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FOCUS *report*

Major Issues of the 87th Legislature

During its 2021 regular and three called special sessions, the 87th Texas Legislature enacted 1,097 bills and adopted 10 joint resolutions after considering 7,982 measures filed.

This report includes some of the highlights of the session. It summarizes many proposals that were approved and some that were not, and it includes arguments offered for and against each measure as it was debated.

Proposals considered by the Legislature included revising the property tax system and the school finance system, addressing state and local disaster response and recovery efforts, and revising state policies on mental health and school safety. The Legislature also approved a state budget for the fiscal 2022-23 biennium and continued numerous agencies after their review by the Sunset Advisory Commission. The legislation featured in this report is a sampling and not intended to be comprehensive.

Other House Research Organization reports covering the 2021 session include those examining the bills vetoed by the governor and the constitutional amendments on the November 2, 2021, and May 7, 2022, ballots.

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*Finally approved

Bills in the 87th Legislature, Regular Session

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	Introduced	Enacted	Percent enacted
House bills	4,671	587	12.6%
Senate bills	2,256	486	21.5%
TOTAL bills	6,927	1,073	15.4%
House joint resolutions	163	4	2.5%
Senate joint resolutions	58	4	6.9%
TOTAL joint resolutions	221	8	3.6%

Includes 20 vetoed bills — 12 House bills and eight Senate bills

	2019	2021	Percent change
Bills filed	7,324	6,927	-5.4%
Bills enacted	1,429	1,073	-24.9%
Bills vetoed	56	20	-64.3%
Joint resolutions filed	217	221	1.8%
Joint resolutions adopted	10	8	-20%
Legislation sent or transferred to Calendars Committee	2,071	1,624	-21.6%
Legislation sent to Local and Consent Calendars Committee	909	869	-4.4%

Source: Texas Legislative Information System, Legislative Reference Library

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Business Regulation and Economic Development

* Finally approved

Prohibiting viewpoint censorship by large social media platforms

HB 20 by Cain, Second Called Session
Effective September 9, 2021

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HB 20 establishes complaint procedures and disclosure requirements for social media platforms for the management and removal of content. The bill prohibits censorship by social media platforms based on a user's viewpoint. Its provisions on social media platforms apply only to a platform or service that functionally has more than 50 million active monthly users in the United States.

Discourse on social media platforms. HB 20 prohibits a social media platform from censoring a user, a user's expression, or a user's ability to receive the expression of another person based on:

- the viewpoint of the user or another person;
- the viewpoint represented in the user's expression or another person's expression; or
- a user's geographic location in Texas or any part of the state.

This applies regardless of whether the viewpoint is expressed on the social media platform or another medium. Provisions on discourse on media platforms apply only to a user who resides in, does business in, or shares or receives expression in Texas and only to expression shared or received in Texas.

User remedies. A user may bring an action against a social media platform that violates the bill with respect to the user. A user that proves a violation is entitled to recover declaratory relief, including costs and reasonable attorney's fees, and injunctive relief. A court must hold in contempt a platform that fails to promptly comply with a court order and must use all lawful measures needed to secure immediate compliance with the order, including daily penalties. A user may bring an action under the bill regardless of whether another court has enjoined the attorney general from enforcing the bill's provisions or declared any provisions unconstitutional unless that court decision is binding on the court in which the action was brought.

HB 20 does not subject a social media platform to damages or other legal remedies to the extent the platform is protected from those remedies under federal law. A social media platform is not prohibited from censoring expression that:

- the platform is specifically authorized to censor by federal law;
- is the subject of a referral or request from an organization whose purpose is to prevent the sexual exploitation of children and protect survivors of childhood sexual abuse from ongoing harassment;
- directly incites criminal activity or consists of specific threats of violence targeted against a person or group because of their race, color, disability, religion, national origin or ancestry, age, sex, or status as a peace officer or judge; or
- is unlawful.

Public disclosure. A social media platform must publicly disclose accurate information on its content management, data management, and business practices, including specific information about how the platform:

- curates and targets content to users;
- places and promotes content, services, and products, including its own;
- moderates content;
- uses search, ranking, or other algorithms or procedures that determine results on the platform; and
- provides users' performance data on the use of the platform and its products and services.

The disclosure must be sufficient to enable users to make an informed choice on the purchase of or use of access to or services from the platform. The disclosure must be published on a website easily accessible to the public.

Acceptable use policy. A social media platform must publish an acceptable use policy in a location easily accessible to a user. The policy must:

- reasonably inform users about the types of content allowed on the platform;
- explain the steps the platform will take to ensure content complies with the policy;
- explain the means by which users can notify the platform of content that potentially violates the acceptable use policy, illegal content, or illegal activity, including a complaint system described by the bill, and;
- include publication of a biannual transparency report including the total number of instances in which the platform was alerted to illegal content, illegal activity, or potentially policy-violating content and the number of instances in which the platform removed content, suspended or removed an account, or took other action as specified in the bill.

Complaint procedures. HB 20 requires a social media platform to provide an easily accessible complaint system to enable a user to submit a complaint and track its status, including a complaint regarding illegal content or activity or a decision made by the social media platform to remove content posted by the user. A platform must make a good-faith effort to evaluate the legality of the content or activity within 48 hours of receiving notice of illegal content or illegal activity, excluding weekend hours and subject to reasonable exceptions based on concerns about the legitimacy of the notice.

Content removal. If a social media platform removes content based on a violation of its acceptable use policy, the platform must:

- notify the user who provided the content of the removal and explain why it was removed;
- allow the user to appeal the decision; and
- provide written notice to the user who provided the content of the determination regarding a requested appeal, and in the case of a reversal of the decision to remove the content, the reason for the reversal.

A platform is not required to provide notice to a user who can not be contacted after reasonable steps to make contact or if the platform knows that the potentially policy-violating content is related to an ongoing law enforcement investigation. Regarding an appeal by a user over removed content that the user believed was not potentially policy-violating content, the platform must, not later than the 14th day after the date the platform receives the complaint:

- review the content;
- determine whether it adhered to the platform's acceptable use policy and take appropriate steps based on that determination; and
- notify the user about the determination.

Email. HB 20 prohibits an email service provider from intentionally impeding the transmission of another person's email message based on the content of the message unless the provider is authorized to block the transmission under certain provisions of the Business and Commerce Code or other state or federal law, or has a good-faith, reasonable belief that the message contains malicious computer code or material that is obscene, depicts sexual conduct, or violates other law.

Enforcement. The attorney general may bring an action to enjoin a violation or potential violation of the bill and may recover costs, reasonable attorney's fees, and reasonable investigative costs. Any person may notify the attorney general of a violation or potential violation of provisions on viewpoint censorship.

Supporters said

HB 20 would prevent prominent social media sites that have come to dominate public discourse from unfairly discriminating against certain viewpoints and ensure they are accountable for their actions when they remove content. The bill also would bring transparency to the companies' content moderation policies and actions. HB 20 would hold social media platforms to basic standards of accountability by requiring them to publicly disclose how they target content to users, promote products and services, and use algorithms to determine results on their platform.

HB 20 would curtail big tech companies' ability to silence viewpoints on their platforms by prohibiting viewpoint censorship and allowing users who were wrongly censored to sue the company and, if successful, recover costs and attorney fees. While the bill would prohibit censorship based on a user's viewpoint, it would not restrict social media platforms' ability to remove certain kinds of objectionable content, including obscene or violent material otherwise protected by the First Amendment but subject to control under the federal Communications Decency Act. The bill also would not

penalize social media companies for blocking content that incited criminal activity or threatened violence, and would allow for removal of content in order to prevent sexual exploitation of children.

While some say that as private companies, large social media companies have the right to control the content on their platforms, such companies have become the gatekeepers of free speech and have acted to limit mostly, though not exclusively, conservative views. The bill would allow the public and the attorney general to serve as watchdogs over unwarranted content removal and viewpoint censorship. Regulating the content moderation policies of big tech companies would not violate their First Amendment rights since, due to their dominant market shares, they function as common carriers of public speech and as such can be prohibited by the government from discriminating against their customers. The bill would not compel speech on the part of social media companies, only prevent their censorship of others' speech. The bill's application only to platforms with 50 million domestic monthly users would ensure that it applied only to companies that effectively functioned as common carriers and served as the new public square.

The bill is unlikely to lead to a rash of lawsuits being filed in Texas courts by social media users against the companies because it contains no cause of action for damages. HB 20 also does not include the provisions that have caused other bills on social media censorship to be enjoined by federal court in other states.

Critics said

HB 20 would run counter to the First Amendment by prohibiting a private business from controlling its own content based on dubious claims that social media platforms are censoring certain viewpoints. Social media companies' market power and hosting of private speech do not transform them into a public forum or common carrier subject to First Amendment restraints, and no law or court ruling thus far has found social media companies to be common carriers. By forcing social media platforms to host any and all viewpoints, the bill would compel political speech. The bill's 50 million-user threshold would be arbitrary and discriminatory and could unfairly target certain companies on the basis of perceived liberal bias. HB 20 could face a costly legal challenge and be found unconstitutional. Similar bills outside of Texas have already been enjoined by a federal court.

HB 20's distinction between viewpoint and content is unclear. Content moderation is at the core of the business models for social media companies, who seek to create a welcoming environment for users and advertisers. The bill could create an incentive for companies to not remove content that may be objectionable but not unlawful, such as bullying, misinformation, or even hate speech, in order to avoid being accused of violating the bill. Content moderation decisions could lead to costly lawsuits for a social media company.

By subjecting social media companies to burdensome regulation and exposing them to expensive litigation, HB 20 could inhibit the state's efforts to persuade technology companies to locate in Texas through policies conducive to business and job creation, and it could harm Texas' reputation as a business-friendly state.

Notes

The HRO analysis of HB 20 appeared in the August 27 *Daily Floor Report*.

A similar bill, **SB 12** by Hughes, passed the Senate and died in the House in the regular session of the 87th Legislature. The HRO analysis of SB 12 appeared in Part One of the May 24 *Daily Floor Report*.

Extending, revising the Texas Economic Development Act (Ch. 313)

HB 1556 by Murphy, HB 4242 by Meyer
Died in the House, Died in the Senate

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The 87th Legislature considered several bills that would have extended Tax Code ch. 313, the Texas Economic Development Act, which governs temporary property tax abatement agreements that school districts enter into with private entities for certain projects. The act is set to expire on December 31, 2022.

HB 1556 would have extended the Texas Economic Development Act through December 31, 2032, and revised certain portions of Tax Code ch. 313.

The bill would have expanded the investments and property eligible for a limitation on appraised value to include certain renovation or improvement projects, rather than just new buildings or improvements. A renovated building or component would not have been considered a qualified investment unless it otherwise qualified under statute.

The bill also would have revised ch. 313 agreement applications. Rather than requiring a school district to establish an application fee for a limitation, the bill would have required applicants to pay districts a $60,000 application fee. The application form could have required the applicant to provide only certain information as listed in the bill.

HB 1556 would have removed certain requirements for limitation agreements, including certain supplemental and revenue protection payments. A person and school district could not have entered into an agreement under which the person agreed to provide supplemental payments pursuant to an application filed on or after January 1, 2023. Instead, the bill would have required an agreement to provide for stabilization payments to the school district. Such payments could have been up to 38 percent of an amount calculated by applying the maintenance and operations tax rate of the district to the difference between the market value of the qualified property and the value under the limitation agreement.

Reporting requirements under the Texas Economic Development Act also would have been revised to require the comptroller to adopt a single annual reporting form for recipients of a limitation on appraised value and to remove certain contents of a report sent to the Legislature.

HB 4242 would have extended the Texas Economic Development Act for two years, until December 31, 2024.

Supporters said

HB 1556 and HB 4242 would allow school districts across the state to continue using a tool that has proved successful in attracting large-scale capital investment to Texas. HB 1556 also would provide vital reforms to the program.

Under Tax Code ch. 313, companies currently may agree to build facilities within school districts for qualifying projects in exchange for a temporary abatement of school property taxes. These investments result in more jobs and benefits to the economy. When the abatement ends, the developed facilities are taxed at full value, meaning that states pay less aid to these districts and the tax base of the districts grows. Chapter 313 agreements expand and promote the long-term stability of school districts by attracting investments that otherwise would not have come to the state. Projects also attract additional ancillary businesses and services, indirectly generating more jobs.

Chapter 313 agreements provide a counterweight to the relatively high property taxes that businesses face when considering investment in Texas. Other states also offer incentives to recruit businesses, and discontinuing the program would leave Texas at a competitive disadvantage. By extending Chapter 313, the bills would provide businesses currently considering an investment in Texas with needed certainty.

HB 1556 also would include essential reforms, such as eliminating outdated revenue protection payments that businesses pay districts under some current agreements. This would ensure the program incentivized investments that brought tax revenue to all schools and did not function as a special funding mechanism for a few. In addition, HB 1556 would expand qualifying projects under the program to include certain renovations of facilities that already qualified under Chapter 313, allowing Texas to better compete for not just new headquarters but also ongoing company capital investments in qualifying projects. The bill also would streamline the application process.

Concerns that the program negatively impacts the state budget are misguided. Chapter 313 agreements bring developments to the state that previously did not exist, meaning there is no loss of property tax revenue. Instead, school districts benefit from the increased tax base and revenue at the end of the temporary abatement. Further, Chapter 313 agreements are entered into at the discretion of school districts, helping to ensure an investment benefits the district and would not have located in Texas but for the abatement.

Critics said

HB 1556 and HB 4242 would extend an unnecessary program that strains the state budget. The state pays school districts for any school taxes relinquished due to abatements under the program, leading to less money available for other state needs. The Chapter 313 program also can increase inequality among school districts. While supporters claim the state will receive benefits of additional property tax revenues after the 10-year abatement ends, the taxable value remaining afterwards is only a fraction of the state's investment. The state should not forfeit funds to out-of-state shareholders that could be better spent for recovery efforts in Texas.

The program also struggles to achieve its mission of economic development and job creation. The benefits received by private entities through abatements often outweigh the number of jobs created, and the program does not go far enough in requiring more job creation or higher wages. Rather than continue the Chapter 313 program, the state instead should focus on other less costly economic development policies.

The abatement is largely unnecessary, as many of the businesses that have entered into Chapter 313 agreements would have located to Texas even without the abatement and many of the projects are dependent on the state's geography and resources. Businesses also do not need these abatements because the property tax burden has fallen significantly in the past 20 years. If the Legislature were to continue Chapter 313, it should review the program, expand oversight, and establish a "but for" requirement such that a project would not locate in Texas but for an abatement.

In addition, HB 1556 would expand Chapter 313 further by qualifying renovations, expansions, and improvements on existing projects for abatements. This could increase projects, driving up costs to the state, and would be an inappropriate use of limitation agreements, which were created as a tool to draw new projects into the state rather than continuing to fund the expansion of projects already here.

Other critics said

By eliminating revenue protection payments, HB 1556 would remove school districts' ability to negotiate for these benefits in Chapter 313 agreements. Districts should have the discretion to develop a partnership with a business so that additional funds could be shared with the local community. This could have a chilling effect on the adoption of this important economic development tool in many school districts.

Notes

The HRO analyses of HB 1556 and HB 4242 appeared in Part One of the May 7 *Daily Floor Report*.

Preempting local regulation of certain employment policies

SB 14 by Creighton, Second Called Session
Died in the House

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SB 14 would have prohibited a municipality or county from adopting or enforcing an ordinance, order, rule, regulation, or policy requiring terms of employment that exceeded or conflicted with federal or state law on employment leave, hiring practices, employment benefits, scheduling practices, or certain other terms of employment.

Any provision that violated the bill would have been void and unenforceable.

The bill would not have affected:

- the Texas Minimum Wage Act;
- the authority of a political subdivision to negotiate terms of employment with its employees or the designated bargaining agent;
- a policy relating to terms of employment for employees of a municipality or county, regardless of when the policy was adopted;
- employment and safety protections afforded by and in compliance with state and federal law, including rest and water breaks as required under the Occupational Safety and Health Act of 1970, or any applicable guidance of the Occupational Safety and Health Administration Heat Illness Prevention Campaign; or
- a contract or agreement for terms of employment voluntarily entered into between a private employer or entity and a governmental entity.

The bill would have applied to an ordinance, order, rule, regulation, or policy adopted before, on, or after the effective date.

Supporters said

SB 14 would provide more certainty and consistency for Texas businesses, including those impacted by the COVID-19 pandemic, by preempting certain burdensome and costly local regulations imposed on private employers.

Local governments should not dictate how businesses provide employment leave, establish hiring or scheduling practices, or offer employment benefits. Such regulations interfere with the freedom of private businesses to establish their own practices and benefits, and they amount to government overreach.

Many small businesses and restaurants work on small profit margins, so costly local mandates for terms of employment, such as some paid sick leave mandates, could force them to close. Other ordinances may affect the ability of a business to retain staff or make benefit agreements and can lead to reductions in employee hours, ultimately harming employees. Employers want their businesses to remain operational and competitive, so attracting and retaining the best employees under their own terms is in their best interest.

Cities and counties have imposed several ordinances on private employers in recent years to mandate certain terms of employment, creating a patchwork of regulations across the state. This has created burdensome compliance costs for businesses that operate across city or county lines. A business operating in a single county may have several differing city regulations for which to account. SB 14 would provide statewide consistency and fairness by removing the patchwork regulations. As businesses struggle due to the COVID-19 pandemic, it is increasingly important to provide certainty in the state's business environment to rebuild a thriving economy and ensure Texas businesses remain competitive. Concerns that the bill would negatively impact certain workers are unfounded. Protections in state and federal laws, rules, and regulations already address worker health and safety, nondiscrimination, and other worker rights.

Concerns about paid sick leave or LGBTQ+ rights already have been addressed by the courts. The federal Occupational Safety and Health Administration (OSHA) regulates health and safety standards such as water and rest breaks, and businesses follow OSHA guidance. SB 14

would not affect municipal or county employee contracts or collective bargaining agreements.

The bill specifies that only a provision that violated the bill would be made void, leaving the rest of the ordinance intact and preventing unintended consequences. The scope of this bill would be only to clarify where jurisdiction of employment regulations was located, not to determine or establish new statewide regulations. Concerns that some have expressed about local health and safety requirements during an emergency or disaster would not relate directly to this bill or its purpose.

Critics said

SB 14 could roll back important workplace protections and tie the hands of local elected officials by preempting local ordinances on employment leave, hiring and scheduling practices, benefits, and other worker protections.

The bill could make it more difficult for employees to receive basic worker rights, including paid sick leave and nondiscrimination protections for LGBTQ+ individuals, minorities, and other vulnerable groups that eliminate biases from the hiring process, as well as "ban the box" protections that can provide a second chance for those who have been involved with the criminal justice system. Because the bill's exemption for OSHA breaks would not cover local mandates, SB 14 also could void local requirements for water and rest breaks for outdoor workers in the summer heat. State and federal laws and regulations do not go far enough to protect workers, and local communities should be able to adopt policies to fill the gaps. The Legislature should enact statewide protections rather than rolling back local worker benefits.

SB 14 also could hinder local efforts to respond to circumstances such as the current pandemic. Given the impact of COVID-19 on employees, especially low-wage employees, it is especially important to ensure proper worker protections. The bill could prevent local mandates for protection of frontline workers, including handwashing stations, mask mandates, and social distancing requirements, that help prevent the spread of COVID-19. Local mandates on paid sick leave, which could be voided by this bill, also would help stop the spread of viruses by allowing workers to take off necessary sick time rather than being compelled to attend work while ill and potentially contagious. Because of the broad language of SB 14, it is not clear whether the bill would apply to local emergency response ordinances if those ordinances affected a business's scheduling practices or other terms of employment.

The bill would remove local control from cities and counties, contrary to the idea that the government closest to the people best serves the people. Local government officials are elected to represent the community's best interests, including worker protections, and policies are crafted with input from local businesses. Such protections and benefits incentivize employers to locate in Texas, as they may help businesses recruit workers.

Notes

The HRO analysis of SB 14 appeared in the September 1 *Daily Floor Report*. A similar bill, also **SB 14** by Creighton, was introduced in the regular session and died in conference committee. The HRO analysis of SB 14, regular session, appeared in Part One of the May 25 *Daily Floor Report*.

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Civil Jurisprudence and Judiciary

* Finally approved

Establishing a framework for civil actions involving commercial truckers

HB 19 by Leach
Generally effective September 1, 2021

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HB 19 provides a framework for trial procedures, use of evidence, and determination of liability in certain civil actions involving commercial motor vehicles in which a claimant seeks recovery of damages for bodily injury or death caused in an accident.

The bill does not apply to a commercial motor vehicle being used at the time of the accident for personal, family, or household purposes. It also does not apply to passengers in commercial motor vehicles unless the person is an employee of the owner, lessor, lessee, or operator of the vehicle.

Bifurcated trial. In a civil action under the bill, the court must provide for a bifurcated trial on motion by a defendant. In the first phase of the bifurcated trial, the trier of fact must determine liability for and the amount of compensatory damages. In the second phase the trier of fact must determine liability for and the amount of exemplary damages.

A finding in a trial's first phase that an employee defendant was negligent in operating an employer defendant's commercial motor vehicle may serve as a basis for the claimant to proceed in the second part of the trial on a claim against the employer defendant, such as negligent entrustment. Such a claim requires a finding that the employee was negligent in operating the vehicle as a prerequisite to the employer defendant being found negligent in relation to the employee defendant's operation of the vehicle. This provision does not apply to a claimant who pursues such a claim in the first phase of a bifurcated trial.

Liability for employee negligence. If, within the time specified by the bill, the employer defendant in a civil action brought under the bill stipulates to liability for respondeat superior, meaning that, at the time of the accident, the person operating the vehicle was the defendant's employee and acting within the scope of that employment, that defendant's liability for compensatory damages must be based only on the stipulated respondeat superior liability, with certain exceptions.

If the employer defendant stipulates to such liability and the trial is bifurcated, a claimant may not present evidence in the first phase of the trial on certain ordinary negligence claims against the employer defendant unless exceptions detailed in the bill apply.

Exceptions. If an employer defendant is regulated under specified laws, a party may present certain evidence in the first phase of a bifurcated trial regarding the employee driver and the employer defendant. Evidence may be presented, as applicable and as specified in the bill, on whether the employee who was operating the employer defendant's commercial motor vehicle at the time of the accident:

- was licensed to drive the vehicle;
- was disqualified from driving the vehicle;
- was subject to an out-of-service order; and
- was driving the vehicle in violation of a license restriction imposed under specified law, in addition to other kinds of evidence as laid out in the bill.

Evidence also must be allowed in the first phase on whether the employer defendant:

- allowed the employee to operate the employer's commercial motor vehicle in violation of specified laws;
- had complied with applicable law regarding controlled-substance testing of the employee driver if certain conditions were met;
- had made the investigations and inquiries as provided under applicable law regarding the employee driver if the accident occurred on or before the first anniversary of the date the employee driver began employment; and
- was subject to an out-of-service order.

Such evidence is admissible in the first phase of a bifurcated trial only to prove ordinary negligent entrustment by the employer defendant to the employee who was driving the employer defendant's vehicle at

the time of the accident. This evidence also is the only evidence that may be presented by the claimant in the first phase of the trial on the negligent entrustment claim.

Permissible actions. The bill does not prevent a claimant from pursuing an ordinary negligence claim against an employer defendant for a claim, such as negligent maintenance, that does not require a finding of negligence by an employee as a prerequisite to an employer defendant being found negligent for the employer defendant's conduct or omission.

Evidence of violations of regulations and standards. In the first phase of a bifurcated trial, evidence of a defendant's failure to comply with a regulation or standard is admissible only if:

- the evidence tends to prove that failure to comply was a proximate cause of the bodily injury or death for which damages are sought; and
- the regulation or standard is specific and governs, or is an element of a duty of care applicable to, the defendant, the defendant's employee, or the defendant's property or equipment.

The bill does not prevent a claimant from pursuing a claim for exemplary damages relating to the defendant's failure to comply with applicable regulations or standards or from presenting evidence on that claim in the second phase of a bifurcated trial.

Visual depictions of accident. A photograph or video of a vehicle or object involved in an accident that is the subject of a civil action brought under the bill is presumed admissible, even if the photograph or video tends to support or refute an assertion regarding the severity of damages or injury to an object or person involved in an accident. A court may not require expert testimony for admission into evidence of such a photograph or video except as necessary for authentication.

Commercial automobile insurance report. The Department of Insurance (DOI) must conduct a study each biennium on the effect of HB 19, for each year of the biennium, on premiums, deductibles, coverage, and availability of coverage for commercial automobile insurance. By December 1 of each even-numbered year, DOI must submit a written report of the study results for the preceding biennium to the Legislature. This provision will expire December 31, 2026.

Supporters said

HB 19 would clarify and modify current law to streamline and create a fair framework for commercial vehicle litigation. The bill would protect commercial vehicle operators from frivolous and unjust lawsuits, while ensuring that all victims of collisions still could be heard and made whole in court.

It has been shown that, over the past decade, motor vehicle accidents have increased substantially, while the number of collisions involving a fatality, severe injury, or any other injury increased by significantly smaller amounts or even declined. Despite these trends that seem to warrant a reduction in litigation, excessive and unjust motor vehicle litigation remains a concern for businesses and drivers across Texas. It is often the case that the person or entity being sued in such cases is not at fault in the collision, yet must spend increasing amounts of money on court costs and insurance coverage.

To avoid the risk of a large judgment, insurers often settle commercial vehicle cases without regard to merit, possibly encouraging plaintiff attorney's to file more lawsuits. As a result, some insurers are pulling out of Texas, and the companies that remain are increasing deductibles and premiums and reducing coverage for commercial vehicles regardless of claims history. The bill's framework would provide the balance needed to award fair compensation to Texans injured in accidents, while ensuring that commercial trucking companies and operators could adequately protect themselves from unfair lawsuits.

The bill's modified framework for civil actions would clarify and revise the litigation process for civil actions involving commercial motor vehicles to ensure that an essential industry to the state of Texas was protected when blame was not warranted, without compromising the ability of Texans to access justice for true injuries. The bifurcated trial provisions also would ensure that the evidence introduced in a civil action matched the type of damages to be awarded. The presumption of admissibility for properly authenticated visual depictions of the accident would prevent trial courts from excluding photographs that show the actual damage to a plaintiff's vehicle, which would be useful to the court in determining whether the damage done to the vehicle aligned with the damages claimed.

Critics said

HB 19 would remake the civil justice system for the benefit of one particular industry, commercial trucking, to the exclusion of other industries in Texas at a time when more oversight in the industry is needed. Texas has some of the highest rates in the nation of preventable injuries and deaths on highways caused by large commercial trucks. The bill's modified framework for civil actions involving commercial motor vehicles could restrict pursuit of full compensation for Texans injured in accidents and could encourage commercial trucking companies to operate their businesses with more freedom and less regard for the safety of Texans sharing the road. At a time when Texas should be focused on making the state's roads safer, attempts to further protect the commercial trucking industry in civil actions are misguided and could leave injured Texans with less recourse to access justice.

Notes

The HRO analysis of HB 19 appeared in Part One of the April 29 *Daily Floor Report*.

Revising procedures and grounds for terminating parental rights

HB 567 by Frank
Effective September 1, 2021

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HB 567 revises provisions governing termination of a parent-child relationship, the conditions under which the Department of Family and Protective Services (DFPS) may take possession of a child, and the placement of a child after certain suits of possession. The bill also establishes a statutory definition of the term "neglect."

Termination. HB 567 establishes that allowing a child to engage in independent activities that are appropriate and typical for the child's level of maturity, physical condition, developmental abilities, or culture do not constitute clear and convincing evidence sufficient for a court to order the termination of the parent-child relationship. DFPS is prohibited from taking possession of a child based on evidence that a parent allowed the child to engage in such activities or that a parent tested positive for marijuana, with certain exceptions.

Neglect. HB 567 defines "neglect" as an act or failure to act by a person responsible for a child's care, custody, or welfare evidencing the person's blatant disregard for the consequences of the act or failure to act that results in harm to the child or creates an immediate danger to the child's physical health or safety. The definition does not include allowing a child to engage in independent activities that are appropriate and typical for the child's level of maturity, physical condition, developmental abilities, or culture. The bill also replaces related language referencing "substantial risk" with "immediate danger."

Placement of a child after certain hearings. The bill revises Family Code provisions concerning the placement of a child after a hearing held in certain suits affecting the parent-child relationship, including suits filed by a governmental entity requesting permission to take possession of a child without prior notice and suits related to the taking of a child in an emergency without a court order.

In such suits, if the court does not order the return of the child to the parent or custodian from whom the child was removed and finds that another parent or custodian entitled to possession of the child did not cause the immediate danger to the child or was not the perpetrator of the alleged neglect or abuse, the court must order the possession of the child by that person. However, the court does not have to order the possession of the child by that person if the court finds that:

- the person cannot be located after the exercise of due diligence by DFPS;
- the person is unable or unwilling to take possession of the child; or
- reasonable efforts are made to enable the person's possession of the child, but the possession by that person presents a continuing danger to the child.

If the court does not order possession of the child by a parent or other custodian, the court is required to place the child with a relative unless it finds that the placement is not in the child's best interest.

At the end of each permanency hearing in a suit affecting the parent-child relationship in which DFPS is appointed or designated as the temporary or permanent managing conservator of a child, the court must order the department to return the child to the child's parent or parents unless it finds, with respect to each parent, that there is a continuing danger to the physical health or safety of the child and returning the child to the parent or parents is contrary to the child's welfare. The bill does not prohibit the court from issuing a temporary order for the monitored return of the child to the child's parent or parents.

Timely resolution. The bill also revises the timeline and procedures for the court to render final orders for a child under DFPS care. On the timely commencement of a trial on the merits related to a final order for a child under DFPS care, the court is required to render a final order by the 90th day after the date the trial commences. If the court finds that extraordinary circumstances necessitate extending the 90-day period, the court may extend the period for the time it determines necessary. A

party may file a mandamus proceeding if the court fails to render a final order within the required time.

Court ordered services. HB 567 authorizes DFPS to file a suit requesting a court to render a temporary order requiring a child's parent, guardian, or other member of the child's household to participate in certain services, including services for reducing a continuing danger to the child caused by the parent or guardian or for reducing a substantial risk of abuse or neglect.

A petition filed under the bill must be supported by a sworn affidavit supporting a finding that the child has been a victim of or is at substantial risk of abuse or neglect. The affidavit must meet certain requirements and support a finding that there is a continuing danger to the child caused by the parent or other responsible person unless that person participates in services requested by DFPS.

HB 567 requires the court to appoint an attorney ad litem to represent the interests of the child. An attorney ad litem must also be appointed to represent the interests of a parent for whom participation in services is requested. The court must inform each parent of the right to an attorney and, for a parent who is indigent and appears in opposition to the motion, of the parent's right to a court-appointed attorney. The bill also establishes procedures for determining whether a parent is indigent for the purpose of representation.

An order to participate in services may be issued only after notice and hearing requirements are met. The court is required to deny DFPS's petition unless it finds sufficient evidence that abuse or neglect has occurred or that there is a substantial risk of abuse, neglect, or continuing danger to the child's health or safety caused by the parent, guardian, or other member of the household and that services are necessary to ensure the child's health and safety.

If the court grants the petition and issues an order, it must state its findings, make appropriate temporary orders to ensure the child's safety, and order the parent or guardian to participate in specific services narrowly tailored to address the findings.

The court must hold a hearing within 90 days after issuing an order to review the status of each person required to participate in services, the child, and the services provided or referred. The court then must set hearings every 90 days to review the continued need for the order.

Orders expire on the 180th day after being issued unless the court extends the order. Orders may be extended for no more than an additional 180 days only under certain circumstances.

Other provisions. HB 567 requires additional duties of an attorney ad litem appointed for a child in certain child welfare services proceedings related to reviewing the child's medical care and ascertaining whether the child has received certain documents, including a certified copy of the child's birth certificate, a Social Security card, a driver's license or personal identification certificate, and any other personal documents DFPS determines appropriate. The bill also repeals several provisions of the Family Code related to advisory hearings and non-emergency removals of children.

Supporters said

HB 567 would reduce harm caused to children when they are unnecessarily separated from their parents by reforming portions of the Family Code that govern when and under what conditions children may be removed from their families or guardians. The bill would help to balance the responsibility of the Department of Family and Protective Services (DFPS) to remove children who are in danger with the equally important task of leaving families intact whenever possible by establishing a statutory definition of "neglect" and limiting the length of Child Protective Services cases.

Research has shown that children suffer trauma when they are removed from their homes, even if only for a few months. In the majority of cases handled by DFPS, children are removed for neglect. However, the state's current description of neglect is too broad and can lead to children being removed from their homes even when they are not in danger or being mistreated. By establishing a definition of neglect that included only actions that placed a child in immediate danger, HB 567 would help prevent unnecessary removals and allow DFPS to focus on only the most serious cases. The bill's definition of neglect would not prevent the removal of a child from a dangerous situation, but would help keep children who were not in danger with their families and out of state custody.

In addition, the bill would protect home schoolers, parents who choose not to have their children vaccinated for religious and or other reasons of conscience, those accused of certain nonviolent misdemeanor offenses, and economically disadvantaged parents who face unfair and increased risk of having their children removed relative

to more affluent families. A study has demonstrated a statistically significant relationship between removals for an allegation of neglect and poverty, with children in rural and working-class areas of the state much more likely to be removed from their homes.

HB 567 also would make Texas law consistent with the requirements of the federal Family First Prevention Services Act, which seeks to reduce the number of children in foster care by providing services to preserve families at risk of separation before such a step becomes necessary.

In cases where it was necessary to remove a child from a parent or guardian, HB 567 would require courts to place the child with a non-offending parent or family when possible. This would restore the fair adjudication rights of non-offending parents, who often become a casualty of DFPS cases when they could provide a safe placement for a child. The bill also would require that children be returned to their families after a permanency hearing except when there is a continuing danger, helping to ensure that children were returned home as quickly and safely as possible.

Critics said

HB 567, while well intentioned, could result in unintended consequences for children in Texas. While the bill contains many positive steps toward reducing unnecessary and traumatic removals of children from their families, several of the bill's provisions could result in some children being left in unsafe situations.

By establishing a statutory definition of neglect that includes "blatant disregard" as an element of the definition, which could involve an inquiry into a parent's mental state, as well as only actions resulting in a child's immediate danger or harm, HB 567 could lead to children being left in risky situations because they could not be determined to fit the definition. Further study of the impact this change in definition could have on child protection investigations and processes throughout the state should be undertaken and considered before changes are made.

Notes

The HRO analysis of HB 567 appeared in the March 31 *Daily Floor Report*.

The 87th Legislature enacted other bills related to parental rights, including **SB 1578** by Kolkhorst, effective September 1, 2021. The bill requires the court, when making a determination on whether a child was or had been a victim of abuse or neglect, to consider the opinion of a medical professional obtained by a parent against whom the protective order was sought. The HRO analysis of SB 1578 appeared in the May 20 *Daily Floor Report*.

HB 2924 by Dutton, effective September 1, 2021, removes a provision under which a parent could be penalized in a current case concerning the parent-child relationship for the termination of parental rights with regard to another child. The HRO analysis of HB 2924 appeared in Part One of the May 4 *Daily Floor Report*.

HB 2926 by Parker, effective September 1, 2021, establishes conditions under which a petition for the reinstatement of parental rights may be filed following the involuntary termination of the parent-child relationship. The HRO analysis of HB 2926 appeared in Part One of the May 7 *Daily Floor Report*.

Modifying the rule against perpetuities

HB 654 by Lucio
Effective September 1, 2021

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HB 654 modifies the rule against perpetuities to require an interest in a trust other than a charitable trust to vest, if at all, no later than 300 years after the effective date of the trust if:

- the trust's effective date is on or after September 1, 2021, or;
- the trust's effective date is before September 1, 2021, and the trust instrument specifically provides that an interest in the trust will vest under the law governing perpetuities as applicable on the date the interest vests.

The effective date of the trust is the date the trust becomes irrevocable. The bill prohibits a settlor of a trust from directing that a real property asset be retained or refusing that a real property asset may be sold for a period longer than 100 years.

Supporters said

HB 654 would increase the state's competitiveness in estate and trust planning by modifying and clarifying the rule against perpetuities (RAP) to protect the corpus of a trust for a longer time than under current law. Currently, 23 other states have modified their RAP to offer perpetual trusts or to extend the permissible duration of a trust. The restrictive nature of the rule in Texas incentivizes Texans to move trust assets to other states with more relaxed RAP laws. The movement of these assets and associated trust management businesses has negative economic impacts for Texas, as the money associated with these trusts started in other states leaves Texas for generations. HB 654 would make Texas competitive with other states by offering a maximum permissible duration of 300 years for a trust.

It has been shown that a state's abolition of the RAP can substantially increase average reported trust assets and trust account sizes, and the modifications to the RAP presented by the bill could support similar trust asset growth in Texas. Additional fees and resources associated with trust management would contribute to significant growth in the Texas economy by producing new jobs to support additional and growing trust accounts. However, the bill would not eliminate the RAP nor allow for perpetual trusts in Texas, and would specify that land in a trust could not be kept from sale for more than 100 years, which should dispel any concerns about indefinite restriction of use and availability of important assets. The bill also would clarify the permissible duration for a Texas trust by eliminating the confusing statutory language and establishing a fixed number of years for a trust to exist. The current statutory language is outdated and difficult to understand, which can lead to increased litigation.

Critics said

HB 654 would change a long-established principle of Texas property law by effectively abolishing the rule against perpetuities (RAP), which could negatively affect the Texas economy and large-scale charitable giving. The current RAP is intended to promote alienability of property and prevent dynastic treatment of assets that would restrict their productive use and availability. Trusts under the bill's proposed modifications to the rule could tie up billions of dollars for many generations and keep them out of the normal stream of commerce, since trustees invest for wealth preservation and conservation rather than profit.

The current RAP encourages charitable giving by excluding charitable trusts from its requirements. Modifying the rule for non-charitable trusts would allow for essentially permanent trusts, which could deplete the pool of assets available for charitable giving. Under HB 654, disputes over proposed charitable distributions and difficulties associated with interpreting trusts drafted hundreds of years ago could generate increased litigation, which could overburden courts.

Notes

The HRO analysis of HB 654 appeared in the March 31 *Daily Floor Report*.

Establishing liability exceptions for certain claims relating to pandemic

SB 6 by Hancock
Effective June 14, 2021

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SB 6 establishes limits on certain kinds of liability relating to a pandemic disease or pandemic emergency. Liability exceptions are established for certain actions by physicians, health care providers, and first responders, as well as by manufacturers and others involved with specified products. The bill also establishes liability protections for certain exposures of individuals to a pandemic disease and certain actions taken by educational institutions.

The bill defines "disaster declaration" as a declaration of a state of disaster or emergency by the U.S. president applicable to the entire state, a declaration of a state of disaster by the governor under the Texas Disaster Act of 1975 for the entire state, and any amendment, modification, or extension of the declaration.

"Pandemic disease" is defined as an infectious disease that spreads to a significant portion of the population of the United States and that posed a substantial risk of a significant number of human fatalities, illnesses, or permanent long-term disabilities.

Provisions on the liability of physicians, health care providers, and first responders apply only to actions that began on or after March 13, 2020, for which a judgment had not become final by the bill's effective date.

Liability of physicians, health care providers, first responders. SB 6, under certain circumstances, provides physicians, health care providers, and first responders exceptions from liability for injuries or deaths arising from care, treatment, or failure to provide care or treatment relating to a pandemic disease or a disaster declaration related to a pandemic disease.

The exception from liability does not apply in cases of reckless conduct or intentional, willful, or wanton misconduct that meets certain conditions in the bill. The exception to liability applies if a physician, health care provider, or first responder proves by a preponderance of the evidence that:

- a pandemic disease or disaster declaration related to a pandemic disease was a producing cause of the care, treatment, or failure to provide care or treatment that allegedly caused the injury or death; or
- the individual who suffered injury or death was diagnosed or reasonably suspected to be infected with a pandemic disease at the time of the care or treatment.

The bill establishes when certain defenses to liability may be used by a physician, health care provider, or first responder.

Product liability actions. Under SB 6, during a pandemic emergency, persons would not be liable for certain actions relating to product liability and injury, death, or property damage relating to specific products unless certain conditions are met, including knowledge of a defect or actual malice. The potential exception from liability applies only to certain products listed in the bill.

The liability limits can apply, under certain conditions, to the design, manufacture, sale, and donation of products. Liability limits also can apply to failures to warn or provide adequate instructions and to the selection, distribution, or use of a product.

Liability for causing exposure to pandemic disease. Under the bill, a person would not be liable, under certain circumstances, for injuries or death caused by exposing an individual to a pandemic disease during a pandemic emergency. A person could be liable for exposure if a claimant establishes certain factors relating to failing to warn someone of certain conditions or failing to implement official standards, guidance, or protocols.

Failure to warn. A person would be not be liable for failure to warn unless a claimant established that the

person who exposed the claimant knowingly failed to warn the individual of or remediate a condition that the person knew was likely to result in disease exposure. To be liable a person must have control over the condition, know that the individual was more likely than not to come into contact with the condition, and have a reasonable opportunity and ability to remediate the condition or warn the individual.

Failure to implement standards, guidance, protocols. A person would not be liable for failure to implement government standards unless the claimant established that the person who exposed the claimant knowingly failed to implement or comply with government-promulgated standards, guidance, or protocols intended to lower the likelihood of exposure to the disease, and:

- the person had a reasonable opportunity and ability to implement or comply with the standards, guidance, or protocols and refused or acted with flagrant disregard of them; and
- the standards, guidance, and protocols did not, on the date of exposure, conflict with government-promulgated standards, guidance, or protocols that the person had implemented or with which the person had complied.

The bill establishes a way to address situations in which an order, rule, or authoritative declaration by the governor, the Legislature, a state agency, or a local governmental conflicts with a different government-promulgated standard, guideline, or protocol. A person cannot be considered to have failed to implement or comply with the standard, guideline, or protocol if, at the time of an exposure, the person was making a good-faith effort to substantially comply with at least one conflicting order, rule, or declaration.

Scientific evidence. For a person to be liable, a claimant must establish that reliable scientific evidence shows that the failure to warn the individual of the condition, remediate the condition, or implement standards, guidance, or protocols was the cause of the individual contracting the disease.

The bill establishes a timeline for claimants to give defendants a report by at least one qualified expert that provides a factual and scientific basis for asserting that the defendant's failure to act caused the person to contract a pandemic disease. The bill also establishes procedures and deadlines for objections to the sufficiency of the information in the report and ways to cure deficiencies.

Liability of educational institutions. Educational institutions are not be liable for damages or equitable monetary relief from canceling or modifying a course, program, or activity if the cancelation or modification arose during a pandemic emergency and was caused, in whole or in part, by the emergency.

Supporters said

SB 6 would support the health care providers, businesses, and others who helped Texas fight the COVID-19 pandemic by giving them limited liability protection for their good-faith efforts during the pandemic. The bill also would provide needed protections to the businesses, religious institutions, schools, non-profit organizations, and others that tried to follow government standards, guidelines, and protocols designed to fight the pandemic. The bill would not create immunity from lawsuits for any entity or shield bad actors who harmed people, but would impose common-sense limits on liability for some lawsuits related to the pandemic. The bill would balance the needs of all parties by having a retroactive effective date so that it applied to actions taken during the pandemic.

Liability of physicians, health care providers, first responders. SB 6 would give protections to the state's frontline health care workers who stepped up to care for Texans during the pandemic, doing the best they could in a fluid situation. During this time, health care workers were faced with shifting protocols, incomplete information, limited supplies, and changing standards and so should be afforded reasonable protection from lawsuits under certain circumstances.

SB 6 would give health care providers working during the pandemic protection from inappropriate lawsuits by extending to them the standard of willful, wanton misconduct applied to health care providers giving emergency care. Care provided during the pandemic is analogous to emergency care and should be held to the same standard, rather than to the standard of negligence that would apply in many suits absent SB 6.

While the bill would provide some liability protection for health care workers, it would not protect them from all lawsuits. Health care providers, including nursing homes, could be held accountable for certain willful or wanton misconduct. Nursing homes and other providers that asserted that care was related to a pandemic disease would have to prove that the pandemic disease or other criteria in the bill was the cause of the person's injury or death.

Product liability. SB 6 would extend reasonable liability protections for designing, manufacturing, and marketing certain products so that businesses helping Texas deal with a pandemic disease could operate during a pandemic emergency. The bill would ensure that producing certain products, such as personal protective equipment, in good faith during a pandemic did not expose a business to lawsuits unless actual malice or knowledge of defects was involved.

Liability for causing exposure to pandemic disease. The bill would recognize that those acting in good faith by following official guidelines should have some protections from liability for exposure of others to a pandemic disease. Businesses, schools, churches and other places that made honest efforts to comply with government standards, guidance, or protocols during the pandemic should not be penalized for following rules that they were given. The bill would make allowances for conflicting guidance and require that a person made a good-faith effort to comply with at least one conflicting order. The bill would not penalize an entity for not following government protocols. Deciding which conflicting orders with which to comply would be up to each person.

The bill's provisions requiring those bringing a lawsuit to provide the defendant with a report by an expert would be modeled on similar requirements for lawsuits relating to emergency health care. The report would not present a barrier in legitimate cases, as workers or others needing to file a report should have access to the necessary information, and the bill would allow for the report to be revised under certain circumstances.

Critics said

SB 6 would impose unfair restrictions that would prevent Texans from pursuing certain claims for injuries and deaths or property damage related to pandemics. Lawsuits for actions taken during the pandemic should be allowed to proceed as they do under current law, with courts considering cases on their merits without unique provisions designed to shield certain parties from liability.

Liability of physicians, health care providers, first responders. SB 6 would provide too broad a liability shield for certain injuries, especially those that might occur in a nursing home. A nursing home could use the bill to claim that almost any action or omission occurring in the past year was impacted by the pandemic, even if the provider should be subject to liability for the action or omission. The extra burden that the bill would impose in lawsuits if a nursing facility claimed pandemic-related protections would be too high for residents or families to reasonably be expected to meet.

Liability for causing exposure to pandemic disease. The bill would establish too high a legal hurdle for workers injured by exposure to a pandemic disease. It would require a pre-discovery report from the individual claiming injury, and it could be difficult for a worker to obtain information such as company policies and records to give to the expert producing the report. This is in contrast to cases related to emergency medical care in which patients had access to their medical records, and to lawsuits under current law in which the worker had access to the information during the pre-trial discovery process.

Other critics said

The bill would go too far in basing liability protections on adherence to overly restrictive government standards, guidance, or protocols by penalizing businesses or organizations that did not follow them, effectively writing those standards into law.

Notes

The HRO analysis of SB 6 appeared in the May 21 *Daily Floor Report*.

