

TO: TCEP
FROM: Imperium Public Affairs
DATE: June 2, 2021
SUBJECT: 87th Regular Legislative Session – Sine Die Report



OVERVIEW

The 2021 Texas Legislature was a drastically different session as compared to the previous session in 2019. When the 87th Texas Legislature gavelled in on January 12th, the state and the world was grappling with the impacts of a global pandemic. Social distancing measures meant access to the Capitol was drastically reduced, and all visitors during session were required to take a COVID-19 test or show proof of vaccination prior to entry and wear masks throughout the building. These precautions would carry into May, creating a significant boundary between legislative offices and the public there to engage on legislative issues.

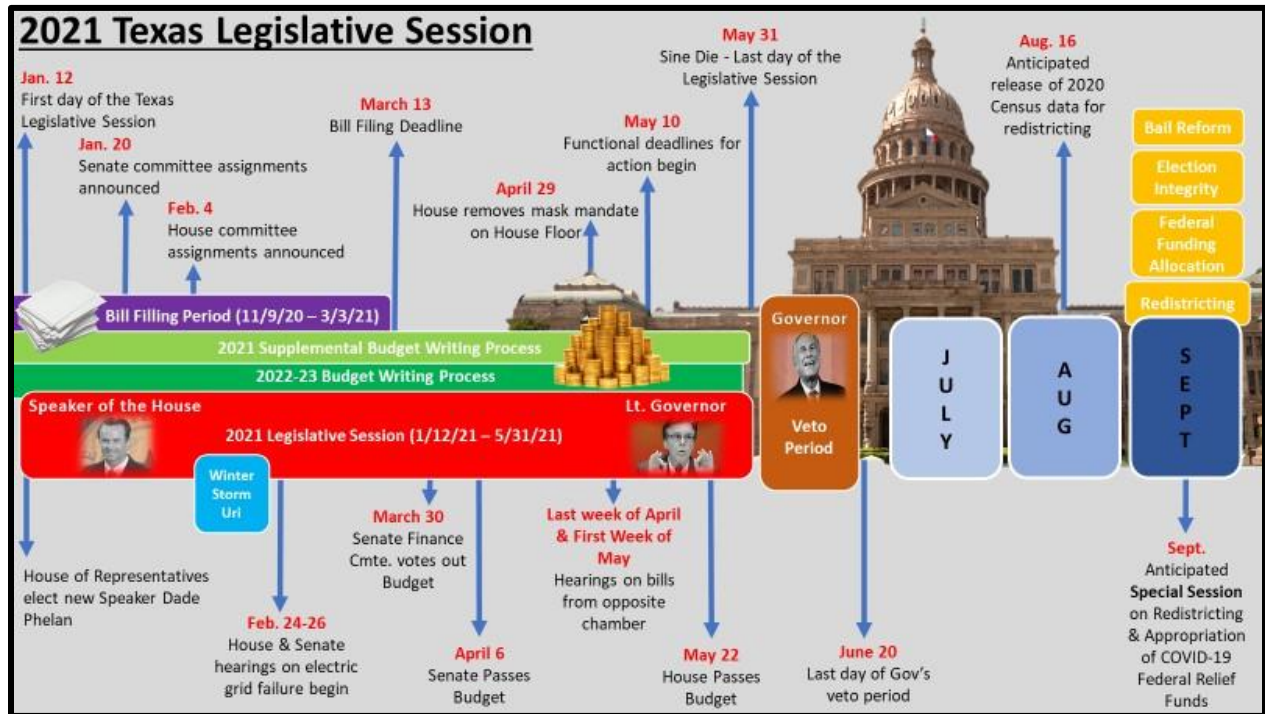
Based on the results, this was an exceptional session for emergency physicians. The legislature passed landmark liability protections for physicians serving Texans during the Covid-19 pandemic. The interim work on the medical taxation issue at the Comptroller's Office allowed that bill to sail through the process and be one of the first bills signed by Governor Abbott this session. None of the contentious scope of practice bills got any traction, despite being filed by the chair of the House Public Health Committee. Additionally, the health plans were unable to make changes that were made to the balance billing reform enacted by the legislature in 2019.

