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S.B. 387
133rd General Assembly

Bill Analysis

Version: As Introduced

Primary Sponsor: Sen. Burke

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SUMMARY

- Terminates certain provisions of the “Director’s Order for Retail and Business Compliance for Facial Coverings throughout the State of Ohio,” issued on November 13, 2020, regarding cooperation with agencies for order enforcement.
- Declares an emergency.

DETAILED ANALYSIS

Termination of certain health order provisions

The bill terminates the paragraph labeled “10. Cooperation.” of the “Director’s Order for Retail and Business Compliance for Facial Coverings throughout the State of Ohio,” issued on November 13, 2020, which requires businesses do the following:

- Allow access to, and permit inspection of the public areas of their premises by, representatives of the Ohio Department of Health, local health departments or districts, and law enforcement during all business hours;
- Provide any information regarding compliance with the order that is requested;
- Cooperate fully in any inspection or investigation of compliance with the order (see **COMMENT** below).¹

Summary of the order

The order generally prohibits stores, retail businesses, and other enterprises offering goods in person to the public (“retailers”) from operating unless they comply with the order’s

¹ Section 1; Lance D. Himes, Interim Director of Health, RE: Director’s Order for Retail and Business Compliance for Facial Coverings throughout the State of Ohio, available [here](#).

requirements. The order reiterates a requirement from a previous order generally mandating that all customers 10 years old and older wear a facial covering while inside a retail location. The order further requires retailers to do all of the following:

- Post clearly visible signage at all entrances to the retailer's premises stating that all persons entering must wear a facial covering;
- Post and enforce the maximum capacity limitation determined pursuant to the Director's Updated and Revised Order for Business Guidance and Social Distancing, issued on May 29, 2020;
- Limit and stagger the number of persons in a retail establishment to assure that a minimum of six feet of physical separation can be maintained between persons;
- Mark six feet of separation spots in all check-out lines;
- Arrange all store aisles to be directionally one-way, if necessary to achieve appropriate social distancing;
- Place hand sanitizers in high contact locations;
- Require employees to regularly wash hands and stay home if symptomatic;
- Disinfect high touch items after each use;
- Notify a customer who is unable to wear a mask of reasonable accommodations available to the customer and provide the accommodation when requested;
- Designate an on-site compliance officer for each retail location and each shift during all business hours;
- Allow access to, and permit inspection of, the public areas of the retail premises by, representatives of the Department of Health, local health departments, and law enforcement during all business hours;
- Provide any requested information regarding compliance with the order.²

The first time a retailer fails to follow the order's requirements, the retailer receives a warning. For each subsequent failure, the retailer must close the premises to the public for a period of no more than 24 hours.³

The order authorizes enforcement by Ohio employees with enforcement powers, including the BWC Workers' Compensation Retail Compliance Unit. The order also authorizes enforcement by local health departments and local law enforcement agencies.⁴

² Order at ¶ 3 through 8 and 10.

³ Order at ¶ 9.

⁴ Order at ¶ 12.

The order is in effect until the State of Emergency declared in the Governor’s Executive Order expires or the Director of the Ohio Department of Health rescinds or modifies the order.

Effective date

The bill declares an emergency by stating its provisions are necessary to relieve a severe burden on Ohio’s businesses and their employees. If passed as an emergency law, the bill would take effect immediately following the Governor’s signature.⁵

COMMENT

Because the bill terminates a portion of an order issued by the Director of Health, it might be questioned for violating the constitutional doctrine of separation of powers. 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.”⁶

The Constitution grants the General Assembly the power to enact laws, but accords the Governor the power to execute them.⁷ A reviewing court might find that the bill attempts to give the General Assembly a legislative veto power – that is, the authority to both make the law allowing the executive branch to issue public health orders⁸ and to determine how that law is enforced by terminating portions of those orders, without taking the steps necessary to amend the law. 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. 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.”⁹

HISTORY

Action	Date
Introduced	11-30-20

S0387-I-133/ts

⁵ Section 2.

⁶ *South Euclid v. Jemison*, 28 Ohio St.3d 157, 158 (1986).

⁷ Ohio Constitution, Article III, Section 6.

⁸ R.C. 3701.13 and 3701.14, not in the bill.

⁹ *Bowsher v. Synar*, 478 U.S. 714, 733-734 (1986).