Creating opioid abatement account and trust fund for settlement funds

SB 1827 by Huffman
Effective June 16, 2021

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SB 1827 provides for the collection and allocation of money obtained under a statewide opioid settlement agreement. It requires 15 percent of the money obtained under such an agreement to be deposited into an opioid abatement account that will be appropriated to state agencies and 85 percent of the money to be deposited into an opioid abatement trust fund. Some of the amount deposited to the trust fund must be distributed to cities and counties and some to an opioid abatement fund council established by the bill to further distribute the funds. Under the bill, money obtained under a statewide opioid settlement agreement must be allocated in accordance with that agreement.

Opioid abatement fund council. SB 1827 establishes the Texas opioid abatement fund council to ensure that money recovered by Texas through a statewide opioid settlement agreement is allocated fairly and spent to remediate the opioid crisis in the state using efficient and cost-effective methods directed to the regions experiencing opioid-related harms.

The council is composed of the following 14 members:

- six regional members, appointed by the executive commissioner of the Health and Human Services Commission (HHSC), from academia or the medical profession, with significant experience in opioid interventions, each appointed to represent one of the six groups of regional health care partnership regions listed in the bill;
- four members who are current or retired health care professionals with significant experience in treating opioid-related harms, with one each appointed by the governor, the lieutenant governor, the House speaker, and the attorney general;
- one member employed by a hospital district and appointed by the governor;
- one member employed by a hospital district and appointed by the attorney general;
- one member appointed by the governor who is a member of a law enforcement agency with experience with opioid-related harms; and
- one nonvoting member who serves as the presiding officer of the council and is the comptroller or the comptroller's designee.

The HHSC executive commissioner must make appointments from a list of two qualified candidates provided by the governing bodies of counties and municipalities that brought a civil action for an opioid-related harm against a released entity, released an opioid-related harm claim in a statewide opioid settlement agreement, and are located within the regions for which the member is being appointed.

Opioid abatement account. The bill establishes the opioid abatement account as a dedicated account in the general revenue fund administered by the comptroller. The account is composed of money obtained from a statewide opioid settlement agreement, money received by the state from any other source resulting from an action by the state against an opioid manufacturer or distributor, and other sources listed in the bill. Fifteen percent of the money obtained under a statewide opioid settlement agreement will be deposited into the opioid abatement account.

Money in the account may be appropriated only to a state agency for the abatement of opioid-related harms. The bill lists approved uses by state agencies for money appropriated from the account, including preventing opioid use disorder through evidence-based education and prevention and supporting efforts to prevent or reduce deaths from opioid overdoses or other opioid-related harms. Other uses include training and treatment related to opioid addiction and addressing the needs of persons involved with criminal justice and rural county unattended deaths.

Opioid abatement trust fund. SB 1827 establishes the opioid abatement trust fund as a trust fund outside of the treasury and administered by a trust company. The fund consists of money obtained under a statewide opioid

settlement agreement and interest, dividends, and other fund income. The trust fund will receive 85 percent of the money obtained in a statewide settlement agreement.

The bill requires the trust company administering the fund to:

- distribute 15 percent of the total amount of money obtained under a statewide opioid settlement agreement to counties and cities to address opioid-related harms in those communities; and
- allocate 70 percent of the total amount of money obtained under a statewide opioid settlement agreement and distributed to the fund and the account as specified in the bill.

Of the 70 percent of the total amount of money obtained under an agreement, the bill requires that $5 million be used to provide basic civil legal services to indigent persons directly impacted by opioid-use disorders, including children who need legal services as a result of opioid-use disorders by a parent, legal guardian, or caretaker. The remainder of the 70 percent must go to the opioid abatement fund council.

Opioid abatement fund council duties and allocation of funds. The opioid abatement fund council is required to allocate 1 percent of the funds it receives to the comptroller for administrative costs, 15 percent to hospital districts, and the remaining amount based on the opioid abatement strategy developed by the council.

The council is required to determine and approve evidence-based opioid abatement strategies, among other duties. The strategies must include an annual allocation methodology based on population health information and prevalence of opioid incidences and an annual targeted allocation to distribute funds for targeted interventions as identified by opioid incidence information. The bill requires that to approve any decision or strategy, at least four of the six council members appointed from regional health care partnership regions and at least four members appointed under other categories would have to approve the decision or strategy.

Supporters said

SB 1827 would help the state and local areas respond to the public health crisis and other issues resulting from the opioid crisis by creating a fund to collect and disburse money received through litigation against opioid manufacturers and distributors. Texas is a party to several multi-jurisdictional lawsuits that should result in large settlements coming to the state. SB 1897 would ensure that the funds from opioid manufacturers and distributors went to meet local and regional needs following the outline of the litigation settlement. The framework established by the bill would help ensure that funds were distributed fairly and that they were spent to help remediate and abate the opioid crisis in Texas. The money would be used for efforts related to the prevention, treatment, and recovery from opioid abuse on both the state and local levels, which would help all Texans benefit from the settlement funds.

The bill is crafted to make sure that funds would be allocated according to a potential opioid settlement agreement. Rather than reproduce in the bill itself the language from the agreement describing how to distribute money, SB 1827 would require money to be allocated in accordance with the settlement agreement. In addition, a provision in Article 9 of the General Appropriations Act for fiscal 2022-23 lists the pro-rata share of opioid settlement funds that would go to cities and counties so that if a settlement was more or less than anticipated, the distribution of funds would be fair and entities would receive the same proportion of funds. The bill also enacts a widely agreed upon measure to include hospital districts among those receiving funds.

SB 1827 would ensure that local entities had a strong voice in appointing members to the council by requiring that the HHSC appointments came from lists provided by counties and cities, while retaining the state as the appointing entity. Taken together, the bill's provisions would have the same effect as reproducing the settlement language in statute.

Critics said

SB 1827 should recognize the agreement between the state and local entities to receive and distribute funds received through opioid litigations settlements. It is important that terms relating to distributing the funds be enumerated so that settlements can be reached. The bill also should allow local entities to make appointments to the opioid council to ensure that the interests and perspectives of localities are considered.

Notes

The HRO analysis of SB 1827 appeared in the May 22 *Daily Floor Report*.

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Criminal Justice and Public Safety

* Finally approved

Increasing penalty for obstructing a hospital, emergency care services

HB 9 by Klick
Effective September 1, 2021

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HB 9 raises the penalty for certain offenses that involve obstructing a highway or other passageway. The bill increases from a class B misdemeanor (up to 180 days in jail and/or a maximum fine of $2,000) to a state-jail felony (180 days to two years in a state jail and an optional fine of up to $10,000) the penalty for knowingly:

- preventing the passage of an authorized emergency vehicle operating its emergency audible or visual signals or
- obstructing access to a hospital or other health care facility that provides emergency medical care.

If a court grants community supervision to someone convicted of a state-jail felony under the bill, the court must require as a condition of community supervision that the defendant serve at least 10 days of confinement in a county jail.

Supporters said

HB 9 would help protect those in need of emergency care by increasing the criminal penalty for blocking access to a hospital or emergency care facility or preventing passage of an authorized emergency vehicle. Timing can be critical in an emergency, and only a few minutes can mean the difference between life and death.

The bill would help anyone needing emergency medical care and also address situations similar to a reported incident in which law enforcement officers were shot and access to a hospital was blocked. The bill would address many other situations as well, such as street racing or other gatherings that could block a street or entrance to a medical facility, in which it is necessary to ensure emergency vehicles can move as needed.

HB 9 would apply only to emergency situations in which an individual knowingly blocked access to a medical facility or access of an authorized emergency vehicle using lights or a siren. Emergency vehicles should not have to look for alternative routes in emergency situations or weigh the seriousness of someone's injury when determining their route.

The bill would not infringe on the rights of individuals, and those engaged in peaceful protests in the community who did not threaten another's emergency medical care or block an emergency vehicle would not fall under its provisions. The act would have to be done knowingly, ensuring that those who might have visual or other impairments or other reasons for not meeting this standard were not subject to the bill's penalties.

Critics said

HB 9 is unnecessary, could be used to criminalize peaceful protests, and could have a chilling effect on the rights to speech and assembly. Incidents described by the bill are not occurring in Texas, and current law adequately punishes anyone who would block access to a hospital or obstructed a highway, street, or other applicable area.

Under Penal Code sec. 42.03, obstructing a highway or other passageway already is a class B misdemeanor, carrying an appropriate potential punishment of up to 180 days in jail. Raising the penalty to a felony with mandatory jail time for those receiving probation would be out of proportion to the offense. A felony offense would be too severe for conduct that does not include bodily harm. Requiring a minimum jail sentence for someone given community supervision would reduce judicial discretion and establish a mandatory minimum out of step with punishments for other first offenses.

The bill would too broadly define where an offense could occur. Hospitals could have multiple entrances, and the bill would include as potential felony offenses blocking even those that may be used by staff or for non-emergency reasons.

The bill should include defenses for situations in which a felony punishment was inappropriate. For example, defenses should be available for those who can not control their movements due to obstructions by other people or objects, as well as for individuals with certain impairments, such as visual or hearing impairments. For cases in which an alternative, non-delaying route around an obstruction was available, an increased penalty also would be inappropriate.

Notes

The HRO analysis of HB 9 appeared in Part One of the May 5 *Daily Floor Report*.

Appropriations to governor, state agencies for border security

HB 9 by Bonnen, Second Called Session
Effective September 17, 2021

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HB 9 appropriates $1.8 billion in general revenue to seven state entities for border security efforts for the two-year period beginning on the bill's effective date.

Grants for physical barriers, local efforts. The bill appropriates $1 billion to the Trusteed Programs within the Office of the Governor for border security operations through border security grants. This appropriation may not be used to acquire property through the use of eminent domain or to build a barrier along the Texas-Mexico border on property acquired through the use of eminent domain.

The Trusteed Programs also receive an additional $3.8 million in funding for staff training on the handling of misdemeanor and felony crimes for prosecutors serving a county in the border region or a county significantly affected by border crime.

Law enforcement. The bill appropriates about $301 million to the Texas Military Department for additional personnel to support border security operations.

The Department of Public Safety receives:

- $133.5 million for 52 weeks of Operation Lone Star surge costs incurred during the two-year period beginning on the bill's effective date;
- $3.4 million to purchase tactical marine unit vessels; and
- $17.9 million for 79 additional FTEs.

Correctional security operations, jail standards. HB 9 appropriates to the Texas Department of Criminal Justice $273.7 million for correctional security operations. It appropriates $214,785 to pay an additional three FTEs at the Commission on Jail Standards and for overtime compensation and travel expenses.

Legal system. HB 9 appropriates about $32.5 million to the Office of Court Administration for staff, equipment, indigent legal representation, foreign language interpreters for courts, and administrative costs. Of this appropriation, $905,200 is to be used for visiting judges. The bill authorizes six FTEs for the agency.

Health services. The bill appropriates about $5.5 million to the Department of State Health Services to buy ambulance services and an additional $10.9 million to buy ambulance services for use at two border security processing centers.

Reporting. The Department of Public Safety, Texas Military Department, the Trusteed Programs within the Office of the Governor, Texas Department of Criminal Justice, Commission on Jail Standards, and Office of Court Administration, are required to report to the Legislative Budget Board the budgeted and expended amounts and performance indicator results for border security. The entities must report quarterly and include amounts and information for nine types of information listed in the bill.

Supporters said

HB 9 would address the crisis at the Texas-Mexico border by supporting state agencies and local governments working to protect Texans and their property. Texas currently is experiencing unprecedented challenges with an extraordinarily high volume of migrants trying to cross the border into the state illegally, as well as drugs and weapons trafficking, human trafficking, and other crimes. Accompanying these crimes are private property damage, threats to private property owners, strains on law enforcement resources, and public health risks related to COVID-19.

Funding in HB 9 would allow the heightened border security efforts the governor launched earlier this year to continue and expand, making Texans safer by securing the international border. While legal immigration and the legal commerce and cultural relationships with Mexico should be supported, the current illegal activities are

endangering Texans throughout the state. It is incumbent on the state to take action because federal officials are not addressing these problems in a way that protects Texans. The seriousness and scale of these problems warrant HB 9's investment in physical barriers, law enforcement efforts, and the legal and criminal justice systems.

Grants for physical barriers, local efforts. HB 9 would provide the Trusteed Programs within the Office of the Governor with grant funding because this is the most effective way to address the fluid situation on the border and gives the state flexibility to efficiently respond to changing needs to deploy state resources to enforce state and federal laws.

About $750 million in grant funding from HB 9 could be allocated to efforts the governor announced in June to secure the border and keep Texans safe by building a wall or other structures. This would help address current problems and provide a long-term solution. HB 9 also would allow significant funding to flow to local law enforcement agencies and authorities working daily to address serious problems, including crime, jail crowding, a large increase in deceased bodies being found, and humanitarian needs. The funding in HB 9 also would be used by the governor's office to support up to three intake centers and jails for immigrants who were arrested as part of border security efforts.

Law enforcement. HB 9 would support increased law enforcement efforts on the border, including those authorized by the governor's May 2021 disaster declaration. Under the declaration, the governor directed the Department of Public Safety (DPS) to enforce federal and state laws to prevent criminal activity along the border, including criminal trespassing, smuggling, and human trafficking and to help Texas counties. As part of these efforts, the Texas Military Department (TMD) has been providing crucial support to DPS, and HB 9 would allow those efforts to continue and expand.

The bill's appropriation to DPS would fund surge operations for Operation Lone Star, which the governor launched in March 2021. The operation involves about 1,000 DPS troopers, agents, and rangers helping secure the border and fighting the serious crimes tied to the illegal drug trade, human smuggling, and human trafficking. Enforcing all criminal laws, including trespassing, supplements federal immigration enforcement and can deter others from crossing the border illegally, especially if those crossing are faced with jail time and being turned over to immigration officials. Texans living on the border — like all Texans — deserve justice and safety and to live where criminal laws are enforced.

DPS also would receive funding for marine vessels and additional intelligence operations and support to further its border law enforcement efforts. Additional funds for the governor's Trusteed Programs would go to the Border Prosecution Unit to train law enforcement officers on handling border crimes to ensure that cases were handled properly.

Correctional security operations, jail standards. HB 9 would give the Texas Department of Criminal Justice funds for converting and operating one of its facilities as a jail for migrants who had been arrested on state charges and for converting two other units if necessary. The bill also would return to the agency funds that were moved from its budget earlier this year so that construction on the border wall could begin.

Legal system. The bill would support the legal system needed to handle the influx of migrants by providing the Office of Court Administration with funding for visiting judges, court interpreters, lawyers for indigent defendants, staff, and other costs. Without this funding, the legal system on the border would be unable to handle the current crisis caused by the large influx of migrants.

Health services. HB 9 also would recognize the increased need for health resources resulting from the influx of migrants by appropriating funds for ambulance services for new legal processing centers and jail facilities.

Critics said

Texas should not continue to increase what is already a high level of spending on border security, which should be borne by the federal government and especially when other areas of state responsibility need funding, including education, the energy grid, community care aides, health care, addressing the pandemic, and more.

The bulk of spending in HB 9 would take the wrong approach by prioritizing physical structures and barriers over giving funds to local law enforcement entities and others who have pressing needs for resources and assistance on the border. Technology, rather than physical barriers, also should be explored.

HB 9 would pour a large amount of state funds into what so far largely has been an effort to arrest and prosecute trespassers, and it is unclear that these efforts

would deter border crossing by those desperate to escape violence or other grave situations. Instead of using state funds to channel economic migrants or those who may be trying to reach immigration authorities into the state criminal justice system, funds should be used on proven strategies to combat serious felony and drug crimes.

Supplying an additional $1.8 billion on top of the $1.1 billion in border security spending already appropriated for fiscal 2022-23 would be unsustainable or come at the later price of raising taxes or cutting spending in important areas of the budget, such as health care or education.

Notes

The HRO analysis of HB 9 appeared in the August 27 *Daily Floor Report*.

Making marijuana possession up to 1 ounce a class C misdemeanor

HB 441 by Zwiener
Died in the Senate

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HB 441 would have lowered the penalty for possession of less than 1 ounce of marijuana to a class C misdemeanor and required peace officers to issue citations in such cases. The bill also would have prohibited arrests, authorized the expunction of records, and eliminated automatic driver's license suspensions in such cases.

Penalties. The bill would have revised the penalties for possession of the smallest amounts of marijuana. Rather than a class B misdemeanor (up to 180 days in jail and/or a maximum fine of $2,000) for knowingly or intentionally possessing up to 2 ounces of marijuana, it would have been a class C misdemeanor (maximum fine of $500) to possess 1 ounce or less of marijuana. Possession of more than 1 ounce and up to 2 ounces would have remained a class B misdemeanor.

Peace officers would have been prohibited from making an arrest if charging a person for possession of an ounce or less of marijuana or with a class C misdemeanor offense for possession of drug paraphernalia.

The bill would have eliminated the automatic suspension of a driver's license for marijuana possession offenses that were punished by fine only.

Deferrals, expunctions in certain cases. The bill would have required judges, under certain circumstances, to defer proceedings in cases of possession of an ounce or less of marijuana or possession of drug paraphernalia and to put individuals pleading guilty or no contest on probation. Judges would not have been required to take these actions if the individual had previously received a deferral of disposition for the same offenses for conduct committed within 12 months before the current offense.

Courts dismissing a complaint under the bill for possession of an ounce or less of marijuana or possession of drug paraphernalia would have had to notify individuals of their right to have their record expunged. The dismissed complaint would not have been a conviction and could not have been used against the person for any purpose.

The bill would have authorized the expunction of records for a person charged with possessing an ounce or less of marijuana or a class C misdemeanor offense for possession of drug paraphernalia if the person had been acquitted of the offense or if the complaint had been dismissed and it was at least 180 days from the date of the dismissal or at least one year from the date of the citation.

Supporters said

HB 441 would revise penalties and procedures associated with possession of the very smallest amounts of marijuana to better reflect the seriousness of the offense, mitigate the harsh consequences that can come with a criminal record, and allow state and local governments to use criminal justice resources more efficiently and effectively. The bill would not legalize, decriminalize, or promote marijuana but would allow a reasonable enforcement mechanism to hold those possessing small amounts of marijuana accountable through a class C misdemeanor.

Current laws establishing a class B misdemeanor for possessing up to 2 ounces of marijuana over-criminalize a non-violent behavior that does not pose a public safety risk, and this criminalization can result in negative consequences that are out of proportion to the offense. Drug charges or convictions can be barriers to employment, housing, education, military service, and more, and can lead to the revocation of driver's licenses. In low-level marijuana cases, these consequences often fall on young Texans and follow them for a lifetime. By limiting arrests, requiring probation, and allowing records to be expunged, the bill would keep individuals employable and in school and allow them to move on from a minor offense.

The bill would help address significant and unnecessary costs to local governments to enforce current laws on possession, freeing resources to address more serious incidents. A statewide law is needed for consistent

treatment of individuals instead of a patchwork of local policies. This could help address geographic and racial disparities in the enforcement of drug laws.

HB 441 would not reduce public safety nor encourage drug use. Current punishments would remain for possession of larger amounts of marijuana and for selling marijuana.

Critics said

Marijuana is a potentially harmful drug and possessing even small amounts should continue to be treated as such under law. Current law making possession of up to 2 ounces a class B misdemeanor provides a range of punishments and options for handling low-level possession cases, including probation, pre-trial diversion, and deferred adjudication, and some jurisdictions use current law to issue a citation and a summons to appear in court. These options allow communities to handle cases appropriately and to address any cost concerns. By prohibiting arrests, the bill would reduce law enforcement officers' discretion, something that should be retained in handling these cases.

Marijuana continues to be a public health and safety concern, and lowering penalties could send the wrong message about drug use. Any expanded drug use could exacerbate public health problems, such as drug abuse and addiction. These problems can be especially harmful to youth, who are developing cognitively.

Notes

The HRO analysis of HB 441 appeared in Part One of the April 29 *Daily Floor Report*.

A related bill, **HB 2593** by Moody, which died in conference committee, would have transferred tetrahydrocannabinols (THC) and related substances from Penalty Group 2 in the Texas Controlled Substances Act to a new category, Penalty Group 2-B. THC is a component in certain marijuana products such as wax for e-cigarettes or edible gummies. Under the bill, penalties for possession of these substances range from a misdemeanor to a felony, depending on amount. The HRO analysis of HB 2593 appeared in Part One of the April 27 *Daily Floor Report*.

Earlier parole review for some offenses committed when younger than 17, 18

HB 686 by Moody
Vetoed by the governor

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HB 686 would have reduced the minimum prison terms that had to be served before certain individuals who committed certain serious crimes when they were younger than 17 or 18 years old could have been considered for release on parole and would have required certain factors be considered when determining whether to release such inmates on parole. The bill would have applied to any inmate confined in a Texas Department of Criminal Justice facility on or after the bill's effective date, regardless of when the offense for which the inmate was confined occurred.

Parole eligibility. HB 686 would have reduced the amount of time that some individuals convicted of capitol murder for an offense committed when they were younger than 18 years old would have had to serve before being considered for parole. The time would have been reduced from 40 years, without consideration of good conduct time, to 30 years. This change would not have applied to those convicted of a capital felony for murdering a peace officer or fireman or for murdering more than one person during the same criminal transaction or during different transactions related to the same scheme or course of conduct. In such cases, individuals would not have been eligible for parole until their actual time served was 40 years, without consideration of good conduct time.

HB 686 also would have established that inmates who were serving sentences for certain offenses and were younger than 17 years old at the time the offenses were committed were eligible for parole after serving either 30 years or one-half of the applicable time under standard eligibility calculations, whichever was less and without consideration of good conduct time. Inmates would have to have served a minimum of four years in order to be eligible for release on parole.

These provisions would have applied to those serving sentences for one of the serious first-degree felonies listed in Code of Criminal Procedure art. 42A.054 for which defendants can not be given judge-ordered community supervision. It also would have applied to first-degree felony offenses of continuous human trafficking, directing activities of a street gang, and engaging in organized criminal activity.

Parole consideration factors. HB 686 would have required parole panels to consider certain things when deciding whether individuals subject to the bill would have been released on parole. Parole panels would have had to assess the individual's growth and maturity, taking into consideration the hallmark features of youth, and, as compared to adults, the diminished culpability of juveniles and the greater capacity of juveniles for change.

The Board of Pardons and Paroles would have been required to adopt a policy establishing factors for parole panels to consider when reviewing an individual subject to HB 686 for release on parole. The policy would have had to ensure that the inmate was given a meaningful opportunity to obtain parole release and would have been required to:

- consider the age of the inmate at the time of the offense as a mitigating factor in favor of granting release on parole;
- allow those with knowledge of the inmate before the offense or knowledge of the inmate's growth and maturity after the offense to submit statements for the parole panel to consider; and
- establish a mechanism for the parole panel to consider an expert's comprehensive mental health evaluation of the inmate.

The bill would not have affected certain rights of crime victims, their guardians, or the close relatives of deceased victims or create a legal cause of action.

Supporters said

HB 686 would address the state's overly harsh sentencing policies for individuals who committed serious crimes when they were younger than 17 or 18 years old

by allowing some of these individuals to be considered for release on parole sooner than they would be under current law. The bill would impose a "second look" at these inmates and recognize that rehabilitation is an important part of the criminal justice system by giving these individuals a meaningful chance for a life in which they could contribute to society.

Currently, individuals who commit serious felonies or capital murder while a youth can receive long prison sentences that require them to serve decades and up to 40 years before being considered for release on parole. Some individuals who would have their parole eligibility changed under the bill were sentenced decades ago during a tough-on-crime era when juveniles were sentenced more harshly than today, and some were sentenced as a party to a crime, possibly for acts in which they did not take direct part and did not intend.

This extreme sentencing has serious negative effects, including on youths of color and highly vulnerable youths. Such harsh sentencing also ignores science about young brains lacking maturity, having an underdeveloped sense of responsibility, being more susceptible to poor decision-making, but also being more capable of change and rehabilitation. These long sentences provide no realistic mechanism for these offenders, who might have been sentenced to prison when as young as 14 years old, to be reviewed for parole for decades.

HB 686 would give the parole board a tool to consider these cases after an appropriate amount of time in prison but would not resentence or release anyone. The bill would ensure that parole panels assessed appropriate information about an inmate, allowing the panels to weigh factors in each individual's case and decide whether to grant parole or to have individuals serve more of their sentences. Giving these offenders a meaningful chance to be reviewed for early release also would be in line with U.S. Supreme Court rulings banning death sentences for those under 18 at the time of a crime, eliminating mandatory life-without-parole for youthful offenders, and indicating that laws should reflect the differences between children and adults.

Safeguards in the bill ensure it would not be used inappropriately by excluding those guilty of capital murder of a law enforcement officer or of multiple murders, such as mass shooters, who would continue to have to serve 40 years before being parole eligible. The bill would not break promises made at the time of sentencing because individuals' sentences would not be altered and parole eligibility laws are separate from sentencing provisions, with juries receiving instructions to not consider how parole laws apply to individuals. Victims would retain their rights and could continue to give input during the parole process.

HB 686 could save the state money if the parole board approved release for individuals who would have served longer — perhaps decades — without the bill. Elderly inmates contribute significantly to the rising cost of prison health care, and HB 686 could lead to reduced costs in that area as well.

Critics said

The time served before parole eligibility should not be shortened for inmates who have already been convicted and sentenced. Victims, surviving family members and friends, the public, and jurors were promised at the time of prosecution that an individual would be incarcerated for a certain number of years, and that promise should not be broken. In cases with plea agreements, victims and the inmate agreed to a sentence based on parole laws in effect at the time, and it would be unfair to change that agreement. Moving up parole eligibility could be especially hard on victims who want to weigh in on parole considerations and who might have to act years earlier than they had planned to participate in the parole process.

HB 686 would go too far in including some accused of capital murder among those who would be considered for parole early. The seriousness of this crime warrants these offenders, even those who were young when the crime was committed, serve the minimum terms currently in statute.

Notes

The HRO analysis of HB 686 appeared in the April 7 *Daily Floor Report*.

Requiring officers to keep body cameras on while active in investigations

HB 929 by Sherman
Effective September 1, 2021

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HB 929 requires a peace officer who is equipped with a body worn camera and actively participating in an investigation to keep the camera activated for the entirety of the officer's participation in the investigation, unless the camera has been deactivated in compliance with that policy. The bill is known as the Botham Jean Act.

The bill revises the circumstances under which a peace officer may choose not to activate a body worn camera or discontinue a recording in progress. Officers may take such action only for any encounter with a person that is not related to an investigation, rather than for nonconfrontational encounters with persons.

The bill also requires law enforcement agencies' policies on the use of body worn cameras to include provisions on the collection of a body worn camera, including applicable recorded video and audio, as evidence.

Supporters said

HB 929 would address concerns about law enforcement officers discontinuing use of their body-worn cameras while engaging in an investigation by requiring agencies to have policies for officers to keep cameras on while actively participating in the investigation. Turning off a camera can leave interactions between an officer, suspect, witnesses, and others unrecorded and can leave the officer's employing agency, prosecutors, defense attorneys, and courts without any objective evidence about an interaction or investigation. Ensuring investigations are recorded would promote transparency and accountability and help protect officers as well as suspects, witnesses, bystanders, and others. Agencies would continue to adopt their own policies and give officers guidance on those policies within the framework required by statute. The bill would be named after Botham Jean, a man who was shot and killed in his apartment by an off-duty Dallas police officer who said she thought the apartment was hers.

Critics said

HB 929 would mandate that body-worn camera policies impose a potentially confusing and complicated requirement on law enforcement officers to keep cameras on while actively participating in an investigation. There is no clear definition of when an investigation begins or ends, and interpretations could vary about when a camera had to be on or off. For example, questions could be raised about whether an officer could turn off a camera to take a personal call during an investigation. Debate about when an investigation is being conducted could expose officers to litigation over when they had their cameras activated. It also could create a situation in which some individuals interpreted officers to have an open-ended duty to keep cameras on.

Notes

The HRO analysis of HB 929 appeared in Part Four of the May 11 *Daily Floor Report*.

HB 54 by Talarico, effective May 26, 2021, prohibits law enforcement agencies from authorizing a person to accompany and film a peace officer acting in the line of duty for the purpose of producing a reality television program. The HRO analysis of HB 54 appeared in Part Three of the April 14 *Daily Floor Report*.

HB 1757 by Krause, which died in the Senate, would have created a defense to prosecution for the crime of interfering with a peace officer performing a duty if the conduct engaged in consisted only of filming, recording, photographing, documenting, or observing a peace officer if the defendant obeyed any reasonable and lawful order by the officer to change the defendant's proximity or position. The bill also would have made it a crime for a peace officer or other law enforcement agency employee to alter, destroy, or conceal another person's audio, visual, or photographic recording of a peace officer's performance of official duties without obtaining the other person's written

consent and with intent to impair the recording's verity, intelligibility, or availability as evidence in an investigation or official proceeding related to the officer's performance of official duties. The HRO analysis of HB 1757 appeared in Part One of the April 28 *Daily Floor Report*.

Revising law of parties in capital murder cases seeking death penalty

HB 1340 by Leach
Died in the Senate

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HB 1340 would have created new provisions governing criminal responsibility for another's conduct in capital murder cases that fall under the conspirator liability portion of the state's law of parties. The law of parties establishes that if persons conspire to commit a serious crime and, in the process of committing the crime, a person commits another crime that should have been anticipated, all parties can be guilty of the crime actually committed, even though they did not intend to commit it.

Under the bill, an individual conspirator would have been guilty of capital murder as a party to the offense if in attempting to carry out a conspiracy to commit one felony, a capital murder was committed by one of the conspirators even though there was no intent to commit the murder, if:

- the conspirator was a major participant in the conspiracy;
- in attempting to carry out the conspiracy, the conspirator acted with reckless indifference to human life; and
- the capital murder was committed in furtherance of the unlawful purpose of the conspiracy.

A conspirator would have been considered a major participant if the conspirator planned, organized, directed, or otherwise substantially participated in the specific conduct that resulted in the death of a victim.

A conspirator would have been considered to have acted with reckless indifference to human life if the conspirator was aware of but consciously disregarded a substantial and unjustifiable risk that another conspirator intended to commit an act that was clearly dangerous to human life.

Courts would no longer be required to ask juries in the sentencing phase of capital murder cases involving the law of parties whether the defendant anticipated that a human life would be taken.

Supporters said

HB 1340 would address the most troubling aspect of the state's law of parties by limiting the death penalty to parties in capital murder cases to cases in which an individual was a major participant and acted with reckless indifference to human life.

The cases of Jeffery Wood and others have called attention to deficiencies in Texas' law of parties. The conspirator liability provisions of the law of parties have been used to obtain death sentences in this and other cases in which accomplices, such as lookouts or getaway drivers, were not directly involved in the capital murder and did not kill or intend to kill, but were convicted because they should have anticipated the murder. Such conjecture about what was on someone's mind should not be used to make someone eligible for a death sentence. The death penalty should be reserved for the worst cases, and this principle is violated by allowing a death sentence for conspirators who did not kill, were not major participants, and did not act with reckless indifference.

Death sentences could still be imposed for conspirators if they met both the criteria in the bill and current provisions requiring the jury to determine if the defendant actually caused the death or intended to kill. Other individuals not meeting the criteria in the bill but who were found guilty under the law of parties could still be held accountable and sentenced appropriately.

The bill would put the Texas criminal justice system in step with court rulings by stating that an accomplice must have been a major participant in underlying conspiracy and must have acted with reckless indifference to human life. Juries would continue to play their role in deciding cases and those guilty of capital murder would continue to receive appropriate punishments.

Critics said

Changes should not be made that would reduce the ability of the criminal justice system to address situations in which a death sentence reached under the current law of parties would be justified.

In these situations, as in any case in which the death penalty is sought, it is juries that examine the specific facts and decide if capital punishment is warranted. HB 1340 would step into the province of these juries. In past cases, some juries have decided that a defendant's participation as a party warranted the death penalty.

Notes

The HRO analysis of HB 1340 appeared in Part One of the May 4 *Daily Floor Report*.

The 87th Legislature considered other bills that would have changed the process used to determine if a criminal defendant would be punished with the death penalty. **HB 140** by Rose, which died in the Senate, would have prohibited death sentences for a capital murder defendant who was determined under the criteria in the bill to be a person with severe mental illness at the time of the offense. If found guilty of capital murder, these defendants would have to be sentenced to life in prison without parole. The bill would have established a pre-trial process to determine if a defendant was a person with severe mental illness, with the jury making the determination. The HRO analysis of HB 140 appeared in Part Four of the May 11 *Daily Floor Report*.

HB 252 by Moody, which died in the Senate, would have revised the jury instructions given during the sentencing phase of a capital felony trial. The HRO analysis of HB 252 appeared in the April 21 *Daily Floor Report*.

Revising burden of proof in innocent owner asset forfeiture proceedings

HB 1441 by Schaefer
Died in the Senate

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HB 1441 would have revised the burden of proof required in asset forfeiture proceedings in which property owners trying to recover property seized under civil asset forfeiture laws said they had no role in an alleged crime. Instead of property owners having to prove by a preponderance of the evidence that they had no knowledge of the crime or that they did not participate in it, the state would have had the burden of proving by clear and convincing evidence that the required circumstances that can make property exempt from forfeiture did not apply to the property.

Supporters said

HB 1441 would help property owners who are innocent of a crime recover property that had been seized through the asset forfeiture process by revising the burden of proof required in forfeiture proceedings when someone raised an innocent owner defense.

Current law requiring property owners to prove they and their property had no role in an alleged crime violates individuals' private property rights by upending the idea of innocent until proven guilty. Innocent owners are required to prove that they did not know or did not do something to keep what is rightfully theirs. The process can be difficult and expensive and can discourage people from trying to regain their property.

Shifting the burden to the government when an owner raises the innocent owner defense would restore the presumption of innocence and place the responsibility where it belongs: on government officials taking private property. The government agencies seizing and bringing forth forfeiture proceedings should have sufficient information about a crime and property ownership to meet this burden. Officials who ensure seized property meets statutory requirements and identify the proper owner should not be burdened by the bill. The bill would raise the burden of proof in these proceedings from the low threshold of preponderance of the evidence, sometimes referred to as having to prove something only by 51 percent, to a more appropriate level for something as important as property rights.

Critics said

HB 1441 would erode an effective tool for preventing criminals from profiting from their crimes and for protecting the due process rights of property owners.

The burden of proof when an individual raises the innocent owner defense is properly placed on property owners because they have the information, such as car titles or bank records, that can prove their innocence. If the burden were shifted and the government had to prove that the defense did not apply, the government likely would have to obtain the proof from the owners, which could involve intrusive investigations into property owners and could extend court cases and delay returning property to innocent owners. Government agencies work in good faith to seize contraband only from those involved with a crime and to return property to legitimate innocent owners.

Requiring a standard of clear and convincing evidence would be too high a burden for decisions in asset forfeiture cases and would improperly equate these decisions with other situations using that standard, including parental rights cases. Under current law there is a check on these proceedings because law enforcement authorities have to meet an initial burden of proving that property has a substantial connection to crime before it is seized.

Notes

The HRO analysis of HB 1441 appeared in the April 21 *Daily Floor Report*.

Prohibiting use of emergency powers to regulate firearms, gun stores

HB 1500 by Hefner
Effective September 1, 2021

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HB 1500 specifies that the Texas Disaster Act (Government Code ch. 418) does not authorize any person to prohibit or restrict the business or operations of a firearms or ammunition manufacturer, distributor, wholesaler, supplier, or retailer or a sport shooting range in connection with a disaster.

The bill removes the governor's authority during a declared disaster to suspend or limit the sale, dispensing, or transportation of firearms and prohibits the governor from restricting the sale and transportation of explosives or combustibles that are components of firearm ammunition.

The bill removes the governor's authority to control the sale, transportation, and use of weapons and ammunition through a directive issued during a state of emergency under Government Code ch. 433. Such a directive also may not control the storage, use, and transportation of explosives or flammable materials that are components of firearm ammunition or prohibit or restrict the business or operations of a firearms or ammunition manufacturer, distributor, wholesaler, supplier, or retailer or a sport shooting range.

HB 1500 removes a city's authority to regulate the use of firearms, air guns, or knives in the case of an insurrection, riot, or natural disaster. The bill specifies that provisions relating to local regulation of firearms, air guns, knives, and explosives may not be construed to authorize the seizure or confiscation of any firearm, air gun, knife, ammunition, or supplies or accessories from an individual who is lawfully carrying or possessing such items.

Supporters said

HB 1500 would protect the rights of lawful gun owners and firearms retailers by prohibiting emergency powers from being used to prevent or impede the sale of firearms, ammunition, and related components. The bill would ensure Texans could defend themselves, their families, and their property, which is especially critical during disaster situations.

Last year, several local orders issued in response to the ongoing COVID-19 pandemic that allowed only essential businesses to remain open did not designate firearms manufacturers or retailers or shooting ranges as essential. However, according to a March 2020 attorney general opinion, cities and counties may not use emergency declarations to regulate the sale of firearms due to state firearms preemption statute.

The bill simply would codify the attorney general opinion to completely protect firearms businesses from overregulation by ensuring that in any future disaster or emergency, such businesses were classified as essential. By prohibiting any level of government from using emergency powers to regulate firearms, ammunition, and related businesses, the bill would support the constitutional rights of lawful gun owners by ensuring access to items they have a right to own and possess.

Critics said

HB 1500 would override local control by eliminating a city's authority to regulate the use of firearms and other weapons during an insurrection, riot, or natural disaster. Local leaders should have the discretion to take actions necessary to protect the public health and safety of their citizens during times of tension and anxiety.

Notes

The HRO analysis of HB 1500 appeared in the April 15 *Daily Floor Report*.

Continuing TCOLE, creating review of law enforcement regulation

HB 1550 by Cyrier
Died in the House

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HB 1550 would have continued the Texas Commission on Law Enforcement (TCOLE) until September 1, 2023, and would have created a panel to study the regulation of law enforcement personnel and agencies. The bill also would have required the Sunset Advisory Commission to conduct a limited-scope review of TCOLE for the 88th Legislature, required TCOLE to conduct criminal history record checks on law enforcement license applicants, and established a process for the emergency suspension of a license, among other provisions.

The panel that would have been created by the bill would have studied and made recommendations on the regulation of persons licensed by TCOLE and entities authorized by law to employ them. In conducting the study, the panel would have been required to consider:

- the standards of conduct applicable to licensees;
- the education and training requirements for licensees;
- TCOLE's regulation of training programs and schools; and
- the accountability to the public of licensees and of entities authorized to employ them.

The panel would have been abolished December 31, 2022.

Supporters said

HB 1550 would continue the Texas Commission on Law Enforcement (TCOLE) because the state has a need for an agency to set and enforce licensing and training standards for law enforcement personnel. The bill also would recognize the need to improve the regulatory model by creating a panel to make recommendations for improvements.

While Texas has a continued need to regulate law enforcement, the regulatory model is fragmented, lacks statewide standards, and has not evolved with the changing landscape. As a result, state law enforcement regulation can no longer ensure the conduct, training, transparency, and accountability that the public expects of law enforcement. Since these gaps in regulation cannot be addressed through changes to TCOLE's operations, the bill, rather than attempting to rush a repair of a fundamentally broken system, would task a blue ribbon panel with taking a comprehensive look at how the state regulates law enforcement and make recommendations on changes needed to protect the health, safety, and welfare of Texans and law enforcement personnel. Without addressing this fundamental misalignment, neither TCOLE nor the state can effectively license and regulate law enforcement personnel in Texas, which involves larger policy issues beyond the scope of a Sunset review.

The intent of the blue ribbon panel would be to consider many topics related to reforming public safety. Whether it is training, misconduct, investigative authority, model policies, or the agency separation process, the blue ribbon panel could propose changes to be discussed and enacted by the next Legislature. The bill also would require Sunset to complete a limited-scope review of TCOLE in the next review cycle to ensure TCOLE had the tools necessary to professionalize law enforcement and ensure the public trusted the service they provided.

The bill would provide for certain changes TCOLE could implement before the next legislative session to improve its efficiency and effectiveness, regardless of the outcomes of the panel's review, including emergency suspension of a license if the person constituted an imminent threat to the public health, safety, or welfare and criminal history background checks on all license applicants.

Critics said

By providing for a blue ribbon panel instead of making meaningful changes, HB 1550 in effect would delay reform until at least the next legislative session in

2023, possibly bypassing the current environment of support for public safety reforms. Texans should not have to wait two years for improved law enforcement oversight, transparency, and accountability. In addition, the panel could put additional responsibilities and burdens on TCOLE, which already suffers from insufficient funding and resources.

While the bill would provide a process for TCOLE to issue an emergency order suspending a license under certain circumstances, the bill should go a step further and expand TCOLE's authority to revoke or suspend licenses of peace officers who have committed serious acts of misconduct, rather than continuing the current practice of handling discipline at the local level.

Notes

The HRO analysis of HB 1550 appeared in Part One of the May 11 *Daily Floor Report*.

SB 24 by Huffman, effective September 1, 2021, establishes a new preemployment procedure for law enforcement agencies hiring a person licensed by the Texas Commission on Law Enforcement (TCOLE).

Under the bill, before a law enforcement agency may hire a licensed person, the agency must, as prescribed by TCOLE, obtain the person's written consent for the agency to review information required under the bill and request such information from TCOLE or another applicable person.

The law enforcement agency must submit to TCOLE confirmation that the agency contacted each entity necessary to obtain the information and obtained and reviewed specific information listed in the bill, including personnel files and other employee records from each previous law enforcement agency employer, including the employment application submitted to the previous employer and employment termination reports and service records maintained by TCOLE. If TCOLE or a law enforcement agency received from a law enforcement agency a request for information and the person's consent, the commission or agency would have to provide the information to the requesting agency.

TCOLE would have to establish the forms and procedures required under the bill. The head of a law enforcement agency would have to review and sign each confirmation form before submitting to TCOLE.

The HRO analysis of SB 24 appeared in the May 21 *Daily Floor Report*.

HB 3712 by E. Thompson, effective September 1, 2021, establishes content requirements for the basic peace officer training program and requires the Texas Commission on Law Enforcement to develop model training curriculum and policies for law enforcement agencies. The basic training course would have to be at least 720 hours and include training on:

- the prohibition against the intentional use of a choke hold, carotid artery hold, or similar neck restraint in searches and arrests, unless the officer reasonably believes the restraint is necessary to prevent serious bodily injury to or the death of the peace officer or another;
- the duty of a peace officer to intervene to stop or prevent another officer from using force against a person suspected of committing an offense if the amount of force exceeds what is reasonable under the circumstances and the officer knows or should know that the other officer's use of force violates state or federal law, puts a person at risk of bodily injury and is not immediately necessary to avoid imminent bodily injury to a peace officer or other person, and is not required to apprehend the suspect; and
- the duty of a peace officer who encounters an injured person as part of the officer's official duties to immediately and as necessary request emergency medical services and, while waiting for emergency services, to provide first aid or treatment to the extent of the officer's skills and training, unless the request or the provision of first aid or treatment would expose the officer or another person to a risk of bodily injury or the officer is injured and physically unable to make the request or provide the treatment.

The model training and policies would have to include curriculum and policies on these subjects.

TCOLE must specify mandated topics for up to 16 hours of the 40 hours of continuing education mandated for officers to take every 24 months.

The HRO analysis of HB 3712 appeared in Part One of the April 29 *Daily Floor Report*.

Creating the Second Amendment Sanctuary State Act

HB 2622 by Holland
Effective September 1, 2021

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HB 2622 creates the Second Amendment Sanctuary State Act, which prohibits a state entity from assisting in the enforcement of certain new federal firearms laws or regulations, withholds state funds from an entity in violation of the bill, and establishes a complaint process.

Enforcing federal firearms laws, regulations. The bill prohibits a state agency, political subdivision, or a law enforcement officer from contracting with or providing assistance in any way to a federal agency or official for the enforcement of a federal statute, order, rule, or regulation that imposes a prohibition, restriction, or other regulation that does not exist under state law and that relates to:

- a registry requirement for a firearm, a firearm accessory, or ammunition;
- a requirement that a person be licensed to own, possess, or carry a firearm, a firearm accessory, or ammunition;
- a requirement that a background check be conducted for the private sale or transfer of a firearm, a firearm accessory, or ammunition;
- a program for confiscating a firearm, a firearm accessory, or ammunition from a person who is not otherwise prohibited by state law from possessing the items; or
- a program that requires an owner to sell a firearm, a firearm accessory, or ammunition.

The prohibition does not apply to a contract or agreement to provide assistance in the enforcement of a federal statute, order, rule, or regulation in effect on January 19, 2021.

State funds. A political subdivision may not receive state funds if it enters into a contract or adopts a rule, order, ordinance, or policy under which the subdivision requires or assists with the enforcement of any federal firearms laws or regulations described in the bill. The subdivision also may not receive state funds if it, by consistent actions, requires or assists with the enforcement of such federal firearms laws or regulations.

State funds may be denied for the fiscal year following the year in which a final judicial determination in an action brought under the bill is made that the political subdivision is in violation of the bill. "State funds" means money appropriated by the Legislature or money under the control or direction of a state agency.

Complaint process. Any individual living in the jurisdiction of a political subdivision may file a complaint with the attorney general if the individual offers evidence to support an allegation that the political subdivision has required or assisted with the enforcement of any federal firearms laws or regulations described in the bill.

If the attorney general determines that a complaint is valid, and to compel the political subdivision to comply with the bill, the attorney general may file a petition for a writ of mandamus or apply for other appropriate equitable relief in a district court in Travis County or in a county where the principal office of the political subdivision is located.

The attorney general may recover reasonable expenses incurred in obtaining relief, including court costs, attorney's fees, investigative costs, witness fees, and deposition costs.

An appeal of a suit brought under the bill is governed by the procedures for accelerated appeals in civil cases under the Texas Rules of Appellate Procedure, and the appellate court has to render its final order or judgment with the least possible delay.

Suit against state agency. The attorney general has to defend any state agency in a suit brought against it by the federal government for an action or omission consistent with the requirements of the bill.

Supporters said

HB 2622 would enact the Second Amendment Sanctuary State Act and protect Texans' Second Amendment rights by prohibiting public resources from being used in the enforcement of certain exclusively federal firearms laws and regulations in the state.

Current impending federal legislation and potentially forthcoming federal executive action are threatening to erode the constitutional rights of Texans, namely the right to self-defense and to keep and bear arms. Such regulations could include magazine capacity or size limitations, registration requirements, and expanded background checks. The bill would take a proactive step and ensure that any new federal gun control laws did not infringe on the rights of Texans and their abilities to protect themselves, their families, and their properties.

