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# OHIO LEGISLATIVE SERVICE COMMISSION

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Office

**S.B. 308\***  
**133<sup>rd</sup> General Assembly**

## Bill Analysis

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**Version:** As Reported by Senate Judiciary

**Primary Sponsor:** Sen. M. Huffman

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### SUMMARY

#### **Civil immunity for health care providers**

- Expands the tort action immunity granted to certain health care providers and emergency medical technicians who provide emergency services during a declared disaster as described below.
- Extends the immunity to (1) actions taken during a declared emergency, (2) actions by additional health care providers, (3) decisions to withhold or withdraw health care services, and (4) compliance with an executive order or director's order.
- Extends the immunity to professional discipline and other civil actions.

#### **Exceptions to immunity**

- Excludes from immunity in tort actions conduct taken in reckless disregard of the consequences or that constitutes willful or wanton misconduct.
- Excludes from immunity in professional disciplinary actions conduct that constitutes gross negligence.
- Excludes from immunity conduct that is outside the skills, education, or training of the health care provider, unless undertaken in good faith and in response to a lack of resources caused by a disaster or emergency.
- Maintains and expands the current law exception for wrongful death actions to apply to the health care providers and services covered by the bill.

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\* This analysis was prepared before the report of the Senate Judiciary Committee appeared in the Senate Journal. Note that the legislative history may be incomplete.

## **Class action prohibition**

- Specifies that if immunity does not apply, no class action can be brought against a health care provider for the above conduct undertaken during a disaster or emergency.

## **Qualified civil immunities of service providers**

- Grants a service provider qualified civil immunity for illness or for injury, death, or loss in providing services that are as a result of, or in response to, a disaster or emergency declared due to COVID-19 or are intended to assist persons to recover from such disaster or emergency during its period and ending on April 1, 2021.
- Grants a service provider qualified civil immunity for injury, death, or loss resulting from, or related to, a person's actual or alleged exposure to an illness in the course of that provider's provision of services during the period of the declared disaster or emergency due to COVID-19 and ending on April 1, 2021.
- Specifies that the immunities also apply to a cause of action against a service provider for contribution or indemnity for damages sustained by any person during the declared disaster or emergency due to COVID-19 and ending on April 1, 2021.

## **Exceptions to immunity**

- Provides that the above immunities do not apply if it is established that the service provider's act or omission is reckless or intentional conduct or willful or wanton misconduct.
- Defines "reckless conduct" as conduct by which, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause an illness, or an injury, death, or loss or is likely to be of a nature that results in such an illness, or an injury, death, or loss under the circumstances of the immunities.
- Provides that the bill does not create a new cause of action, a third-party claim, or a substantive legal right against any person and does not affect any civil immunities or defenses established by another Revised Code section or available at common law to a service provider that provides the services.

## **Government order**

- Provides that a government order does not create nor is to be construed as creating a duty of care upon any person that may be enforced in a cause of action, or create a new cause of action or substantive legal right against any person with respect to the matters contained in the government order.
- Specifies that a presumption exists that such government order is not admissible as evidence that a duty of care or substantive legal right has been established.

## **Class action prohibition**

- Specifies that if neither of the above immunities applies, no class action can be brought against any service provider alleging liability for damages for injury, death, or loss to person or property on the specified cause of action.

## **Statement of intent**

- Declares the General Assembly's intent that executive branch orders and recommendations do not create new legal duties for purposes of tort liability and are presumed to be (1) irrelevant to the existence or breach of a duty and (2) inadmissible in tort actions to establish the existence or breach of a duty.
- Declares the General Assembly's intent that the bill is to apply broadly to all sectors of the economy that engage with the public and that the use of the terms "services" and "service provider" be broadly construed in order to promote commerce, recovery from disasters or emergencies, and to alleviate suffering.

## **Other**

- Specifies that the bill's provisions apply from the date of the Governor's Executive order 2020-01D, declaring a state of emergency due to COVID-19, issued on March 9, 2020.
- Declares an emergency.

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# **DETAILED ANALYSIS**

## **Qualified immunity for health care providers in a disaster**

### **Overview**

The bill expands the qualified immunity under existing law for health care providers providing emergency services during a declared disaster. Under current law, a health care provider or emergency medical technician (EMT) who provides emergency medical services, first-aid treatment, or other emergency professional care, including providing any medication or medical product, as a result of a disaster is not liable in a tort action for injury, death, or loss to person or property arising from the provider's or EMT's act or omission.<sup>1</sup>

Current law defines "disaster" as any occurrence of widespread personal injury or loss of life that results from any natural or technological phenomenon or act of a human, or an epidemic and is declared to be a disaster by the federal government, the state government, or a political subdivision of Ohio.<sup>2</sup> Under the bill, an "emergency" is any period during which

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<sup>1</sup> R.C. 2305.2311(B) and (C)(5).

