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Bill Analysis

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SUMMARY

Temporary civil immunity for health care providers

- Grants temporary qualified immunity to specified health care providers who provide health care services or emergency services during a declared disaster or emergency as described below.
- Grants immunity from tort liability and professional discipline for such services provided as a result of and in response to a disaster or emergency that results in injury, death, or loss allegedly resulting from (1) actions or omissions in the provision, withholding, or withdrawal of those services, (2) decisions related to the provision, withholding, or withdrawal of those services, and (3) compliance with an executive order or director's order.
- Grants immunity from tort liability and professional discipline for injury, death, or loss that allegedly resulted because a health care provider was unable to treat a person, including the inability to perform any elective procedure, due to an executive or director's order or a local health order issued in relation to an epidemic or pandemic disease or other public health emergency.

Exceptions to immunity

- Excludes from immunity in tort actions conduct that constitutes a reckless disregard of the consequences or intentional conduct or willful or wanton misconduct on the part of the person against whom the action is brought.
- Excludes from immunity in professional disciplinary actions conduct that constitutes gross negligence.

- Excludes from immunity conduct 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.

Limitations

- Provides that the immunity does not create a new cause of action or substantive legal right against a health care provider or affect any immunities or responsibilities of a health care provider.
- Limits the bill's provisions regarding immunity for health care providers to March 9, 2020, through December 31, 2020.

General immunity

- In uncodified law, generally prevents bringing a civil action for injury, death, or loss to person or property against any person if the cause of action on which the action is based, in whole or in part, is that the injury, death, or loss is caused by the exposure to, or the transmission or contraction of, "MERS-CoV," "SARS-CoV," or "SARS-CoV-2," or any mutation thereof.
- Provides that the above immunity does not apply if it is established that the exposure to, or the transmission or contraction of, any of those viruses or mutations was by reckless or intentional conduct or with willful or wanton misconduct of the person against whom the action is brought.
- Generally defines "reckless conduct" as conduct by which, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such conduct:
 - Is likely to cause an exposure to, or a transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof, or
 - Is likely to be of a nature that results in an exposure to, or a transmission or contraction of, any of those viruses or mutations.
- Specifies that a government order, recommendation, or guideline does not create a duty of care on a person that may be enforced in a cause of action or that may create a new cause of action or substantive right against any person regarding the matters in the government order, recommendation, or guideline.
- Provides that the general immunity provisions apply from March 9, 2020, through December 31, 2020.

State immunity

- Provides that the state is immune from liability in any civil action or proceeding that:
 - Involves the performance or nonperformance of a governmental function or public duty as a result of a state agency's response to the COVID-19 pandemic by arranging

or providing care, protection, or treatment for any person in the custody of the state; or

- As the result of the performance or nonperformance of a governmental function or public duty, an officer or employee becomes infected with COVID-19.

Indemnification

- The bill prohibits the state from indemnifying a state employee for any portion of a judgment in either of the above civil actions or proceedings.

Political subdivision tort liability

- Expands the list of functions that constitute the definition of “governmental function” under the Political Subdivision Tort Liability Law to include:
 - Compliance with an order resulting from the COVID-19 pandemic issued by the Ohio Health Department, health districts, the state government, a political subdivision, or the Emergency Management Agency;
 - Any operation or function to abate the effects of the conditions for which an emergency declaration by the state or a political subdivision, or a public health emergency declaration issued by the federal or state government or county or municipal health department, have been issued;
 - The provision or nonprovision of a local government function during an emergency declaration issued by the state government or a political subdivision, or during a public health emergency declaration issued by the federal or state government, a county or municipal health department, or a general health district.

Legislative findings and statement of intent

- Based on enumerated findings, 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.

COVID-19 as an occupational disease

- Creates a presumption, for purposes of the Workers’ Compensation Law, that specified emergency responders, corrections officers, and certain food workers who contract COVID-19 contracted the disease in the course of and arising from their employment.
- Allows the presumption to be rebutted by affirmative evidence.

