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HOUSE BILL 37

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

INTRODUCED BY

Angelica Rubio

AN ACT

RELATING TO EMPLOYMENT; ENACTING THE PAID SICK LEAVE ACT;
REQUIRING ACCRUAL OF PAID SICK LEAVE FOR EMPLOYEES; PROVIDING
REMEDIES FOR VIOLATIONS; REQUIRING RULEMAKING; ESTABLISHING
BURDEN OF PROOF STANDARDS FOR RETALIATION CASES; DECLARING AN
EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
cited as the "Paid Sick Leave Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Paid Sick Leave Act:

A. "child" means an adopted child, a biological
child, a foster child or a stepchild;

B. "division" means the labor relations division of
the workforce solutions department;

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1 C. "domestic partner" means an individual with whom
2 another individual maintains a household and a mutual committed
3 relationship, without a legally recognized marriage;

4 D. "employ" means to suffer or permit to work; the
5 burden of proof shall be upon the person for whom the work is
6 performed to show independent contractor status by clear and
7 convincing evidence;

8 E. "employee" means an individual employed by an
9 employer, including an individual employed on a part-time,
10 seasonal or temporary basis, or an individual performing
11 domestic service in a private home for remuneration;

12 F. "employer" means any individual, partnership,
13 association, corporation, business trust, legal representative
14 or organized group of persons employing one or more employees
15 at any one time, acting directly or indirectly in the interest
16 of an employer in relation to an employee, but does not include
17 the United States; "employer" includes the state or any
18 political subdivision of the state; "employer" includes a
19 person providing remuneration for domestic service in a private
20 home;

21 G. "family member" means an employee's spouse or
22 domestic partner or a person related to an employee or an
23 employee's spouse or domestic partner as a child or legal ward;
24 an adoptive, biological or foster grandchild, grandparent or
25 parent; a stepgrandchild, stepgrandparent or stepparent; or a

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1 sibling or stepsibling; "family member" also includes a spouse
2 or domestic partner of a family member, an individual to whom
3 the employee stands or stood in loco parentis or any other
4 individual whose close association with the employee or
5 employee's spouse or domestic partner is the equivalent of a
6 family relationship;

7 H. "paid leave policy" means an employer policy
8 that meets or exceeds the accrual requirements and allows for
9 the same employee use of paid sick leave and under the same
10 conditions as provided in the Paid Sick Leave Act;

11 I. "paid sick leave" means time that is compensated
12 at the same hourly rate and with the same benefits, including
13 health care benefits, as the employee normally earns during
14 hours worked and is provided by an employer to an employee for
15 the purposes described in the Paid Sick Leave Act;

16 J. "public health emergency" means a declaration or
17 proclamation issued pursuant to federal, state or local law of
18 an emergency related to a risk or threat to public health; and

19 K. "year" means a consecutive twelve-month period.

20 SECTION 3. [NEW MATERIAL] EARNED PAID SICK LEAVE--USES
21 AND ACCRUAL--MINIMUM RATE.--

22 A. An employer shall provide employees paid sick
23 leave for:

24 (1) an employee's mental or physical illness,
25 injury or health condition; medical diagnosis, care or

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1 treatment of a mental or physical illness, injury or health
2 condition; or preventive medical care;

3 (2) an employee to care for a family member
4 with a mental or physical illness, injury or health condition;
5 to care for a family member who needs medical diagnosis, care
6 or treatment of a mental or physical illness, injury or health
7 condition; or to care for a family member who needs preventive
8 medical care; or

9 (3) an absence necessary due to domestic
10 abuse, sexual assault or stalking suffered by the employee or
11 employee's family member; provided that the leave is for the
12 employee to obtain medical or psychological treatment or other
13 counseling, relocate, prepare for or participate in legal
14 proceedings or obtain services or to assist the employee's
15 family member with any of those activities.

16 B. Employees shall accrue a minimum of one hour of
17 paid sick leave for every thirty hours worked; provided that
18 employers may choose a higher accrual rate or provide for
19 accrual of all earned paid sick leave at the beginning of a
20 year.