<sup>2</sup> R.C. 2305.2311(A)(10).

Congress, the Governor, a board of county commissioners, a board of township trustees, or a mayor or city manager in Ohio has declared or proclaimed that an emergency exists.<sup>3</sup>

The bill expands that immunity to include both of the following:

- Actions taken as a result of or in response to a declared disaster or emergency (instead of as a result of a disaster).<sup>4</sup>
- Health care services rendered by a health care provider for the diagnosis, prevention, treatment, cure, or relief of a health condition, illness, injury, or disease, including providing medication, medical equipment, or other medical product (instead of emergency services). Health care services also include behavioral health services, personal care services (assisting with activities of daily living and self-administration of medication and preparing special diets), and experimental treatments.<sup>5</sup>

### **Covered actions**

In addition to actions or omissions in the provision of health care services by a health care provider, the bill extends immunity to the following:

- Withholding or withdrawing health care services, emergency medical services, first-aid treatment, or other emergency professional care;
- Any decision related to providing, withholding, or withdrawing those services;
- Compliance with an executive order or director's order issued during and in response to the disaster or emergency.<sup>6</sup>

The bill further provides that a health care provider is not subject to professional discipline or liable in a tort action for injury, death, or loss to person or property that allegedly arises because the provider was prohibited from treating, diagnosing, or testing a person for any illness, disease, or condition, including performing elective procedures, by an executive or director's order or an order of a local board of health issued in relation to an epidemic, pandemic, or other public health emergency.<sup>7</sup>

### **Covered providers**

The bill expands the categories of health care providers that are granted immunity. Included under current law are advanced practice registered nurses, registered nurses,

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<sup>3</sup> R.C. 2305.2311(A)(11) and R.C. 5502.21(C) and (F), not in the bill.

<sup>4</sup> R.C. 2305.2311(B)(1) and (C)(5); R.C. 5502.21(F), not in the bill.

<sup>5</sup> R.C. 2305.2311(A)(20) and 3721.01(A)(5)(a), not in the bill.

<sup>6</sup> R.C. 2305.2311(B)(1).

<sup>7</sup> R.C. 2305.2311(B)(4).

pharmacists, dentists, optometrists, physicians, physician assistants, hospitals, EMTs, and paramedics.<sup>8</sup> The bill also grants immunity to the following individuals and entities:

- Licensed practical nurses;
- Chiropractors;
- Physical therapists, occupational therapists, and athletic trainers;
- Speech-language pathologists and audiologists;
- Laboratory workers;
- Massage therapists;
- Respiratory care professionals;
- Health care professional's employer;
- Direct support professionals;
- Behavioral health providers (providers of alcohol and drug addiction services, mental health services, or other behavioral health services, including chemical dependency counselors, clinical counselors, professional counselors, social workers, marriage and family therapists, and psychologists);
- Home medical equipment services providers;
- Other health care workers who provide healthcare-related services to an individual under the direction of a health care professional with the authority to direct that worker's activities, including medical technicians, medical assistants, dental assistants, occupational therapy assistants, physical therapist assistants, orderlies, nurse aides, and other individuals acting in a similar capacity;
- Medicaid home and community-based services providers;
- Home health agencies;
- Hospice care programs;
- Physician practices;
- Facilities that provide health care services or are health care settings, including a hospital, emergency department, inpatient, ambulatory, surgical, ambulatory surgical, urgent care, treatment, laboratory, adult day care, residential care (commonly referred to as "assisted living"), residential treatment, long-term care, or intermediate care facilities or facilities for individuals with developmental disabilities (include institutions for mental disease and residential facilities); developmental, diagnostic, or imaging

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<sup>8</sup> R.C. 2305.2311(A)(12) to (14) and (18).

centers; rehabilitation or therapeutic health settings; federally qualified health centers (FQHCs) or FQHC look-alikes; or modular field treatment facilities or alternative care sites designated for temporary use to provide medical services in response to a disaster or emergency; and

- Agents, board members, committee members, employees, employers, officers, or volunteers of a home health agency, hospice care program, health care professional's employer, physician practice, Medicaid home and community-based services provider, or facility.<sup>9</sup>

