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

## Bill Analysis

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**Version:** As Passed by the Senate

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

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### SUMMARY

- Prohibits a state of emergency issued by the Governor, including a public health state of emergency, from existing for more than 90 days unless extended by the General Assembly.
- Permits the General Assembly to extend a state of emergency in 60-day intervals by adopting a concurrent resolution.
- Requires the Governor to notify the President of the Senate and Speaker of the House of Representatives, in writing, at least 15 days before the Governor intends to declare an identical or substantially similar state of emergency.
- Permits the General Assembly to terminate a state of emergency declared by the Governor.
- Permits the General Assembly to rescind certain orders and rules issued by the Governor and the Ohio Department of Health (ODH), and to invalidate certain emergency rules adopted by any agency.
- Establishes the Ohio Health Oversight and Advisory Committee, and requires the Committee to report findings and make recommendations to the General Assembly.
- Limits the duration of a public health state of emergency to 90 days unless extended by the General Assembly.
- During a public health state of emergency, requires the Governor and ODH to report to the Senate President and House Speaker any actions taken in response to the emergency.
- 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.
- Subjects existing orders and rules issued by the Governor, ODH, and other agencies to review and rescission by the General Assembly and the Committee.

- Specifies any emergency declaration in effect on the bill's effective date is considered to have been issued on the bill's effective date and may not exist for more than 30 days following the bill's effective date unless extended by the General Assembly.

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## DETAILED ANALYSIS

### **Authority of General Assembly regarding a state of emergency**

The bill prohibits a state of emergency declared by the Governor to exist for more than 90 days unless extended by the General Assembly. An amendment to a state of emergency is not considered a new state of emergency.<sup>1</sup> The General Assembly may extend a state of emergency for up to an additional 60 days and can do so continuously by adopting subsequent concurrent resolutions, however, no extension may last more than 60 days. If the Governor intends to declare an identical or substantially similar state of emergency, the Governor must notify, in writing and at least 15 days before doing so, the President of the Senate and Speaker of the House of Representatives. If the General Assembly does not extend a state of emergency, the Governor cannot declare an identical or substantially similar one for 30 days following the expiration of the state of emergency, unless otherwise authorized by the General Assembly by adopting a concurrent resolution.<sup>2</sup>

Under the bill, after a state of emergency declared by the Governor has been in effect for 30 days, the General Assembly may terminate the state of emergency by adopting a concurrent resolution. After the General Assembly terminates a state of emergency, the Governor is prohibited from declaring an identical or substantially similar state of emergency for 30 days.<sup>3</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>4</sup>

### **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 the Ohio Department of Health (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. Beginning on the 11<sup>th</sup> day 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

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<sup>1</sup> R.C. 107.43(A).

<sup>2</sup> R.C. 107.43(B).

<sup>3</sup> R.C. 107.43(C).

<sup>4</sup> R.C. 107.43(C)(1) and (D).

order or rule or action by adopting a concurrent resolution.<sup>5</sup> After the General Assembly rescinds a special or standing order or rule, ODH is prohibited from reissuing the special or standing order or rule (or a substantially similar special or standing order or rule) for 30 days. If ODH attempts to reissue a special or standing order or rule that was rescinded – or issues a substantially similar special or standing order or rule to the one that was rescinded – the special or standing order or rule is invalid and has no legal effect.<sup>6</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>7</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 public health state of emergency (see "**Public health state of emergency**" below).<sup>8</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 minority party to serve as the Committee ranking 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 Committee member from the Senate who is a member of the minority party to serve as the Committee ranking minority member.<sup>9</sup> The Committee meets at the call of the chairperson.<sup>10</sup>

In addition to its powers during a public health emergency (see "**Public health state of emergency**" below), the Committee is authorized to oversee actions taken by ODH to

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<sup>5</sup> R.C. 101.36(B)(1) and (2).

<sup>6</sup> R.C. 101.36(C)(1) and (2).

<sup>7</sup> R.C. 103.65(A).

<sup>8</sup> R.C. 103.65(B).

<sup>9</sup> R.C. 103.65(C).

<sup>10</sup> R.C. 103.65(E).

prevent the spread of contagious or infectious diseases under R.C. 3701.13 and by the Director 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>11</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>12</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>13</sup>

## **Public health state of emergency**

The bill limits the duration of a “public health state of emergency,” which the bill defines to mean an emergency for which the Governor declares an emergency in response to a threat to the preservation of the life and health of Ohioans.<sup>14</sup> This includes the three current types of emergencies the Governor has specific statutory authority to declare: an air pollution emergency, an energy shortage emergency, and an adulterated consumer product emergency.<sup>15</sup> A public health state of emergency may last only 90 days unless the General Assembly adopts a concurrent resolution to extend the emergency.<sup>16</sup>

During a public health state of emergency:

- The Governor and ODH are required to report to the President and Speaker every action the Governor or ODH take in response to the emergency.<sup>17</sup>
- The Committee may oversee actions taken by the Governor, ODH, and other agencies.<sup>18</sup>
- The Committee may consult with and provide advice to the Governor, ODH, and other agencies regarding necessary and appropriate actions.<sup>19</sup>

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<sup>11</sup> R.C. 103.651(B)(1)(b).