21 C. Employees shall not use or accrue more than
22 fifty-six hours of earned paid sick leave in a year, unless the
23 employer's paid sick leave policy provides for a higher limit
24 on use or accrual. Paid sick leave shall begin to accrue on
25 the date the employee commences work or the effective date of

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1 the Paid Sick Leave Act, whichever is later. An employer may
2 loan paid sick leave to an employee in advance of accrual by
3 such employee. Employees exempt from overtime requirements
4 under federal and state law shall be assumed to work forty
5 hours in each work week for purposes of paid sick leave
6 accrual, unless their normal work week is less than forty
7 hours. When an overtime-exempt employee's normal work week is
8 less than forty hours, accrual of paid sick leave shall be
9 based on the employee's normal amount of work week hours.

10 D. Beginning on the sixtieth day after the
11 effective date of the Paid Sick Leave Act, an employee shall be
12 entitled to use accrued paid sick leave.

13 E. An employer shall allow the use of paid sick
14 leave for the purposes provided in Subsection A of this section
15 upon the request of an employee or an individual acting on the
16 employee's behalf. The request may be made orally, in writing,
17 by electronic means or by any other means acceptable to the
18 employer. When possible, the request shall include the
19 expected duration of the absence. When the use of paid sick
20 leave is foreseeable, such as a scheduled medical appointment
21 or similar matter, the employee shall make a good faith effort
22 to provide notice to the employer in advance of the use of the
23 paid sick leave and shall make a reasonable effort to schedule
24 the use of paid sick leave in a manner that does not unduly
25 disrupt the operations of the employer. Advance notice shall

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1 not be required for paid sick leave due to an emergency,
2 unexpected illness, domestic abuse, sexual assault or stalking.

3 F. An employer shall not require an employee to
4 find a replacement worker as a condition of using paid sick
5 leave.

6 G. An employer shall not require an employee to use
7 other paid leave before the employee uses paid sick leave
8 pursuant to the Paid Sick Leave Act.

9 H. An employer's failure to provide paid sick leave
10 based on the employer's misclassification of the employee as an
11 independent contractor is a violation of the Paid Sick Leave
12 Act.

13 I. Unused earned paid sick leave shall be carried
14 over to the following year, but employees shall not carry over
15 more than fifty-six hours of paid sick leave in a year, unless
16 the employer's paid sick leave policy provides for more hours
17 to carry over. When an employee is transferred but remains
18 employed by the same employer, when a successor employer
19 replaces the original employer or when an employee separates
20 from employment and is rehired by the same employer within
21 twelve months, the employer shall reinstate all previously
22 accrued and unused earned paid sick leave to the employee, up
23 to a maximum of fifty-six hours, unless the employer chooses to
24 provide more, or unless the employer previously chose to pay
25 out the earned paid sick leave upon transfer or separation.

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1 J. Documentation shall not be required to obtain
2 the use of paid sick leave, except that when an employee uses
3 three or more consecutive work days of paid sick leave, an
4 employer may require the employee to provide reasonable
5 documentation that the paid sick leave was used for a purpose
6 permitted pursuant to this section. Documentation signed by a
7 health care professional indicating that paid sick leave is
8 necessary shall be considered reasonable. If an employer
9 chooses to require documentation from a health care
10 professional, the employer is responsible for reimbursing out-
11 of-pocket medical expenses that the employee incurs in
12 obtaining the documentation if the medical visit is not
13 medically necessary and made solely to obtain documentation for
14 the employer or if such costs are not covered by the employee's
15 or family member's insurance plan. In cases of domestic abuse,
16 sexual assault or stalking, an employee may choose to provide
17 one of the following types of documentation, which shall be
18 considered as reasonable documentation for paid sick leave: a
19 police report, a court-issued document or a signed statement
20 from a clergy member, attorney, advocate, the employee, a
21 family member of the employee, a victims services organization
22 or other person affirming that the paid sick leave was taken
23 for one of the uses in Subsection A of this section. A signed
24 statement pursuant to this subsection may be written in the
25 employee's native language and shall not be required to be in a

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1 particular format or notarized. An employer shall not require
2 that the documentation explain the nature of any medical
3 condition or the details of the domestic abuse, sexual assault
4 or stalking.