The bill would not preclude federal authorities from enforcing federal firearms laws in Texas but simply would codify the spirit of a 2019 court opinion that said states could not be compelled to use state resources to enforce federal law. The Texas Constitution delegates the power to regulate the right to keep and bear arms to the state, so the bill appropriately would return control to the state to ensure Texans had a say in any gun control measures that were enacted and enforced.

Texas currently has a patchwork of local policies and regulations, so the bill would ease confusion and ensure consistent application of state firearms laws across the state.

The bill would not affect contracts or agreements in place by January 19, 2021, so many current state-federal law enforcement operations would not be impacted. In other states that have passed similar legislation, none have seen a reduction in federal funding as a result.

Critics said

HB 2622 would violate the basic concept of federal law supremacy. While efforts to nullify federal law with state law likely would not stand up under scrutiny and would be largely symbolic, the bill still could negatively impact gun safety in the state. It would limit enforcement of common-sense federal firearms laws, including background checks, and preempt new federal firearms law or regulations, regardless of their merit or necessity.

The bill would impact local control and remove the discretion of political subdivisions and local law enforcement agencies to adopt policies and enforce laws and regulations best suited for their communities. By restricting state funds, the bill could prevent cities and counties from providing essential services and could result in the loss of much-needed federal funds. Also, by allowing any individual to file a complaint, the bill would invite litigation, which would be costly for local taxpayers.

The bill also could impact state-federal coordinated law enforcement operations. It is unclear how it would affect cross-credentialed peace officers and whether participation of such officers on a task force that enforced federal firearms laws would violate the bill, impacting needed state or federal funding to their agency or city.

Notes

The HRO analysis of HB 2622 appeared in Part One of the April 29 *Daily Floor Report*.

Modifying bail setting process, eligibility

SB 6 by Huffman, Second Called Session
Generally effective January 1, 2022

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SB 6 requires the development and use of a public safety report when setting bail, requires magistrates making bail decisions to receive training, establishes requirements for who can set bail in certain cases, and creates procedures for some cases involving bail schedules. It prohibits release on personal bond for some offenses, modifies statutory rules governing the bail process, and establishes requirements for charitable bail organizations. It also establishes reporting requirements for bail and requires notice of bond conditions be sent to local law enforcement authorities. The bill is called the Damon Allen Act.

Development, use of public safety report system. The Office of Court Administration (OCA) is required to develop and maintain a public safety report system for use by magistrates when making decisions about bail for criminal defendants in jail pretrial. The system must provide magistrates with certain information, including a summary of the criminal history of the defendant and previous failures of the defendant to appear in court after a release on bail. The report system may not include information not listed in SB 6 and may not include an assessment of a defendant's risk or make a recommendation on the appropriate bail. The report cannot be the only item relied on by a judge or magistrate to make a bail decision.

Magistrates must consider a public safety report before setting bail for defendants charged with a class B misdemeanor or higher offense. A magistrate may set bail for defendants charged only with a misdemeanor without a public safety report if the report system is unavailable for longer than 12 hours due to a technical failure at OCA.

Magistrates must submit to OCA a bail form that includes information about each defendant and the bail that was set. OCA must collect and report on the data.

Training, qualifications for bail decisions. Only magistrates who meet qualifications established in the bill may release on bail defendants charged with felonies or misdemeanors that carry potential terms of confinement. OCA must approve training that includes magistrates' duties for setting bail in criminal cases and training on the DPS criminal history system.

Bail for defendant charged with offense committed while on bail. SB 6 establishes requirements for courts if a defendant is charged with committing offenses while released on bail for a pending case. Under these circumstances, if a felony offense is committed in the same county as a pending felony offense for which the defendant is on bail, the defendant may be released on bail only by the court in which the first offense is pending or another court designated by the court before which the previous case is pending. If a defendant is charged with a new offense while on bail for a previous offense and the new offense was committed in a different county, electronic notice of the new charge must be promptly given to the court in which the previous offense is pending.

Action on bail decision. The bill requires magistrates to take certain actions on bail within 48 hours of an individual's arrest. Within this time, a magistrate must order, after individualized consideration of all circumstances and other statutory factors, that a defendant be granted personal bond with or without conditions, granted surety or cash bond with or without conditions, or denied bail in accordance with the Texas Constitution and other law. In making bail decisions, magistrates must impose the least restrictive conditions, if any, and the personal bond or cash or surety bond necessary to reasonably ensure the defendant's appearance in court and the safety of the community, law enforcement, and victim of the alleged offense.

Unless specifically provided by another law, there is a rebuttable presumption that bail, conditions of release, or both were sufficient to reasonably ensure the defendant's appearance in court and the safety of the community, law enforcement, and the alleged victim. These provisions may not be construed as requiring the court to hold an evidentiary hearing that was not required by other law.

The bill establishes requirements for using bail schedules and standing orders that set bail in certain situations. Defendants charged with class B misdemeanor offenses or higher who are unable to give bail established by a bail schedule or standing order may file with the magistrate a sworn affidavit saying they are without means to pay the amount and requesting appropriate bail.

Defendants must complete a form to allow a magistrate to assess their financial situation. Magistrates must inform defendants of their right to file an affidavit and ensure that the defendant receive reasonable assistance in completing the affidavit and the form collecting financial information. A defendant who files an affidavit is entitled to a prompt review before the magistrate on the bail amount. Magistrates must make written findings supporting their decision if they do not reduce bail after the review.

Magistrates may make bail decisions about defendants charged only with a fine-only misdemeanor without considering criminal history record information.

Prohibited release on personal bond. SB 6 prohibits the release of certain defendants on personal bond, under which courts establish a bail amount but defendants do not give the court money or other security and agree to return to court and to other conditions. Release on personal bond is prohibited for those charged with:

- offenses involving violence, as defined by the bill; or
- a felony or certain other offenses committed while released on bail or community supervision.

The other offenses that would preclude a personal bond for someone on bail or community supervision include certain offenses of assault involving bodily injury, deadly conduct, terroristic threat, or disorderly conduct involving a firearm. The bill lists 20 offenses considered violent offenses.

Charitable bail organizations. SB 6 establishes requirements for a charitable bail organization, defined as a person who accepts and uses donations from the public to pay a defendant's bail. The term does not include a person accepting donations for someone who is a member of the person's family or a nonprofit corporation organized for a religious purpose. The provisions do not apply to a charitable bail organization that pays a bail bond for no more than three defendants in a 180-day period.

Charitable bail organizations must be nonprofit organizations exempt from federal income taxes and must register and have a certificate to operate from the counties in which they will pay bail. Organizations must submit a monthly report to the sheriff of each county where they operate, including information for each defendant for whom a bail bond was paid in the preceding month and any dates on which the defendant failed to appear in court as required. Sheriffs must give OCA a copy of the report, and OCA must submit a report annually on the information to the governor, lieutenant governor, House speaker, and other legislators.

Charitable bail organizations may not pay a bail bond for a defendant if the organization is considered to be out of compliance with the bill's reporting requirements. Sheriffs may suspend organizations from paying bail bonds in the county for up to one year if the sheriff determines the organization has paid bonds in violation of SB 6 and the organization has received a warning from the sheriff in the preceding 12 months for a payment of bond in violation of the bill.

Rules for setting bail. The bill revises statutory provisions that establish the rules for setting the amount of bail. The bill states that current consideration required to be given to the nature of the offense and its circumstances must include whether the offense involved violence or violence against a peace officer. In addition to a current requirement that the future safety of a victim of an alleged offense and the community be considered, the bill requires the future safety of law enforcement to be considered.

The bill adds two rules to those that govern the setting of the amount of bail and conditions of release. It requires consideration of the criminal history of the defendant, including acts of family violence, other pending criminal charges, and instances in which the defendant failed to appear in court following release on bail. Citizenship status of the defendant also must be considered.

Reporting and other provisions. SB 6 requires court clerks to include certain information about bail in their currently required statistical monthly report to OCA. OCA must post the information on its website and report on it annually to the governor, the lieutenant governor, the House speaker, and certain legislative committees. OCA also must publish on its website information from a newly established bail form that must be filled out by those setting bail in cases of class B misdemeanors or higher.

Supporters said

SB 6 would be a balanced approach to reforming Texas' bail system. Its provisions would work together both to ensure that safety and appearance in court drove bail decisions and to quickly allow some defendants to be moved out of jails while they await trial.

The current system can result in bail amounts that do not reflect the threat to the public posed by those accused of crimes or the likelihood that the accused will appear in court. Decisions under the current system have allowed

high-risk and dangerous defendants with financial means out on the streets pretrial and allowed violent and habitual offenders to be released pretrial multiple times on either personal or cash bonds, resulting in serious and violent crimes. These decisions have harmed public safety, failed victims, communities, and law enforcement, and resulted in tragedies such as the 2017 killing of Department of Public Safety trooper Damon Allen, for whom the bill would be named. Trooper Allen was shot during a traffic stop by someone who had been released on bail despite being a repeat offender with a violent past.

Development, use of public safety report system. SB 6 would improve bail decisions by giving magistrates a public safety report system with a readable, condensed form containing criminal history and other information that should be weighed when making bail decisions. Currently, decisions can be made by magistrates who do not know a defendant's full criminal history or other vital information, such as their history of appearing in court. The report would not dictate an outcome or reduce judicial discretion because magistrates would make individual decisions in each case. Other information would be considered, and the report could not be the only item relied on by a magistrate. The public safety report would be free, quick and easy to use, and would not slow down bail decisions.

Training, qualifications to make bail decisions. The bill would require training and demonstrated competency for those making bail decisions, which would ensure that qualified individuals were acting in this complex and important area. Since these decisions affect public safety and the liberty of those accused of crimes, it is especially important that everyone making them is trained and understands their duties.

Bail for defendant charged with offense committed while on bail. SB 6 would support informed and accountable decisions about bail by limiting who could set bail for individuals that are charged with a new felony offense while released on bail for another felony.

Action on bail decision. SB 6 would address concerns that the current system unfairly keeps some non-dangerous defendants with limited financial means in jail pretrial. The directives in the bill to impose the least restrictive conditions and bail, either personal or money, to ensure court appearance and protect public safety would ensure defendants received fair conditions on any bond and that personal bonds and monetary bail were used appropriately.

The bill would track recent court rulings on the use of bail schedules, which are used to set bail based on specified factors, such as the type of offense. SB 6 would respect defendants' rights by establishing a fair process, including a potential review, when an individual was unable to give bail set by a schedule or standing order. The defendant, by being in the best position to know if bail was affordable, should be the one to raise the issue of bail being unaffordable. Filling out the form would not be burdensome. The bill specifies that it is to be done to the best of the defendant's knowledge, and these provisions would not trigger a requirement for the appointment of an attorney to indigent defendants.

Charitable bail organizations. SB 6 establishes reasonable transparency measures and parameters for charitable bail organizations without limiting anyone's right to bail. It is important for communities to know who has posted bail for individuals released from jail pretrial and who is accountable for such individuals, and SB 6 would ensure this by requiring reporting by organizations. The bill would not prohibit family or religious organizations from posting bonds and would not apply to those providing funds for a small number of bonds.

Rules for setting bail. Under the bill, decisions about bail would be more reasonable than under current law. Public safety would be improved because magistrates and judges would have information from the public safety report and revised rules that required the consideration of criminal history, family violence, and safety to law enforcement.

Critics said

SB 6 could channel more defendants into the money bail system, which keeps some low-risk defendants in jail pretrial because they are unable to raise bail money and allows others who are a risk to the public but have resources to post bail and be released after an arrest. Increasing reliance on the money bail system could have a negative impact on communities of color and could exacerbate or perpetuate disparities in the criminal justice system based on economic factors that relate to an individual's ability to pay bail.

Several provisions would increase the number of individuals held in jail pretrial or the amount of time spent in jail pretrial, which goes against the presumption of innocence for these defendants. Keeping defendants in jail pretrial can have serious negative consequences for individuals, including job loss, an impact on health, family

stress, and future interactions with the criminal justice system. Spending more time in jail pretrial also can lead to innocent individuals pleading guilty to get out of jail, and those in jail pretrial can be more likely to be sentenced to a term of incarceration if found guilty and to receive a longer sentence than others. More defendants spending more time in jails would be costly to counties, could be especially burdensome on rural and small jails, and could divert resources from other needs.

Development, use of public safety report system. A statewide requirement to use a pretrial public safety report system could unfairly delay pretrial release for some defendants and result in the detention of some who otherwise would be released. The report might not result in a fair and accurate assessment of defendants because it would focus on information that could increase or restrict bail, rather than mitigating factors or context for events. For example, the bill would require looking at previous failures to appear in court but would not require looking at the reasons for the failure. While failing to appear in court could involve a willful non-appearance in some cases, failure to appear may occur for other reasons, such as transportation issues or work requirements.

Action on bail decision. Requirements that those who cannot pay bail set by a bail schedule or standing order file an affidavit and a form with financial information could present a barrier to affordable bail for many individuals. It could be difficult for some in jail to prove the inability to pay without outside assistance, and the process established in the bill could trigger requirements that an indigent defendant be provided an attorney. The onus should be on the court to verify before setting bail that a defendant has the ability to pay the amount rather than on defendants to prove that they cannot afford bail.

Prohibited release on personal bond. SB 6 would remove judicial discretion by prohibiting certain defendants from being released on a personal bond. It is unfair to categorically deny a type of bond to individuals who have only been accused and are presumed innocent. Public safety is best achieved when magistrates consider cases without restrictions on the type of bond that can be used to make bail. Judges and magistrates can be held accountable for decisions they make about releases on personal bond, and conditions such as electronic monitoring can be used for personal bonds in the same way as they are used for monetary bonds to protect community safety.

The bill would set up a system that treats defendants unequally based on wealth. Individuals excluded from personal bonds under the bill could be given money bonds, allowing those with resources to buy their pretrial release from jail while keeping those without resources incarcerated. For defendants with limited means, even cash bonds set very low can be out of reach and result in pretrial incarceration.

Charitable bail organizations. Charitable bail organizations help level the playing field for those without resources who otherwise cannot secure their freedom pretrial in the same ways as those with resources, and there is no need to restrict their operations. The organizations are accountable and their work is transparent because courts have information about who posts bail for any individual, some localities have imposed additional measures, and organizations fall under regulations for nonprofit organizations. These organizations help keep Texas communities safe by supporting those whose bail they post and have been successful in having their clients appear in court as required.

Rules for setting bail. The rules SB 6 would require to be considered when setting bail might not provide enough context to result in a fair and accurate assessment of defendants. The rules, like the public safety report, would focus on information that could increase or restrict bail, rather than mitigating factors or context for events, such as failure to appear in court or criminal history.

Notes

The HRO analysis of SB 6 appeared in the August 27 *Daily Floor Report*.

SB 6 was enabling legislation for **SJR 3** by Huffman, a proposed constitutional amendment that would have amended the Texas Constitution to expand the conditions under which judges and magistrates were authorized to deny bail and would have established procedures for when bail was denied in these cases. SJR 3 was considered by the House on August 30 but failed adoption by a vote of 87 yeas to 35 nays, with one present, not voting. The HRO analysis of SJR 3 appeared in the August 27 *Daily Floor Report*.

A similar constitutional amendment, **SJR 1** by Huffman, was approved by the Senate during the third called session of the 87th Legislature but failed to be adopted by the full House. The analysis of SJR 1 appeared in the October 13 *Daily Floor Report*.

Allowing hotel guests to carry, store firearms and ammunition at hotels

SB 20 by Campbell
Effective September 1, 2021

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SB 20 prohibits a hotel, unless possession of a handgun, other firearm, or ammunition is prohibited by state or federal law, from adopting a policy prohibiting a hotel guest from:

- carrying or storing a firearm or firearm ammunition in the guest's hotel room;
- carrying a firearm or firearm ammunition directly en route to or from the hotel or the guest's hotel room;
- carrying a firearm or firearm ammunition directly en route to or from the guest's vehicle located on the hotel property, including a vehicle in a parking area provided for hotel guests; or
- carrying or storing a firearm or firearm ammunition in the guest's vehicle located on the hotel property, including a vehicle in a parking area provided for hotel guests.

A hotel may adopt a policy requiring a hotel guest carrying a firearm or ammunition in a common area on the hotel property to carry a handgun in a concealed manner or carry a firearm or ammunition in a case or bag.

The bill creates defenses to prosecution for the crimes of criminal trespass, trespass by a license holder with a concealed handgun, and trespass by a license holder with an openly carried handgun if an individual is a guest at the hotel and:

- carries or stores a handgun, firearm, or ammunition in the actor's hotel room;
- carries a handgun, firearm, or ammunition directly en route to or from the hotel or the actor's hotel room;
- carries a handgun, firearm, or ammunition directly en route to or from the actor's vehicle located on the hotel property, including a vehicle in a parking area provided for hotel guests; or
- carries or stores a handgun, firearm, ammunition in the actor's vehicle located on the hotel property, including a vehicle in a parking area provided for hotel guests.

The bill defines "hotel" to mean a hotel, motel, inn, or similar business offering more than 10 rooms to the public for temporary lodging for a fee.

Supporters said

SB 20 would protect the rights of Texans to lawfully keep their weapons with them by prohibiting hotels from establishing a policy forbidding such actions. Currently, if a hotel decides to prohibit the concealed or open carrying of handguns on its premises, it may provide such notice.

It can be difficult to determine a hotel's policy, and travelers sometimes arrive at hotels to find the facility prohibits firearms and that they cannot bring in their weapons. This can force guests complying with the hotel policy to leave their weapon in their vehicles, which can be inadvisable and even unsafe, as the weapons could be stolen. Law-abiding Texans who are hotel guests should be allowed to keep their weapons safe and secure near them and to carry them from their vehicles to their rooms.

SB 20 would be a logical extension of current laws, including those covering law-abiding apartment dwellers carrying and keeping their firearms. Hotels have opened themselves up to the public, and guests should be able to bring their firearms to and from their rooms, which are functioning as individuals' places of residence. Under the bill, hotels would retain control of their property, as the bill ensures they have the discretion to require that firearms and ammunition be carried in a concealed manner or in a case or bag.

Critics said

SB 20 would infringe on the right of hotels to exercise control over their property and prohibit the carrying of

firearms on their premises. While hotel guests have rights in their home, there is a difference between a private home and a hotel's private property. Hotels should be able to control their private property and have a gun-free establishment, something they might do as part of their business model. Individuals or businesses might prefer a gun-free hotel, and SB 20 would take away options for hotels to provide such a service and would put an onus on the hotel to determine if a guest legally possessed a firearm. Those who want to bring firearms to a hotel easily could contact the hotel before arrival and determine the establishment's policy.

The bill could set a precedent for private property rights in relation to Second Amendment rights that ultimately could impact short-term rental properties or any other private property that currently restricts the carrying of handguns.

Notes

The HRO analysis of SB 20 appeared in the May 22 *Daily Floor Report*.

Limiting peace officer use of choke holds; establishing a duty to intervene

SB 69 by Miles
Effective September 1, 2021

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SB 69 prohibits peace officers from intentionally using a choke hold, carotid artery hold, or similar neck restraint in searching or arresting a person unless the restraint is necessary to prevent serious bodily injury to or the death of the officer or another person.

The bill also establishes that a peace officer has a duty to intervene to stop or prevent another peace officer from using force against someone suspected of committing an offense if the amount of force exceeds that which is reasonable under the circumstances and the officer knows or should know that the other officer's use of force:

- violates state or federal law;
- puts a person at risk of bodily injury and is not immediately necessary to avoid imminent bodily injury to a peace officer or other person; and
- is not required to apprehend the person suspected of committing an offense.

A peace officer who witnesses the use of excessive force by another officer must promptly make a detailed report of the incident and deliver the report to the supervisor of the officer making the report.

Supporters said

SB 69 would ensure uniform, statewide, appropriate policies banning choke holds by law enforcement officers and requiring officers to intervene to stop the use of excessive force by another officer.

Choke holds and other methods to restrict airflow employed by peace officers can lead to serious injury or death, as in the case of George Floyd in 2020. While most law enforcement agencies reportedly have policies banning these holds, SB 69 would establish a statewide standard and ensure that all agencies prohibited these potentially lethal restraints. The bill would appropriately include an exception for circumstances in which this type of restraint was necessary to prevent serious bodily injury or death of the officer or another person.

The bill also would establish a uniform policy requiring offices to intervene and report excessive uses of force so that statewide all officers would work under the same rules. In the absence of an explicit policy, some officers might not intervene or report uses of excessive force because they fear retaliation by their peers or that reporting an incident could harm their career. Codifying a duty to intervene would leave no question as to the role of police officers and could result in fewer citizen complaints, instances of misconduct, and disciplinary issues as well as increased trust with the community.

Critics said

Banning approved chokehold techniques could result in officers using other techniques that could be more harmful. The exception provided in the bill allowing the hold if necessary to prevent serious bodily injury to or the death of the officer or another person could result in officers being hesitant to use a neck restraint and the use of other dangerous options during a search or arrest.

Notes

The HRO digest of SB 69 appeared in Part Three of the May 24 *Daily Floor Report*. The bill originally included only provisions relating to choke holds. It was amended on the House floor to include establishing a duty for peace officers to intervene to prevent another officer from using excessive force. Those provisions also were in **SB 68** by Miles, which was not enacted. SB 68 was digested in Part Three of the May 25 *Daily Floor Report*.

A related bill, **HB 88** by S. Thompson, which would have been known as the George Floyd Act, died in the House Homeland Security and Public Safety Committee.

HB 88 contained numerous provisions dealing with interactions between law enforcement officers and individuals detained or arrested, many of which were included in other bills. HB 88 would have prohibited uses of force by offices that impeded breathing by applying pressure on the throat or neck or blocking the nose or mouth. It also would have established the duty of a peace officer to intervene if witnessing the use of excessive force by another officer. HB 88 also would have:

- created a legal cause of action against peace officers for depriving a person of a right, privilege, or immunity secured by the Texas Constitution;
- revised the duties of police officers relating to their duty to prevent crimes and to make arrests;
- established requirements for law enforcement agencies to adopt cite-and-release and use of force policies that contain certain provisions;
- limited arrests for fine-only class C misdemeanor crimes;
- required corroborating evidence for drug crime convictions made on the testimony of undercover peace officers;
- established uses of a progressive disciplinary matrix outlined in the bill for infractions committed by police officers; and
- revised provisions dealing with the use of force by peace officers.

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Elections

* Finally approved

Revising election laws, modifying offenses and criminal penalties

SB 1 by Hughes, Second Called Session
Effective December 2, 2021

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SB 1 establishes the Election Integrity Protection Act of 2021. It revises statutes on voter registration, conduct and security of elections, poll watchers and election officers, early voting by mail, assisting voters, election fraud offenses, election-related court proceedings, and ineligible voters, among other provisions.

Legislative intent. The bill establishes the intent of the Legislature that the application of the Election Code and the conduct of elections be uniform and consistent throughout the state to reduce the likelihood of fraud in the conduct of elections, protect the secrecy of the ballot, promote voter access, and ensure that all legally cast ballots are counted. Election officials and other public officials must strictly construe the provisions of the Election Code to effect this intent.

Reasonable accommodation for voters with disabilities. SB 1 specifies that a provision of the Election Code may not be interpreted to prohibit or limit the right of a qualified individual with a disability from requesting a reasonable accommodation or modification to any election standard, practice, or procedure mandated by law or rule that the individual is entitled to request under federal or state law.

Voter registration. Under the bill, certain information required to be included as part of a voter registration application must be supplied by the person desiring to register to vote. SB 1 modifies the offense of making a false statement on a voter registration application by increasing the offense to a class A (up to one year in jail and/or a maximum fine of $4,000) from a class B misdemeanor (up to 180 days in jail and/or a maximum fine of $2,000), specifying that the offense must be committed knowingly or intentionally, and adding coercion of another person to make a false statement to the description of the offense.

The bill also requires the secretary of state to enter into an agreement with the Department of Public Safety (DPS) under which information in the statewide computerized voter registration list is compared with information in the DPS database on a monthly basis to verify the accuracy of citizenship status information previously provided on voter registration applications. After a registrar receives notification of persons who indicate a lack of citizenship status in connection with a motor vehicle or DPS record, the registrar must deliver a written notice to each such person requiring the submission of certain documents to prove U.S. citizenship. The secretary of state must provide a report to the Legislature of the number of voter registrations canceled under these provisions during the calendar year by December 31 of each year.

SB 1 also revises statutes on the digital correction of certain voter registration information, notice of a change in registration information on a voter's county of residence, and the requirement for the secretary of state to notify certain parties of ineligible individuals registering to vote or voting in an election, among other provisions.

Election conduct and security. The bill prohibits voters, other than those physically unable to enter a polling place without personal assistance or likelihood of injury, from casting a vote from inside a motor vehicle. It also modifies the hours during which early voting by personal appearance may be conducted during the early voting period for certain counties, entitles voters in line at the closing time of a polling place during early voting to vote, and requires the creation of checklists for presiding judges when opening and closing a polling place.

SB 1 also prohibits voting system ballots from being arranged in a manner that allows a political party's candidates to be selected in one motion or gesture, requires the use of a certain methodology by commissioners courts to select the location of temporary branch polling places, revises the composition of early voting ballot boards, requires the development of a protocol for electronic devices in a central counting station to track all device input and activity, and requires video surveillance of areas containing voted ballots in counties with 100,000 or more people, among other provisions.

The secretary of state is required to conduct an audit of the elections held in four randomly selected counties during the previous two years. Of the counties in the audit, two must have a total population of less than 300,000 and two must have a total population of 300,000 or more.

Election officers and observers. The bill specifies that the purpose of Election Code ch. 33 is to preserve the integrity of the ballot box in accordance with Tex. Const. Art. 4, sec. 4, by providing for the appointment of watchers, and it establishes the intent of the Legislature that watchers accepted for service be allowed to observe and report on irregularities in the conduct of any election. A watcher appointed under ch. 33 must observe without obstructing the conduct of an election and call to the attention of an election officer any observed or suspected irregularity or violation of law in the conduct of the election.

SB 1 prohibits a presiding judge from having a watcher duly accepted for service removed from a polling place for violating a provision of the Election Code or other statute on the conduct of elections, other than a violation of the Penal Code, unless the violation was witnessed by an election judge or clerk. A presiding judge may call a law enforcement officer to request that a poll watcher be removed if the poll watcher commits a breach of the peace or a violation of law. The secretary of state must develop and maintain a mandatory training program for watchers.

The bill makes it a class A misdemeanor for an election officer to intentionally or knowingly refuse to accept a watcher to serve when acceptance is required. It also revises the class A misdemeanor offense of unlawfully obstructing a watcher so that a person would commit the offense if the person served in an official capacity at a location at which the presence of watchers was authorized and knowingly prevented a watcher from observing an activity or procedure the person knew the watcher was entitled to observe.

SB 1 also requires a watcher to take an oath swearing or affirming that the watcher will not disrupt the voting process or harass voters in the discharge of the watcher's duties, entitles watchers to observe all election activities related to closing a polling place, and allows the appointing authority for a watcher who believes the watcher was unlawfully prevented or obstructed from performing the watcher's duties to seek injunctive relief, a writ of mandamus, and any other remedy available under law, among other provisions.

Voting by mail. The bill requires an in-person delivery of a marked mail ballot voted early to be received by an election official at the time of delivery and for the receiving official to record certain information on a roster prescribed by the secretary of state. It also requires that an application for an early voting ballot to be voted by mail be submitted in writing and signed by the applicant using ink on paper. Early voting ballot applications must include:

- the number of the applicant's driver's license, election identification certificate, or personal identification card issued by the Department of Public Safety (DPS);
- if the applicant has not been issued a driver's license or personal identification number, the last four digits of the applicant's Social Security number; or
- a statement by the applicant that the applicant has not been issued an identification number or a Social Security number.

SB 1 prohibits an officer or employee of the state or a political subdivision of the state from distributing or using public funds to facilitate the distribution of an application form for an early voting ballot to a person who did not request an application. A political party or candidate for office may distribute such an application form to a person who did not request one.

A mail ballot may be accepted only if the identifying information the voter is required to provide on the voter's application to vote early by mail matches the information on the voter's application for voter registration. A signature verification committee or early voting ballot board is required, by the second business day after discovering certain defects in ballots voted early by mail and before deciding whether to accept or reject a timely delivered ballot, to:

- return the carrier envelope to the voter by mail, if the committee or board determines that it is possible to correct the defect and return the envelope before the polls closed on election day; or
- notify the voter of the defect by phone or email and inform the voter that the voter may request to have the application to vote by mail canceled or come to the early voting clerk's office in person by the sixth day after election day to correct the defect.

The bill contains other provisions on storing and tabulating returned mail ballots, mail ballot carrier envelopes, and the keeping of electronic records and notes by members of signature verification committees and early voting ballot boards.

Voter assistance. In addition to the current authorization in certain circumstances to receive assistance in marking a ballot, SB 1 entitles a voter to receive assistance in reading a ballot if the voter cannot do so because of a physical disability that renders the voter unable to write or see or an inability to read the language in which the ballot is written. A person, other than an election officer, who assists a voter in preparing a ballot must complete a form stating the name and address of the person assisting the voter, the person's relationship to the voter, and whether the person received or accepted any form of compensation or other benefit from a candidate, campaign, or political committee.

The bill requires a person who simultaneously assists seven or more voters who are unable to enter a polling place by providing the voters with transportation to the polling place to complete and sign a form, provided by an election officer, that includes the person's name and address and other specified information. This requirement does not apply if the person is related to each voter within the second degree by affinity or the third degree by consanguinity.

A person, other than an election officer, selected to provide assistance to a voter must take the required oath under penalty of perjury. The bill adds statements to the required oath that the assistant would have to swear to or affirm.

SB 1 specifies that the current state-jail felony offense (180 days to two years in a state jail and an optional fine of up to $10,000) of knowingly failing to comply with certain carrier envelope marking requirements does not apply if a person is related to the voter within the second degree by affinity or the third degree by consanguinity.

The bill makes it a state-jail felony to offer to compensate another person to assist voters or solicit or receive compensation for such assistance. The offense does not apply if the person assisting a voter was an attendant or caregiver previously known to the voter.

Election fraud. SB 1 prohibits a public official or election official from creating, altering, modifying, waiving, or suspending any election standard, practice, or procedure mandated by law or rule in a manner not expressly authorized by the Election Code. It also creates or modifies several offenses related to election fraud.

Under the bill, it is a third-degree felony (two to 10 years in prison and an optional fine of up to $10,000) for a person, directly or through a third party, to knowingly provide or offer to provide vote harvesting services in exchange for compensation or other benefit, to knowingly provide or offer to provide compensation to another person in exchange for vote harvesting services, or to knowingly collect or possess a mail ballot or official carrier envelope in connection with vote harvesting services.

SB 1 makes it a state-jail felony:

- for an election judge to knowingly provide a voter with a form for an affidavit related to provisional voting if the form contained information that the judge entered on the form knowing it was false;
- for a public official acting in an official capacity, with exceptions, to knowingly solicit the submission of an application to vote by mail from a person who did not request an application, distribute an application to a person who did not request one unless the distribution was expressly authorized under the Election Code, authorize or approve the expenditure of public funds to facilitate third-party distribution of an application to a person who did not request one, or complete any portion of an application and distribute the application to an applicant; or
- for a person to make a false statement or swear to the truth of a false statement previously made while making the voter assistance oath required by statute.

The bill makes it a class A misdemeanor to knowingly or intentionally make any effort to alter the ballot of another or otherwise cause a ballot to not reflect the intent of the voter, prevent an eligible voter from casting a legal ballot, or provide false information to an eligible voter with the intent of preventing the voter from voting, among other prohibited actions. If a person committed the offense while acting in the person's capacity as an elected official, it is a state-jail felony.

The bill also makes it a class A misdemeanor for an early voting clerk or other election official to knowingly mail or otherwise provide an early voting ballot by mail or other mail ballot materials to a person the clerk or official knew did not submit an application for a ballot to be voted by mail.

SB 1 makes it a class C misdemeanor (maximum fine of $500), with exceptions, to knowingly refuse to permit another person over whom a person has authority in the scope of employment to be absent from work during early voting for the purpose of voting or to knowingly subject or threaten to subject the other person to a penalty for attending the polls.

Enforcement. SB 1 specifies that a person may not serve as an election official if the person has been finally convicted of an offense under the Election Code. An election official may be liable to the state for a civil penalty if the official is employed by or is an officer of the state or a political subdivision of the state and violates a provision of the Election Code. An action alleging that an election officer violated such a provision may only be brought against the officer in the officer's official capacity.

The bill requires the prioritization of certain proceedings related to violations of the Election Code, with certain exceptions, and specifies requirements and deadlines for courts in handling these cases. SB 1 also creates offenses for communicating with a court clerk with the intention of influencing or attempting to influence the composition of a three-justice panel, court, or judge assigned a specific election-related proceeding.

Ineligible voters. For cases in which the defendant is adjudged guilty of a felony offense, the bill requires a court to make an affirmative finding that the person has been found guilty of a felony, enter the affirmative finding in the case's judgment, and instruct the defendant regarding how the felony conviction will impact the defendant's right to vote in Texas.

SB 1 specifies that an action constituting the class A misdemeanor offense of illegal voting must be taken knowingly or intentionally. The bill adds to the definition of the offense voting or attempting to vote in an election in Texas after voting in another state in which a federal office appears on the ballot and the election day for both states is the same day. A person may not be convicted solely upon the fact that the person signed a provisional ballot affidavit unless corroborated by other evidence that the person knowingly committed the offense. This applies to an offense committed before, on, or after December 2, 2021.

Supporters said

SB 1 would help provide uniformity in Texas elections and restore the confidence of voters in election integrity. It would empower poll watchers to oversee election conduct without fear of being unfairly removed, add safeguards for the lawful assistance of a voter, and strengthen the consequences for violations of election law.

Voter registration. The bill would make it easier for voters who moved to a new county to maintain their voter registration by requiring voter registrars to coordinate to ensure that the voter's registration in the original county of residence was canceled and the voter was registered in the new county. Requiring the secretary of state to compare information on the statewide voter registration list with Department of Public Safety information to verify the citizenship of registered voters would help keep voter rolls accurate and ensure the integrity of elections.

Conduct of elections. SB 1 would make it easier for Texans to vote lawfully by expanding early voting from at least eight hours to at least nine hours on weekdays and by making it an offense for employers to keep an employee from going to the polls during early voting, a prohibition which currently applies only to voting on election day. The bill also would entitle individuals in line when the polls closed during early voting to vote, which also currently applies only to individuals voting on Election Day.

Election officers and observers. SB 1 would empower poll watchers to perform their roles as observers by prohibiting election judges from removing them for arbitrary reasons or improperly refusing to accept them. If a poll watcher did disrupt a polling place or violate the law, that person could be removed by a law enforcement officer. Poll watchers already are prohibited under current law from watching an individual cast a ballot or conversing with a voter. The bill would not allow watchers to engage with or harass voters, but rather would ensure that watchers could not be unjustly removed from a polling place while performing their duties or have their right to observe election activities infringed.

Voting by mail. SB 1 would help ensure that a voter's eligibility was verified by requiring applications to vote early by mail to include an approved ID number, adding criteria for the acceptance of mail ballots, and expanding the ability of signature verification committees and early voting ballot boards to verify voter signatures on mail ballot applications and carrier envelopes. The bill also would provide more opportunities for voters to have their votes counted by allowing defects in mail-in ballots, including missing signatures or other information, to be corrected by a voter within a specified time frame.

Voter assistance. SB 1 would provide greater protections from exploitation for individuals who may require assistance to vote. This includes individuals over 65 years old casting a ballot by mail and those with disabilities, the visually impaired, and those who could not read the language in which a ballot was printed. By revising the required oath to include acknowledgement that assistance was not provided under coercion and requiring new information to be written on carrier envelopes, the bill would help deter attempts to take advantage of the voter needing assistance.

The bill would not deter individuals from lawfully assisting eligible individuals in casting a ballot. Rather, by requiring an assistant to attest under penalty of perjury that the assistant did not pressure or coerce a voter into choosing that person as an assistant, the bill would increase safeguards to protect such voters from exploitation by bad actors.

Election fraud. SB 1 would help deter various forms of election fraud by creating new criminal penalties and enhancing existing ones, sending a strong message about Texas' commitment to election integrity. Election fraud is a serious offense that undermines a core civic duty and should be treated as such under the law. The bill would not punish individuals for making simple clerical errors or other mistakes because an action prohibited under the bill would have to be carried out knowingly or intentionally to qualify as an offense. SB 1 also would deter the exploitation of vulnerable voters by making it an offense to knowingly provide or offer to provide vote harvesting services for compensation. Ballot harvesting operations undermine the integrity of elections by introducing a financial incentive for the collection of votes, which opens the door to fraud.

Enforcement. By requiring courts to prioritize and expedite certain cases, the bill would provide for the quick disposition of time-sensitive election matters. The bill would not jeopardize other time-sensitive legal proceedings but simply ensure that election complaints within 70 days of an election were handled expeditiously. This would allow for legitimate legal complaints about the election process to be addressed before election day and for injunctive relief to be provided.

Critics said

SB 1 would exacerbate an already restrictive elections system by creating overly harsh penalties, restricting convenient voting options that facilitate voter turnout, and creating an opportunity for partisan poll watchers to intimidate voters. Texas already has strong voting restrictions and relatively low voter turnout rates, and data have shown election fraud to be rare in Texas. Instead of further complicating voting and criminalizing election activities, the Legislature should make it easier for Texans to access the ballot box.

Voter registration. By requiring voter registrars to provide notice of all unlawful registrations to the secretary of state and the attorney general, SB 1 could lead to needless prosecutions of individuals who accidentally registered to vote in the wrong county or made similar inadvertent mistakes. Further, requiring the secretary of state to compare information in the statewide voter registration list with Department of Public Safety data to verify citizenship could lead to thousands of naturalized citizens being asked to prove their citizenship or be removed from voter rolls, as happened in 2019.

Conduct of elections. The bill could reduce voter turnout by prohibiting convenient voting options, including drive-through voting and 24-hour early voting. The ability to vote curbside from a vehicle was valuable to many Texans during the COVID-19 pandemic, when voting in person created the unnecessary risk of viral transmission. Also, 24-hour early voting in Harris County during the 2020 election cycle allowed more people to vote and eased long lines resulting from increased voter turnout.

Election officers and observers. SB 1 could enable partisan poll watchers to harass or intimidate voters by granting watchers overly expansive access to polling places and making it harder for election judges to remove unruly watchers. While an election judge could call a law enforcement officer to remove a watcher violating the law or disrupting the peace, local police departments may not have a sufficient number of officers to respond to complaints from multiple polling places. By the time an officer arrived, the conduct constituting a breach of the peace or violation of the law could have concluded.

Voting by mail. The bill would make it harder for individuals to vote early by mail by applying a voter ID requirement and creating more opportunities for a voter's signature, and therefore ballot, to be wrongly rejected as fraudulent. SB 1 also could limit the ability of voters with disabilities to sign mail ballot applications by requiring ink signatures. Voters with disabilities may make use of signature stamps to accommodate a physical disability. If the bill was interpreted to prohibit the use of such stamps,

it could deter individuals with disabilities from successfully requesting a mail ballot.

Voter assistance. The bill would create more opportunities for valid ballots to be discarded by requiring individuals wishing to provide lawful assistance to voters with disabilities or elderly voters to fill out a form on the carrier envelope. The requirements for carrier envelopes under current law already are extensive, and further complicating these envelopes by adding a form would increase the likelihood of valid votes being discarded due to a simple error or omission by an assistant.

SB 1 also could create a chilling effect on individuals wishing to provide assistance to eligible voters by requiring the voter assistance oath to be taken under penalty of perjury. Under the bill, it would be a state-jail felony to commit perjury in connection with the voter assistance oath. The oath's vague prohibitions on "pressuring" or "coercing" a voter to accept a person as an assistant could deter individuals from providing lawful assistance to eligible voters due to the fear of accidentally violating the Election Code.

Election fraud. Election fraud is rare in Texas and existing law is more than sufficient to deter individuals from fraudulently casting a ballot, changing votes, or otherwise illicitly influencing an election. By implementing overly punitive election offenses, SB 1 could discourage potential voters and poll workers from participating in the electoral process, further depressing Texas' already low voter turnout. Some offenses under the bill would be third-degree and state-jail felonies, placing election crimes on the same level as certain high-value property theft and other serious crimes.

Enforcement. SB 1 would require the prioritization of certain election cases over potentially more pressing judicial matters. The special treatment of election fraud cases under the bill, regardless of merit, could bog down the court system and jeopardize certain time-sensitive legal proceedings, such as cases involving protective orders.

Notes

The HRO analysis of SB 1 appeared in the August 26 *Daily Floor Report*.

SB 7 by Hughes, which died in the House, would have revised laws on voter registration, the conduct of elections, election officers and observers, voting by mail, voter assistance, election fraud, the enforcement of election statutes, voter eligibility, and the posting of election results by certain political subdivisions. The bill also would have created various election-related offenses and enhanced criminal penalties for existing offenses. The HRO analysis of HB 6 by Cain, the House companion bill for SB 7, appeared in Part One of the May 6 *Daily Floor Report*.

HB 574 by Bonnen, effective September 1, 2021, makes it a second-degree felony (two to 20 years in prison and an optional fine of up to $10,000) to knowingly or intentionally make any effort to count votes a person knows are invalid, alter a report to include invalid votes, refuse to count votes a person knows are valid, or alter a report to exclude valid votes. The HRO analysis of HB 574 appeared in the April 15 *Daily Floor Report*.

HB 2149 by Clardy, which died in the Senate State Affairs Committee, would have allowed voting at temporary branch polling places to be conducted on any days and during any hours of early voting by personal appearance for counties with a population of 100,000 or more. The HRO analysis of HB 2149 appeared in Part One of the May 6 *Daily Floor Report*.

HB 1382 by Bucy, effective September 1, 2021, requires the secretary of state to develop or provide an online tool to each early voting clerk that enables a person who submits an application for a ballot to be voted by mail to track the location and status of the application and ballot on the secretary's website and the relevant county website, if applicable. The HRO analysis of HB 1382 appeared in Part Two of the April 28 *Daily Floor Report*.

HB 1622 by Guillen, effective September 1, 2021, allows a person registered to vote in the county where an early voting clerk is conducting early voting to submit to the secretary of state a complaint regarding the clerk's compliance with early voting roster requirements. The HRO analysis of HB 1622 appeared in the April 15 *Daily Floor Report*.

SB 1112 by Bettencourt, which died in the House, would have prohibited a county clerk, an elections administrator, an early voting clerk, or an early voting ballot board to suspend a requirement for the acceptance of an early voting ballot voted by mail. The bill would have made it a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000) for a clerk or an administrator to suspend the ballot acceptance requirements. The HRO analysis of SB 1112 appeared in Part Five of the May 25 *Daily Floor Report*.

SB 1116 by Bettencourt, effective September 1, 2021, requires a county that holds or provides election services for an election, or a city or independent school district that holds an election, to post the results on its public website if the entity maintains a website as soon as practicable after the election. By the 21st day before certain county elections or city or independent school district elections, the relevant entity must post certain information about the upcoming election on its website, if applicable. The HRO analysis of SB 1116 appeared in the May 20 *Daily Floor Report*.

SB 1675 by Campbell, which died in the House, would have specified that the qualifications for early voting by mail and procedures for conducting early voting by mail could not be amended or suspended for any reason, except as specifically permitted by statute. Upon declaration of a state of disaster, the governor would have been able to suspend the statute governing the method of returning a marked early voting ballot only for the purpose of allowing a voter registered to vote at an address in a disaster area to deliver a marked ballot to the early voting clerk's office on or before election day. The HRO analysis of SB 1675 appeared in Part Five of the May 25 *Daily Floor Report*.

Requiring risk-limiting audits of voting machines and paper trail

SB 598 by Kolkhorst
Effective September 1, 2021

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SB 598 requires general custodians of election records, not more than 24 hours after all ballots in an election have been counted, to conduct a risk-limiting audit for a selected statewide race or measure. A general custodian must post a notice of the date, hour, and place of the audit in the custodian's office and on the county website, if applicable. These provisions apply to an election that occurs after August 31, 2026, that contains a race or measure voted on statewide, and in which an auditable voting system is used.

Secretary of state. The secretary of state must select the precincts to be counted and the office or proposition to be counted and may appoint personnel to assist with the audit. The secretary must adopt rules for procedures necessary to implement the risk-limiting audit program. This must include a rule, using widely accepted statistical methods, that provides for the number or percentage of paper records that must be counted in an audit. The results of an audit must be published on the secretary's website within three days after being completed.

Watchers. A watcher may be present for an audit if appointed by a candidate in the election. A watcher must deliver a certificate of appointment that meets certain specifications listed in the bill to the general custodian at the time the watcher reports for service.

Audit pilot program. Beginning with the election taking place November 8, 2022, the secretary of state must conduct a pilot program of the risk-limiting audit program established by the bill. The secretary must select at least five counties to participate in the pilot program, at least one of which must have a population of at least 500,000. The secretary must report the results of the program to the Legislature after each applicable election and make recommendations on the program's statewide implementation. Provisions relating to the pilot program expire August 31, 2026.

Paper audit trail. A voting system consisting of direct recording electronic voting machines may not be used in an election unless the system is an auditable voting system, meaning a system that uses, creates, or displays a paper record that can be read by a voter and is not capable of being connected to the internet or any other computer network or electronic device. Provisions pertaining to a paper audit trail would not apply to an election held before September 1, 2026.

A paper record generated by an auditable voting system may be used only for its specified purposes and may not be retained by the voter. A voter unable to enter a polling place may use a direct recording electronic voting machine regardless of whether the direct recording electronic voting machine was part of an auditable voting system.

An authority that purchased a voting system other than an auditable voting system between September 1, 2014, and September 1, 2021, may use available federal funding and, if such funds are not available, available state funding to convert the purchased system into an auditable system. An authority can be reimbursed for up to 100 percent of the conversion cost under certain conditions. The secretary of state may use any available funds to assist an authority with the purchase of an auditable voting system if the funds have been appropriated for that purpose.

Network connections. Beginning September 1, 2026, a voting system may not be capable of being connected to any external or internal communications network, including the internet, or have the capability of permitting wireless communication.

The secretary of state may not waive any requirements relating to risk-limiting audits, paper audit trails, or the network connection and wireless technology of voting systems.

Supporters said

SB 598 would help to ensure the integrity of election results by requiring electronic voting systems to generate verifiable paper trails, which add a layer of redundancy to the voting process and can be used to verify results in an audit. The bill also would bolster the security of Texas elections by prohibiting voting systems from being capable of connecting to the internet or external communication networks that could expose these systems to manipulation by third parties.

The bill would not create opportunities for the manipulation of paper records generated by auditable voting machines because there are safeguards in place and chain of custody requirements contained in the Election Code. SB 598 would not jeopardize the secrecy of a voter's ballot because a paper ballot record generated by an auditable voting machine could only be inferred to belong to an individual voter using electronic poll book information in a specific and highly unlikely scenario.

