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S.B. 22\*  
134<sup>th</sup> General Assembly

## Bill Analysis

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**Version:** As Reported by House State and Local Government

**Primary Sponsors:** Sens. Johnson and McColley

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## SUMMARY

### State of emergency

- Limits the duration of a state of emergency issued by the Governor to 90 days unless extended by the General Assembly, and allows the General Assembly to extend a state of emergency in 60-day intervals by adopting a concurrent resolution.
- After a state of emergency declared by the Governor has been in effect for 30 days, permits the General Assembly to terminate the state of emergency.
- Prohibits the Governor from reissuing a state of emergency for 60 days after expiration or termination, unless approved by the General Assembly by adopting a concurrent resolution.
- Permits the General Assembly to rescind orders and rules issued by the executive branch in response to the emergency, and prohibits the reissuance of a rescinded order or rule for 60 days unless approved by the General Assembly by adopting a concurrent resolution.
- During a state of emergency, requires the Governor and Department of Health (ODH) to report to the President of the Senate and Speaker of the House any actions taken in response to the emergency.

### Ohio Health Oversight and Advisory Committee

- Establishes the Ohio Health Oversight and Advisory Committee, consisting of three members of the Senate and three members of the House.

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\* This analysis was prepared before the report of the House State and Local Government Committee appeared in the House Journal. Note that the legislative history may be incomplete.

- Authorizes the Committee to oversee actions taken by the Governor, ODH, or any agency in response to a state of emergency; to oversee actions taken by ODH and the Director of Health for preventing the spread of contagious or infectious disease and controlling and suppressing the cause of disease; and to consult with and advise the Governor, ODH, and other agencies during a state of emergency.

### **Authority of ODH and local boards of health**

- Permits the General Assembly to rescind certain orders and rules issued by ODH and certain actions of the Director of Health.
- Specifies that the authority of ODH relating to the preservation of the life and health of the people is superior to the authority of local boards of health.
- Specifies that a local board of health may only issue a quarantine and isolation order that applies to specific individuals that have been medically diagnosed with or have come into direct contact with someone who has been medically diagnosed with a specified disease.
- Generally, prohibits a local board of health from closing schools or prohibiting public gatherings and instead permits a local board to close a specific school if certain conditions are met.
- Specifies that a local board of health may only issue orders and regulations that apply to specific individuals and businesses, and that orders and regulations for preventing or restricting disease may only apply to individuals and businesses that have been medically diagnosed with or come into direct contact with someone who has been medically diagnosed with the disease or have a documented incident of the disease in the building.

### **Impact of bill on existing emergency declarations, orders, rules, and actions**

- Terminates the current state of emergency 30 days after the bill takes effect, unless extended by the General Assembly by concurrent resolution, and prohibits the Governor from reissuing a state of emergency for 60 days, unless approved by the General Assembly by adopting a concurrent resolution.
- Subjects existing emergency declarations, orders, and rules issued in response to a state of emergency by the executive branch, and certain orders and rules issued by ODH or actions taken by the Director of Health to review by the Committee and rescission by the General Assembly.

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## DETAILED ANALYSIS

### State of emergency

#### Duration; extension; termination

The bill limits the duration of a state of emergency<sup>1</sup> declared by the Governor to 90 days, unless extended by the General Assembly. An amendment to a declaration of a state of emergency,<sup>2</sup> the declaration of a substantially similar state of emergency, or the reissuance of any part of an initial declaration is not considered a new state of emergency.<sup>3</sup> The General Assembly may extend a state of emergency for up to an additional 60 days by adopting a concurrent resolution, and can do so continuously by adopting subsequent concurrent resolutions, however, no extension may last more than 60 days.<sup>4</sup> The General Assembly also has authority, after a state of emergency declared by the Governor has been in effect for 30 days, to terminate the state of emergency by adopting a concurrent resolution.<sup>5</sup>