Other

- Specifies that the bill’s provisions apply from the date of the Governor’s Executive Order, 2020-01D, issued on March 9, 2020, declaring a state of emergency due to COVID-19, through December 31, 2020.
- Declares an emergency.

TABLE OF CONTENTS

Qualified immunity for health care providers in a disaster or emergency	4
Inability to provide services	5
Covered providers	5
Duration of immunity	7
Exceptions to immunity.....	7
Reckless disregard, intentional conduct or willful or wanton misconduct	7
Gross negligence.....	7
Outside skills, education, and training	7
Interaction with other legal rights and duties	7
Application	8
General qualified immunity	8
Effect of government order.....	8
Definitions	8
Applicability	9
State immunity.....	9
Indemnification	10
Political subdivision tort liability.....	10
Legislative findings and statement of intent	11
COVID-19 as an occupational disease.....	12
Application to existing disasters	13

DETAILED ANALYSIS

Qualified immunity for health care providers in a disaster or emergency

The bill enacts a new uncodified section granting temporary qualified civil immunity for health care providers providing health care services during a declared disaster or emergency. Under the bill, a health care provider who provides health care services, emergency medical services, first-aid treatment, or other emergency professional care, including providing any medication or medical equipment or product, as a result of or in response to a disaster or emergency is not subject to professional disciplinary action and is not liable in a tort action to any person or government agency for injury, death, or loss to person or property arising from any of the following:

- An act or omission of the health care provider in the provision, withholding, or withdrawal of those services;
- 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.¹

The bill 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.² An “emergency” is any period during which the 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.³

For purposes of the immunity, “health care services” mean services rendered by a health care provider for the diagnosis, prevention, treatment, cure, or relief of a health care condition, illness, injury, or disease (including the provision of any medication, medical equipment, or other medical product). It also includes personal care services (assisting with activities of daily living and self-administration of medication and preparing special diets) and experimental treatments.⁴ Under the bill, a tort action is a civil action for injury, death, or loss to person or property, including a medical claim, and 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.⁵

Inability to provide services

The bill further provides that a health care provider is not subject to professional discipline nor liable in a tort action for injury, death, or loss to person or property that allegedly arises because the provider was unable to treat, diagnose, or test 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.⁶

Covered providers

The bill grants immunity to the following individuals and entities:

- Advanced practice registered nurses, registered nurses, and licensed practical nurses;
- Pharmacists;
- Dentists and dental hygienists;

¹ Section 3(B)(1).

² Section 3 (A)(10).

³ Section 3 (A)(11) and R.C. 5502.21(C) and (F), not in the bill.

⁴ Section 3(A)(21); R.C. 3721.01, not in the bill.

⁵ Section 3(A)(46).

⁶ Section 3(B)(4).

- Optometrists;
- Physicians;
- Physician assistants;
- Chiropractors;
- Physical therapists, occupational therapists, and athletic trainers;
- Speech language-pathologists and audiologists;
- Laboratory workers;
- Massage therapists;
- Respiratory care professionals;
- Direct support professionals (an individual employed by an agency to provide direct care to individuals with developmental disabilities);
- Behavioral health providers (providers of alcohol and drug addiction services, mental health services, or other behavioral health services, including chemical dependency counselors and prevention consultants and specialists, clinical counselors, professional counselors, social workers, marriage and family therapists, and psychologists);
- Emergency medical technicians (EMTs-basic, EMTs-I, and paramedics);
- Home health agencies;
- Hospice care programs;
- Medicaid home and community-based services providers;
- Other health care workers who provide health-care 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 any other similar individual;
- Facilities that provide health care services, including hospitals, inpatient, ambulatory, surgical, emergency care, urgent care, treatment, laboratory, adult day-care, residential care (commonly referred to as "assisted living"), residential treatment, long-term care (nursing homes, homes for the aging, residential facilities licensed by the Department of Mental Health and Addiction Services, nursing facilities, skilled nursing facilities, and intermediate care facilities for individuals with intellectual disabilities), or intermediate care facilities or facilities for individuals with developmental disabilities (including institutions for mental disease and residential facilities); physician's offices, developmental, diagnostic, or imaging centers; rehabilitation or therapeutic health settings; federally qualified health centers (FQHCs) and FQHC look-alikes; or modular field treatment facilities or alternative care sites designated for temporary use to provide medical services during a disaster or emergency; and