The bill's timeline of September 1, 2026, for the complete transition to auditable voting machines is reasonable given the significant logistical demands of this transition on local election authorities.

Critics said

SB 598 could create opportunities for bad actors to alter or remove paper ballot records generated by an auditable voting machine by failing to require strict procedures for the storage and security of these records. The bill also could jeopardize the secrecy of the ballot in small precincts by creating a paper record that could be inferred to belong to an individual voter using the electronic poll book.

Other critics said

SB 598 should require all voting machines to be auditable before September 1, 2026. The state should be able to audit its election results much sooner than this time frame permits.

Notes

The HRO analysis of SB 598 appeared in Part Three of the May 25 *Daily Floor Report*.

SB 1 by Nelson, the general appropriations act, appropriates $34 million in federal funds, contingent on the receipt of these funds, for fiscal year 2022 for the purpose of reimbursements for the retrofitting of certain auditable voting systems, the replacement of certain systems that cannot be so upgraded, and the development of secure tracking systems for mail ballots in accordance with the provisions of SB 7 or similar legislation by the 87th Legislature, Regular Session. If the secretary of state cannot certify that sufficient federal funds exist by November 1, 2021, $34 million in general revenue funds is appropriated to the secretary of state for fiscal 2022 for these purposes.

HB 5 by Bonnen, Second Called Session, effective September 17, 2021, appropriates an additional $4.3 million to the secretary of state for fiscal year 2022 for reimbursements for the retrofitting of certain auditable voting systems, the replacement of certain systems that cannot be upgraded, and the development of secure tracking systems for mail ballots in accordance with HB 3 or similar legislation of the 87th Legislature, Second Called Session. The HRO analysis of HB 5 appeared in the August 30 *Daily Floor Report*.

HB 1397 by White, effective September 1, 2021, requires a contract to acquire equipment necessary for operating a voting system from a vendor to identify each person or entity that has a 5 percent or greater ownership interest in the vendor and, if applicable, the vendor's parent company and each subsidiary or affiliate of the vendor. The HRO digest of HB 1397 appeared in Part One of the May 4 *Daily Floor Report*.

SB 1387 by Creighton, effective June 16, 2021, specifies that for a voting system or voting system equipment to be approved for use in elections, the system in which the equipment is designed to be used must be manufactured, stored, and held in the United States and sold by a company whose headquarters and parent company's headquarters, if applicable, are located in the United States. The secretary of state must conduct a comprehensive study to determine the feasibility of the bill's provisions and submit a detailed report summarizing its findings to the Legislature by January 1, 2023. The HRO digest of SB 1387 appeared in Part Three of the May 23 *Daily Floor Report*.

Revisions to voter residency requirements, voter roll maintenance

SB 1111, SB 1113 by Bettencourt
Effective September 1, 2021

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SB 1111 prohibits a person from establishing residence for the purpose of influencing the outcome of a certain election or establishing residence at any place the person has not inhabited. A person may not designate a previous residence as a home and fixed place of habitation unless the person inhabits the place at the time of designation and intends to remain.

If a voter registrar has reason to believe that a voter's residence address is a commercial post office box or similar location that does not correspond to a residence, the registrar must deliver to the voter a written notice requesting confirmation of the voter's current residence.

The response of a voter to a confirmation notice confirming the voter's residence, required no later than 30 days after a notice was mailed, must include a sworn affirmation of the voter's current residence and, if the voter's address does not correspond to a residence, evidence of the voter's residence address or an indication of an exemption from those requirements. A voter's residence may be documented by providing a photocopy of certain documents as specified by the bill.

A voter whose residence in Texas has no address may document residence by executing an affidavit stating this fact, providing a concise description of the location of the residence, and delivering the affidavit to the registrar with the response to confirmation notice.

The documentation requirements do not apply to certain voters, including members of the armed forces of the United States or the spouse or dependents of a member, full-time students who live on campus at an institution of higher education, and peace officers whose driver's licenses omit an officer's actual residence address, among other individuals.

A voter who is enrolled as a full-time student living on campus at an institution of higher education may use the address of a post office box located on campus or in a dormitory owned or operated by the institution to confirm the voter's residence.

SB 1113 permits the secretary of state to withhold state and federal funds administered and distributed by the secretary for voter registration, election administration, and reimbursement for statewide special election expenses from a voter registrar who fails to timely perform a duty requiring the approval, change, or cancellation of a voter's registration. The secretary must distribute funds if the registrar performs the duty by 30 days after the funds are withheld.

Supporters said

SB 1111 would help to ensure fair elections by prohibiting individuals from establishing residence for the purpose of influencing the outcome of an election or at a place the voter did not reside. There have been reports of individuals moving to a specific district in order to influence an election in that district or listing a commercial mailbox as a residence when registering to vote. The bill would preclude these actions that could unfairly alter the outcome of an election and would create a uniform process by which voters could confirm their residence with the secretary of state.

The bill would not create an unreasonable burden on eligible, lawfully registered voters asked to confirm their residence because it provides a long list of acceptable documents that could be used to satisfy this requirement. It also would provide exemptions to the documentation requirement for members of the armed services and their spouses, full-time students, and other individuals specified in the bill.

Since it is impossible to live in a commercial mailbox, SB 1111 would appropriately exclude such boxes from being listed as a voter's residence. This would not create an unreasonable burden on voters experiencing homelessness

because such voters could list their residence as the physical location at which they were living at the time of registration.

SB 1113 would help to ensure the accuracy of voter rolls in Texas by allowing the secretary of state to withhold election assistance funding from counties whose registrars failed to cancel the registrations of ineligible voters in a timely manner. It has been reported that certain counties have failed to cancel voter registrations of the deceased, individuals who moved out of the county, individuals convicted of a felony, and non-citizens. The bill would incentivize these counties to maintain accurate voter rolls by creating a potential consequence for failure to comply with voter registrar requirements.

Requiring registrars to complete the cancellation of ineligible voter registrations in a timely manner would bolster, not diminish, the accuracy of voter rolls. The bill would not seek to punish counties by withholding funds but rather encourage them to comply with their duties. The withholding of election funds also would not be permanent, since the secretary of state would have to restore funding as soon as a county came back into compliance. If a voter registrar objected to the withholding of funds under the bill, the county could use existing legal avenues to seek relief.

Critics said

SB 1111 would create an unreasonable burden on eligible, lawfully registered voters by unnecessarily requiring them to confirm their residence with the secretary of state. In addition, the documents required to prove residency under the bill may be difficult to obtain for low-income voters or voters without access to transportation. Creating an extra hurdle for voters to prove their residency could result in thousands of voters being inappropriately removed from the rolls because they did not respond to the confirmation notice, could not acquire an acceptable document to prove residence, or did not see the notice in the mail.

Requiring voters to provide evidence of their residence also could violate the National Voter Registration Act, which allows voters to respond to a residence confirmation notice by affirming in writing that their voter registration address is correct.

Certain voters, including individuals experiencing homelessness, may list their residence as a commercial mailbox when registering to vote. By prohibiting listing such a mailbox as a residence, the bill would disenfranchise individuals with no physical address.

SB 1113 would unfairly punish counties whose voter registrars could not complete the cancellation of a voter's registration quickly due to administrative constraints or lack of resources. It also could risk the ability of registrars to maintain accurate rolls by withholding election-related funds, thereby counteracting the goal of ensuring certain registrations were cancelled in a timely manner.

The word "timely" is undefined, which could intimidate counties into rushing cancellation of voter registrations, a serious task that should not be completed hastily. Had this bill been in effect in 2019 when counties received an inaccurate list of flagged voters from the secretary of state, a large number of eligible voters could have been incorrectly purged by registrars rushing to comply with the secretary's orders to avoid losing funding.

In addition, the bill does not contain due process provisions or allow for a county to appeal the secretary of state's decision, limiting a county's ability to seek relief under the law.

Notes

The HRO digest of SB 1111 appeared in Part Three of the May 23 *Daily Floor Report*. The analysis of SB 1113 appeared in the May 21 *Daily Floor Report*.

HB 1264 by K. Bell, effective September 1, 2021, requires abstracts prepared by local registrars of death and clerks of courts with probate jurisdiction to be filed with voter registrars and the secretary of state as soon as possible, and no later than seven days after an abstract is prepared. The HRO analysis of HB 1264 appeared in the April 8 *Daily Floor Report*.

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General Government and Appropriations

* Finally approved

Creating Texas Pandemic Response Act

HB 3 by Burrows
Died in conference committee

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HB 3 would have created the Texas Pandemic Response Act to establish the roles of the governor, state agencies, the judicial branch, and political subdivisions of the state in preventing, preparing for, responding to, and recovering from a pandemic disaster. The bill also would have created the Pandemic Disaster Legislative Oversight Committee to oversee pandemic disaster declarations.

The bill would have defined a "pandemic disaster" and established that such an event was not included in the definition of "disaster" in the existing Texas Disaster Act, while specifying that certain provisions of that act would apply to a declared state of pandemic disaster.

Governor's authority. The bill would have authorized the governor to declare a state of pandemic disaster and to issue, amend, or rescind orders, proclamations, and rules, with the force of law, to accomplish the purposes of the bill. Under the bill, a declared state of disaster could not have continued for more than 30 days unless renewed by the governor and could have been terminated at any time by the Legislature, if convened. A renewed state of pandemic disaster could not have continued more than 90 days after the initial declaration without legislative approval, and the governor would have had to convene the Legislature in a special session to determine whether to modify or terminate the renewed declaration if the Legislature was not already convened. The Pandemic Disaster Legislative Oversight Committee could have terminated a state of pandemic disaster that had been in effect for more than 30 days following the governor's renewal.

The bill also would have placed various limits on the governor's authority during a declared state of pandemic disaster, including for medical procedures, face covering mandates, religious freedom protections, and the sale of firearms and ammunition. The governor would have been prohibited from declaring a new state of pandemic disaster on the same grounds as a previous pandemic disaster that had been ended or not renewed by the Legislature or the Pandemic Disaster Legislative Oversight Committee.

The bill would have designated the presiding officer of the governing body of a political subdivision as the subdivision's pandemic emergency management director. This officer would have served as the governor's agent during a pandemic disaster but would have been prohibited from issuing a pandemic disaster order that:

- required businesses or industries to close;
- distinguished between types of businesses or industries in limiting operations; or
- restricted visitation for residents of nursing and assisted living facilities.

Any local order or rule in response to a pandemic disaster would have been superseded by proclamations, orders, or rules issued by the governor or the Department of State Health Services. A political subdivision that the governor determined to have required the closure of a private business due to a pandemic disaster would have been prohibited from raising property taxes until the governor rescinded the determination.

Pandemic Disaster Legislative Oversight Committee. HB 3 would have created the Pandemic Disaster Legislative Oversight Committee to provide legislative oversight of pandemic disaster declarations when the Legislature was not convened. The committee would have included the lieutenant governor, the House speaker, the chairs of specified Senate and House committees, and two additional members each appointed by the lieutenant governor and House speaker to ensure ethnic minority representation. The committee would have been authorized to review and terminate the governor's pandemic disaster declaration and related proclamations, orders, and rules by the governor or local governments.

Other significant provisions of the bill would have:

- created the Texas Epidemic Public Health Institute at the University of Texas Health Science Center at Houston to support pandemic and epidemic disaster preparedness and to advise the committee;

- established certain civil liability protections for businesses during a declared state of pandemic disaster;
- established regulations for hospital visitation during a declared pandemic disaster; and
- required the Texas Division of Emergency Management to establish a statewide emergency management system to respond to a declared state of pandemic disaster.

Supporters said

HB 3 would address the need for a separate framework to govern state and local responses to a pandemic disaster. The COVID-19 pandemic illustrated that pandemic disasters and their impacts are different from other disasters in terms of geographic scope, duration, and appropriate response methods. The current disaster response framework under the Texas Disaster Act is effective for responding to hurricanes, fires, and tornadoes but is inadequate to address an unprecedented pandemic.

The bill would establish executive emergency powers during a pandemic disaster and provide for state governance to ensure that basic constitutional liberties, including religious freedom and Second Amendment rights, were protected and the economy was safeguarded during future pandemic emergencies. The bill would eliminate confusion about state and local government roles and ensure a more unified statewide response under the governor's authority, rather than a patchwork of different local actions, while also providing an appropriate check on that authority through legislative oversight.

Businesses also would be protected from unjustified property tax increases and certain civil liabilities under pandemic conditions.

Critics said

HB 3 would undermine local control by depriving local governments and officials of the ability to respond effectively to pandemic conditions with actions tailored to their own communities and would instead require them to serve as pandemic emergency managers under state executive direction. Actions at the state level would not necessarily be informed by and about the on-the-ground challenges of specific communities.

The bill's provisions limiting tax revenue for local governments that closed private businesses could be interpreted too broadly and penalize a city or county that closed a single business for a single day in response to pandemic conditions by freezing the tax rate for an entire year.

The bill could negatively impact local revenue based on good-faith efforts of local officials to help their communities combat a pandemic disaster.

Other critics said

HB 3 could unconstitutionally compromise the separation of powers by granting too much authority to the governor and would not provide sufficient limits on executive emergency powers. It would not do enough to ensure that individual rights and personal liberties were protected from government overreach during future pandemics. The bill's civil liability protections also would not go far enough and could result in businesses choosing to close down rather than stay open during a pandemic.

Notes

The HRO analysis of HB 3 appeared in Part One of the May 10 *Daily Floor Report*.

Providing for expansion of broadband service in the state

HB 5 by Ashby
Effective June 15, 2021

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HB 5 establishes the Broadband Development Office and tasks it with preparing a state broadband plan, creating a map of areas with limited access to service, and awarding financial incentives to expand service in eligible areas.

Threshold speed. Under the bill, "broadband service" means internet service with the capability of providing a download speed of at least 25 megabits per second and an upload speed of at least three megabits per second. If the FCC adopts different speeds for advanced telecommunications capability, the comptroller may require internet service to be capable of providing speeds that match that federal threshold to qualify as broadband service.

Broadband Development Office. The Broadband Development Office is established within the comptroller's office to:

- serve as a resource for information on broadband service and digital connectivity in the state;
- engage in outreach to communities on the expansion, adoption, affordability, and use of broadband service and the office's programs; and
- serve as an information clearinghouse on federal broadband assistance programs and addressing barriers to digital connectivity.

The bill also establishes a 10-member board of advisors to provide guidance on the office's programs and on the expansion, adoption, affordability, and use of broadband service.

State broadband plan. The Broadband Development Office must publish on the comptroller's website a state broadband plan with long-term goals for greater access to and adoption, affordability, and use of broadband service in Texas. In developing the plan, the office must take certain actions, including favoring policies that are technology-neutral and examining service needs for public safety, public education, public health, and related agencies.

Broadband development map. HB 5 requires the Broadband Development Office to create and annually update a map classifying each designated area in the state as either an eligible or ineligible area. An area is eligible if fewer than 80 percent of the addresses have access to broadband service and the federal government has not awarded funding to support deployment in the area.

The office does not have to create a map if the Federal Communications Commission (FCC) produces a map that enables the office to identify eligible and ineligible areas and meets the bill's requirements.

Map information. The office must use FCC information and methodology to create and update its map. If information from the FCC is not available or is insufficient, the office may request necessary information from a political subdivision or broadband service provider.

Contracting. The office may contract with a private consultant or other person who is not associated with a commercial broadband provider, including a local government entity, to provide assistance for creating or updating the map.

Reclassification of designated areas. The office must establish criteria for determining whether an area should be reclassified as eligible or ineligible. An area that is classified as ineligible due to the existence of federal funding may be reclassified as eligible if funding is forfeited or the recipient is disqualified and the area otherwise meets the qualifications of an eligible area.

A broadband service provider or political subdivision may petition to reclassify an area. The office must provide notice of a petition to each provider in the area and post notice on the comptroller's website. Within 45 days of receiving the notice, a provider must provide

information to the office showing whether the area should be reclassified. Within 75 days, the office must determine whether to reclassify the area and update the map.

Broadband development program. The Broadband Development Office must establish a program to award grants, low-interest loans, and other financial incentives to applicants to expand access to and adoption of broadband service in eligible areas.

It must establish and publish criteria for making awards, and it must prioritize applications in areas with the lowest percentage of access to broadband service and applications that will expand access in schools and institutions of higher education.

In making awards, the office may not favor a particular broadband technology or consider distributions from the state universal service fund. The office may not award incentives to a provider that does not report requested information or to a noncommercial provider if a commercial provider submitted an application for the area.

Certain information from each application must be available on the comptroller's website for at least 30 days before the office decides on the application. During those 30 days, the office must accept from any interested party a written protest of the application.

The office also must establish and publish criteria for award recipients, including requirements that awards be used only for capital expenses, purchase or lease of property, and other expenses that facilitate the provision or adoption of broadband service.

Broadband Development Account. The bill establishes the Broadband Development Account in the general revenue fund. The account consists of legislative appropriations, gifts and grants, and interest earned on any invested money. The comptroller must deposit to the account federal money received by the state for broadband development.

Money in the account may be appropriated only to the Broadband Development Office for the purposes of creating or updating the eligibility map, administering the broadband development program, creating or updating the state broadband plan, or engaging in community outreach.

Participation in FCC proceedings. The Broadband Development Office may provide input into FCC proceedings on the geographic availability and deployment of broadband service in the state to ensure that the information available to the FCC reflects the current status of service and the state is best positioned to benefit from federal broadband service deployment programs.

The office may participate in a federal process allowing governmental entities to challenge the accuracy of the FCC's information on the geographic availability and deployment of broadband service. The office must establish procedures and a data collection process in accordance with FCC rules to enable the office to participate.

Governor's Broadband Development Council. HB 5 expands the Governor's Broadband Development Council to include one nonvoting member appointed by the Broadband Development Office and certain voting members appointed by the governor. The council no longer includes a member of the House or Senate appointed by the speaker or lieutenant governor, respectively. The bill also revises how the governor makes certain appointments to the council and expands the duties and required study topics of the council.

Supporters said

HB 5 would help expand broadband service across Texas in a way that was technologically neutral and holistic. A large gap between those who have broadband access and those who do not currently creates economic and social disparities for unserved areas. One recent report estimated that nearly 900,000 Texans, mostly from rural areas, were unserved. The COVID-19 pandemic has exacerbated the issue as public education, health care, and criminal justice services have moved online.

HB 5 would help bridge the gap by creating the Broadband Development Office, which would be tasked with implementing a state broadband plan and directing loans, grants, or other funds to certain unserved areas in the state to which access to and adoption of broadband could be expanded. This would help the state draw down federal funds to allow providers to move into high-cost areas. The program would serve both rural areas affected by the lack of access to broadband infrastructure and urban areas with low adoption rates.

Broadband Development Office. The bill would create an office to oversee the expansion of broadband, which would be advised by a 10-member board representing economic development, education, and urban and rural areas. The office would best be placed within the comptroller's office because it would be tasked with awarding funds to unserved areas. The financial

expertise, statewide presence, stakeholder relationships, and transparency of the comptroller's office make it the most appropriate location for the Broadband Development Office.

State broadband plan. Texas is currently one of just six states that do not have a statewide broadband plan, making the state less competitive in receiving federal funds. By requiring the creation of a plan, the bill would establish goals to guide the development of broadband infrastructure and ensure no federal funds were left on the table.

Various ways to deliver broadband, such as through cable internet, fiber, or wireless services, may be appropriate in different areas of the state. By requiring the office to favor technology-neutral policies, the bill would create a level playing field and include new innovations in technology, including satellite internet services. The plan also would be holistic, as the office would have to collaborate with regional stakeholders and examine specific needs for public education, health, and criminal justice.

Broadband development program. The bill would establish a broadband expansion program, under which certain areas with less than 80 percent of broadband service that had not already received federal funding could be eligible for funds. This would help to build broadband infrastructure, addressing one of the biggest challenges to access. The office would have to prioritize areas with the least service and provide a challenge process for award applications, ensuring dollars were not needlessly spent.

When awarding funds, the office could not favor a particular technology or award a noncommercial provider if a commercial provider had applied in the area. These provisions would create a fair environment for awarding loans or grants that would encourage the expansion and adoption of services in a manner that did not interfere with private competition.

The bill should not be amended to allow, rather than require, broadband providers to respond to a protest to reclassify an area as eligible or ineligible under the broadband expansion program. The requirement would ensure compliance so that funds were spent only where needed.

Broadband development map. The office would have to develop a map to identify where funds to build broadband infrastructure should be sent. This would allow Texas to focus on even more granular data than that offered on a federal level. The bill would combine the preferred Federal Communications Commission (FCC) methodology on gathering data with the state's internal knowledge of its communities to best serve areas of need.

The map should not be expanded to include adoption rates, as it is important to keep uniformity with federal methodology so that the statewide map works correctly and interacts well with federal law. The office, in both the statewide plan and the broadband development program, would factor in the adoption rates and affordability of broadband in the state. Concerns that the bill would create a state map that did not use FCC data and methodologies are unfounded, as the bill clearly states that the office would have to use federal data and methodologies to create the map.

Threshold speed. The bill would adopt as the threshold speed for broadband service a download speed of at least 25 megabits per second and an upload speed of at least three megabits per second to conform with FCC speeds. It is important to maintain uniformity so that state maps and federal maps align and federal funds can be disbursed properly in the state. If the FCC did increase speed requirements, the bill would include a mechanism by which the comptroller could increase the minimum speed for broadband services.

Governor's Broadband Development Council. The bill makes some changes to the council to include representation from the Broadband Development Office to prevent a duplication of efforts and broaden the representation of other groups.

Critics said

HB 5 should be amended to expand broadband in the state while ensuring appropriate oversight, protecting fair competition, and making the best use of federal funds.

Broadband development map. The bill should include adoption rates of broadband services as part of the eligibility map, rather than only including access rates, to include more communities in the state program. This would ensure that the program served communities that did not lack access to broadband because of a lack of infrastructure but because of a lack of adoption due to high cost or low digital literacy.

In addition, the Broadband Development Office should strictly adhere to the FCC map of unserved areas to ensure the data were well vetted. If the state map diverged from the federal map, it could create customer confusion,

imply a different definition of "unserved areas," and jeopardize federal funding.

Broadband development program. The bill wrongly would require each broadband provider in an area to respond to a protest to reclassify an area as an eligible or ineligible area under the broadband expansion program. This provision should be permissive so as not to burden providers.

Threshold speed. The bill should increase the minimum speeds for broadband service, as the current FCC standards may be inadequate for certain services such as remote learning and telehealth programs, especially if multiple users are connected. A 100 megabits-per second download speed and 10 megabits-per-second upload speed would be a better threshold.

Governor's Broadband Development Council. The bill should further expand the Broadband Development Council to ensure that it includes representation from all relevant groups and organizations to be resources on unique broadband issues.

Other critics said

HB 5 inappropriately would grow the size of government and create costs for taxpayers. Companies should bear the cost of developing broadband infrastructure if there is market demand in rural areas. Furthermore, technological innovations in broadband services may soon be made that could make any infrastructure developed under this program outdated.

Notes

The HRO analysis of HB 5 appeared in the April 8 *Daily Floor Report*.

The 87th Legislature also enacted other bills related to expanding access to broadband service.

HB 1505 by Paddie establishes a framework for the affixture of a pole attachment by a broadband provider to a pole owned and controlled by an electric cooperative, including an application process and contracts, procedures related to make-ready activities and attachment specifications, and cost sharing of pole modifications and replacements. The HRO analysis of HB 1505 appeared in Part Two of the May 3 *Daily Floor Report*.

HB 3853 by Anderson allows electric utilities to provide middle mile broadband systems on their electric delivery systems and lease excess fiber capacity to internet service providers. The HRO analysis of HB 3853 appeared in Part One of the April 26 *Daily Floor Report*.

SB 507 by Nichols requires the Texas Transportation Commission to establish an accommodation process authorizing broadband-only providers to use state highway rights-of-way for the installation, adjustment, and maintenance of broadband facilities. The HRO analysis of SB 507 appeared in Part Three of the May 25 *Daily Floor Report*.

SB 632 by Buckingham authorizes the Lower Colorado River Authority to provide fiber capacity to facilitate broadband service connectivity. The HRO analysis of HB 1715 by Buckley, the House companion bill, appeared in the April 8 *Daily Floor Report*.

Prohibiting government disaster orders from closing places of worship

HB 1239 by Sanford
Effective June 16, 2021

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HB 1239 prohibits a government agency or public official from issuing an order that closes or has the effect of closing places of worship in Texas or in a geographic area of the state. The bill defines a "place of worship" as a building or grounds where religious activities are conducted. A "public official" means any elected or appointed officer, employee, or agent of the state or any political subdivision, board, commission, bureau, or other public body established by law.

The bill specifies that the religious freedom statute under Civil Practice and Remedies Code ch. 110 is not considered a regulatory statute for purposes of a state of disaster declared under Government Code ch. 418 and may not be suspended.

A person whose free exercise of religion has been substantially burdened in violation of the bill may assert that violation as a defense in a judicial or administrative proceeding without regard to whether the proceeding is brought in the name of the state or by any other person.

Supporters said

HB 1239 would ensure that houses of worship, which provide essential spiritual, mental, and physical support to Texans, remain open when they are most needed. The bill would prevent public officials from using a disaster declaration to close a church, as happened in 2020 during the COVID-19 pandemic.

The unprecedented closure of churches, mosques, and synagogues during the pandemic negatively impacted many who were struggling with isolation and stress. Closing places where Texans gather to worship not only affected critical ministries and services but violated the religious freedoms guaranteed by state laws and the Constitution. At a time when businesses, including liquor stores, were deemed essential and allowed to remain open, churches were closed and some were even subjected to police patrols. While many churches offered online worship services, others were not able to use technology to reach their congregations.

Allowing places where the faithful can find community and solace is critical during disasters. Church services should not be treated the same as secular gatherings. While some say that public officials should retain the ability to include houses of worship in disaster-related orders to protect the common good, churches themselves can be trusted to make reasonable and appropriate decisions about whether to be open or closed. Calls to limit the bill to places that meet the Tax Code definition of a religious organization could improperly limit certain events, such as home-based Bible studies.

Critics said

HB 1239 could put all Texans at risk by allowing places of worship to remain open during a pandemic. The bill would restrict the ability of the governor and state and local officials to issue emergency orders that limit in-person religious services, even if the orders were treating religious services the same as all other gatherings. This would apply during any disaster, including hurricanes, floods, and fires.

Public officials who issued orders that closed churches early in the pandemic did so to prevent the spread of a highly communicable disease, not to prohibit religious expression. The bill could tie the hands of public officials from enforcing health and safety codes in future disasters.

The bill defines places of worship too broadly, opening up the possibility that the bill's provisions could be abused. It should instead be limited to apply only to qualified religious organizations as defined in the Tax Code.

Notes

The HRO analysis of HB 1239 appeared in the April 8 *Daily Floor Report*.

The 87th Legislature also approved **SJR 27** by Hancock, a proposed constitutional amendment to prohibit Texas or a political subdivision from prohibiting or limiting religious services of religious organizations. The ballot proposition was submitted to voters at the November 2, 2021, election. The HRO analysis of HJR 72 by Leach, the House companion joint resolution for SJR 27, appeared in Part One of the May 10 *Daily Floor Report*.

Prohibiting camping in a public place

HB 1925 by Capriglione
Effective September 1, 2021

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HB 1925 makes it a criminal offense for a person to camp intentionally or knowingly in a public place and forbids a local entity from prohibiting or discouraging the enforcement of any public camping ban. The bill establishes a procedure for a political subdivision to designate certain property for camping by homeless individuals.

Criminal conduct. The bill makes it a class C misdemeanor (maximum fine of $500) for a person to camp in a public place without the consent of the officer or agency with legal duty or authority to manage the place. The actor's intent or knowledge may be established through evidence of activities associated with sustaining a living accommodation, including cooking, making a fire, storing personal belongings for an extended period, digging, or sleeping.

A peace officer, except when there is an imminent threat to public health or safety, must advise the person being issued the citation of an alternative place at which the person may lawfully camp and contact an appropriate official of the political subdivision or an appropriate nonprofit organization to provide the person with certain information about preventing human trafficking and other services that would reduce the likelihood of the person continuing to camp in the public place.

An officer who arrests or detains a person solely for prohibited camping must ensure that all of the person's personal property not designated as contraband under other law is preserved by permitting the person to remove all the property from the public place or taking custody of the property and allowing the person to retrieve it as the person is released from custody. A fee may not be charged for the storage or release of the person's property.

Consent to camp. Consent to camp given by an officer or agency of a political subdivision is not effective, unless it is for recreational purposes, an approved beach access plan, emergency shelter during a declared disaster, or sheltering homeless individuals if the shelter meets certain conditions and is approved by the Texas Department of Housing and Community Affairs. The department may not approve a plan on property that is a public park.

Enforcement. HB 1925 prohibits a local entity, defined as a city or county's governing body or an officer or employee of certain city or county departments or district attorneys, from adopting or enforcing a policy that prohibits or discourages the enforcement of any public camping ban. A local entity may not prohibit or discourage a peace officer or prosecuting attorney who is employed or under the direction of the entity from enforcing a public camping ban.

The attorney general may bring an action in a district court in Travis County or another applicable county to enjoin a violation of the bill's policy on camping bans and may recover reasonable expenses incurred in obtaining relief. A local entity may not receive state grant funds for the state fiscal year following the year in which a final judicial determination is made in an action brought by the attorney general that the entity intentionally violated the bill's policy on camping bans.

Supporters said

HB 1925 would address the growing problem of homeless campsites being located along public rights-of-way, under highways, and in public parks and greenbelts, where the camps present a safety and health hazard to those living there and to the surrounding community. The bill would make camping on public land without permission from the appropriate state agency a class C misdemeanor as a necessary limitation on local jurisdictions that have refused to ensure the safety of their residents. The proliferation of these tent sites has been especially detrimental in downtown areas, where they often are accompanied by an increase in crime, open drug use, and health and sanitation hazards.

While some say a ban on public camping would do nothing more than force people experiencing homelessness into less visible areas, the bill could spur local governments

to designate property for camping by homeless individuals that would offer services to help people connect with shelters and other resources and integrate back into society. The bill appropriately would require that individuals who receive a citation be given information on services that can help reduce the likelihood that the person may illegally camp in the future and would guarantee that a person arrested or detained had an opportunity to remove property or have the property maintained until the person was able to retrieve it.

Critics said

HB 1925 would criminalize homelessness by perpetuating a cycle in which people are given tickets and possibly arrested for camping in a public place. Individuals could be assessed fines that they cannot afford to pay and accumulate criminal records that make it more difficult for them to get housing and employment.

The bill would preempt the decisions of local elected officials who are tackling the complex issue of helping individuals experiencing homelessness find transitional housing and other services, including mental health services. Instead of giving cities more time to address the issue, the bill would force people experiencing homelessness back into remote areas where it is more difficult to connect them with services. It also could create an unfunded mandate on cities or counties to store the belongings of individuals arrested or detained for camping.

Notes

The HRO analysis of HB 1925 appeared in Part One of the May 5 *Daily Floor Report*.

Revising procedures for eminent domain

HB 2730 by Deshotel
Effective January 1, 2022

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HB 2730 revises parts of the eminent domain process, including requirements for an initial offer, terms of conveyance, the landowner's bill of rights, and the appointment of special commissioners. It also establishes education requirements for easement or right-of-way agents.

Initial offer. The bill expands what is required for an initial offer made by an entity with eminent domain authority to be considered a bona fide offer. The initial offer must include:

- a copy of the landowner's bill of rights;
- a statement indicating whether the compensation being offered includes damages to the remainder of the property or an appraisal of the property prepared by a certified appraiser;
- an instrument of conveyance that complies with requirements, including those listed below, with certain exceptions; and
- the name and telephone number of a representative of the entity.

Terms of conveyance. The bill requires a deed, agreement, or other instrument of conveyance provided to a property owner by a private entity with eminent domain authority to address certain general terms, as applicable.

Applicability. A "private entity" means a for-profit entity authorized to exercise eminent domain or a certain water supply or sewer service corporation.

These provisions apply only to a deed, agreement, or other instrument of conveyance for a pipeline right-of-way easement or an electric transmission line right-of-way easement that was included with an offer made to acquire a property interest for public use.

Required terms. Under the bill, certain terms must be addressed by an instrument of conveyance. This includes certain required terms for an instrument that conveys a pipeline right-of-way easement or an easement related to pipeline appurtenances and certain required terms for an instrument that conveys an electric transmission line right-of-way easement.

Any instrument of conveyance also must address:

- a prohibition on any use by the private entity of the property rights being conveyed, other than a use stated in the instrument, without the consent of the property owner; and
- a provision that the terms bind the successors and assigns of the property owner and private entity.

Negotiated terms. A private entity must notify the property owner that the owner may negotiate for certain general terms to be included in the instrument of conveyance. A private entity or the property owner could, after the entity provides an instrument, negotiate for and agree to other terms and conditions not listed in the bill and negotiate for and agree to an instrument that does not include the terms required by the bill.

Amended terms. Except as provided, the bill does not prohibit the required terms from being negotiated, amended, or omitted after the private entity first provides an instrument containing the required general terms. A private entity that changes the terms must provide a copy of the amended instrument to the property owner at least seven days before filing a condemnation petition unless the parties agreed to waive the notice.

A private entity that changes or amends an instrument still is considered to have satisfied the requirements of a bona fide offer if the entity satisfied the requirements as part of the initial offer.

Condemnation petition. The bill requires an entity filing a condemnation petition to provide a copy concurrently by first class mail and certified mail, and if the entity received notice that the property owner was represented by counsel, provide a copy to the property owner's attorney by first class mail, commercial delivery service, fax, or email.

Special commissioners. The bill requires the judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned to appoint special commissioners no later than 30 calendar days after the petition is filed. The judge also must appoint two alternate special commissioners. The bill specifies a process and timeline for each party to strike special commissioners and for such special commissioners to be replaced by alternates if struck.

Landowner's bill of rights. The bill requires the landowner's bill of rights to notify property owners that they have the right to file a written complaint with the Texas Real Estate Commission regarding alleged misconduct by a registered easement or right-of-way agent acting on behalf of the entity exercising eminent domain authority. The landowner's bill of rights statement also must include the terms required for an instrument of conveyance and the terms a property owner may negotiate.

At least once every two years, the attorney general must evaluate and make any changes to the landowner's bill of rights statement to comply with the requirements in statute. Before making any changes, the Office of the Attorney General must publish the proposed changes and accept public comment for a reasonable period.

Easement or right-of-way agents. HB 2730 requires a person to complete a course of study to be eligible for a certificate to sell, buy, lease, or transfer an easement or right-of-way for another. An applicant must complete at least 16 classroom hours of approved coursework in the law of eminent domain, appropriate standards of professionalism, and ethical considerations in the performance of right-of-way services.

The Texas Real Estate Commission may suspend or revoke a certificate if the certificate holder accepts a financial incentive to make an initial offer that the certificate holder knew or should have known was lower than the adequate compensation required under the Texas Constitution.

Supporters said

HB 2730 would create meaningful eminent domain reform that protected property owners' rights while still allowing for the construction of critical infrastructure in the state.

The bill would increase transparency by requiring an initial offer letter made by a condemning entity to a property owner to include an appraisal of the property, including damages to the remainder of the property not being condemned, or a statement on whether the financial compensation offered included damages to the remainder, if any. The letter would have to include the landowner's bill of rights, which would be expanded by the bill so that property owners knew they could file a complaint with the Texas Real Estate Commission. The letter also would make it clear which terms could be negotiated in the instrument of conveyance.

To ensure the process was fair and accountable for property owners, the bill would require instruments of conveyance to include certain minimum easement terms. This is the instrument that property owners are provided at the beginning of the process so that they know what they could reasonably ask for or expect in the process. After providing the minimum terms upfront, the parties could negotiate and amend the provisions. This encourages discussion and agreement among the parties instead of litigation. By providing more information among the parties as to the terms of initial negotiation, the bill would save property owners money on legal fees and encourage building infrastructure for public use.

HB 2730 would provide clarity in the process of appointing special commissioners by establishing specific deadlines for appointment. Current law does not specify the timing of this process, which can lead to significant delays. The bill also provides for alternate special commissioners to fill in for any commissioners struck by a party, making the process more efficient and better for all parties.

The bill also would require easement or right-of-way agents to take certain approved coursework to ensure they had the knowledge and ethical foundations necessary for the job.

While some may believe the condemnation petition should have to include minimal easement terms, this would eliminate the incentive for property owners and the condemning entity to settle before the petition, resulting in costly and time-consuming litigation. This bill would strike the balance between expanding landowners' rights in the eminent domain process and promoting critical infrastructure to meet the growing demands of the state.

Critics said

HB 2730 would not go far enough to provide property owners with transparency, accountability, and

fairness in the eminent domain process. The bill should require the document of conveyance filed with the court in a condemnation petition to contain minimal easement terms. This would prevent condemners from pressuring a property owner to accept a bad deal. The bill also should require a condemning entity to hold an open public meeting after notifying landowners in the area. This would allow the community to hear the details of the projects, which could affect both the owner's land and the county's roads, in a transparent manner and help the community exchange information.

Other critics said

HB 2730 would place condemning entities in a disadvantageous position, leaving them open to burdensome litigation that would slow down the completion of vital critical infrastructure projects.

Notes

The HRO analysis of HB 2730 appeared in Part One of the May 12 *Daily Floor Report*.

Financing Winter Storm Uri debts and other costs

HB 4492 by Paddie, SB 1580 by Hancock
HB 4492 effective June 16, 2021, SB 1580 effective June 18, 2021

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The 87th Legislature considered several proposals financing debts and other costs incurred during the response to Winter Storm Uri in February 2021, including proposals to authorize the ERCOT organization and electric cooperatives to use securitization financing.

HB 4492 authorizes the ERCOT organization to finance the Winter Storm Uri default balance and uplift balance with debt obligations.

The Public Utility Commission (PUC) must require that all market participants fully and promptly pay to ERCOT all amounts owed, or provide for those amounts owed, which must be calculated according to the protocols in effect during the period of emergency, to qualify as a market participant in the ERCOT power region. ERCOT must report to PUC that a market participant is in default for failure to pay, or provide for the full and prompt payment of, all amounts owed to ERCOT.

Default balance financing. HB 4492 enables the ERCOT organization to finance the payment of the Winter Storm Uri default balance with debt obligations and authorizes PUC to contract with the comptroller to finance the obligations.

The comptroller must invest up to $800 million of the Economic Stabilization Fund to finance the default balance to be repaid by ERCOT market participants through default charges established by PUC.

"Default balance" includes only:

- amounts owed to ERCOT by competitive wholesale market participants from the period of emergency (between February 12, 2021, and February 20, 2021) that otherwise would be or have been uplifted to other wholesale participants;
- financial revenue auction receipts used by ERCOT to temporarily reduce amounts short-paid to wholesale market participants related to the period of emergency; and
- reasonable costs incurred to implement a debt obligation order.

PUC may authorize ERCOT to establish a debt financing mechanism to finance the default balance if PUC finds that the obligations are needed to preserve the integrity of the wholesale market and the public interest, after considering:

- the need to timely replenish financial revenue auction receipts;
- the interests of wholesale market participants that are owed balances; and
- the potential effects of uplifting those balances to the wholesale market without a financing vehicle.

PUC must ensure that the structure and price of debt obligations result in the lowest financing costs consistent with market conditions and the terms of the commission's order. The debt obligation order must state the default balance to be financed and the period over which the default charges must be assessed to repay the obligation, which may not exceed 30 years.

The order must include terms ensuring that the imposition and collection of default charges are nonbypassable by wholesale market participants and authorize ERCOT to establish fees or other methods to pursue amounts owed. The order also must include a true-up mechanism requiring that default charges be reviewed and adjusted at least annually to correct over- or under-collections and ensure the expected recovery of amounts sufficient to timely provide all payments of debt service.

These debt obligations, including any bonds, are not a debt or obligation of the state and are not a charge on its full faith and credit or taxing power. The state pledges, however, for the benefit and protection of financing parties and ERCOT that it will not take or permit any action that would impair the value of default property, or reduce, alter, or impair the default charges, until the principal,

interest and premium, and other charges and contracts have been paid and performed in full.

Uplift financing. HB 4492 enables the ERCOT organization to finance the Winter Storm Uri uplift balance on behalf of wholesale market participants through debt obligations and authorizes PUC to contract with another state agency to finance the obligations or use another financial mechanism.

"Uplift balance" means an amount of up to $2.1 billion that was uplifted to load-serving entities on a load ratio share basis due to energy consumption during the period of emergency for reliability deployment price adder charges and ancillary services costs in excess of PUC's system-wide offer cap. A "load-serving entity" includes a municipally owned utility, electric cooperative, or retail electric provider.

ERCOT must file an application with PUC to establish a debt financing mechanism for the payment of the uplift balance if PUC finds that such financing will support the financial integrity of the wholesale market and is necessary to protect the public interest, considering the impacts on both wholesale market participants and retail customers.

A debt obligation order must state the uplift balance to be financed, state the period over which the uplift charges must be assessed to repay the debt obligations, which may not exceed 30 years, and provide the process for remitting the proceeds of the financing to load-serving entities.

An order must include terms ensuring that the imposition and collection of uplift charges are nonbypassable and authorize ERCOT to establish appropriate fees and other methods for pursuing amounts owed from entities exiting the wholesale market. The order also must include a true-up mechanism requiring that uplift charges be reviewed and adjusted at least annually to correct over- or under-collections and ensure the expected recovery of amounts sufficient to timely provide all payments of debt service.

The proceeds of these debt obligations must be used solely to finance those charges and costs that were uplifted to load-serving entities based on consumption during the period of emergency. A load-serving entity that receives proceeds from the obligations may use the proceeds solely to fulfill payment obligations directly related to such costs and refunding costs to retail customers.

ERCOT must assess uplift charges to all load-serving entities on a load ratio share basis, including entities who enter the market after an order has been issued but excluding entities that opt out. PUC must ensure that the structure and price of the debt obligations results in the lowest uplift charges consistent with market conditions and the terms of the order.

All load-serving entities that receive offsets to specific uplift charges from ERCOT must adjust customer invoices to reflect the offsets for any charges that were or otherwise would be passed through to customers, including by providing a refund for any offset charges that were previously paid.

PUC may use certain enforcement mechanisms established in state law, including revocation of certification, against any entity that fails to remit excess receipts from the uplift balance financing or otherwise misappropriates or misuses amounts received.

These debt obligations are not a debt or obligation of the state and are not a charge on its full faith and credit or taxing power. The state pledges, however, for the benefit and protection of financing parties and ERCOT that it will not take or permit any action that would impair the value of uplift property, or reduce, alter, or impair the uplift charges to be imposed until the principal, interest and premium, and other charges and contracts have been paid and performed in full.

SB 1580 enables electric cooperatives to use securitization financing to recover extraordinary costs and expenses incurred due to the abnormal weather events that occurred in the state in the period of emergency beginning 12 a.m., February 12, 2021, and ending at 11:59 p.m., February 20, 2021.

"Extraordinary costs and expenses" means costs or expenses incurred by an electric cooperative:

- for electric power and energy purchased during the period of emergency in excess of what would have been paid for the same amount at the average rate during January 2021; and
- to generate and transmit electric power and energy during the period of emergency, including costs that would not have been incurred but for the abnormal weather events.

The term also includes costs imposed on an electric cooperative or power supplier that were passed on to the electric cooperative by the applicable regional transmission

organization or independent system operator, resulting from defaults by other market participants for costs relating to the period of emergency.

A cooperative that owes ERCOT amounts incurred as a result of operations during the period of emergency must use all means necessary to securitize the amount owed and fully repay the amount immediately upon receipt of the securitized amount, along with any additional amounts necessary.

PUC must require that all market participants pay or make provision for the full and prompt payment of amounts owed calculated solely according to the protocols in effect during the period of emergency to ERCOT to qualify as a market participant in the ERCOT power region.

Under the bill, securitized bonds issued by an electric cooperative, or group of electric cooperatives, have a term no longer than 30 years and are secured by or payable, primarily, from securitized property and the proceeds thereof.

The board of each electric cooperative must ensure that securitization provides tangible and quantifiable benefits to its members greater than would have been achieved absent the issuance of securitized bonds.

The board of an electric cooperative must adopt a financing order to recover the electric cooperative's qualified costs consistent with the standards under the bill. The order must detail the amount of qualified costs to be recovered and the period over which the nonbypassable securitized charges would be recovered.

The interest of an assignee or pledgee in securitized property and in the revenues and collections arising from that property is not subject to setoff, counterclaim, surcharge, recoupment, or defense by the electric cooperative or any other person or in connection with the bankruptcy of the electric cooperative or any other entity. A financing order remains in effect and unabated notwithstanding the bankruptcy of the electric cooperative, its successors, or assignees.

The order must include terms ensuring that the imposition and collection of securitized charges are nonbypassable and apply to all customers connected to the electric cooperative's system assets and taking service, regardless of whether the system assets continue to be owned by the electric cooperative.

The electric cooperative, its servicer, any entity providing electric transmission or distribution services, and any retail electric provider in the electric cooperative's certificated service area is entitled to collect and must remit the securitized charges from the retail customers and from retail customers that switched to new on-site generation. Such retail customers would be required to pay the securitized charges.

A financing order must to be reviewed and adjusted promptly if after its adoption there are additional charges, reductions, or refunds of extraordinary costs and expenses to ensure that there is not an over- or under-collection of extraordinary costs and expenses and ensure that collections on the securitized property are sufficient to timely make all periodic and final payments and fund all reserve accounts related to the bonds.

A financing order also must include a mechanism requiring that securitized charges be reviewed by the board and adjusted annually to correct over- or under-collections and ensure the expected recovery of amounts sufficient to provide for the timely payment of debt service.

Securitized bonds are not a debt or obligation of the state or a charge on its full faith and credit or taxing power. The state pledges, however, that it will not take or permit, or permit any agency or other governmental authority or political subdivision to take or permit, any action that would impair the value of securitized property or reduce, alter, or impair the securitized charges to be imposed, collected, and remitted to financing parties, until the principal, interest and premium, and any other charges and contracts have been paid and performed in full.

No default or uplift charge or repayment may be allocated to or collected from a market participant that otherwise would be subject to an uplift charge solely as a result of acting as a central counterparty clearinghouse in wholesale market transactions in the ERCOT region and is regulated as a derivatives clearing organization.

Supporters said

HB 4492 would minimize the impact of Winter Storm Uri on the state's wholesale electric market by allowing ERCOT to use securitization financing to fund substantial balances that otherwise would be uplifted to the wholesale market as a result of market participants defaulting on amounts owed after the storm. Securitization is a tried and true method that has been used previously in Texas for electricity utilities.