Every legislative session is unique – and the 2021 session was no different with the slow start and lowered expectations due to the COVID-19 pandemic. But that drastically shifted mid-February, on the heels of an unprecedented winter storm that left millions of Texans without power for days.

After winter storm Uri shut down the Capitol for a week, legislators turned their focus from the ongoing pandemic to the catastrophic aftermath of the storm. Bill filing saw a drastic increase for energy reform-focused legislation and committee hearings were scheduled immediately to consider the vulnerabilities of the state's electric grid and determine the best solutions to prevent another incident.

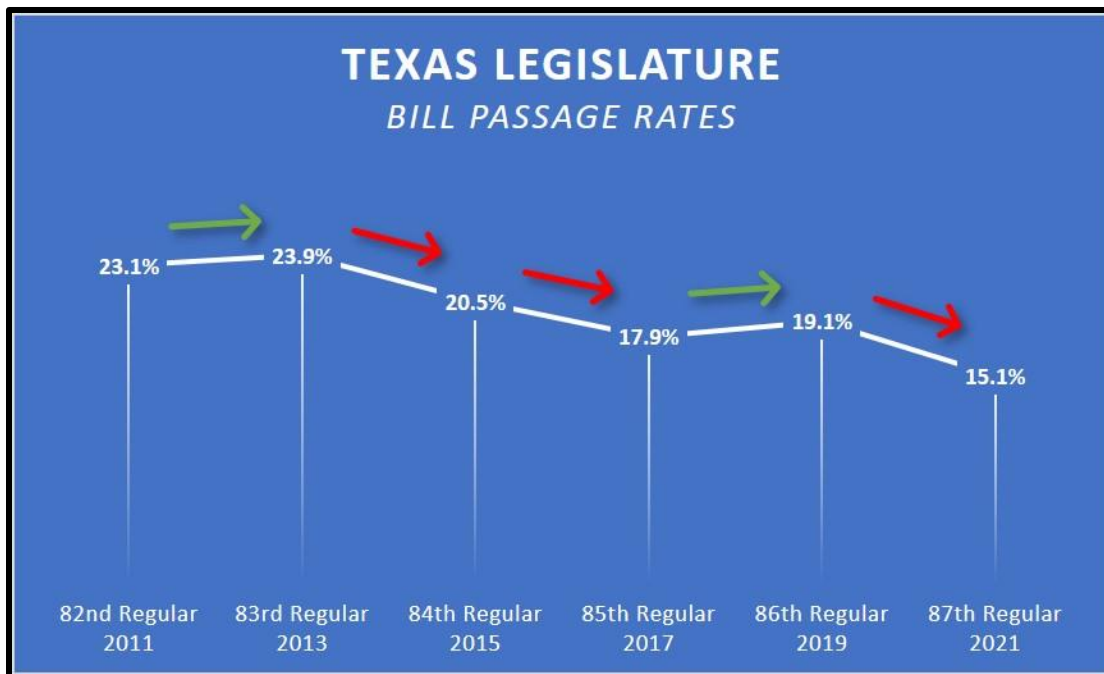
As legislators became more accustomed to the new protocols in place, the pace picked up in April and May. Issues such as statewide expansion of broadband access, ERCOT reform, Covid-19 liability protections for businesses, and permanently adopting alcohol-to-go from restaurants were considered and promoted by legislators who passed a comprehensive budget in addition to these other initiatives.

Despite the late push, this legislature’s work is not complete. They will likely be back in the fall, if not sooner, for additional special sessions. The redistricting process to set legislative and congressional boundaries must still be completed, and the arrival of tens of billions in federal funds from the Covid-19 stimulus will prompt the Governor to call legislators back to Austin.



BLL STATISTICS

The 2021 legislative session produced the lowest bill passage rate in the last 20 years. It is 6.7% lower than the average over that same time. Approximately 75% of House bills and 70% of Senate bills were unable to pass their chamber of origin. Less than half of the House bills that cleared their chamber of origin were passed by the Senate, which is significantly less than the nearly 75% of Senate bills that were passed by the opposite chamber.



SESSION ISSUES

Medical Billing Taxation

HB 1445 - Relating to the applicability of the sales and use tax to medical or dental billing services.

