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OHIO LEGISLATIVE SERVICE COMMISSION

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H.B. 285
134th General Assembly

Bill Analysis

Version: As Introduced

Primary Sponsor: Rep. Seitz

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SUMMARY

- Gives the General Assembly a right to intervene in an action challenging a statute by action of the Speaker on behalf of the House of Representatives, the President on behalf of the Senate, and the Speaker and President acting jointly on behalf of the General Assembly as a whole.
- Authorizes the House, Senate, or General Assembly as a whole to obtain legal counsel other than the Attorney General for such actions.
- Requires the Attorney General to obtain legislative approval before compromising or settling an action brought against the state for injunctive relief or for which there is a proposed consent decree.

DETAILED ANALYSIS

Legislature's right to intervene in statutory challenges

The bill gives the House of Representatives, the Senate, and the General Assembly as a whole the right to intervene¹ in any action in state or federal court that: (1) challenges the constitutionality of a statute, facially or as applied, (2) challenges a statute as violating or preempted by federal law, or (3) otherwise challenges the construction or validity of a statute. The Speaker of the House of Representatives may intervene on behalf of the House, the President of the Senate may intervene on behalf of the Senate, and the Speaker and President acting jointly may intervene on behalf of the General Assembly.

In an action in which the General Assembly has intervened, the bill allows the Speaker or the President – or the Speaker and President acting jointly on behalf of the General

¹ In Ohio, intervention is governed by Rule 24 of the Ohio Civil Rules of Procedure.

Assembly – to obtain legal counsel other than the Attorney General to represent the House, Senate, or General Assembly, as applicable. The House, Senate, or General Assembly must use funds appropriated for that purpose to pay the legal counsel. Finally, the bill specifically prohibits an individual member, or any group of members, from otherwise intervening in an action or obtaining legal counsel at public expense in their capacity as members of the General Assembly.²

Legislative approval in certain legal actions

The bill requires the Attorney General to obtain approval from the legislature before proceeding in certain legal actions. Specifically, if an action is brought against the state for injunctive relief or for which there is a proposed consent decree, the Attorney General cannot compromise or settle the action without the approval of any intervening legislative body (either the House, Senate, or General Assembly, as applicable). If no legislative body intervened, the Attorney General cannot compromise or settle an action without first submitting a proposed plan to the legislature and, in some cases, receiving approval.

In all cases, the Attorney General must submit the proposed plan to the Finance Committees of the House and Senate. The committees, acting jointly, decide whether to schedule a joint meeting to review the proposed plan. If, not later than 14 business days after the Attorney General submits the plan, the committees notify the Attorney General they have scheduled a meeting, the Attorney General is prohibited from compromising or settling the action until the Attorney General receives the joint approval of the committees. So, for instance, if the Attorney General submits a plan to the committees, 20 business days pass and the Attorney General has not received notice from the committees that a meeting is scheduled, the Attorney General may proceed to compromise or settle the action (except, see below).

In cases where the proposed plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, the Attorney General *also must submit* the proposed plan to the Government Oversight Committees. The Attorney General is prohibited from compromising or settling these actions until the Attorney General receives the joint approval of the Government Oversight Committees (the bill *does not* similarly provide a 14-business-day inactive provision in such cases).³

COMMENT

The bill's provisions requiring the Attorney General to obtain legislative approval may be subject to a challenge under the constitutional principle of separation of powers. Wisconsin recently enacted similar laws, which were upheld when subject to a facial challenge under a separation of powers argument. The Wisconsin Supreme Court held: "While representing the

² R.C. 101.55.

³ R.C. 109.02

State in litigation is predominately an executive function, it is within those borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature.” But the court did “stress that this decision is limited. We express no opinion on whether individual applications or categories of applications may violate the separation of powers . . .”⁴ It is possible a reviewing court in Ohio may hold differently than the Wisconsin Supreme Court or, though the bill may survive a facial challenge, there may be circumstances where an action by the legislature under the bill’s provisions ultimately is found to violate separation of powers, given the circumstances.

HISTORY

Action	Date
Introduced	05-04-21

H0285-I-134/ec

⁴ *SEIU, Local 1 v. Vos*, 393 Wis. 2d 38 (2020), at paragraphs 63 and 73.