One of ERCOT's functions is to receive and issue payments to market participants. Currently, if a short-paid invoice remains in the market as a result of a market participant's inability to pay, there is an uplift mechanism that distributes the short-paid amount to all market participants to pay off those debts. The uplift is limited to $2.5 million per month.

Many wholesale market participants incurred extraordinary costs in attempting to restore service during the winter storm, and the current short-pay amount would not allow ERCOT to uplift the costs to the market in a reasonable amount of time due to the limitation on monthly uplift.

HB 4492 would not change the payment structure of how such payments would be made among market participants but simply authorize securitization to recover these extraordinary costs, which is the best solution for market participants, as it would provide rate relief by extending the time frame over which the extraordinary costs had to be recovered and lowering associated carrying costs. The securitization mechanism also would allow wholesale market participants who were owed money to be paid in a more timely manner.

SB 1580 would minimize the impact to electric cooperatives and their customers of the high costs associated with Winter Storm Uri by allowing electric cooperatives to cover extraordinary costs and expenses that resulted from the storm through securitization, a low-cost financial tool that allows for low interest rates on bonds and provides greater quantifiable benefits to ratepayers than conventional financing methods.

Electric cooperatives are consumer-owned, non-profit structures, and the cost of service from cooperatives is borne entirely by their ratepayers. The winter storm caused electric generation assets to trip off-line, resulting in extended power outages that affected millions of Texans. Many electric cooperatives incurred extraordinary costs and expenses to continue providing and attempting to restore service to customers. These extraordinary costs will be built into rates and directly passed on to ratepayers. Securitization of these costs would enable electric cooperatives to manage the impact of the storm in a least-cost fashion, without any cost to the state.

Securitization is a tried and true method that has been used previously in Texas for electricity utilities. This method allows entities to use the creditworthiness of the state to lower interest rates, ensuring ratepayers would not be impacted by additional fees. The long-term debt instrument spreads costs over many years rather than being built into customer bills all at once, minimizing the near-term impact on ratepayers. In addition, the bill would allow electric cooperatives to aggregate to get a better rate on the securitized costs.

Absent this mechanism, it is unlikely many cooperatives would be able to finance the costs of the storm, and their customers would have serious challenges bearing the costs if they were simply passed on in full. This is the best option for cooperatives to continue taking care of their own costs. The bill would not require any cooperative to use this financing method but simply would give them the option. SB 1580 would ensure that the impacts of February's storm did not have lasting ramifications on the state's electric cooperatives.

Critics said

HB 4492 effectively would amount to a bailout plan by using securitization to reallocate debts incurred by certain entities to the entire wholesale market, like a back door repricing of the market. The bill could make customers of entities that were hedged properly pay the debts of entities that short-paid in the market. Affecting market principles should be done only to prevent a complete market collapse, such as the bankruptcy of a majority of retail electric providers. Absent evidence of a total collapse, the market should be left to sort itself out, rather than taking the approach of the bill, which could lead to unintended consequences.

SB 1580 is unlikely to resolve the financial challenges faced by electric cooperatives as a result of the winter storm. In legally structured pools of electric cooperatives, the bond credit rating is set by the least creditworthy obligated entity. This would mean the bonds likely would have higher interest rates that might not significantly reduce the costs for the revenue shortfall, which could result in large monthly costs on customer bills. Further, securitization normally is used in a regulated environment, and electric cooperatives do not have the oversight to assure the necessary irrevocable, non-bypassable charge on ratepayer bills.

Other critics said

HB 4492 should require that efforts first be made to recover default costs from applicable entities or for the ERCOT organization to resettle prices prior to

securitization to ensure that the amount securitized was not greater than it should have been. The bill would not go far enough to address all costs facing wholesale market participants as a result of the winter storm.

HB 4492 should provide direct credits to ratepayers to protect Texans from increased electricity bills to finance the winter storm costs and debts.

Notes

The HRO analysis of HB 4492 appeared in Part One of the April 26 *Daily Floor Report*, while the analysis of SB 1580 appeared in Part One of the May 24 *Daily Floor Report*.

The 87th Legislature also enacted other measures related to financing costs of certain utilities incurred by Winter Storm Uri or similar events.

HB 1510 by Metcalf, effective June 1, 2021, allows an electric utility operating solely outside the ERCOT power region to obtain timely recovery of system restoration costs through securitization and the issuance of transition bonds or system restoration bonds by an issuer other than the electric utility or an affiliated special purpose entity. The HRO analysis of HB 1510 appeared in Part One of the April 19 *Daily Floor Report*.

HB 1520 by Paddie, effective June 16, 2021, provides securitization financing for gas utilities to recover extraordinary costs related to securing gas supply and providing service during natural and man-made disasters, system failures, or other catastrophic events and restoring systems after those types of events. The HRO analysis of HB 1520 appeared in Part One of the April 19 *Daily Floor Report*.

Revising governance of the ERCOT organization and PUC

SB 2 by Hancock, SB 2154 by Schwertner
SB 2 effective June 8, 2021, SB 2154 effective June 18, 2021

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SB 2 reduces the membership of and sets residency requirements for the governing body of the independent organization certified by the Public Utility Commission (PUC) to perform certain functions related to the electric grid and electricity market in the ERCOT power region (ERCOT organization). The bill also revises the selection process for members of the ERCOT organization's governing body by establishing the ERCOT board selection committee.

The bill requires every member of the ERCOT organization's governing body to be a Texas resident, including the ERCOT organization's CEO, the presiding officer of the PUC, and the public utility counsel. The bill also changes the ERCOT organization's CEO status from a voting member to a nonvoting member of the body.

SB 2 reduces the ERCOT organization's governing body from 16 to 11 members by removing from the board six representatives of market participants, one representative of industrial consumer interests, one representative of large commercial consumer interests, and five members unaffiliated with any market segment. These members are replaced with eight members with executive-level experience in certain professions, including finance, business, engineering, trading, risk management, law, or electric market design, selected by the ERCOT board selection committee under the bill. Members are entitled to receive a salary for their service on the governing body.

The bill prohibits a legislator from serving as a member of the ERCOT organization's governing body. A person does not qualify for selection as a member of the governing body if the person has a fiduciary duty or assets in the electricity market for the ERCOT power region. A former member of the governing body may not engage in registered lobbying activities for at least two years after the member ceases being a member.

The bill also establishes the ERCOT board selection committee, which is composed of three members with one each appointed by the governor, lieutenant governor, and House speaker. To be appointed as a member of the committee, a person must be a Texas resident. The committee must select eligible members to serve on the ERCOT organization's governing body and designate a chair and vice chair from those members. The selection committee must retain an outside consulting firm to help select members.

To maintain certification, the ERCOT organization's governing body must be composed of persons selected by the ERCOT board selection committee and may not include more than two members who are employed by an institution of higher education in a professional role. The ERCOT organization's governing body also must establish and implement a formal process for adopting new protocols or revisions to existing protocols. The process must require that new or revised protocols may not take effect until the PUC approves a market impact statement describing them.

Rules adopted by the ERCOT organization and enforcement actions taken by the organization under delegated authority from the PUC may not take effect before receiving PUC approval.

The ERCOT organization must comply with the bill by September 1, 2021. After that date, the PUC may decertify the ERCOT organization if it does not comply with the bill's requirements.

SB 2154 increases the membership of the PUC from three to five governor-appointed commissioners. To be eligible for appointment, a commissioner must be a Texas resident.

Under the bill, only a minimum of two commissioners must be well informed and qualified in the field of public utilities and utility regulation. The bill expands eligibility for appointment as a commissioner to include a person who has at least five years of experience as a professional engineer. The bill also amends eligibility requirements so that a person is not eligible for appointment if at any time

during the previous year, rather than the previous two years, the person was affiliated with certain public utilities.

Under the bill, a member of the Legislature or a person who served as governor, lieutenant governor, comptroller, commissioner of the General Land Office, or attorney general within one year preceding appointment is not eligible for appointment as a PUC commissioner.

The bill also prohibits a former PUC commissioner from engaging in registered lobbying activities before the PUC for at least one year after the former commissioner ceases to be a member of the commission.

Supporters said

SB 2 would take the necessary first steps to improve oversight and reform the governance of the Electric Reliability Council of Texas (ERCOT organization) in the wake of Winter Storm Uri, which left millions of Texans without power in February. Many people voiced concerns about ERCOT organization board members living out of state during the storm and not experiencing the same hardships as Texas residents, as well as about the board's perceived lack of accountability to the Legislature and to residents. Many have called for increased oversight of the selection of ERCOT governing body members and of the governing body's actions.

The bill would create a more trustworthy system by balancing expertise with the needs of consumers, who were the most harmed during and after the winter storm. The bill would increase legislative oversight of the ERCOT organization and ensure the ERCOT organization's board was more accountable to Texans by revising the selection process for ERCOT board members to require eight board members be selected by a committee appointed by elected officials, who ultimately are accountable to voters. By requiring Texas residency of all ERCOT organization board members, the bill would ensure members had a personal stake in the Texas electricity market. As the energy capital of the world, Texas has many potential candidates to choose from who possess significant expertise in the state's unique electricity market.

Currently, all protocol changes, including administrative and market protocols, are proposed by sub-groups within the ERCOT organization before being adopted by the governing body. To allow for increased PUC oversight and accountability, the bill would require all changes to ERCOT protocols to be reviewed and approved by the PUC before adoption, giving the commission veto authority over proposed changes.

SB 2154 would take the necessary steps to reform the governance of the PUC in the wake of the winter storm. Following the storm, concerns were raised about the PUC's actions, and after the resignation of all three PUC commissioners, there have been calls to reform the makeup of the PUC and the requirements for appointment as a commissioner.

The bill would address those calls by increasing the number of PUC commissioners from three to five and revising the eligibility requirements for appointment as a commissioner, including by expanding eligibility to allow professional engineers to serve as commissioners. By requiring only two commissioners to meet the current standard of being well informed and qualified in the field of public utilities, the bill would guarantee that at least three of the five members were not from the public utility industry, leaving room for finance and legal experts. This change would ensure that more viewpoints were incorporated during decision-making processes. By requiring Texas residency of all PUC commissioners, the bill would ensure members had a personal stake in Texas' public utilities.

Critics said

SB 2 would not go far enough to address the issues with the current structure of the ERCOT organization's governing body, and increasing the level of involvement of elected officials could result in the board being influenced by politics. The bill should ensure that new members selected by the ERCOT board selection committee were not selected for political reasons but for subject matter expertise and energy market qualifications. The bill also should increase the number of members representing the interests of residential customers. Currently, there only is one member who represents those interests.

The bill also could limit the participation of knowledgeable experts on the ERCOT organization's board. While it already is challenging to find individuals who meet certain qualifications, the bill could limit further the pool of potential candidates by requiring Texas residency of all members. The safety and resiliency of the ERCOT grid depends on board members who understand technical protocols, write market rules, and design systems to implement policy from the PUC and the Legislature. Some of the most qualified candidates reside out of state.

SB 2154 should revise the PUC to ensure it is more accountable to Texans by requiring some commissioners to represent consumers. This could be achieved by requiring commissioners to represent designated zones in the ERCOT power region, by requiring the lieutenant governor and House speaker to have a role in commissioner selection to instill more legislative oversight, or by requiring at least one commissioner to be elected in the same manner as other state officers. The bill also could reduce the PUC membership from three commissioners to one to ensure better accountability to the public, the governor, and the Legislature.

Other critics said

SB 2 could result in delaying needed, short-order protocol changes by the ERCOT organization by requiring the PUC to review and approve rules adopted by the organization before they could take effect.

Notes

The HRO analysis of SB 2 appeared in Part One of the May 23 *Daily Floor Report*, and the HRO analysis of SB 2154 appeared in the May 20 *Daily Floor Report*.

Preparing the electric grid for and responding to weather emergencies

SB 3 by Schwertner
Effective June 6, 2021

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SB 3 provides for the preparation for, prevention of, and response to extreme weather emergencies and extended power outages and establishes related requirements for the Public Utility Commission (PUC), the ERCOT organization, the Railroad Commission (RRC), the Texas Division of Emergency Management (TDEM), and the Texas Commission on Environmental Quality (TCEQ).

The bill provides for the mapping of the state's electricity supply chain; requires weather emergency preparedness for natural gas, electric, and water services entities; and provides for certain administrative and civil penalties. The bill establishes the Texas Energy Reliability Council and the State Energy Plan Advisory Committee and creates a power outage alert system. The bill also sets requirements for load management, provision of transmission service, and critical natural gas facilities during energy emergencies.

Supply chain mapping. SB 3 establishes Texas Electricity Supply Chain Security and Mapping Committee. The committee must meet at least quarterly and is required to:

- map the electricity supply chain to designate priority needs during extreme weather events;
- identify and designate the sources necessary to operate critical infrastructure;
- develop a communication system between critical infrastructure sources, PUC, and ERCOT to ensure that electricity and natural gas supplies are prioritized to those sources during an extreme weather event; and
- establish best practices to prepare facilities that provide electric and natural gas service to maintain service in an extreme weather event.

The committee must submit a report to the governor, lieutenant governor, House speaker, and Legislature by January 1, 2022, including an overview of the committee's findings.

Weather emergency preparedness. SB 3 establishes requirements for weather emergency preparedness for gas supply chain facilities, gas pipelines, electric generation facilities, transmission providers, and water utilities. RRC or PUC, depending on the entity, must require such facilities to prepare to operate during a weather emergency as provided by agency rule.

The bill provides for inspections of those facilities by the relevant state agency and allows the facility owner a reasonable period of time in which to remedy any violation discovered in an inspection. Violations that are not remedied in a reasonable time period are reported to the relevant agency or the attorney general. A person who violates a rule is liable for a penalty of up to $1 million for each offense.

Penalty classification system. RRC must establish a classification system to be used by a court for violations of the rules regarding gas supply chain facilities. The system must include a range of penalties that may be recovered for each class of violation based on the seriousness of the violation, the history of previous violations, and other criteria. A penalty over $5,000 may be recovered only if the violation is included in the highest class of violations.

Water utilities. Certain water utilities must ensure the emergency operation of its water system during an extended power outage at a minimum water pressure as soon as safe and practicable following a natural disaster. The utilities also must adopt and submit to PUC an emergency preparedness plan.

Weather emergency preparedness reports. SB 3 requires PUC to submit an annual weather emergency preparedness report to the lieutenant governor, House speaker, and Legislature. The report must include an analysis of emergency operations plans of retail electric providers in addition to power generation entities. The bill also requires, rather than allows, PUC to require an entity to file an updated emergency operations plan if it finds the plan on file does not contain adequate information

to determine whether the entity may provide adequate electric services.

The bill requires RRC to analyze emergency operations plans developed by operators of natural gas facilities included on the electricity supply chain map. RRC also must annually report on weatherization preparedness of those facilities to the lieutenant governor, House speaker, and Legislature. RRC must require an entity to file an updated emergency operations plan if it found that a plan on file did not contain adequate information to determine whether the entity could provide adequate natural gas services.

Texas Energy Reliability Council. SB 3 establishes the Texas Energy Reliability Council to ensure that the energy and electric industries in the state meet high priority human needs and address critical infrastructure concerns and enhance coordination and communication in the industries.

The 25-member council is composed of certain representatives of RRC, PUC, the Office of Public Utility Counsel, TCEQ, the Texas Transportation Commission, ERCOT, TDEM, participants in the natural gas supply chain, the electric industry, other energy sectors, and industrial concerns.

The council must meet at least twice each year and, by November 1 of each even-numbered year, submit to the Legislature a report on the reliability and stability of the electricity supply chain.

Power outage alert. SB 3 requires the Department of Public Safety (DPS), with the cooperation of the Texas Department of Transportation (TxDOT), TDEM, the Office of the Governor, and PUC, to develop and implement an alert to be activated when the power supply in the state may be inadequate to meet demand.

When PUC or ERCOT notifies DPS that the criteria for activation has been met, DPS must confirm the accuracy of the information and, if confirmed, immediately issue a power outage alert, including a statement that electricity customers may experience a power outage. DPS must send the alert to designated media outlets and, following receipt, participating radio and televisions stations and other outlets may issue the alert at designated intervals.

Ancillary services. PUC must review the type, volume, and cost of ancillary services to determine whether those services will continue to meet the needs of the electricity market in the ERCOT region. PUC must require ERCOT to modify the design, procurement, and cost allocation of ancillary services in a manner consistent with cost-causation principles and on a nondiscriminatory basis.

Dispatchable generation. PUC must ensure that ERCOT:

- establishes requirements to meet the reliability needs of the power region;
- determines and procures ancillary or reliability services to ensure appropriate reliability during extreme heat and cold weather conditions and during times of low non-dispatchable power production;
- develops appropriate qualification and performance requirements for providing services; and
- sizes the services procured to prevent prolonged rotating outages due to net load variability in high demand and low supply scenarios.

PUC also must ensure that:

- resources are dispatchable and able to meet continuous operating requirements for the season;
- winter resource capability qualifications for a service include on-site fuel storage, dual fuel capability, or fuel supply arrangements to ensure winter performance for several days; and
- summer resource capability qualifications for a service include facilities or procedures to ensure operation under drought conditions.

Distributed generation reporting. ERCOT must require an owner or operator of distributed generation to register with the organization and interconnecting transmission and distribution utility (TDU) information necessary for the interconnection of the distributed generator. This requirement does not apply to distributed generation serving a residential property.

Load management. PUC must allow a TDU to design and operate a load management program for nonresidential customers to be used where ERCOT has declared a Level 2 Emergency or a higher level of emergency or has otherwise directed the TDU to shed load. A TDU implementing such a program must be permitted to recover the reasonable and necessary costs of the program.

PUC must adopt a system to allocate load shedding

among electric cooperatives, municipally owned utilities (MOUs), and TDUs providing transmission service in the ERCOT region during an involuntary load shedding event initiated by ERCOT during an energy emergency.

PUC and ERCOT must conduct simulated or tabletop load shedding exercises with providers of electric generation and transmission and distribution services in the ERCOT region.

Critical natural gas facilities. RRC must collaborate with PUC to establish a process to designate certain natural gas facilities and entities associated with providing natural gas as critical customers or critical gas suppliers during energy emergencies.

Customer awareness. Retail electric providers (REPs), MOUs, and electric cooperatives must periodically provide to their retail customers together with bills information about:

- the utility's procedures for implementing involuntary load shedding;
- the types of customers who may be considered critical care residential customers, critical load industrial customers, or critical load and the procedure to apply for such a designation; and
- reducing electricity use at times when involuntary load shedding events may be implemented.

"Critical care residential customer" means a residential customer who has a person permanently residing in the customer's home who has been diagnosed by a physician as being dependent upon an electric-powered medical device to sustain life. "Critical load industrial customer" means an industrial customer for whom an interruption in service will create a dangerous or life-threatening condition on the customer's premises.

Disaster preparedness education. TDEM must create a list of suggested actions for state agencies and the public to take to prepare for winter storms, organized by severity of storm. The division must develop and post on its website educational materials that include instructions for preparing a disaster kit and certain other information.

Wholesale pricing procedures. PUC must establish an emergency pricing program for the wholesale electric market. The program must take effect if the high system-wide offer cap has been in effect for 12 hours in a 24-hour period after initially reaching the cap.

The emergency pricing program cannot allow an emergency pricing program cap to exceed any nonemergency high system-wide offer cap. PUC must establish an ancillary services cap to be in effect during the period an emergency pricing program is in effect. The program must allow generators to be reimbursed for reasonable, verifiable operating costs that exceed the emergency cap.

PUC must review each system-wide offer cap program, including the emergency pricing program, at least once every five years to determine whether to update aspects of the program.

Billing for water service during emergency. A retail public utility that is required to possess a certificate of public convenience and necessity or a district or affected county that furnishes retail water or sewer service is prohibited from imposing late fees or disconnecting service for nonpayment of bills that are due during an extreme weather emergency until after the emergency is over. Such an entity must work with customers that request to establish a payment schedule for unpaid bills that are due during the emergency.

A utility or affiliated interest that violates these provisions is subject to a civil penalty of $100 to $50,000 per violation. PUC must establish a classification system for violations that includes a range of penalties.

Penalty for disconnection of gas. If a gas utility disconnects natural gas service to a residential customer during an extreme weather emergency or failed to defer collection of the full payment of bills until the emergency was over, the civil penalty is $1,000 to $1 million for each violation. RRC must establish a classification system for violations.

Energy plan advisory committee. SB 3 creates the State Energy Plan Advisory Committee, composed of 12 members appointed by the governor, lieutenant governor, and House speaker. By September 1, 2022, the committee must prepare and submit to the Legislature a comprehensive state energy plan that evaluates barriers in the electricity and natural gas markets that prevent sound economic decisions; evaluates methods to improve the reliability, stability, and affordability of electric service; provides recommendations; and evaluates the market structure and pricing mechanisms, including the ancillary services market and emergency response services.

Supporters said

SB 3 would ensure the reliability and resiliency of the ERCOT power grid, making certain Texas was better prepared for future extreme weather emergencies by addressing some of the key issues that arose during and after Winter Storm Uri in February.

During the storm, much of the state's power generation capacity was unavailable because of operations failures related to icy weather, contributing to widespread, extended power outages that millions of Texans endured. The key issues most cited included a lack of weatherization of natural gas and electric facilities, a lack of oversight, a breakdown of communication with the public, and coordination and planning failures within and between state regulatory agencies. The bill would address these issues by strengthening the state's prevention of, preparation for, and response to energy emergencies.

The ERCOT grid is an interdependent system of electric generators, some of which rely on natural gas providers, and transmission and distribution utilities. During the winter storm, there was a lack of coordination among natural gas producers, electric providers, and regulators and power was shut off to some natural gas facilities because they were not registered as critical load serving electric generation, affecting the natural gas supply to some generation facilities. The bill would require the mapping of the state's electricity supply chain to designate priority electricity service needs, leading to better coordination between the PUC and RRC and ensuring proper functioning of the energy utility supply and generation system.

SB 3 would ensure that information critical for the efficient flow of electricity to natural gas production facilities, and thus the flow of natural gas to electric generators, was provided to responsible entities. As Texas continues to grow and more critical infrastructure is built, it will be increasingly important to have a central repository for this information to help prevent service outages to any critical infrastructure in the future.

The bill also would establish weatherization requirements for electricity generators, transmission providers, natural gas facilities and pipelines, and water utilities. A lack of sufficient preparation for cold temperatures and icy conditions led to extended outages during the storm, and the bill would prevent this from reoccurring by requiring state regulators to ensure that facilities in the electricity supply chain were prepared for future extreme weather events. While some have raised concerns about the cost of weatherization, that cost is minimal compared to the financial and human costs inflicted by February's statewide power outages.

Texas has a diverse climate with varying temperature ranges, so weatherization should not be approached as "one-size fits-all." By requiring PUC and RRC to develop rules instead of setting specific standards in statute, the bill would mandate weatherization but be broad enough to provide flexibility to meet the needs of facilities across the state. The bill appropriately would provide each entity the discretion to choose the best weatherization methods for its facilities.

The bill would ensure that the parts of the natural gas supply chain involved in electric generation were weatherized, including by providing for penalties for violations of the bill's requirements. Much of Texas' daily natural gas production is not used for electric generation, and many wells are operated by smaller owners. Putting additional requirements on these portions of the gas supply chain, especially since they are not part of electric generation, could force these facilities to shut down due to an unnecessary increase in costs. Additionally, the bill would link the weatherization of the natural gas supply chain to the electricity supply chain map, which would ensure critical facilities were subject to weatherization requirements.

The bill would create a strong tool to ensure compliance with reliability requirements by directing PUC and RRC to establish penalties of up to $1 million depending on the violation. These penalties would provide transparency by ensuring that regulated entities were aware of what they could be charged for a violation. Based on current agency rules, violations of the bill would be classified in the highest tier of penalties.

The lack of communication and coordination between the electricity and natural gas industries has been identified as another key issue that played a role in the extended power outages during the winter storm. Currently, the only coordination occurs through an unofficial working group. By formalizing the Texas Energy Reliability Council (TERC) and creating other lines of communication and authority, the bill would enable the electricity and natural gas system to better respond to a disaster and prevent the foreseeable consequences of any resulting power outages.

Additionally, by creating the power outage alert sytem, the bill would provide a way for state agencies to work with media outlets to inform the public before and during

a weather emergency, including by letting the public know about any expected power outages.

The bill would better protect consumers by requiring PUC to establish an emergency pricing program for the wholesale market. After the winter storm, during which the wholesale price of electricity remained for days at the $9,000-per-megawatt-hour offer cap, some customers of wholesale indexed products were left with electricity bills worth thousands of dollars. SB 3 would ensure that consumers would not face those high rates for such an extended period of time in a future emergency.

Critics said

SB 3 would not go far enough to ensure Texas was prepared for future extreme weather emergencies. The bill focuses on electricity supply, missing the other half of the equation: electricity demand. To further enhance resiliency, the bill should focus on reducing energy demand and increasing energy efficiency, which could include demand response, weatherization of buildings and homes, and conservation efforts. Increasing energy efficiency and reducing demand would help prevent future blackouts.

SB 3 would not adequately address the lack of winter weather preparedness of electricity supply chain infrastructure in the ERCOT power region. The entire gas supply chain should be required to weatherize. Facilities should have to ensure the continuity of service during weather emergencies as well, rather than merely being prepared to provide service. Further, the bill should provide firm deadlines by which facilities would have to weatherize. The bill's penalties also would not go far enough to ensure enforcement of weatherization requirements. While penalties could be as high as $1 million per violation, under a tiered penalty system the maximum penalty would be assessed only for egregious violations. This opens up the possibility for minimal penalties, which would erode the ability for steep penalties to provide incentive for facilities to weatherize.

Notes

The HRO analysis of SB 3 appeared in Part One of the May 23 *Daily Floor Report*.

Several other bills were enacted by legislators in the 87th legislative session relating to the electric grid and responding to weather emergencies.

HB 16 by Hernandez prohibits an aggregator, a broker, or a retail electric provider from offering a wholesale indexed product to a residential or small commercial customer. The HRO analysis of HB 16 appeared in the March 30 *Daily Floor Report*.

HB 2483 by P. King allows a transmission and distribution utility to lease and operate facilities that provide temporary emergency electric energy to aid in restoring power to the utility's distribution customers during a widespread power outage. The HRO analysis of HB 2483 appeared in Part One of the April 20 *Daily Floor Report*.

HB 2586 by Thierry requires the Public Utility Commission (PUC) to have an independent audit made annually of the ERCOT organization, including an examination of its financial condition and compliance with PUC standards. The HRO analysis of HB 2586 appeared in the April 8 *Daily Floor Report*.

HB 3648 by Geren requires the Railroad Commission (RRC) to work with PUC to designate certain natural gas facilities and associated entities as critical customers or critical gas suppliers during energy emergencies. The HRO analysis of HB 3648 appeared in Part One of the April 19 *Daily Floor Report*.

SB 1281 by Hancock requires the ERCOT organization to conduct a biennial assessment of the ERCOT power grid to assess its reliability in extreme weather scenarios. The HRO analysis of SB 1281 appeared in Part Three of the May 23 *Daily Floor Report*.

Limiting the use of public money to contract with a lobbyist

SB 10 by Bettencourt
Died in the House

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SB 10 would have prohibited certain political subdivisions or other entities from spending public money or providing other compensation to contract with a registered lobbyist to communicate directly with members of the legislative branch to influence pending legislation. The bill would have excepted expenditures authorized by a majority vote of the governing board of the political subdivision or entity in an open meeting.

The bill would have applied only to a political subdivision that imposed a tax; a political subdivision or special district that had the authority to issue bonds; a regional mobility authority; a transit authority; a regional tollway authority; a special purpose district; a public institution of higher education; a community college district; a publicly owned utility; and river authority or water supply corporation.

A political subdivision or entity that made an expenditure as authorized above to contract with a lobbyist would have had to publish on its website certain information, including the amount of money authorized and a copy of the contract. A contracted lobbyist would not have been allowed to communicate directly with a member of the legislative branch on behalf of the entity regarding pending legislation that would amend certain laws governing the calculation of property tax rates. An entity could not have provided reimbursement to a lobbyist for food, beverages, or entertainment.

SB 10 would not have prevented an officer or employee of an entity from providing information for a member of the legislative branch, appearing before a legislative committee, or communicating directly with members of the legislative branch to influence pending legislation.

The bill would have specified that a person did not have to register as a lobbyist if the person had established an attorney-client relationship with a political subdivision to provide legal services and was entitled to receive compensation, reimbursement, or expenses under an agreement under which the person was retained or employed by the political subdivision.

Supporters said

SB 10 would bring more transparency to the practice of local governments using taxpayer money to contract with lobbyists at the Texas Capitol by prohibiting political subdivisions — including cities, counties, special districts, transportation authorities, and other governmental entities — from using public funds to contract with registered lobbyists, unless it had been approved at a public hearing.

Local governments use millions of dollars of taxpayer money each year for lobbying, diverting those funds from important community services. Those payments can be made without adequate transparency and may even be used to advocate for legislation that would increase spending, give local governments more taxing authority, and increase regulatory power, which means taxpayer money can be spent to lobby on issues that would harm taxpayers against their wishes and without their knowledge. In addition, any lobbyist with whom a local government had contracted would be prohibited from advocating for legislation on property tax rates, ensuring that local governments could not spend taxpayer money to attempt to raise tax rates.

SB 10 would ensure that taxpayer dollars were not used against taxpayer wishes but still would allow local governments to contract with lobbyists as long as it had been approved in an open meeting. The bill would promote transparency measures, such as posting the lobbyist contract online, as well as good governance practices, such as prohibiting local funds from being used to pay for a lobbyist's food, drink, or entertainment. The bill would not prevent an employee or officer of a local government from lobbying the Legislature directly for any issue, nor would it prevent local governments from joining an organization or association that represented similar governments.

Critics said

SB 10 would prevent local governments from meaningfully participating in state policymaking by restricting cities, counties, special districts, and other governmental entities from contracting with a lobbyist to advocate on certain issues. This could limit local control and have a chilling effect on local engagement at the Legislature.

SB 10 would prohibit local governments from advocating for legislation on property tax calculations, effectively eliminating a locality's ability to represent its residents. Legislation on property taxes is of critical importance since those revenues help fund local services, and it is often necessary for local governments to contract with tax experts to better advocate on these issues. The bill would create an unfair playing field because business advocates and other special interest organizations still could hire an unlimited number of lobbyists. If local governments' ability to hire lobbyists were limited, they could be prevented from fighting future unfunded mandates or other types of legislation that could cost taxpayers money.

In addition, local governments do not advocate against the interests of their taxpayers. They hold transparent open meetings to gain community input, are subject to open records laws, and otherwise engage with residents on local issues. If government officials advocated for policies that residents did not support, they could be voted out of office, so local residents ultimately have the ability to set the legislative agenda. Lobbyists are contracted because local government employees and officials have full-time jobs responding to needs in their communities, so they often do not have additional time or money to travel directly to the Texas Capitol. Instead, they rely on contracted lobbyists to protect the interests of residents, just as the state advocates its interests in Washington D.C.

Other critics said

SB 10 would not go far enough to prevent taxpayer money from being used to lobby the Legislature. The bill includes a loophole that would allow a person to avoid registering as a lobbyist if the person had an attorney-client relationship with a political subdivision. This would mean that the good governance measures in the rest of the bill might not apply to lobbyists who were lawyers, negating any improvements the bill would make over the current system.

Notes

The HRO analysis of SB 10 appeared in Part One of the May 24 *Daily Floor Report*.

Limiting disclosure or sale of certain personal information by state agencies

SB 15 by Nichols
Effective June 18, 2021

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SB 15 establishes the Texas Consumer Privacy Act Phase I to revise the Motor Vehicle Records Disclosure Act and limit the disclosure of personal information by certain state agencies.

Authorized use of personal information. The bill amends the definition of "personal information" to include a person's date of birth and email address. The bill removes a provision allowing an agency to disclose to any requestor personal information obtained in connection with a motor vehicle record if the information will be used for motor vehicle market research activities or any purpose specifically authorized by law that relates to the operation of a motor vehicle or public safety. Instead, the bill authorizes the disclosure of personal information for use:

- by a motor vehicle manufacturer, dealership, or distributor for motor vehicle market research activities;
- in the ordinary course of business by a licensed salvage vehicle dealer, independent motor vehicle dealer, wholesale motor vehicle auctioneer, automotive parts recycler, or certain other entities; or
- by an employer, principal, general contractor, nonprofit, charitable organization, or religious institution to obtain or verify information relating to an employee, contractor, or volunteer who holds a driver's license.

Personal information obtained by the Texas Department of Motor Vehicles (TxDMV) in connection with a motor vehicle record may be disclosed:

- when referring potential violations to the Texas Office of Consumer Credit Commissioner, Department of Public Safety (DPS), law enforcement agencies or the comptroller, if the information is necessary for carrying out regulatory functions;
- to the attorney general as part of a response by TxDMV to a subpoena or a discovery request, if the information is necessary for litigation purposes; or
- to a county assessor-collector if the personal information is related to a finding from an audit or investigation related to registration and titling services.

The bill requires personal information obtained by an agency in connection with a motor vehicle record to be disclosed to a requestor who is the subject of the information. An agency must require a requestor to delete from their records personal information received from the agency if the requestor becomes aware that they are not an authorized recipient.

Criminal penalty, civil suit for unauthorized sale of information. A person who sells personal information to a person that is not an authorized recipient commits a misdemeanor offense punishable by fine of up to $100,000, and is liable in a civil suit to the person who is the subject of the information for specified damages and costs. In addition to these damages, a person whose personal information is disclosed for compensation to an unauthorized recipient may sue for injunctive relief and any other equitable remedy determined appropriate by the court.

Redisclosure prohibited, fine increased. A person who receives personal information may not redisclose the information to a person who is not an authorized recipient. An authorized recipient must notify each person who receives personal information that the person may not redisclose it to a person who is not an authorized recipient. The bill increases the maximum fine for violating provisions regarding redisclosure from $25,000 to $100,000.

Bulk record contracts. An agency that provides a requestor access to personal information in motor vehicle records in bulk under a contract must include in the contract:

- a prohibition on the sale or redisclosure of the information for the purpose of marketing extended vehicle warranties by phone; and
- certain requirements related to performance bonds, liability and cyberthreat insurance, notice of security breach, and third party contracts.

An agency that discloses motor vehicle records must include in the records at least two records created solely to monitor compliance and detect violations of the act or contract terms. The agency also must designate an employee to monitor compliance, refer potential violations to law enforcement agencies, and make recommendations on the eligibility of a person to receive personal information.

State agency disclosure and sale of information. SB 15 also establishes specific restrictions on the sale or disclosure of personal information by the Texas Department of Transportation, Department of Public Safety, and Parks and Wildlife Department.

Supporters said

SB 15 would establish the Texas Consumer Privacy Act Phase I to limit state agencies' ability to sell or disclose personal information to third parties. Certain governmental entities have the ability to sell, disclose, and allow the resale of personal information attached to motor vehicle records. Today, there are more than 1,000 entities with whom these records are shared by the Department of Public Safety or Department of Motor Vehicles. Because the agencies cannot control how that information is passed on, the information can end up in the hands of bad actors. This can lead to fraudulent behavior, such as calls about a person's vehicle warranty. SB 15 would provide the measures needed to protect consumer information. The bill would clarify the permissible uses of data so that state agencies and certain authorized entities still could perform essential functions, such as conducting background checks or law enforcement activities.

Critics said

SB 15 could have unintended consequences for the legitimate use of consumer information and may not solve the problem of scam calls about a person's vehicle warranty. Current laws already provide for the proper disclosure of public information and protect against the illegal use of private information. By revising the authorized uses of motor vehicle record information, the bill could restrict access to public information, which can be used to address identity theft. Agencies may have difficulty complying with the bill, and any impact to operations could lead to further interruptions in access to information. Before making such changes, the Legislature should first study how the information is being used by Texans and businesses. In addition, scam calls already are prohibited by certain federal and state laws, and the bill would not address the system of illegal telemarketing these calls utilize.

Notes

The HRO analysis of SB 15 appeared in Part One of the May 24 *Daily Floor Report*.

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Health and Human Services

* Finally approved

Allowing certain telehealth and telemedicine services under Medicaid

HB 4 by Price
Effective June 15, 2021

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HB 4 requires the Health and Human Services Commission (HHSC) to establish policies and procedures, and otherwise ensure certain health care services may be provided through telehealth, telemedicine, telecommunications, or information technology.

Telehealth and telemedicine services. By January 1, 2022, HHSC must ensure that enrollees in Medicaid, the Children's Health Insurance Program (CHIP), and other specified public benefits programs have the option to receive certain services as telemedicine or telehealth services or otherwise use telecommunications or information technology, regardless of whether the benefits are provided through managed care or another delivery model. This provision applies to:

- preventative health and wellness;
- case management, including targeted case management;
- behavioral health services, defined as mental health and substance abuse disorder services;
- occupational, physical, and speech therapy;
- nutritional counseling; and
- assessments, including nursing assessments under certain federal home and community-based services waiver programs.

HHSC must ensure the required service options are provided only if permitted by federal law and if the commission determines it is cost-effective and clinically effective.

Audio-only services. To the extent permitted by state and federal law and to the extent it is cost-effective and clinically effective, the HHSC executive commissioner by rule must implement a system to ensure behavioral health services may be provided using an audio-only platform to enrollees in Medicaid, CHIP, and other specified public benefits programs. The commissioner by rule may provide an audio-only platform for services other than behavioral health services if the commissioner determines that using that platform will be cost-effective and clinically effective.

Medicaid managed care. HHSC must establish policies and procedures for improving access to care under the Medicaid managed care program by encouraging the use of telehealth services, telemedicine medical services, home telemonitoring services, and other telecommunications or information technology.

Reimbursement for home telemonitoring services. The bill allows a Medicaid managed care organization (MCO) to reimburse providers for home telemonitoring services provided to persons and in circumstances other than those specified in statute. The MCO must consider whether the reimbursement for the service is cost-effective and providing the service is clinically effective.

Text messaging and email. By January 1, 2022, the executive commissioner must adopt and publish guidelines for MCOs on how they may communicate by text message or email with enrollees using the contact information provided in the enrollee's application for Medicaid benefits.

Home and community-based services. To the extent permitted by federal law, the executive commissioner must establish policies and procedures that allow a Medicaid MCO to conduct assessments and provide care coordination services using telecommunications or technology if those methods are deemed appropriate by the MCO or HHSC. In establishing the policies and procedures, the executive commissioner must consider whether the recipient requests and consents to receiving the assessment and care coordination services through telecommunications or information technology and whether an in-person assessment or activity is not feasible because of an emergency or state of disaster, including a public health emergency or natural disaster.

HHSC must determine categories of recipients of home and community-based services who must receive in-person visits. Except when not feasible due to a public health emergency or disaster, the bill requires an MCO to conduct for a recipient of home and community-based

services at least one in-person visit with the recipient, and additional visits if necessary, as determined by the MCO.

Provider access standards. The bill requires provider access standards for Medicaid managed care to consider and include the availability of telehealth and telemedicine services within an MCO's provider network.

Other provisions. Outpatient chemical dependency treatment services may be provided by a licensed treatment facility to adult and adolescent clients using telecommunication or information technology, consistent with commission rule.

A rural health clinic as defined by federal law is eligible for reimbursement for certain fees.

Telehealth services also must be offered as covered benefits to CHIP enrollees.

Supporters said

HB 4 would improve access to health care for Texans, especially in rural and medically underserved areas, by allowing multiple services to be provided through telemedicine, telehealth, telecommunications, or information technology.

During the COVID-19 pandemic, demand for telehealth and telemedicine services increased due to heightened mental health needs exacerbated by illness, fear, and social and economic hardship. In response, many health care providers quickly shifted from providing in-person visits to using telehealth and telemedicine and other remote technology tools. This bill would preserve telehealth and telemedicine efforts made during the pandemic to address provider shortages and give Texans access to virtual health care services beyond the public health emergency. The bill would establish sufficient protections for Texans by requiring the Health and Human Services Commission to determine whether providing virtual services was cost-effective and clinically effective.

The bill would ensure continuity of care and could generate cost savings for families and the state. Providing telemedicine, telehealth, and telecommunications services could help families save time and money that they might otherwise spend traveling to appointments or finding child care. Elderly and medically fragile individuals, who often have limited mobility, also would benefit from virtual appointments. Allowing services like preventative health and wellness and care coordination to be provided through telemedicine and telehealth could help practitioners improve "no-show" appointment rates, identify patients' health issues early, efficiently refer a patient to a specialist, and help decrease emergency room visits.

Allowing audio-only benefits for behavioral health services would address a gap in health care services and create flexibility for patients and providers. Many Texans do not have internet access or smartphones, making audio-only their most viable option. Additionally, an audio-only option could help reduce stigma for patients seeking mental health and substance use disorder services.

Critics said

By allowing audio-only benefits to be provided for certain behavioral health services, HB 4 could diminish the quality of care if a health practitioner were not able to assess a patient accurately through audio-only technology.

Other critics said

While HB 4 would make significant strides to advance telehealth and telemedicine services for Texans beyond the pandemic, the bill should require health care professionals' reimbursement rates for telemedicine and telehealth services to be the same as those for in-person services. Providing payment parity would help encourage more providers to use telehealth and telemedicine services.

Notes

The HRO analysis of HB 4 appeared in Part One of the April 14 *Daily Floor Report*.

HB 980 by Fierro, which died in the House, would have required certain health insurance plans to reimburse specified health professionals for telemedicine medical services and telehealth services at least at the same rate for in-person services. The HRO digest of HB 980 appeared in Part Three of the May 12 *Daily Floor Report*.

Extending post-pregnancy Medicaid eligibility, moving programs

HB 133 by Rose
Effective September 1, 2021

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HB 133 requires the Health and Human Services Commission (HHSC) to continue to provide health benefits to a woman eligible for Medicaid for Pregnant Women for at least six months following the date of a delivery or involuntary miscarriage.

The bill also provides for the transition of case management services for Medicaid recipients under the Children and Pregnant Women program and for the transition of Healthy Texas Women (HTW) services to a managed care program.

Children and Pregnant Women program. The bill requires HHSC to transition to a Medicaid managed care model for case management services provided to recipients under the Children and Pregnant Women program, which is administered by the Department of State Health Services.

In transitioning these services, HHSC must ensure a recipient is provided case management services through the managed care plan in which the recipient is enrolled. HHSC also must ensure case management services under the Children and Pregnant Women program are not interrupted when implementing the transition.

Healthy Texas Women program services. The bill requires HHSC to contract with Medicaid managed care organizations (MCOs) to provide HTW program services. In implementing this requirement, HHSC must:

- consult with the state Medicaid managed care advisory committee before contracting with MCOs to provide HTW program services;
- identify barriers that prevent women from obtaining HTW program services and seek opportunities to mitigate those barriers; and
- designate HTW program service providers as significant traditional providers until at least the third anniversary of the date the commission initially contracts with MCOs to provide services.

Eligibility notice. The commission and each MCO participating in the HTW program must provide a woman who is enrolled in the program and has a household income between 100 and 200 percent of the federal poverty level with a written notice containing information about eligibility requirements for and enrollment in a health benefit plan for which an enrollee receives a premium subsidy under the Affordable Care Act based on family income.

Automatic enrollment. By January 1, 2023, HHSC must assess the feasibility, cost-effectiveness, and benefits of automatically enrolling in managed care women who became pregnant while receiving services through the HTW program. The assessment must examine whether automatic enrollment leads to the delivery of prenatal care and services earlier in the women's pregnancies. These provisions expire September 1, 2023.

Supporters said

HB 133 would help to ensure that Texas women had healthy pregnancies and better long-term health outcomes by extending Medicaid benefits for pregnant women from 60 days to six months post-partum, which is four months beyond what is required by federal law. By transitioning case management services under the Children and Pregnant Women program and the Healthy Texas Women program to a managed care model, the bill would create a stronger support system for women and help ensure continuity of care during childbearing years.

According to a 2020 study by the Maternal Mortality and Morbidity Review Committee and the Department of State Health Services, black women and women enrolled in the Medicaid program were more likely to experience pregnancy-related death, and the report suggested that most pregnancy-related deaths are preventable. The report also indicated that 31 percent of the pregnancy-related deaths occurred 43 days to one year after the end of the pregnancy.

The bill would address specific concerns about intermittent insurance coverage for eligible mothers after pregnancy by providing comprehensive continuous care during the critical postpartum period when health issues often arise. Uninsured women are less likely to receive preventative care and services for chronic disease, and many seek health care for the first time after they become pregnant without knowledge of any underlying health conditions that they may have. Providing six months of comprehensive, continuous health care for these women postpartum would give doctors more uninterrupted time to address complications that can arise post-pregnancy and to address long-term health outcomes.

Current Texas family planning and women's health programs that provide health coverage for eligible women postpartum do not provide comprehensive health coverage for a six-month period. Even if women are eligible for a Texas program, they face a lack of certain specialized services or prohibitive financial hurdles for services for which they otherwise qualified. HB 133 would address limitations of the current Texas programs by providing all eligible women with six months of comprehensive health care services postpartum.

Critics said

HB 133 should extend Medicaid eligibility to 12 months after the end of a pregnancy, as recommended by the Maternal Mortality and Morbidity Review Committee. Providing a full year of coverage, rather than only six months, would better combat the causes of maternal mortality, minimize interruptions in care, and improve access to needed services during a critical period in women's lives.

The bill may not adequately address the state's maternal mortality and morbidity issues, and pregnant women in Texas could be better served if time and resources were spent on other solutions. Over the last several years, Texas has focused a considerable amount of attention and resources on the number of Texas women who die due to health issues arising during pregnancy or in the postpartum period, and programs like Healthy Texas Women have already been implemented to address these issues.

Notes

The HRO analysis of HB 133 appeared in Part One in the April 14 *Daily Floor Report*.

The 87th Legislature also enacted another major bill related to Medicaid eligibility. **HB 2658** by Frank, effective September 1, 2021, changes the continuous eligibility period for children in the Medicaid program from one to two consecutive periods of continuous eligibility between each certification and recertification of the child's eligibility for the program, provided certain income requirements are met. HHSC may not recertify a child's eligibility for the Medicaid program more than once every 12 months in accordance with federal law. A child's period of continuous eligibility for the Medicaid program ends on the child's 19th birthday. The bill also requires HHSC to provide Medicaid reimbursement for preventive dental services for certain adult enrollees and amend the capitation rates provided to Medicaid care organizations. The HRO analysis of HB 2658 appeared in Part Two in the April 20 *Daily Floor Report*.

Expanding eligibility for patients' medical use of low-THC cannabis

HB 1535 by Klick
Effective September 1, 2021

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HB 1535 expands patient eligibility for low-THC cannabis prescriptions and establishes a compassionate-use institutional review board. It amends the definition of low-THC cannabis by increasing the allowable weight of THC from 0.5 percent to 1 percent.