## **Types of legal actions**

Current law provides immunity from damages to any person for damages for injury, death, or loss to person or property (tort action), including a medical claim action, but does not include actions for damages for a breach of an agreement between parties or governmental entities. The bill includes actions for damages for a breach of an agreement between parties or governmental entities and also includes claims arising under resident or patient bills of rights and contractual claims arising out of statutory or regulatory requirements applicable to health care providers. The bill also provides immunity from professional disciplinary action and specifies that an individual is not liable to a government agency.<sup>10</sup>

## **Duration of immunity**

The immunity described above applies to actions, omissions, decisions, or compliance by a health care provider as a result of or in response to a disaster or emergency and through the duration of the disaster or emergency.<sup>11</sup>

## **Exceptions to immunity**

### **Reckless disregard or willful or wanton misconduct**

In a tort action, the health care provider immunity granted under the bill does not apply to actions, omissions, decisions, or compliance that constitute a reckless disregard for the consequences so as to affect the life or health of a patient or willful or wanton misconduct. For purposes of this provision, "reckless disregard" means conduct by which, with heedless indifference to the consequences, the health care provider disregards a substantial and unjustifiable risk that the health care provider's conduct is likely to cause, at the time health care or emergency services were rendered, an unreasonable risk of injury, death, or loss to person or property.

This standard replaces the current law provision under which immunity applies only to acts or omissions that do not constitute reckless disregard for the consequences so as to affect the life or health of a patient. Under that provision, "reckless disregard" means conduct that a

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<sup>9</sup> R.C. 2305.2311(A).

<sup>10</sup> R.C. 2305.2311(A)(46) and (B)(1).

<sup>11</sup> R.C. 2305.2311(C)(5).

health care provider knew or should have known, at the time those services or that treatment or care were rendered, created an unreasonable risk of injury, death, or loss to person or property so as to affect the life or health of another and that risk was substantially greater than that which is necessary to make the conduct negligent.<sup>12</sup>

### **Gross negligence**

With regard to professional disciplinary actions, the immunity does not apply to actions, omissions, decisions, or compliance that constitutes gross negligence (a lack of care so great that it appears to be a conscious indifference to the rights of others).<sup>13</sup>

### **Outside skills, education, and training; wrongful death actions**

The bill modifies two current law immunity exceptions as follows:

1. Excludes from immunity actions that are outside the skills, education, and training of the provider unless the provider undertakes the action in good faith and in response to a lack of resources caused by a disaster or emergency, instead of actions that are outside the provider's scope of authority;<sup>14</sup>
2. Maintains an exception for wrongful death actions against a health care provider who provides emergency medical services, first-aid treatment, or other emergency professional care as a result of a disaster and expands the exception to apply to the bill's provisions regarding health care services provided during or in response to a disaster or emergency.<sup>15</sup>

### **Class action prohibition**

If immunity does not apply, the bill prohibits a class action lawsuit from being brought against a health care provider if the lawsuit involves damages for injury, death, or loss to person or property involving the provision, withholding, or withdrawal of health care services, emergency medical services, first-aid treatment, or other emergency professional care, decisions related to those services or care, or compliance with an executive or director's order as a result of or in response to a disaster or emergency.<sup>16</sup>

### **Civil immunities of service providers; exception**

The bill grants a "service provider" qualified immunity from a civil action by any "person" for illness or for injury, death, or loss to person or property, allegedly arising directly or indirectly from the provider's act or omission in providing or performing the provider's "services" that are as a result of or in response to a "disaster" or "emergency" declared due to

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<sup>12</sup> R.C. 2305.2311(A)(43) and (B)(2).

<sup>13</sup> R.C. 2305.2311(A)(18) and (B)(3).

<sup>14</sup> R.C. 2305.2311(C)(3).

<sup>15</sup> R.C. 2305.2311(D).

<sup>16</sup> R.C. 2305.2311(E).