<sup>12</sup> R.C. 103.651(B)(2).

<sup>13</sup> R.C. 103.65(F).

<sup>14</sup> R.C. 107.42.

<sup>15</sup> R.C. 3704.032, not in the bill, 4935.03 (currently may last up to 30 days, but can be extended by the Governor; General Assembly can terminate the emergency at any time with a concurrent resolution), and 3715.74 (currently may last up to 90 days unless extended by General Assembly via concurrent resolution), respectively.

<sup>16</sup> R.C. 107.43(A).

<sup>17</sup> R.C. 107.42.

<sup>18</sup> R.C. 103.651(B)(1)(a).

<sup>19</sup> R.C. 103.651(B)(1)(c).

If the Governor issues an executive order declaring a public health state of emergency, the bill requires the Committee to report to the General Assembly any findings and recommendations that it makes regarding its oversight of, consultation with, and advice to the Governor, ODH, and other agencies not sooner than 20 days and not later than 30 days after the Governor, ODH, or agency take action.<sup>20</sup>

### **Authority of the General Assembly**

Beginning on the 11<sup>th</sup> day following the issuance of an executive order declaring a public health state of emergency, the General Assembly may do any of the following by adopting a concurrent resolution:

- Rescind a subsequent executive order issued by the Governor in response to the public health state of emergency (but not the executive order declaring a public health state of emergency, see “**Authority of General Assembly regarding a state of emergency**” above), including an order authorizing an agency to adopt, amend, or rescind rules on an emergency basis;<sup>21</sup>
- Invalidate a rule adopted or amended on an emergency basis by an agency in response to a public health state of emergency;<sup>22</sup>
- Authorize a rule rescinded by an agency, in response to an order issued by the Governor authorizing an agency to rescind rules on an emergency basis, to be readopted.<sup>23</sup>

If the General Assembly rescinds an executive order or invalidates or authorizes the readoption of an emergency rule, the Governor or the affected agency is prohibited from reissuing the order or readopting the invalidated emergency rule (or a substantially similar one) for 30 days. If the Governor or affected agency attempts to reissue an order that was rescinded or readopt an emergency rule that was invalidated – or issues or adopts a substantially similar order or emergency rule to one that was rescinded or invalidated – the order or emergency rule is invalid and has no legal effect.<sup>24</sup>

### **Existing orders and rules**

The bill provides that any executive order or emergency declaration issued by the Governor; any special or standing order or rule for preventing the spread of contagious or infectious disease issued by ODH under R.C. 3701.13; any 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; and any rule adopted, amended, or rescinded by an agency in response to

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

<sup>21</sup> R.C. 101.36(A)(1).

<sup>22</sup> R.C. 103.651(A)(2) and (4), 111.15(B)(2), and 119.03(G).

<sup>23</sup> R.C. 101.36(A)(3).

<sup>24</sup> R.C. 101.36(C)(1) and (2).

a public health state of emergency that is in effect on the bill's effective date, is subject to review by the Committee and rescission by the General Assembly.

Additionally, the bill provides that any emergency declaration in effect on the bill's effective date is considered to have been issued on the bill's effective date and may not exist for more than 30 days following the bill's effective date unless extended by the General Assembly as provided under the bill.<sup>25</sup>

## **ODH authority – 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> The bill 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>

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## **COMMENT**

The provisions allowing the General Assembly to terminate states of emergency, rescind orders of the Governor or ODH, or invalidate an emergency rule 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>30</sup> A reviewing court might find that the General Assembly cannot take an action with legal effect – such as rescinding an order of the Governor or ODH or invalidating an agency rule – 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.

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<sup>25</sup> Section 3.

<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).

<sup>30</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.

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>31</sup>

In addition, some might examine the provisions with respect to the constitutional principle of separation of powers.<sup>32</sup> The Constitution gives the General Assembly the power to enact laws, but gives the Governor the power to execute them.<sup>33</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 Governor or ODH to issue orders, and the authority to determine how that law is enforced by rescinding the Governor’s or ODH’s orders and agency 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 legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly – by passing new legislation.”<sup>34</sup>

## HISTORY

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

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<sup>31</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 956 (1983).

<sup>32</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>33</sup> Ohio Const., art. III, sec. 6.

<sup>34</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).