Prescriptions. The bill allows licensed physicians to prescribe low-THC cannabis to patients diagnosed with cancer, post-traumatic stress disorder, or a medical condition approved for an authorized research program.

Institutional review board. Under the bill, one or more compassionate-use institutional review boards may be established to:

- evaluate and approve proposed research programs to study the medical use of low-THC cannabis in treating a designated medical condition; and
- oversee patient treatment undertaken as part of an approved research program, including the certification of treating physicians.

An institutional review board must be affiliated with a dispensing organization and meet other affiliation, accreditation, or registration conditions.

Patient treatment. The bill limits participation in an approved research program to permanent residents of the state and requires patients to provide informed consent in writing before receiving treatment. Patient treatment in a research program may be administered only by a licensed physician certified by an institutional review board.

Report. An institutional review board must submit reports that assess the findings of each approved research program to the Health and Human Services Commission (HHSC) by October 1 of each year and the Legislature by October 1 of each even-numbered year.

Rules. By December 1, 2021, the executive commissioner of HHSC must adopt rules designating the medical conditions for which a patient may be treated with low-THC cannabis as part of an approved research program. By December 1, 2021, the Department of Public Safety must adopt or amend its rules on the cultivation, processing, and dispensing of low-THC cannabis by a licensed dispensing organization.

Supporters said

HB 1535 would help Texans with severe medical conditions by expanding access to low-THC cannabis for patients with all forms of cancer, post-traumatic stress disorder (PTSD), and other approved medical conditions. Expanding the list of qualifying medical conditions would provide a pain management alternative to opioids, which can lead to addiction. This would increase the market for low-THC cannabis, which currently is limited, thus allowing dispensing organizations to manufacture low-THC cannabis in larger quantities and help decrease costs. The bill would establish compassionate-use institutional review boards to approve proposed research programs to study potential benefits of medical use of low-THC cannabis, potentially expanding the list of qualifying medical conditions in the future.

Critics said

Because some patients may benefit from higher or lower doses of THC, depending on the severity of their condition, HB 1535 should increase the THC cap above 1 percent for medical cannabis. Decisions about appropriate doses should be left up to the patient and the patient's doctor. The bill also should expand the list of qualifying conditions to include those that cause acute or chronic pain and neurodevelopmental diseases, such as Tourette syndrome.

Notes

The HRO analysis of HB 1535 appeared in Part One in the April 28 *Daily Floor Report*.

Requiring disclosures of certain health care costs; authorizing claims database

HB 2090 by Burrows
Effective September 1, 2021

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HB 2090 requires a health benefit plan issuer or administrator to disclose to enrollees and the public certain health care cost information. The bill specifies the formats for disclosing information and defines several terms. It also authorizes the establishment of the Texas All Payor Claims Database to increase public transparency of health care data and improve the quality of health care in the state.

Applicability of disclosures. Provisions for required disclosures of health care costs to enrollees and the public apply to a specified health benefit plan offered by a health maintenance organization, a small employer health benefit plan, and certain plans under the Texas Employees Group Benefits Act, the Texas Public School Retired Employees Group Benefits Act, the Texas School Employees Uniform Group Health Coverage Act, and the Uniform Benefits Act.

Enrollee disclosures. The bill requires a health plan to disclose to the enrollee, upon request, specified cost-sharing liability information, including:

- an estimate of the enrollee's cost-sharing liability for the requested service or supply;
- the network provider rate containing the negotiated rate and underlying fee schedule rate, as applicable; and
- the out-of-network allowed amount.

"Cost-sharing liability" is defined as the amount an enrollee is responsible for paying for a covered health care services or supply under a health benefit plan's terms. The term generally includes deductibles, coinsurance, and copayments but does not include premiums, balance billing amounts by out-of-network providers, or the cost of health care services or supplies not covered under a health plan.

Required disclosures to enrollees apply only to a health benefit plan issued or renewed on or after January 1, 2024.

A health plan must disclose the cost-sharing liability information through an internet-based self-service tool, a physical copy, or another specified way.

Public disclosures. Under the bill, a health plan must publish on a website three machine-readable files containing a network rate for all covered health care services and supplies, with some exceptions, and an out-of-network allowed amount and prescription drug for each coverage option.

The required public disclosures apply only to a health plan for which federal reporting requirements under federal rules do not apply. Required disclosures to the public apply only to a health benefit plan issued or renewed on or after January 1, 2022.

The file for network rates must include all applicable rates, including negotiated rates, underlying fee schedules, or derived amounts. Out-of-network allowed amounts must include unique out-of-network billed charges and certain allowed amounts, and prescription drugs must include negotiated rates and certain historical net prices.

Texas All Payor Claims Database. The Texas Department of Insurance must collaborate with the Center for Healthcare Data at The University of Texas Health Science Center at Houston to aid in the center's establishment of the Texas All Payor Claims Database to collect, process, analyze, and store data. The center will serve as the database administrator and must design, build, and secure the database infrastructure and determine the accuracy of submitted data.

The bill defines "payor" as certain entities that pay, reimburse, or otherwise contract with a health care provider to provide health care services or supplies to a patient. Among other entities, a "payor" includes a health maintenance organization, the state Medicaid program, including the Medicaid managed care program, and a health benefit plan offered or administered by or on behalf of the state or a political subdivision of the state.

Data. The bill requires each payor to submit to the center certain information, including:

- the name and National Provider Identifier, as described under federal regulation, of each health care provider paid by the payor;
- the claim line detail that documents the health care services or supplies provided by the provider;
- the amount of charges billed by the health care provider and the payor's allowed amount or contracted rate and adjudicated claim amount for health care services, supplies, or devices;
- the name of the payor and health benefit plan and the type of health plan; and
- claim level information that allows the center to identify the geozip, defined as all zip codes with identical first three digits, where the health care services, supplies, or devices were provided.

The center may use data in the database for noncommercial purposes to produce statewide, regional, and geozip consumer reports available through a public access portal that address health care costs, quality, utilization, outcomes, and disparities, population health, or the availability of health care services.

Public portal. The center must collect, compile, and analyze data submitted to or stored in the database and disseminate information to the public through the creation of an online portal.

Data security. Data and reports or information created by the center using that data are confidential, subject to applicable state and federal law on records privacy and protected health information, and not subject to disclosure under the Texas Public Information Act.

Supporters said

HB 2090 would improve price transparency for consumers by codifying into state law a federal rule that requires health insurance plans to disclose certain health care cost information. Currently, health care prices often are opaque, leaving consumers without adequate information to make decisions on health care services. The bill also would help address a lack of provider competition and unsustainable health care price growth in Texas.

By establishing an all payor claims database in Texas, the bill would provide more data to patients and employers and allow individuals to compare prices and quality of health care services. At least 21 states have passed similar legislation, many of which are experiencing the benefits of having access to robust information in the health care system.

Critics said

By requiring the public disclosure of privately negotiated rates, HB 2090 could create scenarios in which reimbursement rates decreased for health care providers, exacerbating existing provider shortages and decreasing the quality of care. Additionally, it is unnecessary to disclose the privately negotiated rates between health insurance plans and facilities because those rates may not have a direct bearing on the actual costs patients would incur.

Notes

The HRO analysis of HB 2090 appeared in Part One of the April 14 *Daily Floor Report*.

The 87th Legislature considered several other bills addressing price transparency for health care facilities.

HB 1907 by Walle, which contained provisions authorizing the Texas Department of Insurance to establish a statewide all payor claims database, died in the Senate. The provisions of HB 1907 were later added as an amendment to HB 2090 in the Senate. The HRO analysis of HB 1907 appeared in Part Two of the May 12 *Daily Floor Report*.

SB 1137 by Kolkhorst, effective September 1, requires licensed hospitals to disclose to the public certain health care cost information, including a list of standard charges and shoppable services. The HRO analysis of SB 1137 appeared in the May 19 *Daily Floor Report*.

HB 1490 by Dean, which died in the Senate, would have required hospitals to disclose the cash price of certain health care services. The HRO analysis of HB 1490 appeared in Part Two of the April 19 *Daily Floor Report*.

SB 2038 by Menéndez, effective September 1, requires freestanding ERs to disclose the prices charged for testing or vaccination for an infectious disease for which a state of disaster has been declared. The HRO analysis of SB 2038 appeared in Part Three of the May 24 *Daily Floor Report*.

Requiring DFPS to establish family preservation services pilot program

HB 3041 by Frank
Effective September 1, 2021

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HB 3041 requires the Department of Family and Protective Services (DFPS) to establish a pilot program for family preservation services in certain child protective services regions in the state. It outlines court proceedings for requiring an applicable family or a child to obtain family preservation services.

Definitions. The bill defines a "child who is a candidate for foster care" as one who is at imminent risk of being removed from the child's home and placed into the department's conservatorship because of a continuing danger to the child's physical health or safety caused by an act or failed action of a person entitled to possession of the child but for whom a court has issued an order allowing the child to remain safely in the child's home or in a kinship placement with the provision of family preservation services.

"Family preservation service" means a time-limited, family-focused service, including a service subject to the Family First Prevention Services Act, provided to the family of a child who is a candidate for foster care to prevent or eliminate the need to remove the child and allow the child to remain safely with the child's family; or a pregnant or parenting foster youth.

Pilot program for family preservation services. The bill requires DFPS to establish a pilot program that allows the department to dispose of an investigation by referring the family of a child who is a candidate for foster care for family preservation services and allowing the child to return home instead of entering foster care or by providing services to a pregnant or parenting foster youth. The department must implement the pilot program in two child protective services regions, one urban and one rural. At least one of those regions must be in a region in which community-based care has been implemented.

In implementing the pilot program, DFPS must use Title IV-E funds to pay for legal representation for parents or provide to counties a matching reimbursement for the cost of the legal representation. DFPS also must use funds received under the Temporary Assistance for Needy Families (TANF) program or other department funds to provide enhanced in-home support services to families qualifying for certain prevention services.

DFPS may contract with one or more persons to provide family preservation services under the pilot program. In a region with community-based care, the department may contract with a single source continuum contractor.

Filing suit. Under the bill, DFPS must obtain a court order to compel the family of a child who is a foster care candidate to obtain family preservation services and complete the family preservation services plan. The department is not required to obtain a court order to provide family preservation services to a pregnant or parenting foster youth.

The department may file a suit requesting the court to render an order requiring the parent, managing conservator, guardian, or other member of the child's household to participate in the family preservation services to:

- alleviate the effects of the abuse or neglect that has occurred;
- reduce a continuing danger to the child's physical health or safety caused by an act or failure to act of the parent, managing conservator, guardian, or other member of the child's household; or
- reduce a substantial risk of abuse or neglect caused by a relevant person's act or failure to act.

Petition. The court must hold a hearing on the petition for suit by the 14th day after the petition is filed unless the court finds good cause for extending that date for up to 14 days.

Attorney ad litem. The court must appoint within specified time frames an attorney ad litem to represent the

interests of the child and an attorney ad litem to represent the relevant parent.

Court order. At the conclusion of the hearing in a filed suit, the court must order DFPS to provide family preservation services and to execute a family preservation services plan if the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that family preservation services are necessary to ensure the child's physical health or safety, among other specified provisions.

The court may, in its discretion, order family preservation services for a parent whose parental rights to another child were previously terminated.

If a court order includes services that are not subject to the Family First Prevention Services Act, the order must identify a method of financing for the services and the local jurisdiction that will pay for the services.

Status hearing. By the 90th day after the date the court rendered an order for family preservation services, the court must hold a hearing to review the status of each person required to participate in the services and of the child and to review services provided, purchased, or referred. The court must set subsequent review hearings every 90 days to review the continued need for the order.

Extension. The bill allows the court to extend an order only once for up to 180 days if the department demonstrates a continuing need for the order, after notice and hearing. The bill specifies criteria in which a court may extend the order for an additional 180 days.

Expiration. On expiration of a court order for family preservation services, the court must dismiss the case.

Family preservation services plan. Subject to a court order, the department in consultation with the child's family must develop a family preservation services plan that:

- includes a safety risk assessment of the child who is the subject of the investigation and an assessment of the child's family;
- states the reasons for the department's involvement with the family;
- is narrowly tailored to address specific reasons for the department's involvement with the family and the factors that make the child a foster care candidate; and
- lists the specific family preservation services the family will receive under the plan, among other specified provisions.

After the plan is signed by DFPS and the family of a foster care candidate and has been certified by the court, the plan remains in effect until the 180th day after the date the court's order for family preservation services is signed, unless renewed by an order of the court, or the date the plan is amended or revoked by the court. The bill allows a family preservation services plan to be amended at any time and establishes relevant amendment procedures.

Service provider. The bill authorizes a parent, managing conservator, guardian, or other member of a household to obtain court-ordered family preservation services from a qualified or licensed provider selected by the person. A parent, managing conservator, guardian, or other member of a household who obtains those services is responsible for the service costs, and those who successfully complete the required family preservation services must obtain verification from the service provider of that completion.

Report. By the first anniversary of the date the department began a pilot program and every two years after that date, the department must contract with an independent entity to evaluate the program's implementation, assess its progress, and report certain findings to the relevant legislative committees.

Supporters said

HB 3041 would implement an important component of the federal Family First Prevention Services Act by requiring provision of family preservation services through a pilot program in certain regions. The Department of Family and Protective Services is tasked with protecting children in Texas from abuse and neglect, which can lead to children being removed from homes deemed unsafe. However, children are increasingly being removed due to alleged safety concerns or allegations of neglect that sometimes are simply the byproducts of poverty rather than acts of malicious parents or guardians.

Research indicates that children suffer further trauma when removed from their homes and placed in foster care. The bill would allow children at imminent risk of entering foster care to remain safely at home while their parent or guardian works to complete evidence-based prevention services, including mental health services, substance abuse treatment, and in-home intensive parenting support.

The bill also would ensure that services rendered by the courts had sufficient oversight and were delivered in a way that respected the rights of parents and families. Implementing a pilot program in one urban and one rural region also would allow the state to address the needs of diverse populations.

Critics said

HB 3041 may not provide enough resources for certain courts that manage heavier caseloads involving court-ordered family preservation services within or outside the Family First Prevention Services Act.

Notes

The HRO analysis of HB 3041 appeared in Part Two in the April 27 *Daily Floor Report*.

The 87th Legislature also considered other bills related to community-based care.

SB 1896 by Kolkhorst, effective June 14, 2021, makes certain changes to Texas' community-based care (CBC) model for quality and assurance of placements for children in foster care, expansion of CBC services, contracting practices, and implementation of federal provisions, among other revisions. The HRO analysis of SB 1896 appeared in Part Two in the May 23 *Daily Floor Report*.

HB 3691 by Frank, which died in the Senate, would have required the Department of Family and Protective Services to define a statewide strategic plan for implementing community-based care in catchment areas and to transfer to a single-source continuum contractor additional services, including family preservation services, in certain catchment areas. The HRO analysis of HB 3691 appeared in Part Two in the May 11 *Daily Floor Report*.

Authorizing nonprofit agricultural organizations to offer health benefits

HB 3924 by Oliverson
Effective September 1, 2021

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HB 3924 allows a nonprofit agricultural organization or its affiliate to offer nonprofit agricultural organization health benefits in the state. A nonprofit agricultural organization acting in accordance with the bill is not a health insurer and is not engaging in the business of health insurance. The bill applies balance billing provisions and the out-of-network claim dispute resolution under current law to a health benefit plan offered by a nonprofit agricultural organization.

Definitions. The bill defines "nonprofit agricultural organization" as an organization that:

- is exempt from taxation under Sec. 501(a), Internal Revenue Code of 1986, as an organization described by Sec. 501(c)(5);
- is domiciled in the state;
- was in existence prior to 1940;
- is composed of members who were residents of at least 98 percent of the state's counties;
- collects annual dues from its members; and
- was created to promote and develop the most profitable and desirable system of agriculture and the most wholesome and satisfactory conditions of rural life in accordance with the organization's articles and bylaws.

"Nonprofit agricultural organization health benefits" means health benefits:

- sponsored by a nonprofit agricultural organization or an affiliate of the organization;
- offered only to the organization's members and members' family members;
- that are not provided through an insurance policy or other product the offering or issuance of which is regulated as the business of insurance in the state; and
- deemed by the organization to be important in assisting its members to live long and productive lives.

Preexisting condition. A nonprofit agricultural organization that offers nonprofit agricultural organization health benefits may not require a waiting period of more than six months for treatment of a preexisting condition otherwise included in the organization's health benefits.

Disclosure. The bill requires a nonprofit agricultural organization that offers health benefits to provide to an individual applying for health benefits written notice stating that the organization's benefits are not provided through an insurance policy or other product regulated as the business of insurance. An individual must sign and return the notice to the nonprofit agricultural organization prior to enrolling in the organization's health benefits.

Balance billing. The bill prohibits an out-of-network provider or a person asserting a claim as an agent or assignee of the provider from billing an enrollee who is receiving a service or supply at an amount greater than an applicable copayment, coinsurance, and deductible under the enrollee's health benefit plan. The billed amount may not be based on any additional amount determined in the out-of-network claim dispute resolution process under current law.

This prohibition does not apply to nonemergency health care that an enrollee elects to receive in writing in advance of the service provided by each out-of-network provider and for which an out-of-network provider delivers a written disclosure to the enrollee.

Payment. An administrator of a health benefit plan offered by a nonprofit agricultural organization must cover emergency care or a related supply provided to an enrollee by an out-of-network provider at the usual and customary rate or an agreed rate. Administrators also must cover care from a facility-based provider, diagnostic imaging, and laboratory services at the usual and customary rate or at an agreed rate. Administrators must make a payment directly to the provider by the 30th day after the administrator receives an electronic claim or by the 45th day after the administrator receives a non-electronic claim.

Notice. An administrator of a health benefit plan offered by a nonprofit agricultural organization must provide a written notice in an explanation of benefits provided to the enrollee and the out-of-network provider in connection with the provided health care service or supply. The notice must include a statement of the billing prohibition as well as the total amount the provider may bill the enrollee under the enrollee's health benefit plan and an itemization of copayments, coinsurance, deductibles, and other amounts included in that total.

Supporters said

HB 3924 would increase access to affordable health care, especially for those in rural communities, by allowing Farm Bureau plans to offer health benefits in Texas. Texans in rural communities have limited choices in the health insurance market and often are forced to go without health coverage due to exorbitant premiums and deductibles.

Five other states already authorize Farm Bureau health plans to operate successfully in providing robust benefits and more affordable options, while helping to decrease the number of uninsured individuals. Exempting these plans from the definition of insurance would allow for advanced coverage options that are not subject to stringent insurance regulations. Farm Bureau health plans are similar to self-funded employer plans in that they have flexibility to design their own coverages. Since the plans authorized under the bill would be self-funded and offered exclusively to Farm Bureau members, they do not meet the threshold of being considered insurance.

The bill would provide sufficient protection to individuals with preexisting conditions by prohibiting a nonprofit agricultural organization from requiring a waiting period of more than six months before treatment of a preexisting condition could begin.

Critics said

By exempting Farm Bureau health plans from the definition of insurance, HB 3924 could decrease consumer protections and increase financial risk in the health insurance market. These unregulated Farm Bureau health plans would not be subject to sufficient preexisting condition protections or network adequacy requirements, among other essential consumer protections. It also could produce instability in the market, divide up the individual risk pool, and unnecessarily inflate the cost of insurance for Texans who rely on comprehensive coverage.

Notes

The HRO analysis of HB 3924 appeared in Part One in the May 4 *Daily Floor Report*.

The 87th Legislature considered other bills addressing alternative health coverage options.

HB 3752 by Frank, effective September 1, 2021, authorizes subsidiaries of the Texas Mutual Insurance Company to offer accident, health insurance, or alternative health benefit coverage. The bill defines "alternative health benefit coverage" as health benefit coverage provided by a subsidiary of the company that is not authorized to engage in the business of insurance in the state; offered only to individuals, small businesses with a maximum of 250 full-time employees, or the company's policyholders or their employees; and that are not provided through an insurance policy or other offered or issued product which constitutes the business of insurance or that is not benefit coverage subject to the state's workers' compensation laws. The HRO analysis of HB 3752 appeared in Part One in the May 4 *Daily Floor Report*.

HB 573 by Oliverson, which died in the House, would have required a person who intended to operate a health care sharing ministry in the state to file certain initial and annual information with the commissioner of the Texas Department of Insurance. The bill would have required a health care sharing ministry to disclose certain financial information, including amounts contributed by members of the health care sharing ministry and total amounts paid to reimburse members' medical expenses. The HRO analysis of HB 573 appeared in Part Two in the May 12 *Daily Floor Report*.

Regulating use of abortion-inducing drugs; creating an offense

SB 4 by Lucio, Second Called Session
Effective September 17, 2021

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SB 4 prohibits a manufacturer, supplier, physician, or other person from providing to a patient any abortion-inducing drug by courier, delivery, or mail service. It repeals certain references to definitions under current law for the final printed label and abortion-inducing drug regimen approved by the U.S. Food and Drug Administration (FDA). A physician must ensure the physician does not provide an abortion-inducing drug for a woman whose pregnancy is more than 49 days (seven weeks) of gestational age.

The bill expands the types of conditions that qualify as reportable abortion complications. It also creates a state-jail felony for a violation of the bill and repeals a reference to the American Congress of Obstetricians and Gynecologists' guidelines in current law.

The bill expands the definition of "abortion-inducing drug" to include misoprostol (Cytotec) and methotrexate. It also adds to the definition of "medical abortion" the terms medication abortion, chemical abortion, drug-induced abortion, RU-486, and Mifeprex regimen.

Physician requirements. The bill expands the actions a physician must take before providing an abortion-inducing drug, including, among other specified actions:

- ensuring the physician does not provide an abortion-inducing drug for a pregnant woman whose pregnancy is more than 49 days (seven weeks) of gestational age;
- examining the pregnant woman in person;
- determining the pregnant woman's blood type and documenting whether she received treatment for Rh negativity.

For a woman who is Rh negative, the physician must offer to administer Rh immunoglobulin at the time the abortion-inducing drug is administered or the abortion is performed or induced to prevent Rh incompatibility, complications, or miscarriage in future pregnancies.

Consent. The bill prohibits a person from providing an abortion-inducing drug to a pregnant woman without satisfying the applicable informed consent requirements under current law.

Reporting. The term "adverse event" is added to the statutory definition of "abortion complication" to include, among other conditions, blood clots resulting in pulmonary embolism or deep vein thrombosis, failure to actually terminate the pregnancy, adverse reactions to anesthesia or other drugs, and any other adverse event as defined by the FDA's criteria provided by the MedWatch Reporting System. A physician who induces an abortion or provides an abortion-inducing drug must comply with specified reporting requirements under current law.

Enforcement. A state executive or administrative official may not decline to enforce the bill, or adopt a construction of it that narrows its applicability, based on the official's own beliefs on the state or federal constitution's requirements unless the official is enjoined by a state or federal court from enforcing the bill.

Criminal offense. For an abortion performed or induced on or after January 1, 2022, a person who intentionally, knowingly, or recklessly violates the bill's provisions commits a state-jail felony offense (180 days to two years in a state jail and an optional fine of up to $10,000), which also may be the basis for an administrative violation under current law. A pregnant woman on whom a drug-induced abortion is attempted, induced, or performed on or after that date in violation of the bill is not criminally liable.

Severability. If any provision or any application of the bill's provisions to any person or circumstance are held to be invalid or unenforceable, it must be construed to give the provision the maximum effect permitted by law, unless such a holding is one of utter invalidity or unenforceability, in which case the provision is severable from others and does not affect the remainder or the application of the provisions to other circumstances or persons not similarly situated.

Supporters said

SB 4 would help protect lives and reduce abortions in Texas by prohibiting a person from providing abortion-inducing drugs by mail or delivery service. It would decrease from 70 days (10 weeks) to 49 days (seven weeks) the time frame in which abortion-inducing drugs could be administered. While the U.S. Food and Drug Administration (FDA) currently authorizes the Mifeprex regimen to be provided up to 70 days (10 weeks) of gestation, the failure rate and risk of complications with drug-induced abortions increases with advancing gestational age. Reducing the time in which abortion-inducing drugs could be administered by repealing references to the FDA and prohibiting these drugs from being provided beyond seven weeks could reduce health risks to women and help save more unborn children.

The bill would protect women's lives by prohibiting a person from providing abortion-inducing drugs by mail or delivery service. This would preserve the doctor-patient relationship and ensure administration of the drug was supervised by a qualified physician. These drugs pose serious risks and may cause complications requiring immediate medical attention, such as hemorrhaging, blood clots, and pelvic inflammatory disease.

It is necessary to codify in state law requirements for abortion-inducing drugs to be administered in person, in the event federal or telemedicine rules change. While the FDA this year announced its intentions to exercise enforcement discretion on the dispensing of Mifeprex or its approved generic version through the mail, Texas maintains an interest in protecting the health and welfare of every woman considering a drug-induced abortion.

Prohibiting abortion-inducing drugs from being dispensed through mail-order or delivery services also could decrease a woman's risk of receiving the drugs from an abusive partner or, for women who are victims of human trafficking, receiving those drugs from traffickers.

The state-jail felony would be appropriate for violators and deter and allow for the extradition of out-of-state physicians who may provide the drugs to a patient without an in-person visit.

Critics said

SB 4 would further restrict a constitutionally protected right to choose abortion by decreasing from 70 days (10 weeks) to 49 days (seven weeks) of gestation the maximum time in which an abortion-inducing drug could be administered. This would conflict with evidence-based medical standards.

Under current law, the Mifeprex regimen may be provided up to 70 days (10 weeks) of gestation, as authorized by the U.S. Food and Drug Administration. Many women do not find out they are pregnant until after six weeks, leaving little time to make a decision about whether to continue or terminate a pregnancy. By prohibiting drug-induced abortions beyond seven weeks of gestational age, the bill would reduce access to reproductive health care and could lead some women to use more dangerous alternatives to end a pregnancy.

The bill would interfere in the doctor-patient relationship and limit physicians' ability to provide the most appropriate medical care. It also could intimidate physicians who prescribed misoprostol and methotrexate for other purposes, such as an autoimmune disorder.

Texas state law already requires in-person visits with a physician for an abortion procedure and when dispensing an abortion-inducing drug. The FDA's decision to use discretionary enforcement for the in-person dispensation requirement would only affect states that allow telemedicine abortions, which Texas does not.

The bill should include an exception for a medication abortion for victims of sexual assault, rape, or incest to avoid imposing further pain and trauma on survivors.The state-jail felony for violations would be too punitive and create broad applicability, further intimidating health care professionals in abortion care. Current law already requires physicians to report several abortion complications to the Health and Human Services Commission. Adding 17 more would increase physician's administrative burden.

Other critics said

SB 4 should give enforcement authority to the Office of the Attorney General to ensure violations were addressed evenly across the state. It also should authorize private citizens to file a cause of action against someone who violates the bill's provisions.

Notes

The HRO analysis of SB 4 appeared in the August 30 *Daily Floor Report*.

Prohibiting an abortion after fetal heartbeat of unborn child is detected

SB 8 by Hughes
Effective September 1, 2021

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SB 8 establishes the Texas Heartbeat Act, which prohibits a physician from performing an abortion on a woman who is pregnant with an unborn child who has a detectable fetal heartbeat. Before an abortion is performed, a physician must conduct a test to determine whether a fetal heartbeat is detected. Any person, other than a state or local government employee, may file a civil action against a physician or other person who performs or induces an abortion or who aids or abets the performance or inducement of an abortion after a fetal heartbeat is detected.

The bill defines "fetal heartbeat" as cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac. "Unborn child" means a human fetus or embryo in any stage of gestation from fertilization until birth.

Prohibited actions by physician. Under SB 8, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child or failed to perform a test to detect a fetal heartbeat. A physician does not violate this provision if the physician did not detect a fetal heartbeat while performing the required test.

The prohibitions against such actions by a physician do not apply if a physician believes a medical emergency exists.

Limitations on public enforcement. No enforcement of provisions on detection of a fetal heartbeat, or of certain Penal Code provisions, in response to violations of SB 8 may be taken or threatened by the state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of the state or a political subdivision against any person, except as provided in the bill.

Civil action for certain violations. Any person, other than an officer or employee of a state or local governmental entity in Texas, may bring a civil action against any person who:

- performs or induces an abortion in violation of the bill;
- knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the abortion costs through insurance or otherwise, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of the bill; or
- intends to engage in the conduct described above.

A person may bring a civil action until the fourth anniversary of the date the cause of action accrues.

A civil action may not be brought by a person who impregnated the abortion patient through an act of rape, sexual assault, incest, or other specified act.

Affirmative defense. SB 8 creates an affirmative defense for persons alleged to have aided or abetted a violation of the bill's provisions. The affirmative defense applies if the defendant reasonably believed the physician performing or inducing the abortion had complied or would comply with the bill. The defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

Defense to action. Under the bill, the following are not defenses to a civil action:

- ignorance or mistake of law;
- a defendant's belief that the bill's requirements are unconstitutional;
- a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in prohibited conduct;
- a defendant's reliance on any state or federal court decision that is not binding on the court in which

the action is brought;
- non-mutual issue preclusion or non-mutual claim preclusion;
- consent of unborn child's mother to abortion; or
- any claim that the enforcement of the bill or imposition of civil liability against the defendant will violate the constitutional rights of certain third parties, except as provided by the bill.

Court. If a claimant prevails in a civil action brought under the bill, the court must award:

- injunctive relief sufficient to prevent the defendant from violating or engaging in acts that aid or abet violations of the bill;
- statutory damages of at least $10,000 for each abortion that the defendant performed or induced in violation of the bill and for each abortion performed or induced in violation that the defendant aided or abetted; and
- costs and attorney's fees.

Undue burden defense limitations. A defendant in a civil action does not have standing to assert the rights of women seeking an abortion as a defense to liability unless:

- the U.S. Supreme Court holds that the state's courts must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law; or
- the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the U.S. Supreme Court.

A defendant in a civil action may assert an affirmative defense to liability if the defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion and the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or group of women.

Court findings; prohibitions. A court may not find an undue burden unless the defendant introduces evidence proving that an award of relief will prevent a woman or group of women from obtaining an abortion or an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.

A defendant may not establish an undue burden by:

- merely demonstrating that an award of relief will prevent women from obtaining certain assistance from others in their effort to obtain an abortion; or
- arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.

Constitutional rights. The bill does not in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under a civil action. A court may not award relief under a civil action if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

Immunity. SB 8 prevails over any conflicting law. The state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of the state or a political subdivision has official immunity in any action, claim, or counterclaim or other type of legal action that challenges the validity of Health and Safety Code ch. 171 or its application.

Severability. If any application of any provision under Health and Safety Code ch. 171 to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances must be severed and may not be affected. Those provisions remain in force.

Supporters said

SB 8 would establish the Texas Heartbeat Act, which is necessary to protect more lives of unborn children. By prohibiting an abortion after a fetal heartbeat is detected, the bill would help to ensure that an unborn child was carried to the full term of a woman's pregnancy.

Some contemporary medical research indicates that a fetal heartbeat is a key medical predictor that an unborn child will reach live birth. To make an informed decision on whether to continue her pregnancy, a pregnant woman has a compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity, a strong indicator that a life is present. An unborn child's life is worthy of protection, which the bill would offer.

Currently, state law generally bans abortions after 20 weeks of pregnancy, but a fetal heartbeat can be detected

as early as six weeks. The bill would reduce the number of abortions performed in Texas by prohibiting abortions once a fetal heartbeat was detected.

Enforcing the Texas Heartbeat Act only through civil enforcement by private citizens, not the state, would strengthen citizens' ability to hold violators accountable for a practice that many Texans find morally objectionable. Allowing private citizens, other than an employee of state or local government, to file suit against a physician or anyone who aided or abetted the performance of an abortion would be similar to certain legal proceedings involving Medicaid fraud. Prohibiting a person who impregnated a woman through rape, sexual assault, or incest from filing such a suit would appropriately protect women from additional trauma.

Texas never repealed, either expressly or by implication, state statutes enacted before the ruling in *Roe v. Wade* that prohibit and criminalize abortion unless the mother's life is in danger. By establishing that Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child, the Texas Heartbeat Act could withstand constitutional challenges, which would mitigate any increased legal costs.The bill would provide an exception to an abortion for a woman experiencing a valid medical emergency, as determined and documented by the physician.

Concerns about improving access to services for women, including maternal health care and assistance in finding stable housing and employment, could be better addressed in other legislation.

Critics said

SB 8 would reduce a woman's access to reproductive health care by prohibiting an abortion after a fetal heartbeat was detected. The bill would unnecessarily interfere with the doctor-patient relationship and could endanger a woman's life by further restricting her constitutionally protected right to choose abortion.

By prohibiting an abortion after a fetal heartbeat was detected, the bill would substantially reduce the time frame in which a woman could decide whether to continue or terminate her pregnancy. Some fetal heartbeats can be detected as early as six weeks, but many women do not find out they are pregnant until after the six-week mark. This would restrict a woman's ability to make an informed choice about her pregnancy.

Allowing any private citizen, including someone who was not personally connected to the woman, to bring a civil action against a physician who performed or a person who aided or abetted in the performance of an abortion could unnecessarily open the door to frivolous lawsuits. The aiding and abetting provisions under SB 8 are too broad and could subject healthcare providers to expensive and burdensome lawsuits.

The bill also could significantly increase costs for defendants and increase case backlogs in the court system. Limiting the defenses to civil actions and prohibiting a wrongly sued defendant from recovering any attorney's fees would inhibit defendants' ability to sufficiently defend themselves. The minimum $10,000 fine also could prevent someone from being able to afford a defense.

SB 8 could subject the state to even more lawsuits by further limiting abortions, which could supersede what is constitutionally authorized under *Roe v. Wade*. This could increase legal costs for the state.

In addition to providing an exception to an abortion when a woman has a medical emergency, the bill should include an exception for cases of rape and incest. Excluding such exceptions could impose additional pain and trauma on survivors of sexual assault.

Instead of interfering with a woman's reproductive health care choices, the Legislature should identify and establish programs that improve access to maternal health care, housing and employment assistance, and other financial resources.

Other critics said

Instead of enacting more restrictions, the Legislature should prohibit abortion outright. Such a bold move could help lead the way to ending a practice that many Texans believe is morally unjustifiable.

Notes

The HRO analysis of SB 8 appeared in Part One of the May 5 *Daily Floor Report*.

The 87th Legislature enacted another major bill on abortion. **HB 1280** by Capriglione, effective September 1, 2021, prohibits a person from knowingly performing, inducing, or attempting an abortion and creates a felony offense for violating the prohibition. The offense created

by the bill takes effect, to the extent permitted, on the 30th day after the issuance of a U.S. Supreme Court judgment in a decision overruling *Roe v. Wade*, the issuance of any other U.S. Supreme Court judgment that recognized the authority of the states to prohibit abortion, or the adoption of an amendment to the U.S. Constitution that restored to the states the authority to prohibit abortion. The bill creates an exception for a licensed physician performing an abortion on a pregnant woman who has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the woman at risk of death or substantial impairment of a major bodily function unless the abortion is performed. The bill also has an exception for medical treatment provided to a pregnant woman by a licensed physician that results in the accidental or unintentional injury or death of the unborn child. The HRO analysis of HB 1280 appeared in Part 1 of the May 5 *Daily Floor Report*.

Allowing long-term residents to designate caregiver for in-person visitation

SB 25 and SJR 19 by Kolkhorst
Effective September 1, 2021

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Various proposals to authorize long-term care residents to designate an essential caregiver for in-person visitation were considered during the regular session of the 87th Legislature.

SB 25 grants residents of certain long-term care facilities, or a resident's guardian or legally authorized representative, the right to designate an essential caregiver with whom a facility may not prohibit in-person visitation. It establishes related guidelines. "Essential caregiver" means a family member, friend, guardian, or other individual selected by a resident, resident's guardian, or resident's legally authorized representative for in-person visits.

The bill applies to residents in a nursing facility, assisted living facility, intermediate care facility for individuals with an intellectual disability, residence providing home and community-based services, or state supported living center.

Guidelines. As soon as practicable after September 1, 2021, the executive commissioner of the Health and Human Services Commission (HHSC) must by rule develop guidelines to help facilities establish essential caregiver visitation policies. The guidelines must require facilities to:

- allow a resident, resident's guardian, or resident's legally authorized representative to designate an essential caregiver for in-person visitation;
- establish a visitation schedule allowing the essential caregiver to visit the resident for at least two hours each day;
- establish procedures to enable physical contact between the resident and essential caregiver; and
- obtain the essential caregiver's signature certifying that the caregiver will follow the facility, program provider, or center's safety protocols and any applicable rules.

Revocation of essential caregiver designation. A facility may revoke an individual's designation as an essential caregiver if the caregiver violates the facility's safety protocols or rules. If an individual's designation as an essential caregiver is revoked, the resident, resident's guardian, or resident's legally authorized representative has the right to immediately designate another individual as the resident's essential caregiver. HHSC by rule must establish an appeals process to evaluate the revocation of an individual's designation as an essential caregiver.

Suspension of essential caregiver visitation. Under the bill, a facility may petition HHSC to suspend in-person essential caregiver visits for up to seven days if in-person visitation poses a serious community health risk. HHSC may deny such a request if it determines that in-person visitation does not pose a serious community health risk.

A facility may request an extension from HHSC to suspend in-person essential caregiver visitation for more than seven days. HHSC may not approve an extension for a period longer than seven days, and a facility must separately request each extension. The bill prohibits a facility from suspending in-person essential caregiver visitation in any year for more than 14 consecutive days or a total of 45 days.

SJR 19 would amend the Texas Constitution to grant residents of certain long-term care facilities the right to designate an essential caregiver with whom the facility could not prohibit in-person visitation. The joint resolution would apply to residents in a nursing facility, assisted living facility, intermediate care facility for individuals with an intellectual disability, residence providing home and community-based services, or state supported living center.

The Legislature by general law could provide guidelines for a facility addressed by the bill to follow in establishing essential caregiver visitation policies and procedures. The ballot proposal was approved by voters on November 2, 2021.

Supporters said

SB 25 and SJR 19 would grant residents of long-term care facilities the right to designate an essential caregiver for in-person visitation, ensuring that residents had access to an essential caregiver at all times, with limited exceptions. Essential caregivers are vital in providing hands-on care and social and emotional support to residents that supplements care provided by facility staff.

During the COVID-19 pandemic, visitation restrictions were difficult for residents and their families as well as for facility staff. Many residents were isolated and lacked connection and physical touch from loved ones for several months, and as a result of these restrictions, some patients died alone. By allowing residents to designate an essential caregiver, the bill and the joint resolution together would ensure vulnerable Texans had access to loved ones, which could improve residents' physical and mental health.

SB 25 would allow long-term care facilities to request a suspension of essential caregiver visitation for seven days if in-person visitation posed a serious community health risk, with possible extensions in seven-day increments. This would create flexibility for facilities in responding to future public health emergencies while limiting disruption to an essential caregiver's access to a resident. Capping the number of consecutive and total days in a year that a facility could suspend in-person visitation would provide ample time for facilities to respond to future disease outbreaks while ensuring residents did not experience prolonged periods of isolation as they did during the pandemic.

These bills would allow a resident immediately to designate another individual as an essential caregiver if the initial essential caregiver's designation were revoked. Designating only one essential caregiver at a time would be an appropriate balance between ensuring residents receive visits from a loved one and providing flexibility for facilities to respond to a future disease outbreak.

Critics said

While it is important for long-term care residents to have access to essential caregivers, SB 25 would not provide sufficient flexibility for facilities to respond to future public health emergencies. Limiting suspension of essential caregiver in-person visitation to 14 consecutive days or a total of 45 days per year may not provide enough time for facilities to contain a future disease outbreak. Requiring facilities to provide a minimum two-hour period for essential caregivers to visit residents also could strain staff resources, especially for facilities that already struggle to maintain adequate staffing to meet residents' needs.

The bill would not provide sufficient protection for essential caregivers who unintentionally violated a facility's safety protocols, potentially subjecting a caregiver's designation to revocation. To avoid unnecessary revocation, the bill should ensure revocations apply only if an essential caregiver intentionally violated a safety protocol and the action created a health and safety risk for one or more residents.

The bill should enable a resident to refuse a person designated as an essential caregiver by the resident's guardian or legally authorized representative if the resident did not agree with the designation. It also should allow a facility to remove the essential caregiver's designation if the caregiver became predatory.

Other critics said

SB 25 and SJR 19 should allow a long-term care facility resident or the resident's guardian or representative to designate more than one person at a time as an essential caregiver for in-person visitation. Limiting the essential caregiver designation to only one person could prevent other family members and friends from seeing a loved one before they passed away.

Notes

The HRO analysis of SB 25 appeared in Part One of the May 23 *Daily Floor Report*.

The HRO analysis of SJR 19 appeared in Part One of the May 24 *Daily Floor Report*.

Capping an enrollee's shared cost on prescription insulin to $25

SB 827 by Kolkhorst
Effective September 1, 2021

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SB 827 prohibits a health benefit plan from imposing a cost-sharing provision for prescription insulin in the plan's formulary if the enrollee must pay more than $25 per prescription for a 30-day supply, regardless of the amount or type of insulin needed to fill the enrollee's prescription. A health plan must include at least one insulin from each therapeutic class in the plan's formulary. Under the bill, "insulin" excludes an insulin drug that is administered to a patient intravenously.

Applicability. The bill applies only to certain health plans issued by specified organizations, including:

- the state Medicaid program;
- the Children's Health Insurance Program (CHIP);
- a plan issued by a health maintenance organization;
- a multiple employer welfare arrangement;
- a basic coverage plan under the Texas Employees Group Benefits Act;
- a basic plan under the Texas Public School Retired Employees Group Benefits Act;
- a primary care coverage plan under the Texas School Employees Uniform Group Health Coverage Act; and
- a basic coverage plan under the Uniform Insurance Benefits Act for employees of the University of Texas and Texas A&M systems.

Exceptions. The bill does not apply to certain plans and policies, including a Medicare supplemental policy as defined by federal law or a workers' compensation policy.

Supporters said

SB 827 would increase access to affordable prescription insulin by capping an enrollee's co-pay at $25 per prescription. Due to rising prescription drug costs, many Texans with diabetes forgo medication because they cannot afford to pay for the insulin they need to survive. Without insulin, diabetic individuals are at risk of losing vision, limbs, and organs, and some may die.

Capping an enrollee's co-pay is necessary to provide vulnerable Texans access to lifesaving medication. The bill could reduce emergency room visits, hospitalizations, and health care costs. It also could improve Texans' medication adherence, leading to better health outcomes.

Concerns about improving access to insulin for uninsured Texans by establishing a discount drug program could be better addressed in other legislation.

Critics said

SB 827 could increase premium costs for employers and families by capping an enrollee's co-pay at $25 per prescription insulin. While pharmaceutical drug prices are too high, a co-pay cap would not decrease the price of insulin but could incentivize drug companies to continue increasing insulin prices with minimal accountability or transparency.

The bill also would not decrease out-of-pocket costs for uninsured Texans with diabetes. To decrease insulin costs for uninsured individuals, the Legislature should establish a discount drug program.

Notes

The HRO analysis of SB 827 appeared in the May 22 *Daily Floor Report*.

Creating legislative public health oversight board; revising definitions

SB 966 by Kolkhorst
Effective September 1, 2021

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SB 966 adds definitions and makes other revisions under current law and establishes the legislative public health oversight board.

The bill revises the definition of "public health disaster" to mean:

- a state of disaster declared by the governor; and
- a determination by the commissioner of the Department of State Health Services (DSHS) that there is an immediate threat from a communicable disease, health condition, or chemical, biological, radiological, or electromagnetic exposure that poses a high risk of death or serious harm to the public and creates a substantial risk of harmful public exposure.

"Public health emergency" is defined as a determination by the DSHS commissioner, evidenced in a commissioner-issued emergency order, that there is an immediate threat from a communicable disease, health condition, or chemical, biological, radiological, or electromagnetic exposure that:

- potentially poses a risk of death or severe illness or harm to the public; and
- potentially creates a substantial risk of harmful exposure to the public.

Public health disaster or emergency. Under SB 966, a declaration of a public health disaster or an order of public health emergency may continue for up to 30 days after the date the disaster or emergency is declared or ordered by the DSHS commissioner.

Renewal. A public health disaster may be renewed by the Legislature or by the DSHS commissioner with the approval of the legislative public health oversight board for another 30 days, and a public health emergency order may be renewed by the commissioner for another 30 days. A renewal period may not exceed 30 days.

If the Legislature or the legislative public health oversight board is unable to meet to consider the renewal of a declaration of a public health disaster, the declaration must continue until the Legislature or the board meets unless the declaration is terminated by the DSHS commissioner or governor.

By the seventh day after the DSHS commissioner issues an initial declaration of a public health disaster or an order of a public health emergency, the commissioner must consult on the disaster or emergency with the chairs of the standing committees of the Senate and House with primary jurisdiction over public health.

Legislative public health oversight board. SB 966 establishes the legislative public health oversight board to provide oversight for declarations of public health disasters and orders of public health emergencies issued by the commissioner of DSHS and to perform other specified duties.

Membership. The board consists of:

- the lieutenant governor and House speaker, who are joint chairs of the board;
- the chairs of certain Senate and House committees as specified in the bill;
- two additional members of the Senate appointed by the lieutenant governor; and
- two additional members of the House appointed by the speaker.

Meetings. Under the bill, the board must meet in Austin, with certain exceptions, and must meet as often as necessary to perform its duties. As an exception to state open meetings laws and other law, for a meeting in Austin at which both joint chairs of the board are physically present, any number of the other board members may attend the meeting by telephone conference call, video conference call, or other similar telecommunication device.

A meeting held by use of telephone conference call, video conference call, or other similar telecommunication device is subject to certain notice requirements, must be open and audible to the public, and must provide two-way audio communication between all board members in attendance.

Supporters said

SB 966 would address calls to include the Legislature in decision-making during future public health disasters and emergencies by establishing the legislative public health oversight board. After the Department of State Health Services (DSHS) declared a public health disaster for Texas on March 12, 2020, in response to the COVID-19 pandemic, concerns were raised that legislative oversight was bypassed despite many Texans seeking clarification on or modification to the declaration. The creation of the legislative oversight board would ensure the voices of the Legislature were not sidelined during future public health disasters and emergencies and that elected representatives were involved in the decision-making process. Creating the board also would provide a better balance of powers and improve accountability for DSHS.

Critics said

By establishing a legislative public health oversight board, SB 966 could hinder the state from responding efficiently to mitigate the spread of a communicable disease during a public health disaster or emergency. The bill also should include members with medical expertise on the legislative oversight board to ensure qualified persons were consulted on public health measures.