5 K. All information an employer obtains related to
6 the employee's reasons for taking paid sick leave shall be
7 treated as confidential and not be disclosed except with the
8 permission of the employee or for the purpose of validating an
9 insurance disability claim or as required by federal law, the
10 Paid Sick Leave Act or a court order.

11 SECTION 4. [NEW MATERIAL] SUPPLEMENTAL LEAVE DURING A
12 PUBLIC HEALTH EMERGENCY.--

13 A. In addition to the accrued paid sick leave
14 provided pursuant to Section 3 of the Paid Sick Leave Act, on
15 the date a public health emergency is declared, an employer
16 shall provide supplemental paid sick leave for absences due to
17 the circumstances listed in Subsection E of this section. Such
18 supplemental paid sick leave shall be provided in the following
19 amounts at a minimum:

20 (1) eighty hours for an employee who normally
21 works forty or more hours in a week; or

22 (2) the number of hours the employee works on
23 average in a fourteen-day period for an employee who normally
24 works fewer than forty hours in a week.

25 B. The supplemental paid sick leave provided

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1 pursuant to Subsection A of this section shall be the entirety
2 of supplemental paid sick leave required under the Paid Sick
3 Leave Act for a public health emergency regardless of whether
4 the public health emergency is subsequently amended, extended
5 or renewed.

6 C. If a public health emergency was declared before
7 and remains in effect on the effective date of the Paid Sick
8 Leave Act, supplemental paid sick leave under this section
9 shall be provided to employees on the effective date of the
10 Paid Sick Leave Act.

11 D. An employer may count an employee's unused
12 accrued paid sick leave pursuant to Section 3 of the Paid Sick
13 Leave Act toward the supplemental paid sick leave required in
14 Subsection A of this section. An employee may use supplemental
15 paid sick leave under this section until four weeks after the
16 official termination of a public health emergency.

17 E. Supplemental paid sick leave pursuant to this
18 section shall be available to an employee for absences due to:

19 (1) care, testing or treatment of the employee
20 or a family member to whom the employee provides care as a
21 consequence of being diagnosed with, experiencing symptoms of
22 or exposure to a person or item with a communicable illness or
23 transmittable condition that is related to a public health
24 emergency;

25 (2) self-isolation by the employee or a family

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1 member to whom the employee provides care as a consequence of
2 being diagnosed with, experiencing symptoms of or exposure to a
3 person or item with a communicable illness or transmittable
4 condition that is related to a public health emergency;

5 (3) the pursuit of preventive care for the
6 employee or a family member to whom the employee provides care
7 for a communicable illness that is related to a public health
8 emergency;

9 (4) compliance with a determination by the
10 employer or a local, state or federal public official or health
11 authority having jurisdiction over the location of work for the
12 employee or a family member to whom the employee provides care
13 that:

14 (a) the place of employment must be
15 closed;

16 (b) the individual's presence on the job
17 or in the community would jeopardize the health of others due
18 to exposure to a communicable illness or transmittable
19 condition related to a public health emergency; or

20 (c) the individual is exhibiting
21 symptoms of a communicable illness or transmittable condition
22 related to a public health emergency, regardless of whether the
23 individual has been diagnosed with the communicable illness;

24 (5) care of a family member when that
25 individual's:

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1 (a) care provider is unavailable due to
2 a public health emergency; or

3 (b) school or place of care has been
4 physically closed due to a public health emergency, whether or
5 not the school or place of care is providing instruction or
6 services remotely; or

7 (6) an inability to work due to a health
8 condition that may increase the risk posed by a communicable
9 illness that is related to a public health emergency.

