave.

(c) Notwithstanding the provisions of subsection (b) of this section, if an employer pays a covered employee another supplemental benefit for leave taken on or after January 1, 2023, that is payable for the reasons listed in paragraph (1) of subdivision (b) and that compensates the covered employee in an amount equal to or greater than the amount of compensation for COVID-19 supplemental paid sick leave to which the covered employee is entitled as set forth under paragraph (3) of subdivision (b), then the employer may count the hours of the other paid benefit or leave towards the total number of hours of COVID-19 supplemental paid sick leave that the employer is required to provide to the covered employee under paragraph (2) of subdivision (b). For purposes of the foregoing, the other supplemental benefit for leave taken that may be counted does not include paid sick leave to which the covered employee is otherwise entitled, but may include paid leave provided by the employer pursuant to any federal or local law in effect or that became effective on or after January 1, 2023, if the paid leave is provided to the covered employee under that law for any of the same reasons set forth in subdivision (1), subsection (b) of this section.

(d) In addition to other remedies as may be provided by the laws of this state or its subdivisions, including, but not limited to, the remedies available to redress any unlawful business practice, the Labor Commissioner shall enforce this section. For purposes of enforcement and to implement COVID-19 supplemental paid sick leave, this section shall apply as follows:

(1) The Labor Commissioner shall enforce this section as if COVID-19 supplemental paid sick leave constitutes wages under §20-5A-1 *et seq* of this code*.*

(2) COVID-19 supplemental paid sick leave shall be set forth separately from paid sick days. The employer shall provide an employee with written notice that sets forth the amount of COVID-19 supplemental paid sick leave that the employee has used through the pay period in which it was due to be paid on either the employee’s itemized wage statement or in a separate writing provided on the designated pay date with the employee’s payment of wages. The employer shall list zero hours used if a worker has not used any COVID-19 supplemental paid sick leave. This requirement is not enforceable until the next full pay period following the date that this section takes effect.

(3) Section 249 applies to COVID-19 supplemental paid sick leave.

(4) By seven days after the date of enactment of this section, the Labor Commissioner shall make publicly available a model notice of the covered employee’s rights under this section. Only for purposes of COVID-19 supplemental paid sick leave, if an employer’s covered employees do not frequent a workplace, the employer may satisfy this notice requirement by disseminating notice through electronic means, such as by electronic mail.

(e) (1) The requirement to provide COVID-19 supplemental paid sick leave as set forth in this section shall take effect 10 days after the date of enactment of this section, at which time the requirements shall apply retroactively to January 1, 2023.

(2) The requirement to provide COVID-19 supplemental paid sick leave as set forth in this section applies retroactively to January 1, 2023, in order to protect the economic well-being of covered employees who took leave for the reasons listed in subdivisions (1) or (2), subsection (b) of this section beginning on or after January 1, 2023, as all the requirements in the Emergency Paid Sick Leave Act established by the federal Families First Coronavirus Response Act (Public Law 116-127) expired before the effective date of this section. An employer may require a covered employee to provide documentation of a positive COVID-19 diagnostic test during the relevant period if an employee requests retroactive payment of the COVID-19 supplemental paid sick leave described in subparagraph (i), paragraph (D), subdivision (2), of subsection (b) of this section.

(A)(i) For any such leave taken, if the employer did not compensate the covered employee in an amount equal to or greater than the amount of compensation for COVID-19 supplemental paid sick leave to which the covered employee is entitled as set forth under subdivision (3), subsection (b) of this section, then upon the oral or written request of the employee, the employer shall provide the covered employee with a retroactive payment that provides for such compensation.

(ii) For any such leave taken, if the employer did compensate the covered employee in an amount equal to or greater than the amount of compensation for COVID-19 supplemental paid sick leave to which the covered employee is entitled as set forth under paragraph (3) of subdivision (b), then upon the oral or written request of the employee, such employee should be credited for any leave hours used for COVID-specific leave purposes, and the employer should be credited for providing those hours as COVID-19 supplemental paid sick leave.

(B) For any such retroactive payment, the number of hours of leave corresponding to the amount of the retroactive payment shall count towards the total number of hours of COVID-19 supplemental paid sick leave that the employer is required to provide to the covered employee under subdivision (2), subsection (b) of this section.

(C) This retroactive payment shall be paid on or before the payday for the next full pay period after the oral or written request of the covered employee. The retroactive payment shall be reflected on the written notice required by subdivision (2), subsection (d) of this section for the corresponding pay period.

(f) The requirement to provide COVID-19 supplemental paid sick leave as set forth in this section shall remain in effect through September 30, 2023, except that a covered employee taking COVID-19 supplemental paid sick leave at the time of the expiration of this section shall be permitted to take the full amount of COVID-19 supplemental paid sick leave to which the covered employee otherwise would have been entitled under this section.

(g) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

NOTE: The purpose of this bill is to provide Covid-19 supplemental sick leave to covered employees in West Virginia.

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