Notes

The HRO analysis of SB 966 appeared in Part One in the May 25 *Daily Floor Report*.

Revising certain regulations for public health disasters and emergencies

SB 968 by Kolkhorst
Effective June 16, 2021

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SB 968 revises regulations governing the Department of State Health Services, the Texas Medical Board, the Texas Division of Emergency Management, and political subdivisions during a public health disaster or emergency. It prohibits COVID-19 vaccine passports, establishes the Office of Chief State Epidemiologist, and requires wellness checks of certain medically fragile individuals during a public health disaster or emergency.

Public health disaster declaration. The bill allows the commissioner of DSHS to declare a statewide or regional public health disaster or order a statewide or regional public health emergency if the commissioner determines an occurrence or threat to public health is imminent. The commissioner may declare a public health disaster only if the governor declares a state of disaster.

Consultation. After declaring a public health disaster or ordering a public health emergency, the commissioner of DSHS must consult with the Task Force on Infectious Disease Preparedness and Response, including any subcommittee the task force forms to aid in the rapid assessment of response efforts.

Length of disaster or emergency. A public health disaster or emergency continues until the governor or commissioner terminates it on a finding that the threat or danger has passed or the disaster or emergency has been managed to the extent that emergency conditions no longer exist. A declaration of a public health disaster or an order of public health emergency may continue for up to 30 days after the date the disaster or emergency is declared or ordered by the commissioner of DSHS. A public health disaster may only be renewed by the Legislature or by the commissioner of DSHS with the approval of a designated legislative oversight board. A renewal period may not exceed 30 days.

Disease prevention information system. Using existing resources, DSHS must develop and implement a disease prevention information system for disseminating immunization information, including locations of local health care providers offering immunizations, during a declared state of disaster or local state of disaster.

COVID-19 vaccine passports. SB 968 prohibits a governmental entity in the state from issuing a vaccine passport, vaccine pass, or other standardized documentation to certify an individual's COVID-19 vaccination status to a third party for a purpose other than health care, including publishing or sharing any individual's COVID-19 immunization record or similar health information for a non-health care purpose.

The bill prohibits a business in the state from requiring a customer to provide any documentation certifying the customer's COVID-19 vaccination or post-transmission recovery to enter, access, or receive service from the business. A business that fails to comply is not eligible to receive a grant or enter into a contract payable with state funds.

Each appropriate state agency must ensure that businesses in the state comply and may require compliance as a condition for a license, permit, or other state authorization necessary for conducting business in the state.

These provisions may not be construed to restrict a business from implementing COVID-19 screening and infection control protocols in accordance with state and federal law to protect public health or to interfere with an individual's right to access the individual's personal health information under federal law.

Office of Chief State Epidemiologist. The commissioner of DSHS must establish an Office of Chief State Epidemiologist in the department to provide expertise in public health activities and policy in the state by evaluating epidemiologic, medical, and health care information and identifying pertinent research and evidence-based best practices. The commissioner must appoint as the chief state epidemiologist to administer the new office a physician licensed to practice in the state.

Texas Medical Board. The Texas Medical Board (TMB) may not issue an order or adopt a regulation that limits or prohibits a nonelective medical procedure. The bill allows TMB during a declared state of disaster to issue an order or adopt a regulation imposing a temporary limitation or prohibition on a medical procedure other than a nonelective medical procedure only if it is reasonably necessary to conserve resources for nonelective medical procedures or resources needed for disaster response. The order or regulation may not continue for more than 15 days unless renewed by the board.

Texas Division of Emergency Management. The bill requires the Texas Division of Emergency Management (TDEM), in collaboration with certain entities, to conduct a wellness check on certain medically fragile individuals during a declared state of disaster. TDEM also must enter into a contract with a manufacturer or wholesale distributor of personal protective equipment (PPE) that guarantees a set amount and stocked supply of PPE for use during a certain declared public health disaster.

Political subdivisions. A presiding officer of the governing body of a political subdivision may not issue an order during a declared state of disaster or local disaster to address a pandemic disaster that would limit or prohibit housing and commercial construction activities, residential and commercial real estate services, and certain services for essential products and supply chain relief efforts.

Civil penalty. A health care facility that fails to submit a report required by DSHS under a public health disaster is liable to the state for a maximum civil penalty of $1,000 for each failure. The attorney general at the request of DSHS may bring an action to collect an imposed civil penalty.

Supporters said

SB 968 would ensure that Texas was better prepared to respond to future public health emergencies and disasters by clarifying the responsibilities of the Department of State Health Services and other entities, establishing legislative oversight, and requiring contracts to stockpile personal protective equipment. The COVID-19 pandemic highlighted several challenges, including public access to information, coordination between state and local agencies, and shortages in testing and PPE. The bill would help clarify the authority of DSHS, the Texas Medical Board, and the Texas Division of Emergency Management (TDEM) to ensure the state responds more efficiently and effectively in a public health disaster or emergency.

By prohibiting COVID-19 vaccine passports, the bill would protect an individual from discrimination and preserve an individual's choice on whether to receive the COVID-19 vaccine. The COVID-19 vaccine is voluntary and should not be mandated by government or businesses as a condition to receive services.

The civil penalty would ensure health care facilities submitted certain required reports in a timely manner.

Critics said

SB 968 would unnecessarily interfere with a business' choices to adopt its own health policies and could increase the administrative burden for health care facilities that failed to comply with certain reporting requirements. By prohibiting COVID-19 vaccine passports, the bill would unnecessarily interfere with a business' freedom to adopt its own health and safety protocols to protect its employees and customers from exposure to COVID-19 and other diseases. The maximum civil penalty for health care facilities that do not comply with reporting requirements is too punitive, especially for health care facilities that lack adequate resources to sort through large data sets.

Notes

The HRO analysis of SB 968 appeared in Part One in the May 25 *Daily Floor Report*.

The 87th Legislature considered other bills requiring state agencies to take certain actions during a public health disaster or emergency.

HB 3711 by Bucy, which contained provisions requiring the Texas Division of Emergency Management (TDEM), in collaboration with specified entities, to conduct a wellness check on certain medically fragile individuals during a declared state of disaster, died in the House. The provisions of HB 3711 were later amended to SB 968 in the House. The HRO analysis of HB 3711 was published on May 12.

SB 239 by Powell, effective September 1, 2021, requires the Department of State Health Services to develop and implement a disease prevention information system for disseminating immunization information during a declared state of disaster or local state of disaster. Provisions in SB 239 were amended to SB 968 in the House. SB 239 was not analyzed in a *Daily Floor Report*.

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Natural Resources and Environment

* Finally approved

Prohibiting storage or disposal of high-level radioactive waste

HB 7 by Landgraf, Second Called Session
Effective September 9, 2021

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HB 7 prohibits certain disposal or storage of high-level radioactive waste in the state and restricts the permitting of high-level radioactive waste storage facilities. "High-level radioactive waste" has the meaning assigned by federal law and includes spent nuclear fuel.

A person, including the compact waste disposal facility license holder, may not dispose of or store high-level radioactive waste in the state, with the exception of storage at the site of currently or formerly operating nuclear power reactors and research and test reactors located on university campuses.

The Texas Commission on Environmental Quality may not issue a general construction permit, approve a Stormwater Pollution Prevention Plan, or issue a permit under the Texas Pollutant Discharge Elimination System Program for the construction or operation of a facility that is licensed for the storage of high-level radioactive waste by the U.S. Nuclear Regulatory Commission. The bill excepts a permit for a facility located at the site of currently or formerly operating nuclear power reactors and research and test reactors located on university campuses. These provisions apply only to an application or permit amendment submitted on or after the bill's effective date.

Supporters said

HB 7 would enact the will of Texans by banning the storage and disposal of dangerous high-level radioactive waste in the state. A single low-level radioactive waste disposal facility in the state is located in Andrews County, which benefits from jobs and other economic activity generated by the facility. However, the federal Nuclear Regulatory Commission (NRC) is evaluating an application that would authorize storage of spent nuclear fuel, or high-level radioactive waste, in the county. This could jeopardize public health and safety and the environment of the area. Release of high-level radioactive material would contaminate the low-level facility and lead to lost revenues for both the county and the state.

HB 7 would support the residents of Andrews County, where the commissioners court unanimously passed a resolution expressing opposition to the storage of high-level radioactive waste, by prohibiting in-state storage and disposal of such waste. This would protect not only Andrews County but other areas of the state through which high-level radioactive waste could be transported, putting those areas at risk from potential leaks.

The bill would prohibit the Texas Commission on Environmental Quality (TCEQ) from issuing permits for the construction or operation of a high-level radioactive waste facility, so even if such a facility were to be approved by NRC, it would be prevented from operating and subjected to TCEQ's existing enforcement measures. The bill also would exempt existing nuclear reactors to ensure that generators providing power for the state and university reactors continued to store waste on site.

Those claiming a high-level radioactive waste facility would be safe and secure have not considered all the possible impacts. NRC has conducted an environmental impact study regarding the proposed facility, but no study has been done to show the potential impact of storing high-level radioactive waste on oil and gas operations in the Permian Basin, one of the largest producing oilfields in the world. It is in the best interest of the state to protect the Permian Basin, which employs thousands of Texans and generates billions of dollars for the state, including transportation and education funds. Such a facility could make the area a target for terrorism and threaten this significant energy resource.

While some have made calls to also ban greater-than-class C (GTCC) waste, that type is considered to be low-level radioactive waste and often is generated by oil and gas production activities. GTCC waste already has been stored in the low-level waste facility in Andrews County for years and helps drive economic activity.

Critics said

The Legislature should not limit the storage of radioactive waste in Andrews County. The Nuclear Regulatory Commission (NRC) would ensure that any proposed high-level radioactive waste interim storage facility was approved based on its merits. The nation would benefit from a centrally located interim storage facility in Texas, and such a facility also would be advantageous to Texans by bringing jobs and industry to the community. There is no reason to think a federally approved facility would not store spent nuclear fuel rods in a safe manner, as there have not been issues with storing this kind of waste in existing facilities. Significant time and money has been spent to ensure that a Texas facility would meet all safety standards for the public, workers, and the environment. NRC released an environmental impact report concluding that the proposed interim storage facility would not have a long-term impact to the land resources in the area.

Other critics said

HB 7 would not go far enough to ban radioactive waste in the state. It should prohibit the disposal and storage of greater-than-class C (GTCC) waste. While it may not meet the legal definition of high-level radioactive waste, GTCC waste is as dangerous and its storage in the state could increase risks to Texas residents and the environment. The bill also should have stronger enforcement measures, such as specific fines and penalties.

Notes

The HRO analysis of HB 7 appeared in the August 27 *Daily Floor Report*.

During the Second Called Session of the 87th Legislature, members also considered **HB 200** by Landgraf, which would have prohibited a person from importing into, disposing of, or storing high-level radioactive waste in certain areas of the state designated as critical energy infrastructure zones by the Texas Commission on Environmental Quality. The bill died in the House.

Restricting regulation of utility services or appliances based on energy source

HB 17 by Deshotel, HB 1501 by Dean
HB 17 effective May 18, 2021, HB 1501 died in the Senate

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HB 17 prohibits a regulatory authority, planning authority, or political subdivision from adopting or enforcing a measure that has the purpose, intent, or effect of banning, limiting, discriminating against, or prohibiting the connection of a utility service based on the type or source of energy to be delivered to the end-use customer. Such measures also are prohibited for building, maintaining, or installing residential, commercial, or other public or private infrastructure for a utility service.

An entity may not impose an additional charge or pricing difference on a development or building permit applicant for utility infrastructure that encourages builders to connect to a utility service or discourages the installation of facilities for the delivery or use of a utility service based on the type or source of energy to be delivered to the end-use customer. The bill does not limit the ability of regulatory authorities or political subdivisions to choose utility services for properties they own.

HB 1501 would have prohibited a governmental entity from adopting or enforcing a measure that had the purpose, intent, or effect of banning, limiting, restricting, discriminating against, or prohibiting use of an appliance or other system or component fueled by natural gas or propane in the construction, renovation, maintenance, or alteration of a residential or commercial building. A governmental entity could not have imposed an additional charge or pricing difference on a development or building permit applicant that discouraged builders from using an appliance or system or component that was fueled by natural gas or propane in the construction, renovation, maintenance, or alteration of a building. The bill would not have limited the ability of a governmental entity to use an appliance or other system or component powered by any energy source on a property the entity owned.

Supporters said

HB 17 would ensure homeowners, builders, and businesses could decide how best to meet their energy needs. Some states and cities around the country have moved to ban natural gas in new construction. Prohibiting policies that ban or discriminate against a single energy source would preserve customer choice and access to energy sources, including affordable and reliable sources such as natural gas. The bill would not be intended to limit the ability of a political subdivision to implement educational programs.

HB 1501 would protect natural gas and propane appliances for property owners. A growing number of cities have begun to restrict natural gas or propane appliances in new construction, removing options that may be more reliable, economical, and environmentally friendly than options like all-electric appliances. HB 1501 would preempt such misguided local regulations.

Critics said

HB 17 and HB 1501 are too broad and could have a chilling effect on programs that promote energy efficiency if the programs were interpreted as discriminating against a particular energy source for utility services or appliances. In effect, the bills could limit the authority of political subdivisions to educate consumers about cleaner energy choices, to promote electrification out of concern for the effects of climate change, or to offer financial incentives for greener buildings and appliances.

Notes

The HRO analysis of HB 17 appeared in the March 30 *Daily Floor Report*.

The HRO analysis of HB 1501 appeared in Part Two of the May 6 *Daily Floor Report*. It passed both chambers before a point of order on Senate amendments was sustained in the House. The bill was returned to the Senate, where it died.

Requiring state divestment from financial companies that boycott fossil fuels

SB 13 by Birdwell
Effective September 1, 2021

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SB 13 requires state governmental entities, including specified retirement funds and the permanent school fund, to divest from financial companies that boycott energy companies, subject to certain conditions related to fiduciary duty.

The bill defines "boycott energy company" to mean, without an ordinary business purpose, refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations with a company because it:

- engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law, or;
- does business with a company that engages in these actions.

List of boycotting companies. The comptroller must maintain a list of financial companies that boycott energy companies and request written verification from financial companies that they do not boycott energy companies. A company that fails to provide written verification within a specified time will be presumed to be boycotting energy companies. The comptroller will file the list with the presiding officer of each legislative house and the attorney general and post the list on a publicly available website.

Divestment procedure. After receiving the list, a governmental entity must notify the comptroller of any listed financial companies in which it owns direct or indirect holdings. The entity must send a written notice to each listed company informing the company of its listed status, warning of possible divestment, and offering the company the opportunity to clarify its activities. If a financial company ceases boycotting energy companies, the comptroller will remove it from the list. Otherwise, state government entities must sell, redeem, divest, or withdraw all publicly traded securities of the company within a specified time period, with the divestment required to be completed within 360 days after the notice.

Exemptions. State governmental entities are not required to divest from indirect holdings but must send letters to the managers of each investment fund containing listed financial companies requesting that they remove those companies from the fund or create a similar fund without such companies in which the state entity could replace its investments.

A state governmental entity may cease divesting from listed financial companies only if divestment would cause a value loss of managed assets or benchmark deviation of an individual portfolio due. State governmental entities may only cease divesting to the extent needed to avoid such loss or deviation, and otherwise are prohibited from acquiring securities of a listed company. A state governmental entity is not subject to a requirement of the bill if the entity determines that the requirement is inconsistent with its fiduciary responsibility with respect to the investment of assets and related legal duties.

Contracts with boycotting companies prohibited. State agencies and political subdivisions are prohibited from entering a contract for goods and services with any company without written verification in the contract that the company does not boycott energy companies and will not do so during the term of the contract. This prohibition does not apply to contracts with sole proprietorships and applies only to contracts with a company with 10 or more employees and a value of $100,000 or more that is to be paid wholly or partly from public funds. The prohibition also does not apply to a governmental entity that determines that it is inconsistent with the entity's constitutional or statutory duties related to the issuance, incurrence, or management of debt obligations or the management, borrowing, or investment of funds.

Enforcement. The attorney general may bring any action necessary to enforce the bill's provisions regarding investments by state governmental entities.

Supporters said

SB 13 would help protect the state's investments and the overall economic health of Texas by requiring state entities to divest as much as possible from companies that unfairly target energy producers. The politically motivated movement to deny capital to businesses involved in the fossil fuel industry will harm the state's economy. The oil and gas industry is responsible for nearly one-third of the state's gross domestic product, contributes billions to schools, infrastructure, and the rainy day fund, and provides many high-paying jobs in rural areas. Texas funds and taxpayer dollars should not be used to do business with companies whose policies undermine the economic success of the state by making energy less affordable and less secure.

SB 13 would ensure the stability of the state's investments by only requiring divestment that would not result in a loss of value or breach of fiduciary duty. The bill would not prevent but would actually encourage the state to seek out the best available investments. The bill would not violate any company's First Amendment rights, but rather would allow the state to exercise its own right not to do business with an entity that boycotts energy providers.

Critics said

SB 13 would endanger the health of state retirement funds and hinder the long-term growth prospects of the state's economy by limiting the state's investment options. The financial market is moving toward increased divestment from fossil fuels for sound economic reasons and will continue to do so into the future. Meanwhile, oil and gas are economically underperforming relative to other industries. Texas should be looking to capitalize on these market trends rather than resisting them. In order to remain business-friendly, the state should not attempt to pressure or penalize companies for their investment decisions but should seek out the best investments available.

Other critics said

The purchasing decisions of companies often reflect their political beliefs and values. By forcing companies to choose between expressing their beliefs and their ability to contract with the state, SB 13 would infringe on their First Amendment rights. There are better ways to support the oil and gas industry without infringing on free speech, such as by providing preference in state contracting for companies that support the industry.

Notes

The HRO analysis of HB 2189, the companion bill for SB 13, appeared in Part One of the April 19 *Daily Floor Report*.

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Public and Higher Education

* Finally approved

Requiring participation in UIL sports on the basis of biological sex

HB 25 by Swanson, Third Called Session
Effective October 25, 2021

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HB 25 prohibits interscholastic athletic teams sponsored or authorized by school districts or open-enrollment charter schools from allowing a student to compete in a competition designated for the biological sex opposite to the student's as correctly stated on the student's official birth certificate, or if the birth certificate is unobtainable, another government record. The birth certificate's statement of biological sex is considered correct if it was entered at or near the person's birth or changed to correct a scrivener or clerical error in the student's biological sex. Teams may allow female students to compete in an athletic competition designated for male students if a corresponding competition for female students is not offered or available.

The University Interscholastic League (UIL) must adopt rules to implement the bill, subject to approval by the education commissioner. These rules must ensure compliance with state and federal law on the confidentiality of student medical information.

Supporters said

HB 25 would promote safety and fairness in school sports by placing in statute current University Interscholastic League rules for the use of birth certificates for participants in UIL competitions, while specifying that a student could compete only in an interscholastic athletic event designated for the student's sex as assigned at or near birth. This would protect girls' chances to excel in their chosen sports by ensuring ample opportunities for fair athletic competition.

Allowing students to participate in sports events contrary to their sex at birth could put other athletes at a competitive disadvantage due to inherent physiological differences between males and females. It could increase the chances of female athletes being injured, displace girls from teams, and prevent individual girls from winning competitions. It also could deprive female students of athletic scholarships they otherwise would have received and could weaken the protection against discrimination in sports guaranteed to female students in federal law by Title IX.

A recent increase in requests to change the sex recorded on a minor's birth certificate for reasons other than to correct a clerical error, which can be done on the basis of a physician's statement and court order, could lead to more students competing in sports contrary to their biological sex under current UIL rules. The Legislature should not wait for major problems to arise to address this issue. The bill would not prevent anyone from participating in school sports, as long as the person competed with others of the same sex. Opportunities also are available for participating in sports outside of competitive events and teams sponsored by public schools. Many options other than school sports also are available for cultivating a sense of community and inclusion. Students' mental health should be a priority, but unfairly forcing girls to compete against biological males is not the right way to address concerns about mental health.

Concerns that HB 25 would violate some students' privacy are unfounded, as the bill would not authorize nor facilitate any invasive investigations or physical inspections to determine a student's sex, nor would it change the existing UIL procedures for complaints and investigations.

Critics said

By prohibiting transgender students in Texas schools from competing in events designated for the gender with which they identify, HB 25 could negatively impact those who wanted to compete in interscholastic athletics. Sports provide a sense of inclusion and can be critical to the physical, mental, and emotional well-being of children, all of whom should have the chance to enjoy these benefits. The bill could place transgender students at a greater risk of bullying by requiring them to compete with students who did not match their gender identity. Denying transgender youth the chance to fully participate in sports

could harm the mental health of youth who already experience a higher than average risk for suicide.

With no evidence that transgender students are dominating girls' sports at the expense of cisgender girls, or that they will do so in the future, or that they are causing disruption or increasing injuries, HB 25 would attempt to address a problem that does not exist. Substantial variations in physical characteristics and hormone levels exist not only between but within the sexes, so sex assigned at birth is not necessarily the determining factor in athletic ability.

The bill could violate the privacy of all participants in girls' sports by potentially subjecting them to invasive questions about their gender if they were particularly tall or athletic or simply not perceived as "feminine" enough, and transgender students could be forced to come out to their peers before they were ready to do so. The bill would provide no clear guidelines on implementation and enforcement and could discourage participation in girls' sports generally. The bill could subject the state and school districts to costly legal challenges and could have adverse economic consequences if it prompted the withdrawal of business and large planned events from Texas.

Notes

The HRO analysis of HB 25 appeared in the October 14 *Daily Floor Report*.

Modifying public school financing

HB 1525 by Huberty
Generally effective September 1, 2021

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HB 1525 revises certain Education Code provisions on local taxation and revenue, the level of recapture paid to the state by certain property wealthy districts, and funding allotments for certain students. It also expands the teacher incentive allotment, caps spending on transition formula grants, creates a commission to study special education funding, and requires parents to opt their children in to sex education programs.

Pandemic response. HB 1525 requires the Texas Education Agency (TEA) to establish, from state discretionary funds under federal coronavirus relief legislation, programs that help school districts and open-enrollment charter schools implement intensive supports to ensure students perform at grade level and graduate demonstrating college, career, or military readiness. The agency must provide schools with student-based funding as prescribed by the bill, including additional funding for students not performing satisfactorily on state exams. TEA also must provide a one-time reimbursement for technology acquisitions made by districts and charter schools before February 28, 2021.

Reporting. The bill requires TEA quarterly to update the governor and legislative leaders on the implementation and distribution of funds to pandemic-related programs and the use of state discretionary funds under federal coronavirus relief legislation.

Maintenance of effort. The commissioner of education must increase a school district or charter school's funding entitlement as necessary to ensure compliance with requirements for maintenance of effort and maintenance of equity under federal coronavirus response and relief legislation. Before making an increase, the commissioner must notify the Legislative Budget Board and the governor, which is considered approved unless LBB or the governor issues a written disapproval within 30 days. If the total amount of money available for a state fiscal year is insufficient to make a necessary increase, the commissioner must submit to the Legislature an estimate of the amount of funding needed. The maintenance of effort provisions expire September 1, 2025.

Funding adjustments and allotments. HB 1525 revises certain student-based allotments for which schools are entitled to receive funding.

Compensatory education. The bill expands the compensatory education allotment to students experiencing homelessness. It also expands the purpose for the funds to include:

- paying for an instructional coach to raise student achievement at a campus in which educationally disadvantaged students are enrolled; or
- paying expenses related to reducing the dropout rate and increasing the rate of high school completion.

Gifted and talented. HB 1525 creates an allotment for each student served in a program for gifted and talented students, equal to the basic allotment multiplied by 0.07. Not more than 5 percent of a district's students in average daily attendance are eligible for the allotment.

CTE. The bill changes the basis of the career and technology education (CTE) allotment for applicable districts to the sum of the basic allotment and the district's small or mid-sized district allotment. It adopts a three-tiered funding multiplier with higher multipliers for advanced-level courses.

Fast-growth. For the fast-growth allotment, the bill adopts three weights based on whether a district is in the top 40 percent, the middle 30 percent, or the bottom 30 percent of districts, as determined based on the number of students calculated under the bill's provisions for determining whether a school district is experiencing fast growth. The total amount used to provide allotments may not exceed $320 million, although the bill caps the allotment at lower amounts for the next three school years. The bill also adopts a hold harmless provision for districts that are entitled to lower allotments under its provisions for the 2021-2022 school year compared to the 2019-2020 school year, with the total amount of hold harmless funding capped at $40 million.

School safety. HB 1525 expands allowable uses for the school safety allotment to include providing licensed counselors, social workers, and individuals trained in restorative discipline and restorative justice practices and for developing and implementing programs focused on restorative justice practices, culturally relevant instruction, and mental health support. The commissioner must annually publish a report on funds allocated under the school safety allotment.

Instructional materials and technology. The bill allows districts and charter schools to use funds from the instructional materials and technology allotment for costs for distance learning and internet access.

Winter Storm Uri. The bill requires TEA to provide reimbursement to school districts for costs incurred as a result of the 2021 Winter Storm Uri, including any electricity price increases.

Formula transition grants. The bill caps appropriations for formula transition grants at $400 million per school year.

Local property taxes. HB 1525 revises certain laws governing school district tax rates.

Tax swap. The bill specifies that a school district may not impose a school maintenance and operations tax at a rate intended to create a surplus in maintenance tax revenue for the purpose of paying the district's debt service. It requires TEA to develop a method to identify districts that may have adopted such a tax rate and order any such district to comply within three years. A district may use a surplus in maintenance tax revenue to pay the district's debt service under certain conditions, including to prevent a default on the district's debt.

Tax compression. The bill changes the district taxable property value used to calculate a district's maximum compressed tax rate (MCR) from the value determined by the comptroller's study to a value determined by TEA rule using locally determined property values adjusted for certain exemptions and deductions. Local appraisal districts, school districts, and the comptroller must provide any information necessary for TEA to implement the provisions. A school district may appeal to the commissioner the district's taxable property value as determined by TEA.

Recapture districts. HB 1525 revises certain provisions for districts required to make "recapture" payments to the state of a portion of their local property tax revenue in excess of their funding entitlement. The bill establishes that districts may offset recapture payments with state aid received from funds other than the available school fund. It requires the commissioner, after determining that a district had a local revenue level in excess of entitlement after the date the commissioner sent notification for the school year, to include the amount of the excess local revenue in the annual review for the following school year.

Teachers. The bill extends salary increases for school district employees enacted by the 86th Legislature through HB 3 by Huberty as long as the teacher remains employed by the same district and the district is receiving at least the same amount of funding as the amount it received for the 2019-2020 school year.

HB 1525 removes a requirement that a teacher be certified to be designated by a school district or charter school as a master, exemplary, or recognized teacher for purposes of a local optional teacher designation system. The Texas School for the Deaf and the Texas School for the Blind and Visually Impaired are entitled to the teacher incentive allotment.

The bill authorizes a member of a nonprofit teacher organization or an active or retired teacher to participate in a tutoring program to provide supplemental instruction to students in kindergarten through grade 12 on an individualized or small-group basis. The Teacher Retirement System of Texas may not withhold a retiree's monthly benefit if the retiree serves as a tutor.

The bill extends until the 2022-2023 school year the deadline for a classroom teacher in kindergarten through third grade to attend a teacher literacy achievement academy.

Resource campus. HB 1525 allows a campus that has received an overall performance rating of F for four years over a 10-year period to apply to the education commissioner for designation as a resource campus. Such a campus must satisfy certain requirements to qualify for additional funding.

Other provisions. HB 1525 makes a number of other changes, including:

- establishing the Texas Commission on Special Education Funding to develop and make recommendations to the Legislature by December 31, 2022, on statutory changes to improve funding for special education;

- requiring a school district to accept and spend a donation from a parent-teacher organization for supplemental educational staff positions at a school campus until September 1, 2025;
- changing a grant program providing services to students with dyslexia to one providing training in dyslexia for teachers and staff;
- requiring boards of trustees to adopt a policy for a process for adopting materials for a district's human sexuality instruction and requiring notice to parents describing the content; and
- restricting vendor use of personally identifiable student information.

Supporters said

HB 1525 would improve education in Texas by revising the school finance system, resulting in an estimated $464 million in increased funding for public schools through the biennium ending August 31, 2023. The bill would ensure equitable funding to help students succeed and direct federal coronavirus relief funds to address pandemic-related learning losses.

Funding allotments. The bill would help more districts qualify for the fast-growth allotment by measuring growth in the number of enrolled students rather than measuring by a percentile. It would ensure that small and midsize school districts got full funding for their career and technical education (CTE) programs and incentivize districts to provide advanced courses that are more likely to lead to an industry certification by assigning those courses a greater funding weight than lower level courses. The bill also would reinstate a separate allotment for students in gifted and talented programs that was eliminated by HB 3 during the 86th legislative session.

Recapture. The bill would expand the opportunities for a district subject to recapture to net its recapture payment against state aid. The Texas Education Agency (TEA) estimates this would have the impact of reducing recapture revenue by $109 million in fiscal 2022 and $127 million in fiscal year 2023.

Tax swap. The 86th Legislature ended a practice known as "swap and drop" that had been used by some school districts to move taxable pennies from the portion of the property tax rate that pays for facilities to the portion that pays for school operations. Districts used this as a way to lower their tax rate while increasing the revenue generated from some of the pennies. HB 1525 would require TEA to identify those districts and bring them into compliance, while ensuring flexibility for certain districts to maintain their debt obligations.

Teachers. HB 1525 would keep the promise of HB 3's well-deserved higher salaries for teachers by continuing the pay increases as long as the district receives the same level of funding. The bill would remove a requirement that teachers must be certified to participate in the teacher incentive bonus program created by HB 3, broadening the program to more charter school teachers and CTE teachers who come from industry.

Pandemic response. The bill would address student learning loss related to remote learning during the pandemic by allowing schools to use their compensatory education funding for instructional coaches and directing certain federal COVID relief funds to districts and charter schools for intensive supports to help students reach their grade levels.

Critics said

HB 1525, while attempting to correct unintended consequences from HB 3 during the 86th legislative session, would create some winners and losers by changing certain tax and funding provisions. While the bill is designed to adequately fund certain education programs, it would grow state spending when it has not been established that higher spending leads to better student outcomes.

Funding allotments. The tiered funding levels for CTE courses would be too heavily weighted toward students taking advanced level courses while the up-front costs of establishing a CTE course could require the same equipment and instructional support regardless of whether a student was taking beginning or advanced courses.

Recapture. While the bill would lower recapture overall, one provision could create a costly catch-up payment for certain districts that were not notified by TEA that they had become a recapture district in time to seek the required voter approval to send a portion of their local property tax collections to the state. The bill would require these districts to pay revenue from the initial year of recapture in the subsequent year, effectively resulting in a district paying two years of recapture in a single year.

Notes

The HRO analysis of HB 1525 appeared in the April 21 *Daily Floor Report*.

SB 1 by Nelson, the general appropriations act, allocates $464 million for increases to Foundation School Program formula funding and various student allotments, contingent on passage of HB 1525. SB 1 also provides $664 million for targeted programs to help students and schools affected by the pandemic.

The 87th Legislature, during its regular and special sessions, also enacted bills revising school funding for virtual learning, making a one-time supplemental payment to retired educators, and revising management of the Permanent School Fund.

SB 15 by Taylor, enacted during the Second Called Session and effective September 9, 2001, authorizes school districts and charter schools to establish a local remote learning program to offer virtual courses and requires students enrolled in those courses to be counted toward the school's average daily attendance in the same manner as other students. The HRO analysis of SB 15 appeared in the August 27 *Daily Floor Report*.

SB 7 by Huffman, enacted during the Second Called Session and effective September 9, 2001, requires the Teacher Retirement System of Texas to make a one-time supplemental payment, or "13th check," of a retirement or death benefit to certain retirees. The HRO analysis of SB 7 appeared in the August 27 *Daily Floor Report*.

SB 1232 by Taylor, enacted during the regular session and generally effective September 1, 2021, creates the Texas Permanent School Fund Corporation to manage the Permanent School Fund and requires the transfer of certain revenue from the School Land Board to the corporation. The HRO analysis of SB 1232 appeared in Part One of the May 25 *Daily Floor Report*.

Revising student testing, grade promotion requirements

HB 4545 by Dutton
Effective June 16, 2021

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HB 4545 removes statutory requirements that students in grades 5 and 8 pass their required reading and math exams for promotion to the next grade. The bill establishes requirements for school districts to provide accelerated learning to students who fail an exam. It also creates a grant program to help schools increase their instructional rigor.

Grade promotion. HB 4545 removes the statutory prohibition on a student being promoted to a grade 6 or grade 9 program if the student does not perform satisfactorily on the grade 5 or grade 8 math or reading statewide standardized tests. Certain requirements for repeated testing of a student who fails to perform satisfactorily on the exams are repealed. A student who is promoted to the next grade despite having failed an exam must be assigned to an appropriately certified teacher in each subject in which the student failed in the previous school year. The commissioner may waive the requirement at the request of a school district.

Accelerated learning committees. School districts must establish an accelerated learning committee for each student who does not perform satisfactorily on the statewide grade 3, 5, or 8 math or reading exams. Accelerated learning committees replace grade placement committees, which had determined whether a student who failed an exam should be promoted.

The accelerated learning committee must include the principal or designee, the student's parent or guardian, and a teacher of the relevant subject. The committee must develop an educational plan for the student that provides the necessary accelerated instruction not later than the start of the subsequent school year. The plan must be in writing and provided to the student's parent. A district board of trustees must allow a parent to contest the content or implementation of an educational plan.

If a student fails to perform satisfactorily on an exam in the subsequent school year, HB 4545 requires the district superintendent or designee to meet with the student's accelerated learning committee to identify the reason the student did not perform satisfactorily and determine whether to modify the educational plan and whether additional resources are required for that student.

Accelerated instruction. Districts must provide a student in grades 3 through 8 who failed to perform satisfactorily on an exam with accelerated instruction in the applicable subject during the subsequent summer or school year and either:

- allow the student to be assigned a classroom teacher who is certified as a master, exemplary, or recognized teacher for the subsequent school year in the applicable subject area, or
- provide the student supplemental instruction.

In providing accelerated instruction, a district may not remove a student from instruction in the student's current grade level or from recess or other physical activity available to other students. Among other requirements, instruction must be provided for at least 30 hours during the subsequent summer or school year to a student individually or in a group of up to three students by a person with training in applicable instructional materials.

For a student who failed to perform satisfactorily on a required exam, school districts must have a process for a parent or guardian to request that the student be assigned to a particular teacher in the applicable subject area if more than one teacher is available.

The bill requires accelerated instruction for high school students who fail to perform satisfactorily on any of their five required end-of-course exams.

Strong Foundations grant. HB 4545 requires the education commissioner to establish and administer a Strong Foundations grant program for campuses serving students enrolled in prekindergarten through grade 5 to implement a rigorous school approach that combines high-quality instruction, materials, and support structures.

The bill specifies requirements for parts of the grant program that districts, charter schools, and campuses must implement. The commissioner may require a school district or open-enrollment charter school to comply with all requirements of the Strong Foundations grant program at a campus that includes students at any grade level from prekindergarten through grade 5, was assigned an overall performance rating of D or F, and was in the bottom 5 percent of campuses in the state based on student performance on the grade 3 reading exam during the previous school year.

The bill applies beginning with the 2021-2022 school year.

Supporters said

HB 4545 would lower the high-stakes nature of STAAR exams by removing statutory requirements that students in grades 5 and 8 meet state passing standards to be promoted to the next grade. Many such students currently receive ineffective accelerated instruction and are required to retake the exams. HB 4545 would improve the quality of this instruction and allow students to advance to the next grade with their peer group. It would protect students by ensuring a school could not remove them from their regular classroom or recess or other physical activity to provide the accelerated instruction.

The bill would help ensure high-quality teachers were assigned to students who failed to pass a STAAR exam during the previous school year. If more than one teacher of a grade or subject was available, a parent could choose the teacher to whom their child was assigned. The bill would require that an appropriately certified teacher be assigned to such a student, while providing flexibility for the education commissioner to waive the requirement.

The Strong Foundations grant program would address student learning deficits exacerbated by the pandemic by providing funding to improve curriculum and instructional materials, with an emphasis on helping certain low-performing elementary school campuses.

Critics said

HB 4545 would weaken the state testing and school accountability system by removing grade promotion requirements tied to STAAR performance for students in grades 5 and 8. Students who fail to meet STAAR passing standards might be poorly served by a return to social promotion with the risk that they fall further behind their peers on subsequent state exams.

Notes

The Legislative Budget Board estimated that HB 4545 would have a negative impact of $146.8 million to general revenue related funds through the biennium ending August 31, 2023. The HRO analysis of HB 4545 appeared in Part One of the May 10 *Daily Floor Report*.

SB 1 by Nelson, the general appropriations act, contains a contingency rider for HB 4545. Contingent on enactment of HB 4545, SB 1 reduces appropriations for the assessment and accountability system by $1.8 million in each fiscal year of the 2022-23 biennium and increases appropriations by $150 million in fiscal 2022 for the Strong Foundations grant program.

The 87th Legislature considered several other bills related to student testing.

HB 1603 by Huberty, effective June 7, repeals the September 1, 2023, expiration date for individual graduation committee alternatives to high school graduation requirements for students who failed to pass one or two of five required end-of-course exams. It allows the education commissioner to conduct a special investigation when 10 percent or more of students graduating in a particular school year from a particular high school campus are awarded a diploma based on the determination of an individual graduation committee. The HRO analysis of HB 1603 appeared in the April 12 *Daily Floor Report*.

HB 3261 by Huberty, effective June 18, continues the mandate that the Texas Education Agency transition to electronic administration of statewide exams beginning with the 2022-2023 school year. The bill allows school districts to use their instructional materials and technology allotment for certain technology infrastructure and for training personnel in the electronic administration of assessments. It also authorizes the education commissioner to establish a matching grant program to ensure that all school districts and charter schools have the necessary infrastructure to administer state exams electronically. The HRO analysis of HB 3261 appeared in Part One of the May 7 *Daily Floor Report*.

Revising social studies curriculum, civics training for educators

SB 3 by Hughes, Second Called Session
Generally effective December 2, 2021

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SB 3 revises requirements for civics and social studies curriculum and instruction. It prohibits for all grades and courses inculcation in certain concepts and prohibits the awarding of credit for certain student activities. The bill creates a civics training program for teachers and administrators.

Social studies. SB 3 requires the State Board of Education (SBOE) by December 31, 2022, in adopting the social studies curriculum for each grade level from kindergarten through grade 12, to adopt essential knowledge and skills that develop each student's civic knowledge, including an understanding of:

- the fundamental moral, political, entrepreneurial, and intellectual foundations of the American experiment in self-government;
- the history, qualities, traditions, and features of civic engagement in the United States;
- the structure, function, and processes of government institutions at the federal, state, and local levels; and
- the founding documents of the United States.

The essential knowledge and skills must develop each student's ability to:

- analyze and determine the reliability of information sources;
- formulate and articulate reasoned positions;
- understand the manner in which local, state, and federal government works and operates through the use of simulations and models of governmental and democratic processes;
- actively listen and engage in civil discourse, including discourse with those with different viewpoints; and
- participate as a citizen in a constitutional democracy by voting.

The essential knowledge and skills must develop each student's appreciation of:

- the importance and responsibility of participating in civic life;
- a commitment to the United States and its form of government; and
- a commitment to free speech and civil discourse.

The curriculum requirements apply beginning with the 2022-2023 school year, and nothing in them may be construed as limiting the teaching of the essential knowledge and skills.

Curriculum revision. During the revision of the social studies curriculum beginning in 2021 and scheduled to conclude in or around 2023, SBOE may not use the removal from specific statutory reference by SB 3 of certain documents, speeches, historical figures, and other knowledge and skills that were added by HB 3979 by Toth during the regular session as a reason for their removal or non-inclusion from the curriculum.

Instructional requirements, prohibitions. SB 3 includes certain instructional requirements and prohibitions for any course or subject, including an innovative course, for a grade level from kindergarten through grade 12.

Current events. A teacher may not be compelled to discuss a particular current event or widely debated and currently controversial issue of public policy or social affairs. A teacher who chooses to discuss such a topic must explore it objectively in a manner free from political bias.

Student activities. A school district, charter school, or teacher may not require, make part of a course, or award a grade or course credit, including extra credit, for a student's:

- work for, affiliation with, or service learning in association with any organization engaged in lobbying for legislation at the federal, state, or local level, if the student's duties involve directly or indirectly attempting to influence social or

public policy or the outcome of legislation, or any organization engaged in social policy advocacy or public policy advocacy;
- political activism, lobbying, or efforts to persuade members of the legislative or executive branch at the federal, state, or local level to take specific actions by direct communication; or
- participation in any internship, practicum, or similar activity involving social policy advocacy or public policy advocacy.

The bill contains exceptions for certain student community charitable projects, internships, or programs that simulate a governmental process. A teacher may not be prohibited from directing a classroom activity that involves students communicating with an elected official so long as the district, school, or teacher does not influence the content of a student's communication.

Instructional prohibitions. A teacher, administrator, or other employee of a state agency, school district, or charter school may not require or make part of a course inculcation in certain concepts, including that one race or sex is inherently superior to another and that the advent of slavery in the territory that is now the United States constituted the true founding of the United States. A teacher, administrator, or other employee of a state agency, school district, or charter school may not instruct or train any administrator, teacher, or staff member of a state agency, school district, or charter school to adopt the listed concepts or require an understanding of the 1619 Project.

A district or charter school may not implement or enforce any rule in a manner that would result in the punishment of a student for reasonably discussing the listed concepts in school or during a school-sponsored activity or have a chilling effect on reasonable student discussions involving those concepts. SB 3 does not create a private cause of action against a teacher, administrator, or other employee of a school district or charter school.

Private funding. A state agency, school district, or charter school may not accept private funding for the purpose of developing a curriculum, purchasing or selecting curriculum materials, or providing teacher training or professional development related to the prohibited concepts.

Civics training. The education commissioner must develop civics training programs for teachers and administrators using requirements listed in the bill, including for guided classroom discussions of current events, classroom simulations, and media literacy. The commissioner by rule must establish the grade levels at which a teacher provides instruction to be eligible to participate in the training and must include grade levels for which SBOE makes significant revisions to the social studies curriculum. SBOE must approve and annually review each training program.

Each school district and charter school must ensure that each district or school campus that offers a grade level eligible for the training has at least one teacher and one principal or campus instructional leader who has attended a civics training program. The commissioner may delay implementation of the training to a school year not later than the 2025-2026 school year.

The commissioner must establish an advisory board composed of nine current or former educators, each with at least 10 years of experience to help develop the training program.

Supporters said

SB 3 would improve the teaching of civics and social studies in public schools by focusing lessons on the moral, political, entrepreneurial, and intellectual foundations of the American experiment in self-government. This would give students a strong and balanced foundation to understand history and navigate current events. The bill also would improve students' ability to evaluate complex issues and sources of information by better training educators to facilitate classroom discussions, and it would prevent certain kinds of instruction on divisive concepts.

Classroom discussions. The bill would create a needed civics training program for educators to help them guide appropriate classroom discussions of current events and instruct students on media literacy. It would prohibit inculcation in certain divisive concepts under an academic framework known as "critical race theory." SB 3 would ensure that students in Texas public schools learned the good and bad of American history while understanding that their future is not determined by the color of their skin.

Instructional prohibitions. SB 3 would apply to all courses in kindergarten through grade 12 the prohibition on inculcation of certain concepts. This would prevent teachers at any grade level or any subject from advancing a false narrative that America is a hopelessly racist society. This narrative can have negative effects on all students, who may feel distress or feel the role of oppressor or victim being imposed upon them based on their race.

Instead of dividing students on this basis, SB 3 would help foster their unity as Americans dedicated to a democracy founded on a vision of liberty and equality.

The bill would not prevent teaching about racial discrimination, slavery, or segregation. It would, however, prevent teaching that could contribute to racial disharmony, such as the notion that one race is inherently superior to another or that an individual bears responsibility for past actions by other members of the same race or sex.

Student activities. The bill would ensure that educators did not push a political ideology or require student involvement with organizations that promote specific public policy advocacy by awarding students credit for certain activities. Young Texans would still be able to visit the Capitol and be engaged with public policy on their own initiative. This would ensure that a student's engagement on public policy appropriately was made in conjunction with the student's family. Students still could engage in nonpartisan, community-based projects as part of their classes.

Critics said

SB 3 is unnecessary legislation that could have a chilling effect on important classroom discussions about current and historical events. There is little evidence of teachers bringing the college-level concept of "critical race theory" to the state's K-12 classrooms, but the bill could hamper the efforts of educators to teach public school students, including those from diverse backgrounds, to critically weigh multiple perspectives.

Classroom discussions. By limiting teachers' ability to discuss the nation's history of racial oppression, the bill could restrict discussion by students and teachers of the impact of past and current events on their lives and communities. Such instruction, while potentially uncomfortable for some students, could lead to broader understanding of the lingering effects of past actions and how to better address those effects in the current day. The bill could deprive Texas students and teachers of the confidence to have critical conversations in the classroom and could leave students less prepared for college studies.

Instructional prohibitions. The broad topics that would be prohibited by SB 3 include those that are part of standard diversity, equity, and inclusion training in schools, businesses, and government entities, and prohibiting such discussion in the classroom could shut down important conversations about history and current events. SB 3 could give students the false impression that racial discrimination and white supremacy were limited to historical events such as slavery and the Ku Klux Klan, rather than acknowledging that their legacy exists today and that students should be educationally prepared to grapple with it.

Student activities. The bill could limit enriching student activities related to political activism, even as those activities have been shown to prepare students to become informed and active citizens.

Notes

The HRO analysis of SB 3 appeared in the September 2 *Daily Floor Report*.

Revenue bonds for construction at public institutions of higher education

SB 52 by Creighton, Third Called Session
Effective January 18, 2022

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SB 52 authorizes the issuance of $3.3 billion for projects to be financed through the issuance of bonds for capital improvements at public institutions of higher education. The bill would allow funds allocated from the appropriation of general revenue or federal funds to an institution of higher education to supplement revenue funds of the institution for capital construction to be designated as "Capital Construction Assistance Projects."

The bill authorizes specified projects that can be financed by the bonds and the maximum aggregate principal amounts that can be financed for each project at the following universities and university systems:

- The Texas A&M University System ($727.4 million);
- The University of Texas System ($834.2 million);
- University of Houston System ($339.5 million);
- Texas State University System ($422.6 million);
- University of North Texas System ($273.3 million);
- Texas Woman's University ($100 million);
- Stephen F. Austin State University ($44.9 million);
- Texas Tech University System ($299.4 million);
- Texas Southern University ($95.2 million); and
- Texas State Technical College System ($208.5 million).