- Agents, board members, committee members, employees, employers, officers, or volunteers of a home health agency, hospice care program, Medicaid home and community-based services provider, or facility.⁷

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.⁸

Exceptions to immunity

Reckless disregard, intentional conduct 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 intentional conduct or willful or wanton misconduct on the part of the person against whom the action is brought. 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.⁹

Gross negligence

With regard to professional discipline, 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).¹⁰

Outside skills, education, and training

The immunity does not apply in a tort or professional disciplinary action for actions that are outside the skills, education, or training of the health care provider, unless the provider undertakes the action in good faith and in response to a lack of resources caused by a disaster or emergency.¹¹

Interaction with other legal rights and duties

The bill provides that the immunity does not create a new cause of action or substantive legal right against a health care provider, affect any immunities established by another section

⁷ Section 3(A).

⁸ Section 3(C)(5).

⁹ Section 3(A)(42) and (B)(2).

¹⁰ Section 3(A)(18) and (B)(3).

¹¹ Section 3(C)(3).

of the Revised Code or at common law, or affect any legal responsibility of a health care provider to comply with any state law or administrative rule.¹²

Application

The bill clarifies that its provisions regarding immunity for health care providers apply to a health care provider's action, omission, decision, or compliance from the date of the Governor's Executive Order 2020-01D, declaring a state of emergency due to COVID-19, through December 31, 2020.¹³ During that period, these provisions supersede R.C. 2305.2311, which provides that a health care provider or EMT who provides emergency medical services, first-aid treatment, or other emergency professional care 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.¹⁴

General qualified immunity

The bill, in temporary uncodified law, prohibits bringing a civil action for damages for injury, death, or loss to person or property against any "person" if the cause of action on which the action is based, in whole or in part, is that the injury, death, or loss is caused by the exposure to, or the transmission or contraction of, "MERS-CoV," "SARS-CoV," or "SARS-CoV-2," or any mutation thereof, unless it is established that the exposure to, or the transmission or contraction of, any of those viruses or mutations was by "reckless" or intentional conduct or with willful or wanton misconduct of the person against whom the action is brought.¹⁵ See "**Definitions**" for definitions of the terms in quotation marks.

Effect of government order

Under the bill, a government order, recommendation, or guideline neither creates nor is to be construed as creating a duty of care upon any person that may be enforced in a cause of action or may create a new cause of action or substantive legal right against any person with respect to the matters contained in that order, recommendation, or guideline. A presumption exists that any such government order, recommendation, or guideline is not admissible as evidence that a duty of care, a new cause of action, or a substantive legal right has been established.¹⁶

Definitions

The bill defines the following terms:¹⁷

¹² Section 3(C)(1), (2), and (4).

¹³ Section 3(D).

¹⁴ Section 3(D); R.C. 2305.2311, not in the bill.

¹⁵ Section 4(A).

¹⁶ Section 4(B).

¹⁷ Section 4(C).

“**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, governmental, or religious entity, or a “state institution of higher education.”¹⁸

“**MERS-CoV**” means the coronavirus that causes Middle East respiratory syndrome.

“**SARS-CoV**” means the coronavirus that causes severe acute respiratory syndrome.

“**SARS-CoV-2**” means the novel coronavirus that causes coronavirus disease 2019 (COVID-19).

