

**Department of Legislative Services**  
Maryland General Assembly  
2021 Session

**FISCAL AND POLICY NOTE**  
**First Reader**

House Bill 17 (Delegate Cox)  
Health and Government Operations

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**Public Safety - Emergency Powers Limitations (Consent of the Governed Act)**

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This bill limits the Governor's emergency powers and establishes various requirements and prohibitions relating to emergency orders. A declared emergency generally may not exceed 14 days unless extended by the General Assembly. Under the bill, an emergency order does not apply to members of the Maryland General Assembly or the Maryland Judiciary, and the Governor may not threaten or arrest a member of the General Assembly or Judiciary for an alleged violation or attempt to violate an emergency order. An emergency order may not be applied to a U.S. citizen without the approval of the General Assembly, may not require a U.S. citizen to stay at home, wear a face covering, receive a vaccine, or be forced under penalty of law to make any other health decision, and generally may not require the closure of businesses or houses of worship, as specified. In any action brought by a private person to enforce the bill's provisions, in addition to declaratory or injunctive relief, the person may seek treble damages and may be awarded reasonable attorney's fees and costs, as specified.

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**Fiscal Summary**

**State Effect:** The bill likely has a significant effect on State finances and operations, but any such effects cannot be adequately quantified or anticipated, as discussed below.

**Local Effect:** See above.

**Small Business Effect:** Meaningful.

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## Analysis

**Bill Summary:** The bill repeals a provision of legislative intent that states that (1) the General Assembly recognizes the Governor's broad authority in the exercise of the police power of the State to provide adequate control over persons and conditions during impending or actual public emergencies and (2) that specified provisions relating to the Governor's emergency powers be broadly construed to carry out their purpose.

### *Duration of an Emergency Declaration*

A declaration of emergency generally may not exceed 14 days without the approval of the General Assembly, which may extend the emergency by up to an additional 14 days by joint resolution.

Within three days of the issuance of an emergency order, if the General Assembly is not already in session, the Governor must convene the General Assembly to a special session, with video conferencing offered to any member unable to physically attend. In addition, the Governor must provide the members copies of all executive orders and any interpretive guidance and receive input from any member regarding additional requested guidance.

If in session, the General Assembly may terminate the declaration of emergency sooner than 14 days or extend the emergency for up to an additional 14 days. If the General Assembly is not in session, a declaration of emergency may not exceed 14 days unless the Governor issues a call for a special session within three days of the declaration and the General Assembly convenes within 10 days of the declaration.

### *Violations of Orders under a Catastrophic Health Emergency*

Under the bill, the knowing and willful failure to comply with an order, requirement, or directive issued under a declared catastrophic health emergency is a civil infraction (as opposed to a misdemeanor, under current law) subject to a fine of up to \$50 (instead of imprisonment for up to one year and/or a fine of up to \$5,000, as provided under current law).

### *Emergency Powers Limitations*

The bill prohibits the Governor and any official or employee of the Executive Branch, under any executive order or other purported authority, from requiring a member of the General Assembly or Judiciary, or any member of the public, to remain indoors, wear a face covering, not congregate or assemble, close or limit capacity of a business, church, or school, or interfere with the right to obtain and try any medical treatment desired for any illness.

An emergency order may not be applied to a U.S. citizen unless the order has been approved by a two-thirds majority vote of the General Assembly within 72 hours of the issuance of the order. Regardless, an emergency order is not effective unless the Governor has published and made the entire order and any guidance regarding the order available to the public on an easily accessible online platform and format. An emergency order may not include a requirement that a U.S. citizen stay at home, wear a face covering, receive a vaccine, or be forced under penalty of law to make any other health decision. In addition, the Governor generally may not close any business or house of worship by use of an emergency order, except (1) on the certification of at least three independent experts that the building is physically out of compliance with an applicable building code and (2) if the order provides notice and opportunity to appeal the closure within three business days.

The bill further requires an emergency order issued under Title 14 of the Public Safety Article to (1) be narrowly tailored to meet the exigencies of the public emergency; (2) be no broader or more burdensome than is necessary to meet the exigencies of the emergency or immediate threat of an emergency; (3) be issued in response to an actual emergency or imminent threat of an emergency; (4) give due regard in its scope and duration to the impact on the State of Maryland and its citizens, subject to specified disclosure requirements; and (5) be in effect no longer than is necessary to meet the exigency giving rise to the emergency.