Each institution's governing board is authorized to pledge irrevocably to the payment of bonds authorized by the bill all or any part of its revenue funds, including student tuition charges. The amount of a pledge may not be reduced or abrogated while the bonds for which the pledge was made, or bonds issued to refund those bonds, are outstanding.

If sufficient funds are not available to a board to meet its obligations, the board may transfer funds among its institutions, branches, and entities to ensure the most equitable and efficient allocation of available resources. In lieu of financing a project authorized in the bill, a board may finance in the prescribed manner an alternative project for deferred maintenance or infrastructure at the same institution or entity in an amount not to exceed the total authorized for the project and any unspent amount from projects authorized for the institution or entity under Education Code ch. 55. The governing board must notify the Texas Higher Education Coordinating Board of such an alternative project. For financing an alternative project in an amount that exceeds $25 million, the governing board must receive prior written approval from the governor and the Legislative Budget Board (LBB).

SB 52 subjects a project authorized by the bill to oversight by the statewide contract advisory team and requires the governing board of the higher education institution to consult the team before spending any funds on the project. It also requires the governing board to report any major contract that is entered into for purposes of the project to the major contracts database maintained by LBB.

The bill creates a nine-member capital project oversight advisory commission to develop, in consultation with LBB and the comptroller, model guidelines to be considered for procurement and construction related to the capital projects.

Supporters said

SB 52 would authorize certain bonds to allow public institutions of higher education to undertake needed capital projects on their campuses. These improvements would help colleges and universities expand facilities to meet growing enrollment and prepare students with the workforce skills needed to help the state recover economically from the coronavirus pandemic.

The $3.3 billion in projects listed in the bill would help the colleges and universities build new facilities and make critical upgrades to aging buildings to improve health and safety conditions for those who use the

facilities. Some of the projects would help in increasing the number of graduates in critical nursing and health-related fields. The Legislature has not funded university debt assistance, or tuition revenue bonds, since 2015. This has left many universities with overcrowded and even unsafe facilities at a time of enrollment growth.

Historically, the Legislature has appropriated general revenue to reimburse institutions for the tuition used to pay the debt service. SB 52, in conjunction with other legislation being considered by the Legislature, could leverage federal pandemic recovery funds for the construction projects. Public higher education institutions have limited methods for financing capital improvements, and SB 52 would ease pressure on the use of tuition revenue to pay off the bonds. The distribution of bond authorization to each of the state's university systems was done using a consistent methodology to ensure fair treatment of the institutions' requests for funding.

Critics said

SB 52 would have negative fiscal implications for taxpayers by authorizing a higher education building boom at a time when colleges and universities are not doing enough to control their costs. The high cost of tuition is why many students are choosing to go directly from high school to the workforce and those who do attend college are accumulating substantial debt trying to earn a degree. The Legislature should not authorize additional spending without requiring public colleges and universities to take steps to reduce, freeze, or lower tuition.

The bill would authorize significant construction projects at The Texas A&M University and the University of Texas even though those two systems have access to the Permanent University Fund, the largest public endowment fund in the nation. Money should be used to first assist university systems that do not have access to the Permanent University Fund.

Although the Legislature has considered a proposal to use federal coronavirus recovery funds as the source of revenue for bond authorization, it is unclear whether such a proposal would be allowable under interim U.S. Treasury Department guidelines for use of American Rescue Plan Act of 2021 funds. Issues could arise related to using the federal funds for debt service and obligating and completing spending on the projects under specified timelines.

Notes

The HRO analysis of SB 52 appeared in the October 17 *Daily Floor Report*.

Revising TEA investigations, interventions for low-performing schools

SB 1365 by Bettencourt
Generally effective September 1, 2021

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SB 1365 revises and adds provisions on public school accountability and state interventions for districts with unacceptable performance ratings, including the conduct of state investigations and related appeals.

Campus and district performance ratings. SB 1365 revises provisions under which a performance rating of D is considered an acceptable or unacceptable performance rating and specifies when the commissioner of education may assign a rating of "Not Rated."

Meaning of ratings. The bill stipulates that a reference in law to an acceptable school district or campus performance rating includes an overall or domain performance rating of A, B, or C, and a reference to an unacceptable performance rating includes an overall or domain performance rating of F. An overall or domain performance rating of D shall be referred to as performance that needs improvement.

A reference in law to an acceptable performance rating for a district, open-enrollment charter school, or their campuses includes an overall performance rating of D if, since previously receiving an overall performance rating of C or higher, the district, charter school, or district or charter campus has not previously received more than one overall performance rating of D or has not received an overall performance rating of F. A reference in law to an unacceptable performance rate includes a performance rating of D that does not meet those criteria.

The bill includes alternative methods and standards for evaluating performance for the 2020-2021 school year and temporary COVID-19 recovery provisions to assign most districts and campuses a rating of "Not Rated" for the 2021-2022 school year.

Consecutive years of unacceptable ratings. SB 1365 expands information made publicly available by August 15 of each year to include, if applicable, the number of consecutive years of unacceptable performance ratings for each district and campus.

Not Rated. The commissioner may assign a district or campus an overall performance rating of "Not Rated" if the commissioner determines that the assignment of a rating of A, B, C, D, or F would be inappropriate because of a disaster declaration, data integrity breach, insufficient student enrollment, or other reasons outside the control of the district or campus. Such a rating is not included in calculating consecutive school years of unacceptable performance ratings and is not considered a break in consecutive school years of unacceptable performance ratings.

Interventions and sanctions. SB 1365 revises and adds to state interventions and sanctions related to certain performance ratings.

Local improvement plan. A school district, charter school, or district or charter school campus that is assigned a rating of D that qualifies as acceptable performance must develop and implement a local improvement plan under rules adopted by the commissioner.

Campus turnaround plan. SB 1365 requires the commissioner to appoint a conservator to a school district that has been identified as unacceptable for two consecutive years and subject to a campus turnaround plan unless and until each campus for which a turnaround plan has been ordered receives an acceptable performance rating for the school year or the commissioner determines a conservator is not necessary.

Continued unacceptable performance. The bill changes the period of consecutive unacceptable campus performance ratings after which the commissioner must appoint a board of managers to govern the school district or close the campus from three consecutive school years to five consecutive school years.

In a provision that expires September 1, 2027, the commissioner must determine the number of school years of unacceptable performance ratings occurring after the 2012-2013 school year for each district, charter school,

and district or charter campus and use that number as the base number of consecutive years of unacceptable performance for which the rating in the 2021-2022 school year will be added.

SB 1365 prohibits TEA from implementing certain interventions or sanctions for a district, charter school, or district or charter campus if the performance rating initiating the action is based on the first or second overall performance rating of D since previously receiving a rating of C or higher, with certain exceptions.

Conservator. The bill provides that a conservator appointed by the commissioner may exercise the powers and duties defined by the commissioner regardless of whether the conservator was appointed to oversee the operations of an entire district or of a certain campus within the district.

Special investigations. SB 1365 replaces Education Code references to TEA special accreditation investigations with revised provisions for special investigations for certain school district academic, financial, and legal violations. Based on the results of a special investigation, the commissioner may defer interventions and sanctions for school districts until:

- a third party selected by the commissioner has reviewed programs or other subjects of an investigation and submitted a report identifying problems and proposing solutions;
- a district completes a corrective action plan developed by the commissioner; or
- the completion of both the third-party report and corrective action plan.

Based on those results, the commissioner may decline to take the deferred action.

Conduct of investigations. During the pendency of a special investigation, the Texas Education Agency (TEA) is not required to disclose the identity of any witness.

In presenting preliminary findings to a district, the agency must:

- provide a written report;
- provide any evidence relied on in making the preliminary findings;
- disclose to the district the identity of any witness whose statements TEA relied on in making the preliminary findings; and
- may not include recommended sanctions or interventions.

A written report of preliminary findings and all associated materials are excepted from public disclosure as audit working papers of TEA. A district may publicly release a report if approved by a vote of the district board of trustees.

No later than 30 days after receiving the written report, the board may accept the findings or respond in writing. TEA must consider any response before providing the school board a final report in writing that includes proposed sanctions or interventions.

Before the commissioner orders a sanction or intervention based on a final report, the commissioner or designee must provide an informal review, which is not a contested case for purposes of Government Code ch. 2001.

A court may not enjoin a special investigation before its conclusion. A school district must exhaust administrative remedies before appealing the findings or final recommendations to a court.

Hearing following investigation. SB 1365 contains provisions for a hearing by the State Office of Administrative Hearings when a final report results in the appointment of a board of managers, alternative management of a campus, or closure of the district or a district campus. Not later than 90 days after the district requests a hearing, the hearing examiner must issue to the commissioner findings of act and conclusions of law. The hearing examiner may not issue a recommendation for relief.

Commissioner determination. The bill contains provisions for the commissioner to accept, reject, or amend the legal conclusions issued by the hearing examiner. The commissioner may not reject or amend a finding of fact unless the commissioner, after reviewing the record, determines that a finding of fact is not supported by substantial, admissible evidence.

Judicial appeal. A school district may appeal a decision by the commissioner to a district court with jurisdiction in the county in which the district's central administrative offices are located or, if agreed to by the district and the commissioner, a district court in Travis County. A court that is hearing an appeal may not take additional evidence. It may not reverse or remand a decision by the commissioner based on a procedural error unless the

court determines that the error is likely to have caused an erroneous decision.

Commissioner's authority. The bill establishes that if an order, decision, or determination is described as final in certain chapters of the Education Code, an interlocutory or intermediate order, decision, report, or determination made or reached before the final order, decision, or determination may be appealed only as specifically authorized by the code or a rule adopted under the code.

Supporters said

SB 1365 would allow the commissioner of education to better address the problem of chronically failing schools by clarifying the state's authority to intervene when a campus receives a series of unacceptable performance ratings. The school accountability system plays a crucial role in ensuring that a quality education is available to all Texas students, especially when local school officials allow multiyear school failures to leave thousands of students behind.

By specifying that a D rating is considered unacceptable performance under certain circumstances, SB 1365 would allow the commissioner to use statutory sanctions and interventions, including the appointment of a conservator or board of managers to focus on campus improvement. This would ensure that state and local school officials understood the impact of D ratings going forward and prevent a school from indefinitely fluctuating between a D and F rating without sanctions.

While local control of school districts and charter schools is important, state intervention becomes necessary when a school board is unwilling or unable to improve chronically failing schools. The bill would provide local school boards more opportunities to make improvements through a local improvement plan. In the case of a commissioner-ordered sanction such as appointment of a board of managers, the bill would provide local school boards with due process protections through administrative hearings and district court filings to challenge the results of a Texas Education Agency investigation.

The bill provides schools with an additional year of pausing A-F accountability ratings as they address COVID-19 learning losses.

Critics said

SB 1365 could allow the education commissioner to take over more school districts than allowed under current law by treating a D rating the same as an F rating under certain circumstances. This would heighten the already considerable pressure on students taking STAAR exams by increasing the stakes attached to test results under the school rating system.

Notes

The HRO analysis of SB 1365 appeared in Part One of the May 25 *Daily Floor Report*.

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Taxation and Revenue

* Finally approved

Limiting revenues for large cities that defund police, requiring elections

HB 1900 by Goldman, SB 23 by Huffman
HB 1900 effective September 1, 2021, SB 23 effective January 1, 2022

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The 87th Legislature considered several bills to limit tax and other revenues or otherwise restrict municipalities and counties from defunding their police departments and law enforcement agencies.

HB 1900 provides for the disannexation from and limits certain tax and fee revenues of municipalities that defunded their police departments. The bill applies only to a municipality with a population over 250,000.

Under the bill, a defunding municipality is one that adopts a budget for a fiscal year that, in comparison to the preceding year, reduces the appropriation to the police department and for which the Office of the Governor's Criminal Justice Division issues a written determination. This does not include a municipality that reduces its police budget by a percentage that does not exceed the percent reduction of the total budget or a municipality that is granted approval by the division.

HB 1900 requires a defunding municipality to hold an election in each area annexed in the preceding 30 years to decide whether the area would disannex from the municipality. Such a municipality cannot annex an area within 10 years after the division determines it to be a defunding municipality.

The bill limits the property tax rates of defunding municipalities. The no-new-revenue maintenance and operations rate for a defunding municipality will be decreased to account for the municipal public safety expenditure adjustment, which is the difference between the money appropriated and the money spent on public safety in the preceding fiscal year. A defunding municipality also cannot adopt a property tax rate that exceeds the no-new-revenue rate or the voter-approval rate, whichever is less.

HB 1900 requires the comptroller to deduct the amount of money the state spent in a fiscal year to provide law enforcement services in a defunding municipality before sending the municipality its share of sales and use tax revenues.

The bill prohibits a municipally owned utility located in a defunding municipality from raising customer rates or fees. If a utility has not transferred funds to the defunding municipality in the immediately preceding 12 months, it may increase rates to account for pass-through charges imposed by a state regulatory body or the ERCOT organization, for certain cost increases, or to fulfill debt obligations. A utility that increases rates under this provision may not transfer funds to the defunding municipality until the division determines that the municipality has reversed the reduction.

A defunding municipality must, for the purpose of funding retirement benefits, increase municipal contributions to a public retirement system in which its employees participate to ensure the total amount the municipality and members contribute in a fiscal year is not less than the preceding fiscal year on which the determination is based.

SB 23 requires counties with more than 1 million residents to hold elections before reducing or reallocating the funding of a primary law enforcement agency and provides for property tax rate limitations if a county makes such a reduction or reallocation without voter approval.

For purposes of this bill, a county budget does not include: a one-time extraordinary expense; revenues used to repay voter-approved bond indebtedness incurred for law enforcement purposes; detention officer compensation; or a donation or state or federal grant to the law enforcement agency. The bill also would provide an exception for a fiscal year in which a budget reduction was caused by a disaster, including a tornado, hurricane, flood, wildfire, or other calamity, but not a drought, epidemic, or pandemic, and the two fiscal years following that disaster.

A county resident who believes that a county has implemented a proposed reduction or reallocation without

the required voter approval may file a complaint with the Office of the Governor's Criminal Justice Division. On request from the division, the comptroller must determine whether the county has made such a reduction or reallocation and, if so, the county may not adopt a property tax rate that exceeds the no-new-revenue rate until the reduction or reallocation was reversed, restored, or approved in an election.

Supporters said

HB 1900 and SB 23 would address the recent trend of local governments defunding law enforcement by incentivizing large cities to properly fund police and ensuring that counties receive voter approval before reducing or reallocating law enforcement resources.

In 2020, some urban local governments across the country, including in Texas, took steps to defund their law enforcement departments. While the measures may have been intended to address local policing issues, the outcome has been that crime rates have increased and public safety has been compromised. Civilians cannot perform the necessary public safety services of police, so shifting funds to civilian agencies does not solve the problem. If a local government determines its law enforcement department has problems, it would make sense to invest more funds, not less, to address those issues.

HB 1900 would create four corrective solutions to incentivize cities to appropriately fund police. The bill would allow residents of a recently annexed area to vote to disannex themselves, prevent cities from raising property taxes, allow the state to deduct state trooper costs in those cities from sales tax collections, and prohibit cities from recovering funds through electric utilities. These measures would give residents a chance to vote their interests on whether to remain annexed to such cities and would ensure that the city could not simultaneously raise its revenues while risking the public safety of its residents.

SB 23 would ensure that the weighty decision to cut law enforcement funding was not made by a handful of county officials in response to the demands of a vocal minority but rather through the will of a majority of voters. This would take the will and needs of county residents into account while ensuring that law enforcement officers had sufficient resources to keep the public and themselves safe.

The bills are written to apply to large cities and urban counties because these are the areas where the movement to defund law enforcement has gained traction.

Critics said

HB 1900 and SB 23 would impose punitive measures that undermine local discretion in budgeting for public safety. The bills are based on the mistaken premise that local governments have "defunded" law enforcement, when what some have done is restructure budgets based on community needs. For example, a city may redirect some funding from police to a program that sends emergency calls about mental health to a mental health crisis counselor, rather than police. Services would be maintained and may be delivered more effectively by trained professionals. This would also free up resources for the dangerous public safety situations that only law enforcement officers are equipped to handle.

Cities labeled as defunding municipalities under HB 1900 would be subject to onerous measures that could result in fewer city services, including public safety, which would go against the intent of the bill. The additional elections that SB 23 would require would be redundant and wasteful, since the county officials making budgetary decisions are elected by their constituents to do so. The bill also does not ensure that counties would have the opportunity to participate in complaint investigation hearings or present relevant information about their particular budget processes. Local communities know their own needs, and the state should not penalize cities and urban counties by removing this local control.

The bills arbitrarily target certain cities and counties based on population rather than on any specific data related to crime, while some smaller cities and counties actually have higher rates of violent crime. If the intent of the bills is to enhance public safety in the state it is unclear why its provisions apply only to a few cities and counties.

Notes

The HRO analysis of HB 1900 appeared in Part One of the April 29 *Daily Floor Report*. The HRO analysis of SB 23 appeared in the May 22 *Daily Floor Report*.

Increasing residence homestead exemption from school property taxes

SJR 2 and SB 1 by Bettencourt, Third Called Session
Effective on May 7, 2022

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SJR 2 amends the Texas Constitution by increasing the residence homestead exemption from school property taxes from $25,000 to $40,000 of the appraised value of an adult's residence homestead. The proposed constitutional amendment was approved by voters at a May 7, 2022, election.

SB 1 is the enabling legislation for SJR 2. The bill entitles school districts to additional state aid to the extent that combined state and local Foundation School Program revenue for maintenance and operations (M&O) with the increased homestead exemption is less than the district's combined state and local revenue for M&O had the homestead exemption not occurred. Districts also are entitled to additional state aid to the extent that state and local revenue used to service eligible debt after the homestead exemption increase is less than the state and local revenue that would have been available for debt service had the increased homestead exemption not occurred.

The increased homestead exemption applies beginning with the 2022 tax year.

Supporters said

SB 1 is the enabling legislation for a proposed constitutional amendment to provide homeowners needed relief from local school property taxes. The increase in the residence homestead exemption from $25,000 to $40,000 would be expected to save the average Texas homeowner about $176 a year. The savings would continue each year, offering homeowners meaningful, perpetual tax relief, and would be especially helpful to new homeowners and those with lower incomes.

SB 1 would not impact school revenue because state general revenue would make up for lost local property tax revenue. The responsibility for financing public schools is shared between the state and local taxpayers, and the higher homestead exemption would represent an increase in the state's portion while lowering the burden on local taxpayers.

The Legislature considered other methods of delivering school property tax relief, including sending one-time direct payments to homeowners or further compressing school tax rates. SB 1 and SJR 2, the proposed constitutional amendment, would allow Texas voters to determine if raising the homestead exemption is their preferred way to lower property taxes.

Critics said

SB 1 would not provide a financial benefit to the many Texans who rent their homes. It also would not provide any benefit to businesses that pay property tax. In addition, the bill and proposed constitutional amendment would be a long-term financial commitment by the state of an estimated $660 million each year in general revenue. This would mean less state revenue available for other critical budget needs.

Notes

The HRO analysis of SB 1 appeared in the October 15 *Daily Floor Report*. An analysis of SJR 2 did not appear in a *Daily Floor Report*.

The 87th Legislature also enacted other legislation related to school property taxes.

SB 8 by Bettencourt, Second Called Session, effective January 1, 2022, authorizes a person who acquires a property after January 1 of a tax year to receive a residence homestead property tax exemption for the applicable portion of that tax year immediately on qualifying for the exemption if the preceding owner did not receive the same exemption for that tax year. The HRO analysis of SB 8 appeared in the August 26 *Daily Floor Report*.

SJR 2 by Bettencourt, Second Called Session, proposed an amendment to the Texas Constitution to allow the Legislature to provide for the reduction of the limitation on property taxes imposed by a school district on the residence homestead of an individual who was disabled or at least 65 to reflect any statutory reduction from the preceding tax year in the district's maximum compressed tax rate. **SB 12** by Bettencourt is the enabling legislation for SJR 2. The proposed constitutional amendment was approved by voters at a May 7, 2022, election. The HRO analyses of SJR 2 and SB 12 appeared in the August 26 *Daily Floor Report*.

Appropriating federal coronavirus relief and recovery funds

SB 8 by Nelson, Third Called Session
Effective November 8, 2021

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SB 8 appropriates $13.3 billion from money received by Texas under the federal Coronavirus State Fiscal Recovery Fund established under the American Rescue Plan Act (ARPA) of 2021. ARPA provided funds to state, local, territorial, and tribal governments to be used to respond to the COVID-19 pandemic, specifically by creating the Coronavirus State and Local Fiscal Recovery Funds and the Coronavirus Capital Projects Fund. In general, the appropriations are made for the two-year period that begins on the bill's effective date.

SB 8 requires LBB to report certain information about funds appropriated to and spent by political subdivisions, state agencies, and institutions of higher education.

Unemployment compensation. SB 8 appropriates $7.2 billion to the Comptroller of Public Accounts for the unemployment compensation fund to pay back outstanding advances received by the state from the federal government, and to return the fund to the statutory floor computed under the Labor Code on October 1, 2021, as reimbursement for payments made as a result of the pandemic. The funds are to be used during the state fiscal year beginning September 1, 2021.

Health and human services. SB 8 appropriates $2.8 billion to the Department of State Health Services (DSHS) and the Health and Human Services Commission (HHSC).

COVID-19 response. The bill appropriates $2 billion to DSHS during the period beginning on the bill's effective date and ending January 1, 2023. The funds may be used for the following COVID-19 pandemic purposes: funding surge staffing at certain health care facilities; purchasing therapeutic drugs; and operating regional infusion centers.

Staffing needs. The bill appropriates $378.3 million to HHSC for one-time grants to provide critical staffing resulting from frontline health care workers affected by COVID-19, including providing recruitment and retention bonuses for staff of specified health care facilities.

Emergency medical services. The bill appropriates $21.7 million to DSHS to fund emergency medical response service staffing, including funding programs to incentivize and increase the number of Emergency Medical Technicians and paramedics and funding for Emergency Medical Services education programs.

Other items. Other appropriations to HHSC include:

- $237.8 million to HHSC to complete construction of a state hospital in Dallas.
- $75 million for grants to support rural hospitals that have been affected by the COVID-19 pandemic;
- $20 million for an internet portal consolidating provider data for Medicaid and the Children's Health Insurance Program;
- $15 million for expanding capacity at Sunrise Canyon Hospital;
- $5 million for technology updates to the Medicaid eligibility computer system; and
- $14,250 to the Texas Civil Commitment Office for consumable supplies and travel.

SB 8 appropriates federal funds to DSHS for other specified items, including $20 million for the Federally Qualified Health Center Incubator Program and $16.7 million to upgrade existing laboratory facilities and create a new laboratory infrastructure in the Rio Grande Valley.

Public and higher education. SB 8 appropriates $1.2 billion to state agencies related to public and higher education.

Teacher health care. The bill appropriates $286.3 million to the Teacher Retirement System for coronavirus-related health care claims in the TRS-Care and TRS-ActiveCare programs. The bill established that it is the intent of the Legislature that premiums not increase for TRS-Care and TRS-ActiveCare insurance policies as a result of coronavirus-related claims.

University construction. The bill appropriates $325 million to the Texas Higher Education Coordinating Board for university construction contingent on enactment of legislation related to the issuance of tuition revenue bonds.

Texas Child Mental Health Care Consortium. The bill appropriates about $113.1 million to the Texas Higher Education Coordinating Board to support the operations and expansion of the Texas Child Mental Health Care Consortium to expand mental health initiatives for children, pregnant women, and women who are up to one year postpartum. Out of this appropriation, the consortium may enhance the Child Psychiatry Access Network to improve perinatal mental health services.

Other items. The bill makes several appropriations to state agencies related to public and higher education, including:

- $300 million to the Texas Division of Emergency Management to acquire land for a state operations center;
- $40 million to the University of Texas Health Science Center at Houston to operate the Texas Epidemic Public Health Institute;
- to the Higher Education Coordinating Board $15 million for the Texas Reskilling and Upskilling through Education program, $20 million for at-risk students at certain institutions, and $1 million for the rural veterinarians grant program;
- $50 million each to Texas Tech University and the University of Houston for institutional enhancements;
- $3 million to the University of Texas at Austin for the Marine Science Institute Housing Replacement and $235,000 to the university for the Briscoe Garner Museum;
- $3 million to the Texas Education Agency for specified program enhancements; and
- about $1.2 million to Texas A&M University for the Institute for a Disaster Resilient Texas.

Shortfalls in court fee collections, court case backlog, criminal justice. SB 8 makes several appropriations to address matters related to shortfalls in court fee collections, including:

- $7 million to the judiciary section of the comptroller's office, including to pay for visiting judges and support staff;
- $3 million to the Office of Court Administration, including to pay for information technology;
- $13.9 million to the Texas Indigent Defense Commission (TIDC) to be deposited in the Fair Defense Account; and
- $200,000 to the Office of Capital and Forensic Writs.

SB 8 also appropriates to the Texas Commission on Law Enforcement $5.8 million for deposit in the Texas Commission on Law Enforcement Account and $359.7 million to the Texas Department of Criminal Justice for employee compensation.

Other appropriations. The bill makes several appropriations to the Trusteed Programs within the Office of the Governor: $180 million for tourism, travel, and hospitality recovery grants; $160 million for grants to crime victims; and $1.2 million for children's advocacy. SB 8 makes appropriations to other state agencies, including:

- $500.5 million to the Comptroller of Public Accounts for broadband infrastructure, of which $75 million could be used only for the Texas broadband pole replacement program;
- $200 million to the Department of Information Resources for cybersecurity projects;
- $150 million to the Commission on State Emergency Communications for the deployment and reliable operation of next-generation 9-1-1 service;
- $100 million to the comptroller for the Texas Safe Keeping Trust Fund;
- $52.3 million to the Office of the Attorney General for the sexual assault program account and $54.8 million to the office to compensate crime victims;
- $40 million to the Texas Facilities Commission for construction of the Permian Basin Behavioral Health Center;
- $25 million to the State Preservation Board for maintenance and capital improvement projects; and
- $20 million to the Historical Commission for the Washington-on-the-Brazos state historic site.

The bill makes several appropriations to state agencies related to natural resources, including:

- $95 million to the Texas Department of Agriculture for food banks and $5 million for home-delivered meals;
- $35 million to the General Land Office and Veterans Land Board to upgrade Texas state veterans homes;

- $40 million for education and outreach grants and $3 million for the Texas State Aquarium Center to the Parks and Wildlife Department; and
- $5 million for Brazoria County beach and dune maintenance and $300,000 for analyzing the Coastal Texas Study design elements to the General Land Office.

The bill also appropriates $15.5 million to the Department of Transportation for a customs inspection station on the South Orient Rail Line in Presidio.

Supporters said

SB 8 would responsibly appropriate money Texas has received from the federal government to address the effects of the COVID-19 pandemic. The pandemic has impacted Texans and state agencies in a wide range of ways, and SB 8 would address many of these impacts. The bill would balance the numerous possible uses of the funds with those allowed by the federal government in a strategic way that would help the state in its ongoing recovery from the pandemic.

Unemployment compensation. SB 8 would ensure the solvency of the state's unemployment trust fund and prevent businesses from having to pay higher taxes to replenish the fund. When unemployment claims skyrocketed in the spring of 2020 after many businesses laid off workers due to the pandemic, Texas began paying out much higher benefits. Texas borrowed more than $6 billion from the federal government to make its legally required payments. The bill would appropriately use federal coronavirus relief funds to pay back the federal loans and replenish the fund to the required statutory floor amount. Many businesses suffered significant economic losses due to COVID-19 and now is not the time to raise unemployment taxes, particularly on smaller businesses, as they work to recover from the disruptions of the past 18 months.

Health and human services. SB 8 would allocate essential federal funds to the Department of State Health Services (DSHS) and the Health and Human Services Commission for various health care facilities' staffing needs to care for patients during the ongoing COVID-19 pandemic.

SB 8 would address an urgent need to maintain adequate staffing levels at hospitals and help the state respond more efficiently and effectively to the COVID-19 pandemic. Currently, DSHS is experiencing a cash flow issue and needs funds immediately to provide surge staffing, purchase therapeutic drugs, and operate regional infusion centers.

As the pandemic continues, many frontline health care professionals are experiencing burnout, leading them to retire, switch jobs, or quit entirely. Additional federal funds are necessary to increase the number of available hospital staff, which would help stabilize patient care and ensure the provision of needed services.

Directing funds to loan repayment programs and expedited licensure programs, as some have suggested, could be outside the purview of the U.S. Treasury Department's interim final rule.

While some have raised concerns that other items should be funded, SB 8 appropriately would address immediate needs. The bill is designed to appropriate one-time funding, and using the federal funds for an increase in wages for community attendant care workers could become a permanent increase that required the state to use general revenue when federal funds were depleted.

Public and higher education. The bill also would appropriate $325 million to provide Texas university systems with tuition revenue bonds (TRBs) as a method of financing capital projects on campuses. The projects would allow universities to expand facilities to meet growing enrollment and incorporate technology improvements in laboratories and other buildings.

Money set aside in SB 8 for teacher health care would pay for claims related to COVID-19 by active and retired teachers. It would prevent an anticipated 5 percent increase in premiums next year for TRS-ActiveCare participants and would allow the Teacher Retirement System to offer a "premium holiday" for TRS-Care, the program for retired educators, that would allow retirees to avoid paying premiums for a few months.

Critics said

Unemployment compensation. SB 8 would spend nearly half of the American Rescue Plan Act appropriations to shore up the unemployment compensation fund at the expense of other unmet state needs, such as housing, child care, and infrastructure. There are other alternatives for replenishing the fund, including using the Economic Stabilization Fund or financing the debt with bonds that could be paid back by employers over several tax years instead of one. The bill should be structured in a way that

protects small businesses from higher unemployment taxes while requiring major employers, including some whose revenues greatly increased during the pandemic, to pay higher taxes to replenish the fund.

Health and human services. The Legislature should allocate additional funds beyond what the bill has proposed to more effectively address staff shortages in hospitals, nursing homes, home health agencies, and other health care facilities. Because contractors generally pay higher rates for surge staffing than some health care facilities pay their staff, some health care professionals are leaving jobs at facilities to seek these opportunities, making it difficult for facilities to recruit and retain adequate staffing levels for patient care. To help resolve the staffing shortage, the Legislature should invest funds in loan repayment programs and expedited licensure programs.

The bill should include funding to increase wages for community attendant care workers, who currently make $8.11 an hour, a meager amount compared to the value of care they provide to families in need.

Other critics said

Before the Legislature allocates federal funds to state and local hospital surge staffing, it should first disclose how previous surge staffing funds were spent. Financial transparency is needed before allocating additional funds, and the Legislature should carefully consider whether surge staffing is the best use of federal funds or if hospitals could use other funding streams to recruit and retain staff.

Notes

The HRO analysis of SB 8 appeared in the October 15 *Daily Floor Report*. Some provisions of SB 8 related to education were analyzed in HB 160 by Wilson and some provisions related to health and human services were analyzed in HB 161 by Capriglione, also in the October 15 *Daily Floor Report*.

Limiting growth of state appropriations of consolidated general revenue

SB 1336 by Hancock
Effective September 1, 2021

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SB 1336 creates a new spending limit for state appropriations based on the spending of consolidated general revenue. Consolidated general revenue appropriations is defined as appropriations from:

- the general revenue fund;
- a dedicated account in the general revenue fund; or
- a general revenue-related fund.

Under the bill, the rate of growth of consolidated general revenue appropriations in a state fiscal biennium may not exceed the estimated average biennial rate of growth of the state's population during the fiscal biennium preceding the biennium for which approprations are made and during the fiscal biennium for which appropriations are made, adjusted by the estimated average biennial rate of monetary inflation in the state during the same period.

The bill requires that appropriations for a purpose that provides tax relief and appropriations to pay costs associated with recovery from a disaster declared by the governor be excluded from the computation determining whether appropriations exceed the new spending limit.

If the rate of growth of consolidated general revenue appropriations is negative, the amount of consolidated general revenue appropriations for the next fiscal biennium may not exceed the amount in the current biennium.

The LBB's budget recommendations for proposed consolidated general revenue appropriations may not exceed the new limit unless authorized by a majority of the members of the LBB from each legislative house. If the LBB does not adopt a limit established by the bill:

- the estimated average biennial rates of growth of the state's population and of monetary inflation shall be treated as if they were zero; and
- the amount of consolidated general revenue appropriations that may be appropriated within the limit shall be the same as the amount of those appropriations for the current fiscal biennium.

The proposed limit on consolidated general revenue appropriations is binding unless the Legislature adopts a resolution to raise the limit and the resolution is approved by three-fifths of the members of each house of the Legislature. The resolution must find that an emergency exists, identify the nature of the emergency, and specify the amount authorized. The excess amount authorized may not exceed the amount specified in the resolution.

The bill applies to appropriations beginning with fiscal year 2024.

Supporters said

SB 1336 would establish an additional limit on appropriations that would more accurately reflect state spending and help ensure the budget did not grow beyond the state's and taxpayers' means.

The new spending limit would provide a more accurate picture of the growth in the state. While the current spending limit is based on personal income growth, the spending limit established by SB 1336 would use population and inflation, which is a better measure of taxpayers' ability to pay for government. The current spending limit uses only projections, but the new limit would improve on this by taking into account population growth and monetary inflation in the preceding biennium and the biennium for which the new appropriations would be made.

The new limit would give a more transparent and accurate picture of state budgeting by placing a larger share of the budget under a limit in the growth of spending. The current constitutional limit on spending growth applies to state tax revenue not dedicated by the Constitution. It

covers only a portion of the budget and can provide an incentive to constitutionally dedicate funds so they are not under the limit. Another limit, the pay-as-you-go limit, also leaves a portion of the budget not subject to a cap. SB 1336 would institute a limit based on general revenue and general revenue dedicated funds so that a larger share of the budget fell under a spending limit. The new limit also would not restrict spending in emergency situations because it would allow the Legislature to authorize appropriations that exceeded the limit by adopting a resolution.

While the Legislature could impose additional spending limits without legislation and recent ones would fall within the new limit, placing the cap in statute would protect Texans by ensuring that future legislatures adhered to it.

Critics said

It is unnecessary for the Legislature to enact additional restrictions on state spending, as SB 1336 would do. Current limits work well to keep a check on state spending, and Texas has a history of passing conservative budgets that are within the state's means. In addition, there is no need to place another spending limit in statute when the Legislature can impose such limits without a statutory restriction.

Establishing additional spending limits would reduce flexibility in budgeting, which could make the state less able to respond to growth and changing conditions, meet the need for a service, recover from an economic recession, or make large investments in one area of the budget. By focusing on general revenue, SB 1336 would place a limit on education and health care spending, but exclude the state highway fund. Budget writers should be able to respond to all needs without having their hands tied. An additional spending limit also could provide an incentive to push spending to local governments.

While the current constitutional limit is restricted to tax revenue not dedicated by the Constitution, SB 1336 would place under a new limit other types of revenue, such as general revenue dedicated fees. By putting such revenue that might be intended for a specific purpose under a spending cap, the bill could unfairly limit the spending of funds collected for a specific purpose and the need for which might not be related to economic indicators.

Notes

The HRO analysis of SB 1336 appeared in Part One of the May 25 *Daily Floor Report*.

Limiting disasters during which property tax may be raised without election

SB 1427 and SB 1438 by Bettencourt
Effective June 16, 2021

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The 87th Legislature enacted measures limiting the types of disasters during which a taxing unit may raise property tax rates without holding an election.

SB 1427 specifies that for purposes of determining if property damaged by a disaster is eligible for a temporary property tax exemption under Tax Code sec. 11.35, the qualified property must be physically damaged.

SB 1438 specifies that a taxing unit other than a school district or special taxing unit may calculate the voter-approval tax rate in the manner provided for a special taxing unit (8 percent) during a disaster if any part of the unit is located in a disaster area and at least one person is granted a tax exemption under Tax Code sec. 11.35 for property within the taxing unit. The bill limits the period of time during which taxing units may use this calculation to the first tax year in which the total taxable value of property exceeds the total value the year the disaster occurred, up to three years.

In the first tax year following the last year the taxing unit's voter-approval rate is calculated as provided above, the voter-approval tax rate is reduced by the emergency revenue rate, which is a rate that accounts for the difference in the adopted tax rate and the adjusted tax rate. The adjusted voter-approval tax rate is the rate a taxing unit would have calculated in the last year if the taxing unit adopted a rate equal to the greater of: the tax rate actually adopted, if the rate were approved by voters; or, the rate as calculated in the manner provided for a taxing unit other than a special taxing unit (3.5 percent).

The bill also limits the disasters in which a taxing unit or school district may adopt a property tax rate without holding an election. Such a disaster still includes a tornado, hurricane, flood, wildfire, or other calamity, but not a drought, epidemic, or pandemic.

A taxing unit that elects to calculate its rates in the manner provided for a special taxing unit or that adopts a rate that exceeds the voter-approval rate without holding an election, as authorized above, must specify the disaster declaration that provides the basis for calculating or adopting the rate.

The bill also repeals provisions of the temporary exemption under Tax Code sec. 11.35 that provides that a person is not entitled to the exemption if the governor declares territory in the taxing unit to be a disaster area on or after the taxing unit adopts a rate unless the governing body adopts the exemption.

Supporters said

SB 1438 would clarify that property tax disaster exceptions provided to taxing units would apply only during disasters that caused physical property damage and not during a pandemic or epidemic. Last session, the Legislature enacted property tax reform in SB 2 by Bettencourt, which created two exceptions allowing taxing units to raise property tax rates during a disaster without triggering an automatic election. The first exception allows certain localities to raise property tax revenue up to 8 percent, instead of 3.5 percent, for up to three years after a disaster. The second allows localities or school districts to exceed the voter-approval tax rate without holding an election if increased expenditures are needed to respond to a disaster.

However, these exceptions were not meant for disasters such as pandemics or epidemics, which do not cause property damage. Some localities improperly attempted to use the statute to increase taxes during the COVID-19 pandemic, imposing an additional burden on struggling businesses and homeowners. SB 1438, along with the clarification made by SB 1427, would limit the disaster exceptions so that taxing units could raise rates without an election only during a disaster that caused physical damage and not during a pandemic or epidemic, which would be in line with current law that excludes droughts. By limiting the exceptions, the bills would provide that taxing units only claimed the disaster exceptions in situations for

which it was necessary to fund major repairs and only for a limited time.

A taxing unit would not be prohibited from raising tax rates to respond to a disaster but would have to seek approval from the voters. Local elections are the ultimate form of local control and allow the taxpayers to decide whether it is necessary to send more dollars to their local governments. However, the disaster exception, as clarified by SB 1438, should stay in place for the legitimate needs of local governments and school districts facing damage due to a disaster like a hurricane or similar calamity.

Critics said

SB 1438 would limit the ability of local governments to respond to and recover from a disaster by limiting the disaster exceptions for increasing property tax rates without an election. Disasters, including pandemics, impose additional costs on taxing units, and localities should not be restricted from calculating their taxing needs according to their own disaster response plans.

The bill could cost millions of dollars for some localities that had already adopted property tax rates at the increased rates, decreasing the availability of public services. The bill also could prevent certain school districts from responding to the current or future pandemics in a timely fashion, affecting their ability to get children back in school. While not all localities would need to use the disaster exception, this bill would inappropriately limit those that had genuine need. These decisions should be made at the local level because communities know their needs best.

By shortening the recalculation of the voter-approval rate to the first year in which property values reached pre-disaster levels, the bill could prevent communities from fully recovering. Rather than limiting this time frame, the bill should allow localities to claim the disaster exception for up to five years if property values had not recovered to pre-disaster levels. By providing more time, taxing units could raise rates incrementally to slowly recover rather than spiking rates in three years to cover the high cost of repairs.

Other critics said

While SB 1438 is a good first step, it could go further by eliminating the disaster exception. Such an exception is unnecessary because if a taxing unit's property values declined because of damage from a disaster, the taxing unit could adjust its tax rate to generate the same amount of revenue as the prior year, or up to 3.5 percent more revenue, without holding an election.

Notes

SB 1438 was not analyzed in a *Daily Floor Report*. The HRO analysis of HB 3376 by Meyer, the House companion to SB 1438, appeared in the April 21 *Daily Floor Report*.

The HRO analysis of SB 1427 appeared in Part Two of the May 23 *Daily Floor Report*.

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Transportation

* Finally approved

Establishing additional registration or mileage fees on electric vehicles

SB 1728 by Schwertner
Died in the House

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SB 1728 would have established additional registration fees for alternatively fueled vehicles and a council to plan for the development of electric vehicle (EV) charging infrastructure in the state.

Alternatively fueled vehicle fees. SB 1728 would have imposed additional registration fees on alternatively fueled vehicles based on gross weight and whether the vehicle was a plug-in hybrid. The bill also would have imposed an optional fee based on vehicle miles traveled that could have been paid in lieu of the additional registration fee.

An "alternatively fueled vehicle" would have meant a motor vehicle that was capable of being powered by a source other than gasoline or diesel fuel.

A "plug-in hybrid electric vehicle" would have included a vehicle capable of being powered by a battery and by an internal combustion engine that used gasoline or diesel fuel and that recharged by plugging into an outlet or charging station.

Applicability. These provisions would not have applied to a hybrid EV that was not a plug-in, a natural gas vehicle, or a vehicle used exclusively to provide public transportation.

Alternatively fueled vehicle fee. In addition to other fees, at the time of application or renewal of registration of an alternatively fueled vehicle, other than a plug-in hybrid, the applicant would have had to pay an additional fee according to the gross weight of the vehicle, as follows:

- $190 for up to 6,000 pounds; and
- $240 for 6,001 to 10,000 pounds.

For registration of a plug-in hybrid EV, the applicant would have had to pay:

- $30 for up to 6,000 pounds; and
- $40 for 6,001 to 10,000 pounds.

Mileage fee alternative. In lieu of paying the fees above, a person could have paid an annual mileage fee. The annual mileage fee for an alternatively fueled vehicle, other than a plug-in hybrid, that weighed up to 6,000 pounds would have been:

- $30 for up to 3,000 miles;
- $70 for 3,001 to 6,000 miles;
- $110 for 6,001 to 9,000 miles;
- $150 for 9,001 to 12,000 miles; and
- $190 for 12,001 miles or more.

The annual mileage fee for an alternatively fueled vehicle, other than a plug-in hybrid, that weighed more than 6,000 pounds would have been:

- $40 for up to 3,000 miles;
- $90 for 3,001 to 6,000 miles;
- $140 for 6,001 to 9,000 miles;
- $190 for 9,001 to 12,000 miles; and
- $240 for 12,001 miles or more.

The annual mileage fee for a plug-in hybrid that weighed up to 6,000 pounds would have been:

- $5 for up to 3,000 miles;
- $10 for 3,001 to 6,000 miles;
- $20 for 6,001 to 9,000 miles; and
- $30 for 9,001 miles or more.

The annual mileage fee for a plug-in hybrid that weighed more than 6,000 pounds would have been:

- $10 for up to 3,000 miles;
- $20 for 3,001 to 6,000 miles;
- $30 for 6,001 to 9,000 miles; and
- $40 for 9,001 miles or more.

A person could have had such a vehicle inspected at the end of a one-year period for purposes of paying the fee. An inspection station or inspector would have had to

submit odometer readings to Texas Department of Motor Vehicles (TxDMV).

Electric vehicle surcharge. Additionally, a registration applicant with an EV would have had to pay a $10 surcharge, which, until September 1, 2030, would have been deposited to the general revenue fund and used for the operation of the Texas Transportation Electrification Council.

Annual fee adjustment. Each year after September 1, 2030, TxDMV would have had to increase the fees as necessary to adjust for inflation. If the federal government collected a tax on an alternatively fueled vehicle, TxDMV would have had to decrease the state fees as provided by the bill.

Allocation of fees. Except as otherwise provided, each fee and surcharge imposed by the bill would have been deposited to the State Highway Fund.

Texas Transportation Electrification Council. SB 1728 would have established the Texas Transportation Electrification Council, composed of representatives of certain state agencies, which would have been administratively attached to and funded by the Texas Department of Transportation. The council would have had to prepare an assessment of existing and planned public EV charging infrastructure in the state, which would have been used to develop a comprehensive plan for charging infrastructure and associated technologies through the year 2040. The council also would have had to develop policy recommendations to meet the future electrified transportation needs.

These provisions and the council would have expired on January 1, 2031.

Supporters said

SB 1728 would address the growing adoption of alternatively fueled vehicles (AFVs) not solely powered by gas or diesel by establishing a transportation electrification council and fees on AFVs. As more Texans purchase AFVs, such as electric vehicles or hybrids, the state loses a growing amount of motor fuel taxes, which typically are used for transportation projects such as building and maintaining state highways and bridges. By establishing additional registration fees on AFVs, SB 1728 would capture that lost income.

Owners of AFVs contribute the same amount of wear and tear to Texas infrastructure as do conventional vehicles, and thus should pay a proportionate amount toward the costs of building and maintaining roads. Traditional transportation revenues already are falling behind the state's needs due to a rapidly growing population, so the fees also would help bridge that gap in funding. The bill would establish registration fees in line with a 2020 Texas Department of Motor Vehicles (TxDMV) study on fair registration fees, which found that the average conventionally fueled vehicle owner contributes about $100 in state fuel tax revenue and $95 in federal tax revenue. The bill also would allow an AFV owner to opt into a smaller fee on vehicle miles traveled instead of the flat fee to account for drivers who drive fewer miles on Texas roads and thus contribute less to road wear. The fees would be annually adjusted for inflation and decreased if the federal government were to impose a similar tax on AFVs. As the number of electric vehicle models grows and the average cost falls, the state may see a rapid increase in adoption of AFVs and must plan for its future infrastructure needs.

Critics said

SB 1728 would be overly punitive in imposing average annual fees of about $200 on many AFV owners. A TxDMV study found that to replace the average amount of state fuel taxes that a conventionally fueled vehicle owner pays, an EV owner would have to pay around $100 annually. This makes the average fee in the bill about twice the amount recommended by the agency, since the state has no need to collect the federal portion of the fee. Additionally, the amount is nearly double that of other states. As of 2020, more than half of the states had enacted laws imposing fees on AFVs, the average of which was about $120 a year. Even with the optional alternative of a fee on vehicle miles traveled, the fees in the bill would be too high and would burden owners and the industry. Because the number of AFVs on Texas roads is very small relative to conventionally fueled vehicles, the state could wait to impose additional fees. The bill would discourage AFV ownership at a time when the Legislature should promote the use of clean methods of transportation that offer public health benefits and reduce state health care costs.

Notes

The HRO analysis of SB 1728 appeared in Part Three of the May 24 *Daily Floor Report*.

Index by bill number

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