



Legislative UPDATE

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Number 43

U.S. Congress Passes Infrastructure Investment and Jobs Act (IIJA)

Congress recently passed a \$1.2 trillion bill that will make historic investments in the nation's core infrastructure priorities including roads, bridges, rail, transit, airports, ports, energy transmission, water systems, and broadband.

The IIJA includes \$550 billion in new spending, approximately half of which goes to the U.S. Department of Transportation and will result in higher funding levels in existing programs as well as the creation of many new programs. Included in the \$550 billion in new spending is \$110 billion for investments in aging roads and bridges, \$65 billion for grants to states for broadband deployment, \$55 billion for water infrastructure, and \$65 billion for grid reliability and resiliency.

What does that mean for Texas and Texas cities? Based on [numbers from the White House](#), Texas can expect:

- \$26.9 billion for federal-aid highway apportioned programs;
- \$3.3 billion to improve public transportation options;
- \$2.9 billion to improve water infrastructure;
- \$1.2 billion for airport infrastructure development;
- \$537 million for bridge replacement and repairs;

- \$408 million to support the expansion of an electric vehicle (EV) charging network;
- \$100 million to help provide broadband coverage;
- \$53 million to help protect against wildfires; and
- \$42 million to protect against cyberattacks.

The League will report on how cities can access eligible funds in the weeks ahead as that information is made available.

Comptroller Glenn Hegar Releases 2022-2023 Certification Revenue Estimate

Comptroller Hegar [released](#) his [2022-23 Certification Revenue Estimate \(CRE\)](#) last week to certify the state budget and to provide a revised estimate of the Biennial Revenue Estimate (BRE) to reflect current economic information.

"As a result of legislative actions and an updated economic forecast, the Comptroller's office now expects revenue available for general spending in 2022-23 to total about \$135.32 billion, up 15.1 percent from the 2020-21 biennium. This revenue will support the \$123.33 billion in general-purpose spending called for by the 87th Legislature and will result in a projected fiscal 2023 balance available for certification of \$11.99 billion."

PUC Adopts Its First Set of Rules for Weatherization of Electric Utilities

The Public Utility Commission (PUC) [adopted](#) its first set of rules relating to weather emergency preparedness reliability standards after receiving public comments from over two dozen entities, including the City of Houston and the Texas Public Power Association.

The adopted rules include winter weather emergency preparation measures for generation entities and transmission service providers in the Electric Reliability Council of Texas (ERCOT) power region, as required by S.B. 3. The League previously reported on S.B. 3 [here](#).

COVID-19 Update (No. 208)

All pandemic-related updates, including information about the American Rescue Plan's city-related provisions, will be in the [Legislative Update Newsletter](#) from now on.

OSHA Publishes Emergency COVID-19 Vaccine and Testing Rules

In response to President Biden's executive directive, on November 4th, the federal Occupational Safety and Health Administration (OSHA) published its [COVID-19 Vaccination and Testing](#)

[Emergency Temporary Standard \(ETS\)](#), which became effective November 5. The ETS requires employers with 100 or more employees to develop a vaccination and testing policy within 30 days and implement the policy within 60 days. While large private employers in Texas are subject to the ETS, cities in Texas are not. As expected, the ETS does not apply to workers of local governmental entities in states that have not adopted an OSHA-approved State Plan. Texas has not adopted a State Plan (see paragraph 3, [here](#)). More details on the ETS can be found [here](#), but because it is not applicable to Texas cities, we are not going to detail all the requirements here.

Federal Court of Appeals Halts OSHA ETS Implementation

Notwithstanding any of the above discussion, the [5th Circuit Court of Appeals has stayed implementation of the OSHA ETS](#) while the court works through potential constitutional and statutory issues with the ETS.

Centers for Medicare and Medicaid Services Issues New Vaccination Rule

To address the spread of COVID-19 and lower the probability of transmission of the disease in health care settings, the Centers for Medicare and Medicaid Services (CMS) issued an interim final rule with comment period (IFC), effective November 5th, applicable to 21 types of providers and suppliers of Medicare-funded health care related products and services. The IFC requires all staff, with limited exception, of affected facilities to be fully vaccinated against COVID-19 within 60 days. A summary of the IFC is below, but [the complete IFC can be found here](#).

Affected Facilities:

Specifically, the IFC regulates the following types of Medicare-funded providers and suppliers, which are listed in the order of appearance in the regulation (42 C.F.R.) being revised by this IFC:

- Ambulatory Surgical Centers (ASCs) (§ 416.51)
- Hospices (§ 418.60)
- Psychiatric residential treatment facilities (PRTFs) (§ 441.151)
- Programs of All-Inclusive Care for the Elderly (PACE) (§ 460.74)
- Hospitals (acute care hospitals, psychiatric hospitals, hospital swing beds, long term care hospitals, children's hospitals, transplant centers, cancer hospitals, and rehabilitation hospitals/inpatient rehabilitation facilities) (§ 482.42)
- Long Term Care (LTC) Facilities, including Skilled Nursing Facilities (SNFs) and Nursing Facilities (NFs), generally referred to as nursing homes (§ 483.80)
- Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID) (§ 483.430)
- Home Health Agencies (HHAs) (§ 484.70)
- Comprehensive Outpatient Rehabilitation Facilities (CORFs) (§§ 485.58 and 485.70)
- Critical Access Hospitals (CAHs) (§ 485.640)
- Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services (§ 485.725)
- Community Mental Health Centers (CMHCs) (§ 485.904)
- Home Infusion Therapy (HIT) suppliers (§ 486.525)

- Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs) (§ 491.8)
- End-Stage Renal Disease (ESRD) Facilities (§ 494.30)

All facility staff must be “fully vaccinated”:

Phase 1, effective 30 days after publication, includes nearly all provisions of this IFC, including the requirements that all staff have received, at a minimum, the first dose of the primary series or a single dose COVID-19 vaccine, or requested and/or been granted a lawful exemption, prior to staff providing any care, treatment, or other services for the facility and/or its patients. Phase 1 also includes the requirements for facilities to have appropriate policies and procedures developed and implemented, and the requirement that all staff must have received a single dose COVID-19 vaccine or the initial dose of a primary series by December 6, 2021.