If the General Assembly does not extend a state of emergency or if the General Assembly terminates a state of emergency, the Governor cannot declare an identical or substantially similar state of emergency — or issue a declaration with any part of the initial declaration — for 60 days following the expiration or termination.<sup>6</sup> However, during those 60 days, the Governor can submit a request to the General Assembly to issue such a declaration before the 60 day period ends; the General Assembly can review the request and adopt a concurrent resolution authorizing the request.<sup>7</sup> A state of emergency terminated by the General Assembly or declared by the Governor in violation of the bill is invalid and has no legal effect.<sup>8</sup>

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<sup>1</sup> “State of emergency” means the period of time between when the Governor declares any emergency and the expiration of that emergency. This specifically includes the three current types of emergencies the Governor has specific statutory authority to declare: an air pollution emergency (R.C. 3704.032), an energy shortage emergency (R.C. 4935.03), and an adulterated consumer product emergency (R.C. 3715.74). R.C. 107.42(A).

<sup>2</sup> “Declaration of a state of emergency” means any order, proclamation, or other action of the Governor that creates a state of emergency. R.C. 107.42(A).

<sup>3</sup> R.C. 107.42(B).

<sup>4</sup> R.C. 107.42(C).

<sup>5</sup> R.C. 107.42(D)(1).

<sup>6</sup> R.C. 107.42(C) and (D)(2).

<sup>7</sup> R.C. 107.42(E).

<sup>8</sup> R.C. 107.42(D)(1) and (F).

## **Governor and ODH to report to General Assembly during emergency**

During a state of emergency, the Governor and Department of Health (ODH) are required to report to the President of the Senate and Speaker of the House every action the Governor or ODH takes in response to the emergency.<sup>9</sup>

### **Authority of the General Assembly during emergency**

Beginning the day the state of emergency is declared, the General Assembly may do any of the following by adopting a concurrent resolution:<sup>10</sup>

- Rescind, in whole or in part, any order or rule<sup>11</sup> issued or adopted by the Governor, Lieutenant Governor, Secretary of State, Auditor of State, Attorney General, or Treasurer of State (the “statewide elected officers”); by an administrative department or administrative department head;<sup>12</sup> or by a state agency in response to the state of emergency, including an order authorizing an agency to adopt, amend, or rescind rules on an emergency basis;
- Invalidate, in whole or in part, a rule adopted or amended on an emergency basis by an agency in response to the state of emergency;
- Authorize a rule rescinded by an agency, in response to the state of emergency, to be readopted, in whole or in part.

If the General Assembly rescinds or invalidates an order or rule, or portion thereof, the order or rule cannot be reissued or readopted for 60 days. The bill also prohibits, within those 60 days, the issuance or adoption of any rescinded portion, substantially similar order, rule, or portion, or any restriction contained in the rescinded order or rule or rescinded portion. The bill does permit the Governor, on behalf of a department, department head, or other state agency, within 60 days of the General Assembly rescinding the order or rule, to submit a request to the General Assembly to allow the department, head, or agency to reissue or readopt a rescinded order or rule (or the rescinded portion; substantially similar order, rule, or portion; or any restriction contained in the rescinded order or rule or rescinded portion). After reviewing the

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<sup>9</sup> R.C. 107.43(B).

<sup>10</sup> R.C. 107.43(C)(1), 106.022, 111.15, and 119.03.

<sup>11</sup> “Rule” is defined as any rule, regulation, or standard adopted, promulgated, and enforced under the authority of law. It does not include an “internal management rule,” which is any rule, regulation, or standard governing the day-to-day staff procedures and staff operations. R.C. 107.43(A). This provision does not apply to an order to declare the emergency; that is addressed under R.C. 107.42.