“**Reckless conduct**” means 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 exposure to, or a transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof, or is likely to be of a nature that results in an exposure to, or a transmission or contraction of, any of those viruses or mutations. A person is reckless with respect to circumstances in relation to causing an exposure to, or a transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof, when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

“**State institution of higher education**” means 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.¹⁹

Applicability

The bill provides that the general qualified immunity provisions described above apply from the date of the Governor’s Executive Order 2020-01D, issued on March 9, 2020, declaring a state of emergency due to COVID-19, through December 31, 2020.²⁰

State immunity

The bill extends the state of Ohio’s statutory sovereign immunity. Current law grants the state of Ohio immunity from liability for official actions or public duties, subject to enumerated limitations.²¹ The bill extends the immunity to also include immunity from liability in any civil action or proceeding, on or after the bill’s effective date, that either:

- Involves the performance or nonperformance of a governmental function or public duty as a result of a state agency’s response to the COVID-19 pandemic by arranging or

¹⁸ Section 4(C) and by reference to R.C. 1.59, not in the bill.

¹⁹ Section 4(C) and by reference to R.C. 3345.011, not in the bill.

²⁰ Section 4(D).

²¹ R.C. Chapter 2743.

providing care, protection, or treatment for any person in the custody of the state (including health care services); or that

- As the result of the performance or nonperformance of a governmental function or public duty, an officer or employee becomes infected with COVID-19.

The bill further provides that the state does not consent to be sued for either of the above actions or proceedings, and state employees are prohibited from bringing a legal claim against the state involving either of the above actions or proceedings.²² Neither the court of claims nor any courts of common pleas have jurisdiction to hear any case or controversy, initiate any immunity determination, or have the state's liability subject to any determination. Additionally, the state shall not indemnify any employee found liable in a court of competent jurisdiction.²³

Indemnification

The bill limits the state of Ohio's duty to indemnify public employees. Indemnity refers to one party agreeing to pay for potential losses or damages caused by another, under a contractual or other arrangement.²⁴ Subject to certain exceptions, current law requires the state to, in any civil action, indemnify state employees for liability incurred involving the performance of official duties.²⁵ The bill adds one exception and prohibits the state from indemnifying a state employee for any portion of a judgment that either:

- Involves the performance or nonperformance of a governmental function or public duty as a result of a state agency's response to the COVID-19 pandemic by arranging or providing care, protection, or treatment for any person in the custody of the state (including health care services); or that
- As the result of the performance or nonperformance of a governmental function or public duty, an officer or employee becomes infected with COVID-19.²⁶

Political subdivision tort liability

Under the Political Subdivision Tort Liability Law, with specified exceptions and defenses, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.²⁷ In addition to the general definition of "governmental function," current law

²² R.C. 9.87(F)(2) and 2743.02(I).

²³ R.C. 2743.02(I).

²⁴ *Black's Law Dictionary, Indemnity* (10th ed. 2014).

²⁵ R.C. 9.87(A) and (B).

²⁶ R.C. 9.87(B)(5).

²⁷ R.C. 2744.02(A)(1), not in the bill.

specifies a list of functions and activities that are governmental functions.²⁸ The bill adds to the list of “governmental functions” the following:²⁹

- Compliance with an order or directive issued as a result of the COVID-19 pandemic by the Ohio Department of Health or a general health district or city health district created by or under the authority of the Health Districts Law.
- Compliance with an order or directive issued as a result of the COVID-19 pandemic by the state government, a political subdivision, or the Emergency Management Agency in the Department of Public Safety;
- An operation or function to abate the effects of the conditions for which either: (a) an emergency declaration is issued by the state government or a political subdivision; or (b) a public health emergency is issued by the federal or state government or any county or municipal health department;
- The provision or nonprovision of any function of local government during an emergency declaration issued by the state government or any political subdivision, or during a public health emergency declaration issued by the federal or state government, any county or municipal health department, or any general health district.

Legislative findings and statement of intent

The bill states that the General Assembly finds that:

1. It is aware that COVID-19 lawsuits numbering in the thousands are being filed across the country and Ohio business owners are unsure about what tort liability they may face.
2. It is a fact that recommendations about how to avoid a COVID-19 infection change frequently and are often not based on well-tested scientific information, including recommendations from the Centers for Disease Control and Prevention regarding whether members of the general public should wear masks. Ohio businesses need certainty and consistency to reopen.
3. It is aware that business and premise owners have not historically been required to keep members of the public from being exposed to airborne viruses, bacteria, and germs. In Ohio, it is the responsibility of individuals going into public places to avoid exposure to individuals who are sick. Individuals who decide to go into public places are responsible for taking steps the individual feels are necessary to avoid exposure to COVID-19, such as social distancing or wearing a mask.
4. The current COVID-19 health emergency is novel. Past opinions of the Ohio Supreme Court do not deal with COVID-19 or duties to protect the public from exposure in public places to airborne germs and viruses, and the Revised Code does not establish duties on

²⁸ R.C. 2744.01(C)(2).

