

**CONFERENCE COMMITTEE REPORT BRIEF
SUBSTITUTE FOR SENATE BILL NO. 34**

As Agreed to April 28, 2022

Brief*

Sub. for SB 34 would create law regarding actions by governmental entities or public officials affecting face mask requirements as a response to a contagious or infectious disease and would prohibit a COVID-19 vaccination passport be required. The bill would amend the Kansas Emergency Management Act (KEMA) and public health statutes regarding face mask requirements and judicial review of governmental action in response to state of disaster emergencies and state of local disaster emergencies. The bill would remove the authority of the Secretary of Health and Environment (Secretary) or a local health officer to order any law enforcement officer of the state or any subdivision to assist in the execution or enforcement of any order regarding infectious and contagious diseases.

The bill would also amend student health statutes regarding certification of tests or inoculations for first-time enrollment in a school or preschool or day care program operated by a school to specify the tests or inoculations the Secretary would be prohibited from requiring.

Face Mask Requirements (New Section 1)

Notwithstanding any law to the contrary, the bill would prohibit any governmental entity or public official from ordering or otherwise requiring a person to wear a face mask as a response to a contagious or infectious disease, but such entity or official could recommend the wearing of face masks under the bill.

The provisions of this section would not apply to a governmental entity that is a medical care facility, as defined in KSA 65-425, or an adult care home, as defined in KSA 39-923. A medical care facility would include a hospital, ambulatory surgical center, or recuperation center, but would not include a hospice that is certified to participate in Medicare and that provides services only to hospice patients. An adult care home would include any nursing facility, nursing facility for mental health, intermediate care facility for people with intellectual disability, assisted living facility, residential health care facility, home plus, boarding care home, and adult day care facility.

*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kIRD>

Vaccination Passport Requirements (New Section 2)

Notwithstanding any law to the contrary, the bill would prohibit any governmental entity or public official from:

- Issuing a COVID-19 vaccination passport to any individual without such individual's consent;
- Requiring any individual to use a COVID-19 vaccination passport within this state for any purpose; or
- Denying housing to any individual or refusing access by any individual to a place accessible to the general public, or separating any individual from others in a place accessible to the general public, including entry, education, travel, and services within this state, based on such individual's COVID-19 vaccination status.

The bill would not prohibit a governmental entity or public official from instituting COVID-19 screening protocols in accordance with state and federal law to protect public health.

The provisions of this section would not apply to a governmental entity that is a medical care facility, as defined in KSA 65-425, or an adult care home, as defined in KSA 39-923.

As used in this section, the bill would define the following:

- "COVID-19 vaccination passport" would mean written or electronic documentation of an individual's COVID-19 vaccination status; and
- "Screening protocol" would mean a non-invasive method to determine whether an individual has symptoms or other risk factors for developing COVID-19, including, but not limited to, temperature checks, self-reporting of exposure, self-reported vaccination status, and questionnaires.

Amendments to Kansas Emergency Management Act (Sections 3 and 4)

Face Mask Requirements

The bill would specify that neither the Governor nor a governmental entity or public official would have the power under KEMA to order or otherwise require the wearing of face masks as a response to a contagious or infectious disease during a state of disaster emergency or state of local disaster emergency. This provision would not apply to a governmental entity that is a medical care facility, as defined in KSA 65-425, or an adult care home, as defined in KSA 39-923.

Judicial Review of Governmental Actions in Response to State of Disaster Emergencies and State of Local Disaster Emergencies

The bill would amend the process of judicial review for actions filed by aggrieved parties in response to executive orders issued by the Governor during a state of disaster emergency

under KEMA and for actions filed by aggrieved parties in response to actions taken by local units of government during a state of local disaster emergency under KEMA.