TCEP Position: Support

Status: Signed by Gov. Abbott on 4/30/2021; Effective 1/1/2022

Author: Rep. Tom Oliverson, MD (R-Cypress)

Co-authors: Rep. Morgan Meyer (R-Dallas), Rep. Steve Allison (R-San Antonio) & Rep. Valoree Swanson (R-Spring)

Senate Sponsor: Sen. Robert Nichols (R-Jacksonville)

Background: Tax Code sec. 151.0039 defines "insurance service" as insurance loss or damage appraisal, inspection, investigation, actuarial analysis or research, claims adjustment or processing, or loss prevention service. Sec. 151.0101 specifies that insurance services are taxable services under the Limited Sales, Excise, and Use Tax Act.

From 2002 to 2019, the Comptroller's Office held that claims processing did not begin until an insurance company received a claim, so these billing services were exempt from taxation. However, upon further review, they determined there was not a statutory provision strictly excluding those services from sales and use taxes. This bill is the result of successful negotiations during the interim with the Comptroller's Office and medical stakeholders.

HB 1445 clarifies that insurance services subject to sales and use taxes did not include a medical or dental billing service performed before the original submission of:

- a medical or dental insurance claim related to health or dental coverage; or
- a claim related to health or dental coverage made to a medical assistance program funded by the federal or state government.

The bill defines "medical or dental billing service" as assigning codes for the preparation of a medical or dental claim, verifying insurance eligibility, preparing a claim form for filing, and filing a claim.

Liability Protections

SB 6 - Relating to liability for certain claims arising during a pandemic or disaster related to a pandemic.

TCEP Position: Support

Status: Sent to Gov. Abbott

Author: Sen. Kelly Hancock (R-North Richland Hills)

House Sponsor: Rep. Jeff Leach (R-Plano)

Background: SB 6 is legislation designed to provide liability protection for certain individuals, organizations, and institutions that attempt to follow applicable governmental standards, guidelines, or protocols with the purpose of minimizing the spread of a pandemic disease. Liability exceptions would be established for certain actions by physicians, health care providers, and first responders and for certain actions by manufacturers and others involved with specified products. The bill also would establish liability protections for certain exposures of individuals to a pandemic disease and certain actions taken by educational institutions. The bill also states that the legislation creates no new civil cause of action, and it establishes standards that allow such lawsuits to proceed if certain safety protocols were not followed.

Liability of physicians, health care providers, first responders. CSSB 6 would, under certain circumstances, provide physicians, health care providers, and first responders exceptions from liability for injuries or death arising from care, treatment, or failure to provide care or treatment relating to or impacted by a pandemic disease or a disaster declaration related to a pandemic disease. The exceptions would apply to economic and noneconomic damages. The exception from liability would not apply in cases of reckless conduct or intentional, willful, or wanton misconduct that met certain conditions in the bill. The exception would apply if a physician, health care provider, or first responder proved 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, treatment, or failure to provide care or treatment.

A physician, health care provider, or first responder could not use the fact that the individual was diagnosed with or suspected of being infected with the pandemic disease as a defense to liability for negligent care, treatment, or failure to provide care or treatment if certain factors were proved by the claimant. The defense could not be used if the claimant proved by a preponderance of the evidence that the diagnosis, treatment, or reasonable suspicion of infection at the time of the care, treatment, or failure to provide care or treatment was not a producing cause of the individual's injury or death.

The bill would establish a list of actions and circumstances that would be considered care, treatment, or failure to provide care or treatment that could be excepted from liability under the bill. It also sets out timelines for physicians, health care providers, and first responders who intended to raise a defense established by the bill to provide to a claimant specific facts supporting an assertion that they were not liable for the injury or death.

The bill's provisions would apply only to claims arising from care, treatment, or failure to provide care or treatment that occurred during the time from the date that the president of the United States or the governor made a disaster declaration related to a pandemic disease and ending on the date the declaration terminated.

Preauthorization and Utilization Review

HB 3459 - Relating to preauthorization requirements for certain medical and health care services and utilization review for certain health benefit plans.

TCEP Position: Support

Status: Sent to Gov. Abbott

Author: Rep. Greg Bonnen, MD (R-Friendswood)

Coauthor: Rep. Penny Morales Shaw (D-Houston)

Senate Sponsor: Sen. Dawn Buckingham, MD (R-Lakeway)

Background: This bill seeks to remove burdensome prior authorization requirements for physicians that can demonstrate that at least 90% of those requests are ultimately approved. Meeting that threshold would give them “gold card” status and they can be evaluated every six months (In January and June each year) by the state regulated health plan to ensure they are still meeting that 90% approval standard to retain that status. If status is rescinded a physician has 30 days to dispute the health plan’s determination via appeal to an independent review organization (IRO).

