

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 3159

By Delegate Young

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

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §20-20-1, relating to providing Covid-19 supplemental sick leave; defining
3 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.

1 (a) As used in this section:

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

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

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

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

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

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

16 (C) A spouse.

17 (D) A domestic partner.

18 (E) A grandparent.

19 (F) A grandchild.

20 (G) A sibling.

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

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

26 (A) The covered employee is subject to a quarantine or isolation period related to COVID-
27 19 as defined by an order or guidance of the Department of Health and Human Resources, Public
28 Health, the federal Centers for Disease Control and Prevention, or a local public health officer who
29 has jurisdiction over the workplace. If the covered employee is subject to more than one of the
30 foregoing, the covered employee shall be permitted to use COVID-19 supplemental paid sick
31 leave for the minimum quarantine or isolation period under the order or guidance that provides for
32 the longest such minimum period.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

97 (E) The total number of hours of COVID-19 supplemental paid sick leave to which a
98 covered employee is entitled pursuant to paragraphs (A), (B), or (C) of this subdivision, and the

99 total number of hours of additional COVID-19 supplemental paid sick leave to which a covered
100 employee is entitled pursuant to paragraph (D) of this subdivision, shall be in addition to any paid
101 sick leave that may be available to the covered employee.

102 (F) A covered employee may determine how many hours of COVID-19 supplemental paid
103 sick leave to use, up to the total number of hours to which the covered employee is entitled
104 pursuant to paragraphs (A), (B), (C), or (D) of this subdivision. The employer shall make COVID-
105 19 supplemental paid sick leave available for immediate use by the covered employee, upon the
106 oral or written request of the covered employee to the employer.

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

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

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

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

118 (II) Calculated by dividing the employee's total wages, not including overtime premium pay,
119 by the employee's total nonovertime hours worked in the full pay periods occurring within the prior
120 90 days of employment: *Provided*, That for nonexempt employees paid by piece rate, commission
121 or other method that uses all hours to determine the regular rate of pay, total wages, not including
122 overtime premium pay, shall be divided by all hours, to determine the correct amount of COVID-19
123 supplemental paid sick leave under this subdivision.

124 (ii) COVID-19 supplemental paid sick leave for exempt employees shall be calculated in

125 the same manner as the employer calculates wages for other forms of paid leave time.

126 (B) Notwithstanding the provisions of paragraph (A) of this subdivision, a covered
127 employee who is entitled to an amount of COVID-19 supplemental paid sick leave under
128 paragraph (B), subdivision (2) of this subsection, shall be compensated for each hour of COVID-
129 19 supplemental paid sick leave at the regular rate of pay to which the covered employee would be
130 entitled as if the covered employee had been scheduled to work those hours, pursuant to existing
131 law or an applicable collective bargaining agreement.

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

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

147 (c) Notwithstanding the provisions of subsection (b) of this section, if an employer pays a
148 covered employee another supplemental benefit for leave taken on or after January 1, 2023, that
149 is payable for the reasons listed in paragraph (1) of subdivision (b) and that compensates the
150 covered employee in an amount equal to or greater than the amount of compensation for COVID-

151 19 supplemental paid sick leave to which the covered employee is entitled as set forth under
152 paragraph (3) of subdivision (b), then the employer may count the hours of the other paid benefit or
153 leave towards the total number of hours of COVID-19 supplemental paid sick leave that the
154 employer is required to provide to the covered employee under paragraph (2) of subdivision (b).
155 For purposes of the foregoing, the other supplemental benefit for leave taken that may be counted
156 does not include paid sick leave to which the covered employee is otherwise entitled, but may
157 include paid leave provided by the employer pursuant to any federal or local law in effect or that
158 became effective on or after January 1, 2023, if the paid leave is provided to the covered employee
159 under that law for any of the same reasons set forth in subdivision (1), subsection (b) of this
160 section.

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

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

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

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

176 (4) By seven days after the date of enactment of this section, the Labor Commissioner

177 shall make publicly available a model notice of the covered employee's rights under this section.
178 Only for purposes of COVID-19 supplemental paid sick leave, if an employer's covered employees
179 do not frequent a workplace, the employer may satisfy this notice requirement by disseminating
180 notice through electronic means, such as by electronic mail.

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

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

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

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

203 any leave hours used for COVID-specific leave purposes, and the employer should be credited for
204 providing those hours as COVID-19 supplemental paid sick leave.

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

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

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

218 (g) The provisions of this section are severable. If any provision of this section or its
219 application is held invalid, that invalidity shall not affect other provisions or applications that can be
220 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.