Under current law, when an aggrieved party files a civil action in district court in response to an executive order issued by the Governor or an action taken by a local unit of government, a court must issue an order on a petition filed pursuant to the section within seven days of the hearing on such petition, or the relief requested in the petition must be granted. The bill would replace this seven-day requirement with a requirement that the court issue its order without unreasonable delay after the hearing is conducted, and would remove language requiring relief be granted in the petition if the court's order is not issued within seven days.

Infectious or Contagious Diseases and Authority of Local Health Officer or Secretary (Section 5)

The bill would remove the authority of the Secretary or a local health officer to order any sheriff, deputy sheriff, or other law enforcement officer of the state or any subdivision to assist in the execution or enforcement of any order regarding infectious and contagious diseases.

Amendments to Public Health Statutes (Section 6)

The bill would clarify that the power of local health officers under the public health statutes would not include the power to order a person to wear a face mask.

The bill would also amend the judicial review process for actions filed by aggrieved parties against local boards of health in the same manner as elsewhere in the bill.

Amendments to Student Health Statutes (Section 7)

The bill would amend law related to certifications for required tests and inoculations (immunizations) for first-time enrollment at schools and preschool or day care programs operated by a school to specify the Secretary would be prohibited from deeming a test or inoculation necessary if it has not received full approval by the federal Food and Drug Administration (FDA) for the age of the student to whom the requirement applies.

Conference Committee Action

The Conference Committee agreed to remove the content of Sub. for SB 34 and insert the following:

- Certain provisions from SB 541, as amended by the Senate Committee of the Whole and further amended by the Conference Committee, pertaining to mask requirements and the timeframe for a court order in civil cases filed by parties aggrieved by an executive order issued pursuant to a public health emergency;
- Certain provisions of SB 489, as amended by the Senate Committee of the Whole pertaining to law enforcement officers' issuance of orders related to infectious or contagious diseases;

- A provision from 2021 SB 159 (Omnibus Budget Bill) relating to vaccination passports;
- A provision applicable to schools and preschool and daycare programs operated by a school that would prohibit the Secretary from deeming necessary tests or inoculations that have not received full approval by the FDA for the age of the student to whom the requirement would apply;
- Provisions exempting governmental entities that are medical care facilities, as defined in KSA 65-425, and adult care homes, as defined in KSA 39-923, from the provisions prohibiting face mask requirements and vaccination passports; and
- Technical amendments.

Background

Sub. for SB 34, as amended by the Conference Committee, contains provisions of SB 489, as amended by the Senate Committee of the Whole, pertaining to orders related to infectious or contagious diseases; SB 541, as amended by the Senate Committee of the Whole and further amended by the Conference Committee; and a provision from 2021 SB 159 (Omnibus Budget Bill) relating to COVID-19 vaccination passports.

SB 489

The bill was introduced by the Senate Committee on Public Health and Welfare at the request of Senator Hilderbrand.

Senate Committee on Public Health and Welfare

In the Senate Committee hearing, a representative of the Johnson County Sheriff's Department provided **proponent** testimony, stating support for removing the portion of Section 4 authorizing the Secretary to order law enforcement to assist in the execution or enforcement of health orders. A private citizen provided proponent testimony, stating individuals should retain the right to make decisions about their health.

Written-only proponent testimony was provided by two private citizens.

A representative of the Kansas Association of Counties provided **opponent** testimony, stating concern about the Kansas Department of Health and Environment's (KDHE) authority to coordinate with local health departments.

Written-only opponent testimony was provided by representatives of the Kansas Academy of Family Physicians, Kansas Association of Local Health Departments, Kansas Medical Society, McPherson County Health Department, Mid America Immunization Coalition and Nurture KC, Reno County Health Department, and Sedgwick County Health Department, and by two private citizens.

Written-only neutral testimony was provided by a representative of the Kansas Association of Chiefs of Police, Kansas Peace Officers Association, and Kansas Sheriffs Association.

The Senate Committee amended language in the bill allowing local health officers to issue an order requiring quarantine or isolation in certain situations to state that such orders may only be recommended. [*Note:* This amendment was not retained by the Conference Committee.]