<sup>12</sup> See R.C. 121.02 and 121.03, not in the bill, for a list of the departments and heads.

request, the General Assembly may adopt a concurrent resolution authorizing the request, in whole or in part.<sup>13</sup>

An order or rule issued or adopted in violation of the bill's provisions is invalid and has no legal effect.<sup>14</sup>

### **Orders and rules challenged in court**

The bill authorizes a person who challenges an order or rule issued in response to a public health state of emergency to do so in the county where the person's residence or business is located. And, the state is required to pay reasonable attorney's fees and court costs on behalf of a person who successfully challenges an order or rule.<sup>15</sup>

### **Ohio Health Oversight and Advisory Committee**

The bill establishes the Ohio Health Oversight and Advisory Committee. The Committee consists of six members. Three members of the Senate (two from the majority party and one from the minority party) are to be appointed by the Senate President, and three members of the House of Representatives (two from the majority party and one from the minority party) are to be appointed by the Speaker of the House.<sup>16</sup> When appointing Committee members from the minority party, the President and Speaker must consult with the minority leader from their respective chambers.

The bill requires initial appointments to the Committee to be made within 15 days after the bill's effective date. Thereafter, appointments to the Committee occur every two years, not later than 15 days after the commencement of the first regular session of each General Assembly. A member appointed to the Committee serves until appointments are made in the next General Assembly, until a member no longer serves as a member of the chamber from which the member was appointed, or until the member is removed by the President or Speaker. However, a member of the Committee may not be removed during their term during a state of emergency (see "**State of emergency**" above) unless an extraordinary circumstance exists that prevents a Committee member from serving.<sup>17</sup>

In odd-numbered years, the President must appoint a member of the Committee from the Senate who is a member of the majority party to serve as the Committee chairperson, and the Speaker must appoint a member of the Committee from the House who is a member of the majority party to serve as the Committee vice-chairperson, and a member of the Committee from the House who is a member of the minority party to serve as the Committee ranking

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<sup>13</sup> R.C. 107.43(C)(2) and (3). A statewide elected officer is responsible for making this request on behalf of the statewide elected officer.

<sup>14</sup> R.C. 107.43(E).

<sup>15</sup> R.C. 107.43(D) and 2743.03.

<sup>16</sup> R.C. 103.65(A).

<sup>17</sup> R.C. 103.65(B).

minority member. In even-numbered years, the Speaker must appoint a member of the Committee from the House who is a member of the majority party to serve as the Committee chairperson, and the President must appoint a member of the Committee from the Senate who is a member of the majority party to serve as the Committee vice-chairperson, and a Committee member from the Senate who is a member of the minority party to serve as the Committee ranking minority member.<sup>18</sup> The Committee meets at the call of the chairperson.<sup>19</sup>

The bill authorizes the Committee to oversee actions taken by the Governor, ODH, and other agencies and to consult with and provide advice to the Governor, ODH, and other agencies regarding necessary and appropriate actions during a state of emergency. Additionally, the Committee is authorized to oversee actions taken by ODH to prevent the spread of contagious or infectious diseases under R.C. 3701.13 and by the Director of Health to investigate, make inquiry, and take prompt action to control and suppress the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, under R.C. 3701.14.<sup>20</sup>

To assist the Committee in performing its duties, including those duties described below, the bill permits the Committee chairperson to issue subpoenas. Before issuing subpoenas, the Committee chairperson must receive authorization from the Committee, the President, and the Speaker.<sup>21</sup> The bill requires the executive director and staff of the Joint Medicaid Oversight Committee to serve the Committee to enable it to successfully and efficiently perform its duties.<sup>22</sup>

## **Authority of ODH and local boards of health**

### **Authority of the General Assembly regarding certain ODH orders or rules**

The bill also allows the General Assembly to rescind a special or standing order or rule for preventing the spread of contagious or infectious disease issued by ODH under R.C. 3701.13, or an action taken by the Director of Health to investigate, make inquiry, and take prompt action to control and suppress the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions, under R.C. 3701.14. At any time after ODH issues a special or standing order or rule, or the Director takes an action described above, the General Assembly may rescind that standing order or rule or action, in whole or in part, by adopting a concurrent resolution.<sup>23</sup> After the General Assembly rescinds a special or standing order or rule, ODH and the Director are prohibited from reissuing the special or standing order

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<sup>18</sup> R.C. 103.65(C).