In the event any person, including the Attorney General, brings an action for declaratory or injunctive relief to enforce the bill's provisions, the burden of proof must be on the government to prove, by clear and convincing evidence, (1) the existence of an emergency; (2) the need for the emergency order issued; (3) the narrow tailoring of the emergency order; (4) that the emergency order was no broader than necessary to meet the exigencies of the emergency; (5) that due regard was given for the impact on the State, the public at large, public safety, and the long term economic impact on the State and its citizens; and (6) that the emergency order was or is in effect no longer than necessary to meet the exigency giving rise to the emergency.

In any action brought by a private person to enforce the bill's provisions, in addition to declaratory or injunctive relief, the person may seek treble damages from the State or other defendant by proving, by a preponderance of the evidence, that (1) the personal or business activities of the person do not present a substantial risk of furthering the emergency; (2) the personal or economic impact of the emergency order to the person is more severe than the impacts of the emergency to the public as a whole; or (3) the emergency order is otherwise unreasonable as applied to the person.

A person who brings an action under the bill is not required to prove malice by the State or other defendant. The State waives liability to a maximum of \$250,000 for each incident in an action brought under the bill. If a private person prevails in any manner of an action

against the State or other defendant under the bill, the court must award reasonable attorney fees and costs to the private person.

**Current Law:** The emergency powers of the Governor are generally set forth under Title 14 of the Public Safety Article.

### *Maryland Emergency Management Act*

Title 14, Subtitle 1 of the Public Safety Article (Maryland Emergency Management Act) requires the Governor to declare a state of emergency by executive order or proclamation if he or she finds that an emergency has developed or is impending due to any cause. The state of emergency continues until (1) the Governor finds that the threat or danger has passed or the emergency has been dealt with to the extent that emergency conditions no longer exist and (2) terminates the state of emergency by executive order or proclamation. A state of emergency may not continue for longer than 30 days unless renewed by the Governor. The General Assembly may terminate a state of emergency at any time by joint resolution.

After declaring a state of emergency, the Governor may take specified actions if he or she finds them necessary in order to protect the public health, welfare, or safety. Among other things, the Governor may suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision.

### *Governor's Emergency Powers*

Under Title 14, Subtitle 3 of the Public Safety Article (Governor's Emergency Powers), the General Assembly recognizes the Governor's broad authority in the exercise of the police power of the State to provide adequate control over persons and conditions during impending or actual public emergencies. The subtitle's provisions must be broadly construed to carry out its purpose.

Section 14-303 of the Public Safety Article authorizes the Governor to proclaim a state of emergency and designate the emergency area during a public emergency in the State. After proclaiming a state of emergency, and in accordance with specified public notice requirements, the Governor may promulgate reasonable orders, rules, or regulations that he or she considers necessary to protect life and property or calculated effectively to control and terminate the public emergency in the emergency area, as specified. An order, rule, or regulation promulgated under this provision (1) takes effect from the time and in the manner specified in the order, rule, or regulation; (2) may be amended or rescinded, in the same manner as the original order, by the Governor at any time during the state of emergency; and (3) terminates when the Governor declares that the state of emergency no longer exists.

## *Governor's Health Emergency Powers*

Title 14, Subtitle 3A of the Public Safety Article authorizes the Governor to issue a proclamation declaring the existing of a catastrophic health emergency. "Catastrophic health emergency" means a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a deadly agent, including a viral agent capable of causing extensive loss of life or serious disability.

The Governor must rescind the proclamation whenever the Governor determines that the catastrophic health emergency no longer exists. Unless renewed, the proclamation expires 30 days after issuance. The Governor may renew the proclamation for successive periods of up to 30 days if he or she determines that a catastrophic health emergency continues to exist.

