

**Senate Bill No. 528**

(By Senators Kessler, Beach, Laird, Miller, Snyder and Yost)

[Introduced February 20, 2015; referred to the Committee on Labor; then to the Committee on the Judiciary; and then to the Committee on Finance.]

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

4 **ARTICLE 1E. EARNED SICK TIME ACT.**

5 **§21-1E-1. Purposes.**

6 The purposes of the article are:

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

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

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

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

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

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

20 (7) To benefit businesses by reducing worker turnover due to the lack of earned sick time and  
21 decreasing "presenteeism" where workers come to work with illnesses and health conditions that

1 reduce their productivity.

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

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

6 **§21-1E-2. Definitions.**

7 As used in this article:

8 "Commissioner" means the Commissioner of Labor or his or her duly authorized  
9 representatives.

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

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

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

16 "Employee" includes any individual employed by an employer within West Virginia, except  
17 that "Employee" does not include: (A) A bona fide independent contractor; (B) a worker subject to  
18 a collective bargaining agreement; or (C) an individual employed by: (i) The United States  
19 government; (ii) the State of West Virginia, including any office, department, division, agency,  
20 authority, bureau, board, council or other unit of state government, including the legislature and the  
21 judiciary, or (iii) any local government, county or municipality.

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

7 "Family member" means:

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

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

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

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

14 (E) A grandchild;

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

16 or

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

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

1 "Paid earned sick time" means time that is compensated at the same hourly rate and with the  
2 same benefits, including health care benefits, as the employee normally earns during hours worked  
3 and is provided by an employer to an employee for the purposes described in section three of this  
4 article, but in no case may the hourly rate be less than that provided under West Virginia's Minimum  
5 Wage and Maximum Hours Standards For Employees, section two, article five-c of this chapter.

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

12 **§21-1E-3. Use and accrual.**

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

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

21 (c) In determining the number of employees performing work for an employer for

1 compensation during a given week, all employees performing work for compensation on a full-time,  
2 part-time or temporary basis shall be counted. In situations in which the number of employees who  
3 work for an employer for compensation per week fluctuates above and below twenty-five employees  
4 per week over the course of the year, an employer is required to provide paid earned sick time  
5 pursuant to subsection (b) of this section if it maintained twenty-five or more employees on the  
6 payroll for some portion of a day in each of twenty different calendar weeks, whether or not the  
7 weeks were consecutive, in either the current or the preceding calendar year (irrespective of whether  
8 the same individuals were in employment in each day).

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

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

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

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

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

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

7 (6) If an employee is transferred to a separate division, entity or location, but remains  
8 employed by the same employer, the employee is entitled to all earned sick time accrued at the prior  
9 division, entity or location and is entitled to use all earned sick time as provided in this section.  
10 When there is a separation from employment, and the employee is rehired within twelve months of  
11 separation by the same employer, previously accrued earned sick time that has not been used shall  
12 be reinstated. Further, the employee may use accrued earned sick time and accrue additional earned  
13 sick time at the recommencement of employment.

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

18 (e) Employees may use earned sick time:

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

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

4           (3) For closure of the employee's place of business by order of a public official due to a  
5 public health emergency; for an employee's need to care for a child whose school or place of care  
6 has been closed by order of a public official due to a public health emergency; or when it has been  
7 determined by the health authorities having jurisdiction or by a health care provider that the  
8 employee's or employee's family member's presence in the community would jeopardize the health  
9 of others because of the employee's or family member's exposure to a communicable disease,  
10 whether or not the employee or family member has actually contracted the communicable disease;

11           (4) For absence necessary due to domestic violence against the employee or employee's  
12 family member, provided the time is to allow the employee to obtain for the employee or the  
13 employee's family member:

14           (A) Medical attention needed to recover from the physical or psychological injury or  
15 disability caused by domestic violence;

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

17           (C) Psychological or other counseling;

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

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

21           (5) Earned sick time shall be provided upon the oral request of an employee. When possible,

1 the request shall include the expected duration of the absence;

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

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

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

11 **§21-1E-4. More generous earned sick time policy.**

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

16 **§21-1E-5. Certification.**

17 (a) For use of earned sick time of more than three consecutive days, an employer may require  
18 reasonable documentation that the earned sick time has been used for a purpose covered by section  
19 three of this article. Documentation signed by a health care professional indicating that the amount  
20 of earned sick time taken is necessary shall be considered reasonable. A police report indicating that  
21 the employee or employee's family member was a victim of domestic violence; a protective order

1 as defined in section two hundred nine, article twenty-seven, chapter forty-eight of this code or a  
2 general court order; a signed statement from a domestic violence program or victim services  
3 organization affirming that the employee is receiving services related to domestic violence; or a  
4 signed statement from a victim and witness advocate affirming that the employee is involved in legal  
5 action or relocation related to domestic violence shall also be considered reasonable documentation.

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

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

- 12 (1) Be maintained on a separate form and in a separate file from other personnel information;
- 13 (2) Be treated as confidential medical records; and
- 14 (3) Not be disclosed except to the affected employee or with the express permission of the  
15 affected employee.

16 **§21-1E-6. Collective bargaining agreements.**

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

20 **§21-1E-7. Notice and posting requirements.**

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

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

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

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

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

18 **§21-1E-8. Duties and powers of the commissioner.**

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

21 **§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.

3 **§21-1E-10. Enforcement and penalties.**

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

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

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

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

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

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

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

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

18 **§21-1E-11. Severability.**

19 If any provision of this article or application thereof to any person or circumstance is judged  
20 invalid, the invalidity does not affect other provisions or applications of the article that can be given  
21 effect without the invalid provision or application, and to this end the provisions of this article are

1 declared severable.

2 **§21-1E-12. Other legal requirements.**

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

8 **§21-1E-13. Effective date.**

9         This article will take effect on January 1, 2016, provided that in the case of employees  
10 covered by a collective bargaining agreement in effect on the effective date prescribed herein, this  
11 article shall apply on the date of 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.

This article is new; therefore, strike-throughs and underscoring have been omitted.