It would also ensure that physicians who are the most familiar with the delivery of health care in Texas are involved in utilization reviews for health benefit plan coverage by requiring that a physician of the same or similar specialty as the patient's physician who requested the service.

Orders of Protective Custody

HB 2709 - Relating to the county in which an application for court-ordered mental health services must be filed.

TCEP Position: Support

Status: Passed House, but did not pass Senate

Author: Rep. Julie Johnson (D-Dallas)

Senate Sponsor: Sen. Joan Huffman (R-Houston)

This bill was slated to pass on the last local and uncontested calendar in the Senate on May 26. Due to unrelated tensions between the House and Senate the Lt. Gov. chose to not pass over 100 bills on this calendar as retribution for the House killing two priority bills from the Senate on May 25.

Background: Hospitals are finding that some county courts do not allow their treating clinicians to request orders of protective custody for admitted patients from the county in which the hospital is located. Instead, these courts are requiring the hospital to seek the order from the county in which the patient was apprehended by law enforcement, which is often a neighboring county. Concerns have been raised regarding the various interpretations of the statute providing for these orders. This bill seeks to clarify this statute by specifically authorizing these orders to be filed with the county clerk in the county in which the patient is being assessed in an emergency room or hospital.

It would have amended the Health and Safety Code to authorize an application for court-ordered mental health services to be filed with the county clerk in the county in which the proposed patient is being assessed in an emergency room or hospital.

Prudent Layperson Standard

HB 2241 - Relating to the definition of emergency care for purposes of certain health benefit plans.

TCEP Position: Support; Dr. Diana Fite and Dr. J.R. Ford Testified

Status: Did not pass. Placed on General State Calendar 5/12/2021 but ran out of time on the final calendar for HBs.

Author: Rep. Tom Oliverson, MD (R-Cypress)

Coauthor: Rep. Ann Johnson (D-Houston)

Senate Sponsor: Sen. John Whitmire (D-Houston)

Background: Despite clear guidance from the Texas Department of Insurance, some health plans condition reimbursement for emergency services that hospitals and physicians have already provided on a patient's ultimate diagnosis, rather than the symptoms with which the patient presented to the emergency department. The bill would have aligned the statutory definitions related to emergency care and utilization review with its legal interpretation based on presenting symptoms regardless of the final diagnosis of the condition.

HB 2035 - Relating to utilization review of emergency care claims under health benefit plans.

TCEP Position: Support; Dr. Diana Fite and Dr. Carrie de Moor Testified

Status: Did not pass. Heard in House Insurance Committee, but left pending.

Author: Rep. Julie Johnson (D-Dallas)

Senate Sponsor: N/A

Background: The bill would have amended the Government Code relating to utilization review of emergency care claims under health benefit plans. The bill requires that the Health and Human Services Commission (HHSC) contracts with Medicaid managed care organizations (MCOs) include a provision that the MCOs must comply with Section 541.062 of the Insurance Code. Further, the bill requires utilization review of emergency care claims to be performed by a board-certified emergency room physician licensed to practice in the state, and places certain new requirements on utilization review.

Opioids & Controlled Substances

HB 2117 - Relating to the prescribing of controlled substances and dangerous drugs for acute pain.

TCEP Position: Oppose

Status: Did not pass; Referred to House Public Health and never received a hearing.

Author: Rep. Four Price (R-Amarillo)

Senate Sponsor: N/A

Background: This bill was essentially a refile of Rep. Price's onerous informed consent proposal from 2019. It would have prescribed in statute the conversation physicians would be required to have with patients when writing a prescription for any drug, including Tylenol II, for acute pain. TCEP advocated against the bill due to the workflow concerns that the bill would have mandated for emergency physicians and interference in the physician patient relationship.

SB 768 - Relating to increasing the criminal penalties for manufacture or delivery of fentanyl and related substances; creating a criminal offense.