²⁹ R.C. 2744.01(C)(2)(x), (y), (z), and (aa).

businesses and premise owners to ensure that members of the public will not be exposed.

5. It has not delegated to the executive branch the authority to create new legal duties for businesses and premise owners. In Ohio's system of government, the General Assembly makes Ohio's laws, and the Executive Branch enforces those laws.

Based on these findings, 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 the issue of the existence or breach of a duty and (2) inadmissible at trial to establish proof of the existence or breach of a duty in tort actions.³⁰

COVID-19 as an occupational disease

The bill creates a presumption, for purposes of the Workers' Compensation Law,³¹ that any of the employees listed below who contract COVID-19 contracted the disease in the course of and arising from their employment. The presumption may be refuted with affirmative evidence and applies to all of the following employees:

- A person employed as a correction officer by a public or private place used for the confinement of a person charged with or convicted of any crime or alleged or found to be a delinquent child or unruly child under any law;
- A peace officer who has arrest powers under the Arrest, Citation, and Disposition Alternatives Law (a correction officer is not considered a peace officer for purposes of this law);
- A paid or volunteer firefighter of a lawfully constituted fire department;
- A paid or volunteer emergency medical worker (a first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic certified under the Emergency Medical Services Law);
- A retail food establishment employee;
- A food processing establishment employee.³²

Under continuing law, a retail food establishment is a premises where food is stored, processed, prepared, manufactured, or otherwise held or handled for retail sale (for example, a grocery store).³³ A food processing establishment generally is a premises where food is

³⁰ Section 5.

³¹ R.C. Chapters 4121, 4123, 4127, and 4131.

³² R.C. 4123.68(CC) by reference to R.C. 3717.01, 3715.021, and 4123.026, not in the bill.

³³ R.C. 3717.01, not in the bill.

processed, packaged, manufactured, or otherwise held or handled for distribution to another location or for sale at wholesale.³⁴

The bill includes the presumption in the schedule of occupational diseases that are compensable under continuing law. An employee who is disabled by a scheduled occupational disease, or the dependent of an employee whose death is caused by the disease, is typically entitled to any compensation and benefits provided by the Law. The schedule, however, is not exclusive; any disease that satisfies the continuing law definition of occupational disease is compensable. For a disease to be considered an occupational disease under the Law, all of the following conditions must be satisfied:

- The disease is contracted in the course of employment;
- The employment creates a risk of contracting the disease in greater degree and in a different manner from the general public;
- Either of the following applies:
 - The disease is peculiar to that type of employment by the disease's causes and the characteristics of the disease's manifestations;
 - The conditions of the employment results in a hazard that distinguishes the employment in character from employment generally.³⁵

Application to existing disasters

The bill applies to acts, omissions, conduct, decisions, or compliance from the date of the Governor's Executive Order, 2020-01D, issued on March 9, 2020, declaring a state of emergency due to COVID-19, through December 31, 2020. The bill's presumption that COVID-19 is an occupational disease for certain employees applies to workers' compensation claims arising during the same time period.³⁶

HISTORY

Action	Date
Introduced	04-10-20
Reported, H. Civil Justice	05-28-20
Passed House (84-9)	05-28-20

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³⁴ R.C. 3715.01 and 3715.021, not in the bill.

³⁵ R.C. 4123.68; R.C. 4123.01(F), not in the bill, and *State ex rel. Ohio Bell Tel. Co. v. Krise*, 42 Ohio St.2d 247, 253-254 (1975).

³⁶ R.C. 4123.68(CC) and Section 6.