After proclaiming a catastrophic health emergency, the Governor may order the Secretary of Health or other designated official to:

- seize immediately anything needed to respond to the medical consequences of the catastrophic health emergency;
- work collaboratively, to the extent feasible, with health care providers to designate and gain access to a facility needed to respond to the catastrophic health emergency; and
- control, restrict, or regulate the use, sale, dispensing, distribution, or transportation of anything needed to respond to the medical consequences of the catastrophic health emergency by (1) rationing or using quotas; (2) creating and distributing stockpiles; (3) prohibiting shipments; (4) setting prices; or (5) taking other appropriate actions.

If medically necessary and reasonable to treat, prevent, or reduce the spread of the disease or outbreak believed to have been caused by the exposure to a deadly agent, the Governor may order the Secretary of Health or other designated official to:

- require individuals to submit to medical examination or testing;
- require individuals to submit to vaccination or medical treatment unless the vaccination or treatment likely will cause serious harm to the individual;
- establish places of treatment, isolation, and quarantine; or
- require individuals to go and remain in places of isolation or quarantine until the Secretary of Health or other designated official determines that the individuals no longer pose a substantial risk of transmitting the disease or condition to the public.

In addition, the Governor may order the evacuation, closing, or decontamination of any facility. If necessary and reasonable to save lives or prevent exposure to a deadly agent, the Governor may order individuals to remain indoors or refrain from congregating.

A person who knowingly and willfully fails to comply with an order, requirement, or directive related to a catastrophic health emergency is guilty of a misdemeanor and subject to imprisonment for up to one year and/or a fine of up to \$5,000.

**State/Local Fiscal Effect:** The bill places various limitations on the Governor's emergency powers under State law and, thus, broadly affects the State's ability to respond to the current public health emergency relating to COVID-19 and to future public emergencies. The fiscal and operational impact on State and local governments cannot be reliably quantified or fully predicted. Some of the potential effects, however, are discussed below.

Operations and expenditures of the General Assembly and the Department of Legislative Services are likely affected to the extent that the General Assembly must convene in special session to extend or approve emergency orders as required under the bill. Although the length of such special sessions cannot be reliably predicted (especially if the General Assembly must convene every 14 days to renew emergency orders), the average daily cost of the last two special sessions was \$23,000 (primarily for member travel, meal, and lodging reimbursements).

The Maryland Department of Health (MDH) advises that the bill's provisions limit the State's ability to control the spread of COVID-19. To the extent that the spread of the virus is exacerbated as a result, MDH expenditures increase by an indeterminate but significant amount in order to increase its outbreak response accordingly, including purchasing additional protective equipment. In addition, the Maryland Department of Transportation advises that the bill may disrupt its ability to respond to future severe weather events.

The bill lessens the penalty for a violation of an order issued under a catastrophic health emergency. Under the bill, such a violation is a civil infraction subject to a maximum fine of \$50, as opposed to a misdemeanor punishable by imprisonment for up to one year and/or a fine of up to \$5,000. To the extent that penalties for violations are imposed, State and local revenues and expenditures decrease. Any such impact is likely to be minimal but cannot be reliably estimated.

The bill also authorizes persons to seek specified damages and recover attorney's fees and costs in a civil action against the State or other defendant for a violation of the bill's provisions. The State Treasurer's Office (STO) advises that the bill does not specify a funding source for claims paid by the State in a civil action arising from the bill; to the extent that the State Insurance Trust Fund (SITF) is affected, STO may require additional

personnel to investigate claims brought under the bill, and State general fund expenditures for SITF premiums/assessments may be affected. Similarly, to the extent the bill's provisions expose local governments to increased civil liability, local expenditures for claim payments and insurance premiums may be affected.

**Small Business Effect:** Under the bill, specified emergency-related restrictions on business activity are prohibited, and small businesses may sue for damages if unreasonably impacted by an emergency order, as specified in the bill. However, as discussed above, the bill broadly affects the State's ability to respond to public emergencies, of which the impact on small businesses cannot be sufficiently analyzed.

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### **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** None.

**Information Source(s):** Department of Commerce; Harford, Montgomery, and Wicomico counties; Maryland Association of Counties; Maryland Municipal League; Office of the Attorney General; Governor's Office; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Maryland Department of Health; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Department of Legislative Services

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Analysis by: Elizabeth J. Allison

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510