10 F. An employee shall notify the employee's employer
11 of the need to use supplemental paid sick leave pursuant to
12 this section as soon as practicable when the need for the leave
13 is foreseeable and the employer's place of business has not
14 been closed.

15 G. Documentation shall not be required to take
16 supplemental paid sick leave pursuant to this section.

17 SECTION 5. [NEW MATERIAL] WHEN SEPARATE TRACKING IS NOT
18 REQUIRED--NO ADDITIONAL PAID SICK LEAVE REQUIRED.--

19 A. An employer with a paid leave policy shall not
20 be required to provide additional or separate paid sick leave
21 or track sick leave separately from paid leave.

22 B. If an employee covered by a paid leave policy
23 uses all available paid leave for reasons unrelated to paid
24 sick leave, the employer is not required to provide the
25 employee additional paid sick leave.

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1 SECTION 6. [NEW MATERIAL] EXERCISE OF RIGHTS PROTECTED--
2 RETALIATION PROHIBITED.--

3 A. An employer shall not take or threaten an
4 adverse action against an employee:

5 (1) that is reasonably likely to deter an
6 employee from using paid sick leave pursuant to the Paid Sick
7 Leave Act;

8 (2) because the employee has used or attempted
9 to use paid sick leave pursuant to the Paid Sick Leave Act; or

10 (3) because the employee has in good faith
11 alleged or has participated in an investigation or proceeding
12 regarding violations of the Paid Sick Leave Act or informed any
13 person of the person's potential rights pursuant to that act.

14 B. An employer shall not attempt to require an
15 employee to sign a contract or other agreement that would limit
16 or prevent the employee from exercising the employee's rights
17 pursuant to the Paid Sick Leave Act.

18 C. An attempt by an employer to impose a contract,
19 agreement or policy that limits the accrual or use of paid sick
20 leave pursuant to the Paid Sick Leave Act is a violation of the
21 Paid Sick Leave Act.

22 D. Counting or tracking the use of paid sick leave
23 in a manner that would subject an employee to discipline,
24 discharge, demotion, non-promotion, less favorable scheduling,
25 reduction of hours, suspension or other adverse employment

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1 action is a violation of the Paid Sick Leave Act.

2 SECTION 7. [NEW MATERIAL] EMPLOYEE NOTICES--
3 RECORDKEEPING.--

4 A. On or before the thirtieth day after the
5 effective date of the Paid Sick Leave Act, the workforce
6 solutions department shall post on its website a summary notice
7 to employees in English and Spanish of each provision of the
8 Paid Sick Leave Act.

9 B. On or before the fourteenth day after the
10 workforce solutions department has posted a notice pursuant to
11 Subsection A of this section, an employer that:

12 (1) maintains a physical workplace shall
13 provide a copy of the notice to each current employee and shall
14 provide a copy of the notice to each subsequent employee on
15 that employee's first day of work and shall post the notice in
16 a conspicuous place in each establishment where employees are
17 employed;

18 (2) does not maintain a physical workplace
19 shall send a copy of the notice to each current employee and
20 shall send a copy of the notice to each subsequent employee on
21 that employee's first day of work via an electronic
22 communication or post the notice on a web-based platform
23 generally accessible to the employer's employees; and

24 (3) has an employee who works remotely through
25 personal electronic connection or a web-based platform shall

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1 electronically send a copy of the notice to the employee or
2 conspicuously post a copy of the notice on the web-based
3 platform used by the employee.

4 C. An employer shall maintain accurate records of
5 the paid sick leave accrued and used by an employee for four
6 years. The records shall be made available to the division
7 upon the division's request. Upon the request of an employee,
8 an employer shall inform the employee of the amount of paid
9 sick leave available to, accrued by or used by the employee.

10 D. An employer's failure to maintain records of the
11 amount of paid sick leave available to, accrued by or used by
12 an employee is a violation of the Paid Sick Leave Act. In the
13 absence of such records, the division, a court or a jury may
14 rely on accurate and contemporaneously maintained records of
15 the employee's work time to determine the amount of paid sick
16 leave accrued and used or on the employee's reasonable
17 estimates of hours worked if no such records are available.