<sup>19</sup> R.C. 103.65(E).

<sup>20</sup> R.C. 103.651(B).

<sup>21</sup> R.C. 103.651(B)(2).

<sup>22</sup> R.C. 103.65(F).

<sup>23</sup> R.C. 101.36(A)(1) and (2).

or rule or action, or rescinded portion for 60 days. The bill also prohibits, within those 60 days, the issuance or adoption of any rescinded portion, substantially similar order, rule, action, or portion, or any restriction contained in the rescinded order, rule, action, or rescinded portion. If ODH or the Director attempts to reissue a special or standing order or rule or action in violation of the bill's provisions, the special or standing order or rule or action is invalid and has no legal effect.<sup>24</sup>

The bill does permit the Governor, on behalf of ODH or the Director, within 60 days of the General Assembly rescinding a special or standing order or rule or action, to submit a request to the General Assembly to permit ODH or the Director to issue a special or standing order or rule or take an action that was rescinded by the General Assembly. After reviewing the request, the General Assembly may adopt a concurrent resolution authorizing ODH or the Director to issue the rescinded order or rule or action in whole or in part.<sup>25</sup>

## **Quarantine and isolation**

The bill removes the word "ultimate" from existing law describing ODH's authority over matters of quarantine and isolation.<sup>26</sup> It also defines the terms quarantine and isolation as they relate to the authority of ODH and boards of health of city and general health districts.<sup>27</sup> "Isolation" is defined as "the separation of one or more individuals who have been medically diagnosed with a communicable or contagious disease from other individuals who have not been medically diagnosed with the disease." "Quarantine" is defined as "the separation or restriction of movement of one or more individuals who have come into direct contact with someone who has been medically diagnosed with a communicable or contagious disease."<sup>28</sup>

Additionally, the bill specifies that the authority of ODH over matters related to the preservation of the life and health of the people is superior to the authority of boards of health of city and general health districts or another authority that has the power of a local board of health.<sup>29</sup>

## **Local boards of health**

### **Quarantine and isolation orders**

The bill specifies that a local board of health may only issue a quarantine and isolation order that applies to individuals who have been medically diagnosed with or have come into

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<sup>24</sup> R.C. 101.36(A)(3) and (C).

<sup>25</sup> R.C. 101.36(B).

<sup>26</sup> R.C. 3701.13(B)(1). The bill also makes technical changes to this section for organizational purposes.

<sup>27</sup> R.C. 3707.01(A).

<sup>28</sup> R.C. 3701.13(A).

<sup>29</sup> R.C. 3701.13(B)(1).

direct contact with someone who has been medically diagnosed with the disease that is the subject of the order.<sup>30</sup>

### **School closures and prohibitions on public gatherings**

The bill eliminates the authority of a local board of health to generally close schools and prohibit public gatherings during an epidemic or threatened epidemic. Instead, the bill permits a local board of health to close a specific school building for a period of time necessary to bring the building into sanitary condition. A local board of health may take this action against a specific school building when a dangerous communicable disease is unusually prevalent and a verified positive case of the disease is documented in the specific school building.<sup>31</sup>

### **Orders and regulations for the public health**

In addition to the requirements regarding quarantine and isolation orders issued by a local board of health, the bill specifies that a local board of health may only issue orders or regulations that apply to specific individuals or businesses. Any order that applies to a class of persons in violation of this provision is invalid and has no legal effect.<sup>32</sup> Specifically, the bill provides that any order or regulation issued by a local board of health for the prevention or restriction of disease may only apply to individuals and businesses that (1) have been medically diagnosed with the disease that is the subject of the order or regulation, (2) have come in direct contact with someone who has been medically diagnosed with the disease that is the subject of the order or regulation, or (3) have a documented incident in the building of the disease that is the subject of the order or regulation.<sup>33</sup>

### **Impact of the bill on existing declarations, orders, rules, and actions**

The bill terminates the current state of emergency 30 days after the bill takes effect, unless extended by the General Assembly by concurrent resolution, and prohibits the Governor from reissuing a state of emergency for 60 days, unless approved by the General Assembly by adopting a concurrent resolution.<sup>34</sup>

The bill subjects current declarations, orders, rules, and actions covered by the bill to review by the Committee and rescission by the General Assembly, in accordance with the bill's provisions.<sup>35</sup>

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<sup>30</sup> R.C. 3707.11.