TCEP Position: Support; Dr. Jessica Best testified in favor

Status: Sent to Gov. Abbott

Author: Sen. Joan Huffman (R-Houston)

House Sponsor: Rep. Ann Johnson (D-Houston)

Background: This bill amends the Health and Safety Code to create Penalty Group 1-B under the Texas Controlled Substances Act and to transfer from Penalty Group 1 to Penalty Group 1-B fentanyl, alpha-methylfentanyl, and any other derivative of fentanyl. The bill creates an offense for a person who knowingly manufactures, delivers, or possesses with intent to deliver fentanyl, alpha-methylfentanyl, or any other derivative of fentanyl that carries penalties ranging from a state jail felony to a term of imprisonment in the Texas Department of Criminal Justice (TDCJ) for life or for a term of not more than 99 years or less than 20 years, and a maximum \$500,000 fine, depending on the aggregate weight of the controlled substance.

[SB 1827](#) - Relating to the creation of the opioid abatement account, an opioid abatement trust fund, and a statewide opioid settlement agreement.

TCEP Position: Support

Status: Sent to Gov. Abbott

Author: Sen. Joan Huffman (R-Houston)

House Sponsor: Rep. Justin Holland (R-Rockwall)

Background: The bill would create the Opioid Abatement Fund Council to allocate money recovered by the state through an opioid settlement agreement and develop an opioid abatement strategy. The council would be administratively attached to the Comptroller's office and the Comptroller would provide staff and facilities necessary to assist the council in performing its duties.

Language was included by the bill's author to allow for funds from the settlement agreement to be used to cover the costs of the Prescription Monitoring Program and the associated EHR integration.

Scope of Practice

[HB 2029](#) - Relating to the licensing and authority of advanced practice registered nurses.

TCEP Position: Oppose

Status: Heard in House Public Health Committee and never received a vote.

Author: Rep. Stephanie Klick (R-Fort Worth)

Senate Sponsor: Sen. Kelly Hancock (R-North Richland Hills)

Background: This bill sought to amend the Occupations Code to allow nurse practitioners to practice medicine independently. The bill would have allowed APRNs to practice as licensed independent practitioners, as authorized by the Board of Nursing (BON), rather than through agreements with supervising physicians. The bill would allow APRNs to independently prescribe and order medications and devices, including controlled substances, as authorized by BON.

Keeping the committee chair's own bill bottled up in her committee was a collaborative effort on behalf of the entire house of medicine.

SB 993 - Relating to the practice of therapeutic optometry; requiring an occupational certificate to perform certain surgical procedures.

TCEP Position: Oppose filed version; neutral on compromise

Status: Sent to Gov. Abbott

Author: Sen. Kelly Hancock (R-North Richland Hills)

Coauthor: Sen. Royce West (D-Dallas)

Senate Sponsor: Rep. Stephanie Klick (R-Fort Worth)

Background: As filed, this bill sought to drastically expand the scope of practice of optometrists. It would have allowed optometrists to practice laser, scalpel, and needle surgery, treat all levels of glaucoma with no required collaboration with an ophthalmologist, prescribe hydrocodone-combination medications, prescribe systemic medications, and order a wide range of tests and studies. The bills also would have given the Texas Optometry Board (TOB) sole authority over its licensees' scope of practice in the future, giving that agency unprecedented powers.

In the last weeks of the session at the urging of Lt. Gov. Dan Patrick the Texas Ophthalmological Association and Sen. Dawn Buckingham negotiated a compromise and requested that the House of Medicine to not oppose the compromise bill. CSSB993 does the following:

- Expands optometrists' use of only topical and oral medications to treat the eye.
- Allows optometrists to medically manage mild and up-to moderate glaucoma without mandatory co-management with an ophthalmologist.
- Creates a peer review process for glaucoma complaints brought to the TOB. Each complaint must be initially reviewed by an ophthalmologist, and then brought to a panel of an equal number of ophthalmologists and optometrists which will recommend the disciplinary action to be taken. The optometrist will be held to the same standard of care applicable to an ophthalmologist.
- TOB must notify the Texas Medical Board of the receipt and disposition of complaints and must have a searchable list of therapeutic optometrists whose certificate was suspended or revoked by the board and must maintain publicly available online information about the number of complaints filed with the board regarding the treatment of glaucoma by optometrists.