Senate Committee of the Whole

On March 23, 2022, the Senate Committee of the Whole amended the bill to:

- Remove the Secretary's authority to issue orders and adopt rules and regulations regarding isolation and quarantine of persons afflicted with or exposed to diseases injurious to the public health [*Note:* This amendment was not retained by the Conference Committee.]; and
- Specify that local health officers would be required to use only medically necessary and reasonable measures to prevent the spread of infectious, contagious, or communicable diseases [*Note:* The statute that was amended is not included in the Conference Committee report.].

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on SB 489, as introduced, KDHE states enactment of the bill could result in fiscal effects due to the loss of a central, state-level public health authority to assist local units when there is an infectious or contagious disease. This would include the ability to request and secure federal funding for response to an emergency, such as providing necessary supplies and resources. KDHE notes many local health departments lack the administrative capacity to coordinate with federal agencies and authorities on a regular basis. The agency could not estimate the potential fiscal effect. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2023 Governor's Budget Report*.

The Kansas Association of Counties and League of Kansas Municipalities reported the bill would not have any fiscal effect on local governments.

SB 541

The bill was introduced by the Senate Committee on Federal and State Affairs at the request of Senator Petersen, on behalf of Senator Warren.

As the bill was referred to the Senate Committee on Judiciary, it also contained provisions regarding compensation for property affected by governmental actions and property tax relief for businesses affected by governmental restrictions or shutdowns. On March 9, 2022, the Senate Committee removed these sections of the bill and inserted them into HB 2416, creating a substitute bill.

Senate Committee on Judiciary

On March 3, 2022, the Senate Committee on Judiciary held an informational hearing on potential legislation regarding orders and actions by public officials relating to vaccine passports, face mask requirements, gathering limitations, business restrictions, and religious gathering limitations. In the hearing, 19 citizens provided testimony in support of such potential legislation; 36 citizens provided written-only support. One citizen provided neutral testimony.

In the Senate Committee hearing on March 7, 2022, an attorney, a representative of the Kansas Chamber of Commerce, and two citizens provided **proponent** testimony on the bill, stating various concerns over governmental actions taken during the COVID-19 pandemic. Written-only proponent testimony was provided by three citizens.

Representative Jacobs provided neutral testimony on the bill, expressing concern that the bill does not adequately protect the free exercise of religion guaranteed by the U.S. Constitution.

Representatives of the Kansas Association of Counties, Immunize Kansas Coalition, and the League of Kansas Municipalities, and one citizen testified as **opponents** to the bill, stating concerns the bill will hinder the ability of governmental actors to effectively respond to future emergencies. Written-only opponent testimony was provided by representatives of the Harvey County Health Department, the Kansas Academy of Family Physicians, the Kansas Association of Local Health Departments, the Kansas Association of School Boards, the Kansas National Education Association, the Kansas State Board of Education, and Nurture KC; a representative of the cities of Merriam, Mission, Prairie Village, and Westwood Hills; and three citizens.

On March 9, 2022, the Senate Committee amended the bill to:

- Add language in KEMA to limit the powers of the Governor and local units of government during emergencies with respect to the free exercise of religion [*Note:* The provision so amended is not included in the Conference Committee report.];
- Remove two sections governing compensation for property affected by governmental actions and property tax relief for businesses affected by governmental shutdowns or restrictions [*Note:* The Senate Committee inserted these sections into Senate Sub. for HB 2416.]; and
- Remove provisions pertaining to face mask requirements in schools and insert provisions prohibiting any governmental entity or public official from requiring face masks as a response to contagious or infectious disease [*Note:* The amendment regarding face masks in schools was not included in the Conference Committee report. The amendment prohibiting a governmental entity or public official from requiring face masks was amended to exempt governmental entities that are medical care facilities and adult care facilities.].