<sup>31</sup> R.C. 3707.26.

<sup>32</sup> R.C. 3707.54 and 3709.50.

<sup>33</sup> R.C. 3709.212.

<sup>34</sup> Section 3(C).

<sup>35</sup> Section 3(B).



## Severability

The bill states that if any provision of the bill or its application is held invalid, the invalidity does not affect other provisions or applications of the bill that can be given effect without the invalid provision or application, and to that end invalid provisions are severable.<sup>36</sup>

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## COMMENT

The provisions allowing the General Assembly to terminate states of emergency or rescind executive orders and rules by concurrent resolution might be vulnerable to a constitutional challenge on the grounds that the legislature cannot take such an action by resolution. The Ohio Constitution specifies that, “The General Assembly shall enact no law except by bill.” In interpreting that provision, the Ohio Supreme Court has ruled that a joint resolution cannot have the effect of law.<sup>37</sup> A reviewing court might find that the General Assembly cannot take an action with legal effect – such as rescinding an order of a state department – except by passing a bill, which must be presented to the Governor for approval and which, unless an exception applies, is subject to the referendum. This concept is parallel to one found in the U.S. Constitution with respect to Congress. The U.S. Supreme Court similarly has ruled that Congress cannot overrule a determination of an executive official by adopting a resolution.<sup>38</sup>

In addition, some might examine the provisions with respect to the constitutional principle of separation of powers.<sup>39</sup> The Constitution gives the General Assembly the power to enact laws, but gives the Governor the power to execute them.<sup>40</sup> A reviewing court might find the bill attempts to give the General Assembly a legislative veto power – that is, the authority to both make the law allowing the executive to issue orders and adopt rules, and the authority to determine how that law is enforced by rescinding the orders and rules via resolution rather than bill. Ohio’s courts appear not to have addressed this specific issue, but the U.S. Supreme Court and courts in several other states have ruled legislative veto laws unconstitutional on this basis. The U.S. Supreme Court has stated that, “once Congress makes its choice in enacting

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<sup>36</sup> Section 4.

<sup>37</sup> Ohio Constitution, Article II, Section 15 and *Cleveland Terminal and Valley Railroad Company v. State*, 85 Ohio St. 251, 281 (1912). See also Ohio Const., art. II, secs. 1c and 1d and art. XVI, sec. 1. The Ohio Constitution specifically allows legislative action by resolution in some cases, such as to place a constitutional amendment on the ballot.

<sup>38</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 956 (1983).

<sup>39</sup> While no provision of the Constitution explicitly states the principle of separation of powers, according to the Ohio Supreme Court, “this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” *South Euclid v. Jemison*, 28 Ohio St.3d 157, 158 (1986).

<sup>40</sup> Ohio Const., art. III, sec. 6.

legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly – by passing new legislation.”<sup>41</sup>

## HISTORY

Action	Date
Introduced	01-26-21
Reported, S. Gov’t Oversight & Reform	02-17-21
Passed Senate (25-8)	02-17-21
Reported, H. State & Local Gov’t	---

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<sup>41</sup> *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). See also *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980); *General Assembly of New Jersey v. Byrne*, 90 N.J. 376 (1982); *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45 (1984); *Commonwealth v. Sessoms*, 516 Pa. 365 (1987); *State ex rel. Meadows v. Hechler*, 195 W. Va. 11 (1995); *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. 1997); and *Blank v. Department of Corrections*, 462 Mich. 103 (2000).