HB 2596 - Relating to the identification requirements for health professionals associated with certain health facilities; authorizing administrative and civil penalties.

TCEP Position: Support

Status: Referred to House Public Health Committee but did not receive a hearing.

Author: Rep. Jared Patterson (R-Frisco)

Senate Sponsor: N/A

Background: The bill would have required that a health facility adopt a policy requiring a health professional providing direct patient care at the facility to wear a photo identification badge during all patient encounters, unless precluded by adopted isolation or sterilization protocols. The badge must be of sufficient size, be prominently worn and clearly visible, and state: (1) at a minimum the professional's first or last name; (2) the department of the facility with which the professional is associated; (3) the type of any license held by the professional under Title 3, Occupations Code [physician, physician assistant, nurse or advanced practice registered nurse]; and (4) if applicable, the professional's status as a student, intern, trainee, or resident.

HB 4352 - Relating to the scope of practice of physician assistants.

TCEP Position: Oppose

Status: Referred to House Public Health Committee but did not receive a hearing.

Author: Rep. Michelle Beckley (D-Carrollton)

Senate Sponsor: N/A

HB 4362 - Relating to the licensing and regulation of certain health professions; requiring an occupational certificate to perform certain surgical procedures.

TCEP Position: Oppose

Status: Referred to House Public Health Committee but did not receive a hearing.

Author: Rep. Stephanie Klick (R-Fort Worth)

Senate Sponsor: N/A

Coverage Expansion

HB 133 - Relating to the provision of certain benefits under Medicaid and the Healthy Texas Women program, including the transition of case management for children and pregnant women program services and Healthy Texas Women program services to a managed care program.

TCEP Position: Monitor

Status: Sent to Gov. Abbott

Author: Rep. Toni Rose (D-Dallas)

Senate Sponsor: Sen. Lois Kolkhorst (R-Brenham)

Background: This legislation comes out of recommendations provided in the 2020 Texas Maternal Mortality and Morbidity Review Committee and the Department of State Health Services (DSHS) Joint Biennial Report. This legislation would allow for not less than six months of Medicaid coverage following the date the woman delivers or experiences an involuntary miscarriage under the Healthy Texas Women program.

HB 290 - Relating to the period of continuous eligibility and a periodic eligibility review for a child for Medicaid.

TCEP Position: Monitor

Status: Passed as an amendment to SB 2658

Author: Rep. Phillip Cortez (D-San Antonio)

Senate Sponsor: Sen. Lois Kolkhorst (R-Brenham)

Background: The language amends the Human Resources Code to require the Health and Human Services Commission (HHSC) to provide two consecutive periods of eligibility to a child younger than the age of 19 enrolled in Medicaid between each certification and recertification of the child's eligibility. HHSC would be required to perform an income check during the sixth month following the date on which a child's eligibility for medical assistance is certified or recertified. If the review indicates the child's household income does not exceed the maximum income for eligibility, HHSC would be required to provide a second period of eligibility. If the review indicates the child's household income does exceed the maximum income for eligibility, HHSC would be required to continue to provide medical assistance for a period of not less than 30 days, in order to provide the child's parent or guardian time to provide documentation demonstrating that the child's household income does not exceed the maximum income for eligibility. If a parent or guardian fails to provide information demonstrating financial eligibility, HHSC would be required to provide written notice of termination which must include a statement that the child may be eligible for enrollment in the Children's Health Insurance Program.

Other Items

SB 199 - Relating to automated external defibrillators.

TCEP Position: Support

Status: Sent to Gov. Abbott

Author: Sen. Jane Nelson (R-Flower Mound)

House Sponsor: Rep. Four Price (R-Amarillo)

Background: This bill amends the Health and Safety Code to require a person or entity that owns or leases an automated external defibrillator to conduct a monthly inspection to verify the defibrillator is placed at its designated location, reasonably appears to be ready for use, and does not reasonably appear to be damaged in a manner that could prevent operation.