Senate Committee of the Whole

On March 22, 2022, the Senate Committee of the Whole amended the bill to add a section of law prohibiting governmental entities or public officials from restricting worship services or activities and to provide additional restrictions on actions of local health officers. [*Note:* These provisions are not included in the Conference Committee report.]

Fiscal Information

[*Note:* The fiscal note prepared by the Division of the Budget references some provisions regarding compensation and property tax relief now contained in Senate Sub. for HB 2416.]

According to the fiscal note prepared by the Division of the Budget on SB 541, as introduced, the Kansas Department of Health and Environment states that enactment of the bill would result in increased expenditures for the agency, if found by a district court in a civil action to be responsible for and directed to provide awards of compensation pertaining to and resulting from restrictions on use of property due to a governmental action related to a contagious or infectious disease, and issued or adopted by the state, county, or other political subdivision. A total fiscal effect could not be estimated.

The State Department of Education and the Office of the Governor state enactment of the bill would not have any fiscal effect on the operations of either agency. The State Board of Regents reports enactment of the bill would not have a fiscal effect on higher education.

The Office of the Attorney General reports that while enactment of the bill could reduce some of the State's potential legal liability in future cases, certain provisions could be subject to legal challenge. The Office of the Attorney General states some litigation defense could be handled by the Office, but it is possible that specialized outside counsel would need to be hired by the State. The total fiscal effect could not be estimated.

The Department of Revenue states the effects of any future shutdowns or restrictions that would result in the State paying back a portion of a property owner's property taxes cannot be estimated.

The Office of Judicial Administration (OJA) states enactment of the bill could increase the number of cases filed in district court, requiring more time spent by court personnel. The OJA estimates enactment of the bill could result in the collection of docket fees and fines assessed in those cases filed under the bill's provisions. According to OJA, a fiscal effect cannot be estimated.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2023 Governor's Budget Report*.

The Kansas Association of Counties and the League of Kansas Municipalities both state that enactment of the bill would increase costs for local governments related to the defense of potential litigation and would subject local governments to claims for compensation under the bill. A total fiscal effect could not be estimated by either organization.

2021 SB 159

The bill was introduced by the Joint Committee on Special Claims Against the State (Joint Committee).

The bill as introduced included six claims recommended by the Joint Committee to the 2020 Legislature. These claims were not approved for payment by an act of appropriation due to the early departure of the Legislature as a result of the COVID-19 pandemic. These claims

were reconsidered by the Joint Committee during the 2020 Interim and again recommended for payment.

During the 2020 Interim, the Joint Committee met three times and, excluding motor vehicle fuel tax refunds, heard 84 claims, of which 72 claims, or 85.7 percent, were filed against the Department of Corrections or specific correctional facilities. Of the 84 claims heard, the Joint Committee recommended payment for an additional 5 claims.

Senate Committee on Ways and Means

In the Senate Committee hearing, no testimony was provided.

House Committee on Appropriations

In the House Committee hearing, no testimony was provided.

The House Committee on Appropriations amended the bill to add a claim to be paid by the Kansas Department of Wildlife, Parks and Tourism for the reimbursement of deer antlers purchased by the claimant at auction. The supporting document submitted stated the deer was illegally poached on the claimant's land, and the associated antlers, which were acquired by the agency during the course of a criminal investigation, were wrongfully sold at private auction. The House Committee recommended \$16,001 be paid, which was the amount paid by the claimant for purchase of the antlers at auction. Further, the House Committee recommended the agency issue the claimant a salvage tag for the antlers.

The Conference Committee on SB 159 inserted contents adjusting funding for fiscal years 2021, 2022, and 2023 for state agencies. Those provisions included language directing state agencies on the issuance and utilization of COVID-19 vaccine passports.

Fiscal Information

No fiscal note was provided for provisions regarding vaccine passports..

Public health; contagious or infectious diseases; Kansas Emergency Management Act; face mask requirements; vaccination passports; Secretary of Health and Environment; Kansas Department of Health and Environment; local health officers; inoculation certification; adult care homes; medical care facilities

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