Phase 2, effective 60 days after publication, consists of the requirement that all applicable staff are fully vaccinated for COVID-19, except for those staff who have been granted exemptions from COVID-19 vaccination or those staff for whom COVID-19 vaccination must be temporarily delayed, as recommended by the CDC, due to clinical precautions and considerations). Although an individual is not considered fully vaccinated until 14 days (2 weeks) after the final dose, staff who have received the final dose of a primary vaccination series by the Phase 2 effective date are considered to have meet the individual vaccination requirements, even if they have not yet completed the 14-day waiting period.

“Fully vaccinated” is defined as being two weeks or more since completion of a primary vaccination series. Additionally, the completion of a primary vaccination series for COVID-19 is defined in the requirements as the administration of a single-dose vaccine, or the administration of all required doses of a multi-dose vaccine.

Affected Staff:

Each facility's COVID-19 vaccination policies and procedures must apply to virtually all facility staff, regardless of clinical responsibility or patient contact and including all current staff as well as any new staff, who provide any care, treatment, or other services for the facility and/or its patients. Individuals who provide services 100 percent remotely, such as fully remote telehealth or payroll services, are not subject to the vaccination requirements of this IFC. If your city operates an affected facility, please review Section II.A.1 of the IFC for a more complete discussion of which employees are affected.

This IFC is a very broad rule that affects nearly all employees in affected facilities or service sectors, and the required timeframes are short. If your city operates an affected facility, contact your facility manager and the city attorney immediately to work through the details of these regulations.

ARPA Funding Agreements For Non-Entitlement Cities (Originally published in COVID-19 Update No. 207)

TML has received inquiries from a few non-entitlement cities (cities under 50,000 population) regarding potential unanticipated consequences that might flow from acceptance of the [American Rescue Plan Act / Coronavirus Local Fiscal Recovery grant funding](#). Specifically, concerns have been raised that acceptance of these funds will obligate cities who accept the funds (Recipient Cities) to enforce potential future state or federal COVID-19 vaccine mandates or other regulations. The bottom line is that whether a city will be subject to future state or federal rules and regulations is disconnected to accepting ARPA/CLFR funds today.

To receive the ARPA/CLFR funds, a non-entitlement Recipient City must submit a certified submission package to the [Texas Division of Emergency Management](#), which includes the execution of the [U.S. Department of the Treasury Coronavirus Local Fiscal Recovery Fund Award Terms and Conditions](#) (collectively the “Agreement”). The Agreement sets the terms by which the Recipient City receives its allotment of ARPA/CLFR funding. The questions TML has received relate to the scope of provisions in the Agreement such as “Recipient also agrees to comply with all other applicable federal statutes, regulations, and executive orders” and whether these provisions will be used to force a federal COVID-19 vaccine mandate on non-entitlement Recipient Cities. The short answer to the question is likely “no,” and a few reasons are discussed below.

1. Texas cities are already subject to “applicable” state and federal law. The Agreement does not create new laws to apply to Texas cities; rather, it restates the current rule: Texas cities must follow applicable state and federal law. Keep in mind as well that future legislation or regulation need not be tied to receipt of ARPA/CLFR funds to be binding. Declining ARPA/CLFR grant funding guarantees only that the city will not receive those funds. It does not guarantee protection from future legislation.
2. The Agreement is quite specific with regard to much of the “applicable” law. The Agreement cites specific sections of the Code of Federal Regulation that apply to all federal grant funding, the Americans with Disabilities Act, the Civil Rights Act of 1964, and the American Rescue Plan Act as being specifically applicable, and as stated above, those laws are already applicable to Texas cities. There are no additional specific requirements related to COVID-19 vaccinations or masking contained in the Agreement. The Agreement states that the Department of the Treasury may impose additional conditions on the receipt of a “subsequent tranche” of future award funds, and if that is the case, Texas cities will know in advance and can reject the funds if those additional terms are too onerous.
3. There are currently no federal COVID-19 mandates that apply to Texas cities, and ARPA funding does not change this. The current Presidential Executive Orders related to federal contracting and the Presidential directive related to mandatory COVID-19 vaccination are likely not applicable to Texas cities. Please review [TML’s previous analysis of the President’s Executive Orders](#) related to COVID-19 vaccines, which likely do not apply to Texas cities.

Ultimately, the Agreement and the receipt of ARPA/CLRF funding likely does not increase a city's exposure to regulations from the state or federal governments, and declining the funds does not insulate cities, either. The truth is that if the state or federal government wishes to mandate COVID-19 vaccines or other regulations, they can attempt to do so regardless of whether a city has accepted these grant funds. We encourage city officials to read through their city's Agreement and call their city attorney or the TML Legal Services Department with any questions or concerns.

American Rescue Plan Act Funds

As a reminder, the Texas Division of Emergency Management maintains its [Coronavirus Local Fiscal Recovery Fund FAQ](#) with guidance related to the ARPA/CLFR fund program.

The U.S. Treasury Department's Coronavirus State and Local Fiscal Recovery Funds FAQ contains a number of questions and answers related to eligibility for recovery funds and eligible uses of recovery funds and can be accessed [here](#).

The National League of Cities also maintains an ARPA-related FAQ which can be found [here](#).

Reminder: TML Coronavirus materials are archived by date [here](#) and by subject [here](#).

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