The bill revises provisions exempting a person or entity from liability for civil damages relating to the prescription, acquisition, or training in the use of an automated external defibrillator by doing the following:

- exempts the following from liability for civil damages related to such prescription, acquisition, or training or any use or attempted use of or the failure to use the defibrillator unless the conduct is wilfully or wantonly negligent:

- a physician who prescribes or is otherwise involved in the acquisition of the defibrillator; and
- any person or entity that provides training in the use of the defibrillator;
- removes language making any person or entity that acquires such a defibrillator and negligently fails to comply with the applicable requirements regarding the defibrillator liable for civil damages caused by such negligence;
- exempts the following from liability for civil damages related to the use or attempted use of or the failure to use such a defibrillator unless the conduct is wilfully or wantonly negligent:
 - any person or entity that acquires the defibrillator; and
 - any person or entity that owns, occupies, manages, or is otherwise responsible for the designated location where the defibrillator is placed; and
- establishes that immunity from such liability is in addition to any other immunity or limitations of liability provided by other law and applies regardless of whether the person who uses, attempts to use, or fails to use the defibrillator received training in the use of the defibrillator.

HB 1616 - Relating to the Interstate Medical Licensure Compact; authorizing fees.

TCEP Position: Monitor

Status: Sent to Gov. Abbott

Author: Sen. Greg Bonnen, MD (R-Friendswood)

Senate Sponsor: Sen. Joan Huffman (D-Houston)

Background: The bill would create a voluntary, expedited pathway to licensure for qualified physicians who wish to practice in multiple states through the Interstate Medical Licensure Compact while ensuring that physicians are still subject to the laws and licensing regulations of each state in which the respective physician delivers care.

SB 437 - Relating to personal protective equipment management and the establishment of a personal protective equipment advisory committee.

TCEP Position: Support

Status: Sent to Gov. Abbott

Author: Sen. Cesar Blanco (D-El Paso)

House Sponsor: Rep. John Turner (D-Dallas)

Background: The bill would require the Texas Division of Emergency Management (TDEM) to establish, make appointments to, and administer the 14-member Personal Protective Equipment Advisory Committee. There are dedicated seats on the advisory committee for representatives representing hospitals and physicians among others.

The bill would also require TDEM to develop, establish, disseminate, and adopt rules relating to guidelines for the procurement, storage, and distribution of personal protective equipment.

HB 620 - Relating to identification cards issued by health maintenance organizations and preferred provider organizations.

TCEP Position: Monitor

Status: Referred to House Insurance Committee but did not receive a hearing.

Author: Rep. Julie Johnson (D-Dallas)

Senate Sponsor: N/A

Background: The bill would have required that a patient's insurance card clearly state whether their plan was an HMO or PPO.

FALL SPECIAL SESSION EXPECTED

Redistricting

Every ten years state legislators are required to redraw state House and Senate and US Congressional districts to reflect the shift in population. Redistricting will be an especially important issue for rural Texas. As people continue to move to large metropolitan areas around the state, rural districts will have to reach further toward those population centers to meet representation requirements. Using data from the most recently completed census, legislators draw equally populated districts to reflect population growth and guarantee equal voter representation. Redistricting bills follow the same path as any other piece of legislation and are subject to veto by the governor. If the state legislature is unable to approve a state legislative redistricting plan, a backup commission must draw the lines.

Due to COVID-19, the 2020 Census was delayed, ultimately delaying the distribution of official population numbers for each state. And while preliminary results indicate that Texas will gain two Congressional seats, the more detailed numbers necessary to reconfigure districts won't be available until at least August 16, requiring Governor Abbott to call legislators back for a special session to redraw maps.

Federal Funds

On May 20, Governor Greg Abbott informed lawmakers that he would place the allocation of nearly \$16 billion in federal funds for COVID-19 recovery on the call during a special session in the fall. The legislature is charged with the allocation of state funds and there was significant concern as to how COVID-19 recovery funds would be spent, outside the legislature's purview.

Emergency Items that Did Not Pass

On May 30, Governor Abbott issued a press release stating his disappointment and concern that bail reform and election integrity legislation was not ultimately passed by the legislature. He noted that he expects legislators “*to have worked out the details when they arrive at the Capitol for the special session.*” These items will be added to the special session agenda.

Funding for the Legislative Branch

Following Democratic House members breaking quorum in order to stop passage of the omnibus election bill, Governor Abbott announced his intention to veto Article 10 of the budget. Article 10 funds the legislative branch of state government. This is a developing situation, but a mechanism to address funding the legislative branch will likely be taken up in the special session.