COVID-19, or are intended to assist persons to recover from a such a disaster or emergency or otherwise sustain themselves during the period of the declared disaster or emergency and ending on April 1, 2021.<sup>17</sup>

The bill further grants a service provider qualified immunity from a civil action by any person for injury, death, or loss to person or property resulting from, or related to, the person's actual or alleged exposure to an illness in the course of or through that provider's provision of services during the period of the disaster or emergency declared due to COVID-19 and ending on April 1, 2021.<sup>18</sup>

### **Exemption from immunities**

The bill provides that the above immunities do not apply if it is established that the service provider's act or omission is "reckless" or intentional conduct or willful or wanton misconduct.<sup>19</sup>

It defines "reckless conduct" as conduct by which, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause an illness or an injury, death, or loss to person or property under the circumstances specified for either of the above immunities, as applicable, or is likely to be of a nature that results in such an illness or an injury, death, or loss to person or property. A person is reckless with respect to circumstances in relation to causing the illness or the injury, death, or loss, when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.<sup>20</sup>

### **Class action prohibition**

Under the bill, if neither of the above immunities applies, no class action can be brought against any service provider alleging liability for damages for injury, death, or loss to person or property on the specified cause of action.<sup>21</sup>

### **No new cause of action; other immunities not affected**

The bill provides that it does not create a new cause of action, a third-party claim, or a substantive legal right against any person and does not affect any immunities from civil liability or defenses established by another Revised Code section or available at common law to a service provider providing the services.<sup>22</sup>

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<sup>17</sup> R.C. 2305.2312(B).

<sup>18</sup> R.C. 2305.2312(C).

<sup>19</sup> R.C. 2305.2312(D)(1).

<sup>20</sup> R.C. 2305.2312(D)(2).

<sup>21</sup> R.C. 2305.2312(E).

<sup>22</sup> R.C. 2305.2312(F).



## Cause of action for contribution or indemnity

The bill specifies that the above immunities also apply to a cause of action against a service provider for contribution or indemnity for damages sustained by any person during the period of the disaster or emergency declared due to COVID-19 and ending on April 1, 2021.<sup>23</sup>

## Effect of government order

The bill provides that a “government order” does not create or is not to be construed as creating a duty of care upon any person that may be enforced in a cause of action, or does not create a new cause of action or substantive legal right against any person with respect to the matters contained in the government order. A presumption exists that any such government order is not admissible as evidence that a duty of care or substantive legal right has been established.<sup>24</sup>

## Definitions

The bill defines the following terms:<sup>25</sup>

“**Disaster**” has the same definition as above under “**Civil immunity for health care providers.**”

“**Emergency**” means any period during which the United States Congress or a chief executive has declared or proclaimed that an emergency exists due to COVID-19.

“**Government order**” means an order, recommendation, or guideline issued in response to a disaster or emergency due to COVID-19 by a federal official or agency, a state official or agency, a political subdivision, or a “**board of health,**” defined as the board of health of a city or general health district or the authority having the duties of a board of health under the Health Districts Law.

“**Person**” means an individual, corporation, business trust, estate, trust, partnership, and association, as in continuing law, and also includes a school, a for-profit, nonprofit, religious, or governmental entity, or a “**state institution of higher education,**” defined as any of the 13 “state universities” under continuing law, and the Northeast Ohio Medical University, a community college, state community college, university branch established under R.C. Chapter 3355, or technical college.

“**Services**” means any activity, including manufacturing, that is part of or outside of a service provider’s normal course of business conducted during the period of a disaster or emergency declared due to COVID-19 and ending on April 1, 2021.

“**Service provider**” means any person providing the services above, including that person’s owner, officer, director, employee, or agent.

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<sup>23</sup> R.C. 2305.2312(G).

<sup>24</sup> R.C. 2305.2312(H).

<sup>25</sup> R.C. 2305.2312(A).

## Statement of intent

The General Assembly declares its intent that orders and recommendations from the executive branch, from counties and local municipalities, from boards of health and other agencies, and from any federal government agency do not create any new legal duties for purposes of tort liability and are presumed to be (1) irrelevant to determining the existence or breach of a duty and (2) inadmissible at trial to establish the existence or breach of a duty in tort actions.<sup>26</sup>

The General Assembly declares that R.C. 2305.2312 is intended to apply broadly to all sectors of the economy that own property, operate a business, engage in a nonprofit or religious activity, or otherwise engage with the public. The General Assembly further declares its intent that the use of the terms “services” and “service provider” in that section be broadly construed in an effort to promote commerce, recovery from disasters or emergencies, and to alleviate suffering throughout this state.<sup>27</sup>

## Application to existing disasters

The bill applies from the date of the Governor’s Executive Order 2020-01D declaring a state of emergency due to COVID-19, issued on March 9, 2020.<sup>28</sup>

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## HISTORY

Action	Date
Introduced	05-05-20
Reported, S. Judiciary	---

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<sup>26</sup> Section 4.

<sup>27</sup> Section 3.

<sup>28</sup> Section 5.