18 E. Employers that offer paid leave policies may
19 comply with the recording requirements of this section by
20 tracking and recording the equivalent amount of paid leave
21 provided and used by an employee. Employers shall not be
22 required to track or provide paid sick leave separately from
23 other forms of paid leave.

24 SECTION 8. [NEW MATERIAL] COMPLAINTS AND INVESTIGATIONS--
25 DIVISION DUTIES--RULES--CONFIDENTIALITY OF COMPLAINTS.--

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1 A. A person or an entity that has a member who has
2 been affected by a violation of the Paid Sick Leave Act may
3 file a complaint with the division.

4 B. The division shall investigate a violation that
5 it identifies or a complaint of a violation of the Paid Sick
6 Leave Act. The division shall institute or cause to be
7 instituted a civil action for a violation of the Paid Sick
8 Leave Act.

9 C. The division shall promulgate rules for the
10 implementation and administration of the Paid Sick Leave Act.
11 The rules shall include a system:

12 (1) to receive complaints regarding violations
13 of the Paid Sick Leave Act. This system shall provide for the
14 use of multiple means of communicating complaints; and

15 (2) for communications with employees and
16 employers about investigations of complaints.

17 D. The division shall begin an investigation within
18 thirty calendar days of receiving a complaint of a violation of
19 the Paid Sick Leave Act and shall provide status reports on the
20 progress of the investigation to the complainant and the
21 employer in intervals of no greater than ninety days until the
22 investigation is completed. When an investigation is
23 completed, the division shall notify the complainant and the
24 employer of the result.

25 E. In conducting an investigation regarding

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1 potential violations of the Paid Sick Leave Act:

2 (1) the division shall endeavor to maintain
3 the confidentiality of the complainant and the affected
4 employee to the extent allowed by law;

5 (2) the division may review the records
6 regarding all of the employees at a given work location or for
7 a particular employer; and

8 (3) with the authorization of the employee or
9 person reporting the violation, the division may disclose the
10 name and identifying information as necessary to investigate
11 the complaint or enforce the Paid Sick Leave Act or for other
12 purposes that the division establishes by rule.

13 F. When conducting an investigation regarding a
14 potential violation of the Paid Sick Leave Act, the division
15 shall use the burdens of proof required for civil actions
16 pursuant to Section 9 of the Paid Sick Leave Act.

17 G. When the division determines that an employer
18 has misclassified an employee as an independent contractor,
19 the division shall notify the taxation and revenue department,
20 the unemployment insurance division of the workforce solutions
21 department, the workers' compensation administration and the
22 federal internal revenue service.

23 SECTION 9. [NEW MATERIAL] CIVIL ACTIONS--TIME LIMITS--
24 BURDENS OF PROOF.--

25 A. A civil action may be filed in a court of

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1 competent jurisdiction for a violation of the Paid Sick Leave
2 Act within three years from the date the alleged violation
3 occurred; provided that the time limit to file a civil action
4 established by this subsection shall be tolled during an
5 investigation by the division of the violation or related
6 violations by the same employer. An investigation by the
7 division shall not be required to file a civil action, and a
8 lack of an investigation by the division shall not act as a bar
9 to a civil action brought by a complainant pursuant to the Paid
10 Sick Leave Act.

11 B. The division, the office of the attorney general
12 or a person or entity that has a member who has been affected
13 by a violation of the Paid Sick Leave Act may bring a civil
14 action for a violation of the Paid Sick Leave Act.

15 C. A civil action to enforce any provision of the
16 Paid Sick Leave Act may be filed without first filing an
17 administrative complaint with the division and may:

18 (1) encompass all violations that occurred as
19 part of a continuing course of conduct, regardless of the date
20 on which the violations occurred;

21 (2) be pursued by an employee on behalf of the
22 employee or be pursued by an employee of behalf of other
23 employees similarly situated; or

24 (3) be pursued by an agent or representative
25 designated by an employee.

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1 D. It shall not be a defense to any action brought
2 pursuant to this section that the complaint was brought by or
3 in regard to the employment of a worker who does not have
4 evidence of having a legal presence in the United States.

5 E. The parties in a civil action regarding
6 retaliation by an employer shall be subject to the following
7 burdens of proof:

8 (1) when an employee presents a prima facie
9 showing of retaliation, the employer shall then have the burden
10 to establish a legitimate, non-retaliatory reason for the
11 adverse employment action;

12 (2) when an employer meets the burden of proof
13 required by Paragraph (1) of this subsection, the employee
14 shall then have the burden to establish that the reason cited
15 by the employer was not the reason for the adverse employment
16 action; and

17 (3) when it is established that the adverse
18 employment action was motivated by a combination of both lawful
19 and unlawful reasons, the employer shall have the burden to
20 demonstrate that the action would have been taken even in the
21 absence of the unlawful reason.

22 SECTION 10. [NEW MATERIAL] EMPLOYER LIABILITY.--

23 A. An employer that violates the Paid Sick Leave
24 Act shall be liable to the affected employee:

25 (1) for an instance of paid sick leave taken

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1 by an employee but unlawfully not compensated by the employer,
2 in an amount equal to three times the wages that should have
3 been paid or one thousand dollars (\$1,000), whichever is
4 greater;

5 (2) for an instance of paid sick leave
6 requested by an employee but unlawfully denied by the employer
7 and not taken by the employee or unlawfully conditioned on
8 searching for or finding a replacement worker, in an amount
9 equal to actual damages or one thousand dollars (\$1,000),
10 whichever is greater;

11 (3) for each instance of retaliation
12 prohibited by the Paid Sick Leave Act excepting discharge from
13 employment, in an amount equal to actual damages, including
14 back pay, wages or benefits lost, an additional amount of five
15 hundred dollars (\$500) and equitable relief such as rescission
16 of disciplinary measures taken by the employer or other relief
17 as determined by a court of law;

18 (4) for each instance of prohibited discharge
19 from employment, in an amount equal to actual damages,
20 including back pay, wages or benefits lost, an additional
21 amount of one thousand dollars (\$1,000) and reinstatement or
22 other equitable relief as determined by a court of law;

23 (5) for each willful notice or recordkeeping
24 violation, five hundred dollars (\$500); and

25 (6) for each misclassification of an employee

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1 as an independent contractor, actual damages or one thousand
2 dollars (\$1,000), whichever is greater.

3 B. A plaintiff prevailing in a legal action brought
4 pursuant to the Paid Sick Leave Act shall recover all
5 appropriate legal or equitable relief, the costs and expenses
6 of suit and reasonable attorney fees. In an action brought by
7 the division or the attorney general, any damages recovered
8 shall be payable to the individual employees who experienced
9 the violation.

10 SECTION 11. [NEW MATERIAL] RELATIONSHIP TO OTHER
11 REQUIREMENTS.--

12 A. The Paid Sick Leave Act establishes minimum
13 standards for paid sick leave and shall not be construed as
14 creating or imposing any requirement in conflict with,
15 preempting or otherwise limiting other laws or employer
16 contracts or policies that provide greater rights to paid time
17 off, paid leave or paid sick leave.

18 B. The Paid Sick Leave Act shall not be construed
19 to diminish or impair the rights or obligations of an employee
20 or employer under any valid contract, collective bargaining
21 agreement, employment benefit plan or other agreement providing
22 more generous paid sick leave to an employee than required by
23 that act.

24 SECTION 12. SEVERABILITY.--If any part or application of
25 the Paid Sick Leave Act is held invalid, the remainder or its

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1 application to other situations or persons shall not be
2 affected.

3 SECTION 13. EMERGENCY.--It is necessary for the public
4 peace, health and safety that this act take effect immediately.

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