WHITE PAPER

League of Oregon Cities

Understanding Oregon's Unfunded Mandate Law

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In 1995, the Oregon Legislature referred a constitutional amendment to voters requiring the state to pay local governments for the costs of implementing state-mandated programs under certain conditions. The amendment also safeguards certain revenues shared with local governments by the state. The ballot measure – known as the unfunded mandate law – was passed by voters in November 1996. The voters reaffirmed the unfunded mandate law and eliminated its sunset provision in 2000. The full text of the amendment is found in Article XI, Section 15, of the Oregon Constitution.

UNFUNDED MANDATES

With some exceptions, this law requires the state to fund mandates placed on local governments; if the state does not provide proper funding, then local governments generally are not required to comply with the mandate.[1] The term "local government" includes any city, county, municipal corporation or municipal utility operated by a board or commission.[2]

A mandate is any law passed by the Legislature, or any state agency order, that requires a local government to establish a new program or provide an increased level of service through an existing program.[3] A *program*, meanwhile, is defined as any activity that provides administrative, financial, social, health, or other specified services to persons, government agencies, or to the public generally.[4] The Oregon Supreme Court refined this definition in *Linn County v. Brown*, holding that governments must provide a clear "service" to qualify as a "program" under this law.[5] Under *Linn County*, laws that require "internal actions" by governments on behalf of employees are not mandating "services."[6]

If the state requires a local government to incur costs in a new or expanded local "program," the state must adequately fund the program through appropriations or the imposition of a user fee or charge.[7]

First, the local portion of the new program costs cannot exceed .01% of the local government's annual budget.[8] This budgetary impact is measured in the fiscal year that the mandate will be effective.[9] Second, if the mandate is for an existing program, each local government must receive funding that is no less than 95% of the usual and reasonable costs incurred in conducting the program at the same level of service in the preceding fiscal year.[10]

If a local government can show the state failed either of these conditions, then the local government may refuse to comply with the mandate.

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[1] OR. CONST. art. XI, § 15(3) (1996).
[2] OR. CONST. art. XI, § 15(2)(b).
[3] OR. CONST. art. XI, § 15(1).
[4] OR. CONST. art. XI, § 15(2)(c).
[5] *See* Linn County v. Brown, 366 Or 334, 354 (2020).
[6] *Id.*
[7] OR. CONST. art. XI, §§ 15(3), (11).
[8] OR. CONST. art. XI, § 15(3)(b).
[9] *Id.* It is unclear if "annual budget" refers to a city's budget for a specific program, a city's general fund, or a city's entire annual budget. In *Linn County* at least, each of the three plaintiff counties calculated the impact of the state's mandatory paid sick leave based on their entire budgets. *Linn County*, 297 Or App at 332-33.
[10] OR. CONST. art. XI, § 15(3)(a).

EXCEPTIONS TO THE UNFUNDED MANDATE LAW

Local governments must comply with a mandate, even if the state does not provide funding, when:

- The measure is approved by three-fifths of each chamber of the Legislature;
- The program was enacted by legislation prior to January 1997 (the costs of providing increased levels of service are not covered by this exemption, see below);
- The costs of the measure result from creating or changing the definition of a crime;
- The requirements of the measure are imposed by the judicial branch;
- The required program is enacted by voter approval under an initiative or referendum;
- The required program is intended to inform citizens about the activities of local government; or
- The required program is established pursuant to action of the federal government.[11]

REVENUE SAVING PROVISON

Beyond prohibiting unfunded mandates, Article 15, Section 15, safeguards local funding. Subsection 6 provides that, except upon approval by three-fifths of the House and Senate, the Legislature cannot reduce state-shared revenue beyond the aggregate amount distributed to local governments in 1996.[12] In 1996, state-shared revenues included highway use, liquor, cigarette, and 9-1-1 telephone taxes.

FISCAL IMPACT STATEMENTS

The state's Legislative Fiscal Office (LFO) works with the League of Oregon Cities (LOC), the Association of Oregon Counties (AOC), and various state agencies to prepare fiscal impact statements (FIS) to estimate each legislative measure's cost to local government, if information is available to make an estimate. The estimate is generally provided in aggregate (i.e., for all cities or for all counties). However, if unique information is available for individual local governments, that data will be included in the FIS.

For measures that potentially reduce state-shared revenues, the Legislative Revenue Office will prepare revenue impact statements to estimate the revenue impact on local government.

Given the fact-specific nature of the test it may well be that a piece of legislation may present an unfunded mandate to one unit of local government, but not all. Specifically, because local governments likely spend different amounts on the same program, the 95% test will produce different figures for different cities. Likewise, because every local government budget is different, the .01% test is going to produce a different figure for each city. Consequently, fiscal impact statements are drafted broadly and note where legislation raises unfunded mandate issues that might allow a local government to avoid implementation of the law.

Note that, other than legislation, agency rules can sometimes constitute unfunded mandates as well.

[11] OR. CONST. art. XI, § 15(7).
[12] OR. CONST. art. XI, § 15(6).

OPTION OF ARBITRATION

If a local government determines that it spent money on a mandated program without proper funding, the local government may submit the matter to non-binding arbitration. The arbitration must occur within four years of the mandate, and the panel must consist of one representative from the LOC, AOC, and the Oregon Department of Administrative Services.[13]

STATE FEES IN LIEU OF APPROPRIATIONS

As noted above, the state may establish fees as an alternative to appropriations when mandating a new or expanded local program. The LOC takes the position that the state must direct the collection of these fees *under state law*; the state cannot coopt a city's home rule authority when establishing fees.
Home rule cities in Oregon derive authority to adopt local laws from the Oregon Constitution, not the Oregon government.[14] It follows that the Legislature cannot "direct" home rule cities to adopt a local ordinance. Though the Legislature may preempt local legislation in many areas, i.e., whenever it impedes on state authority, the Legislature cannot compel local legislation.[15]

Nothing in Article XI, Section 15, suggests that voters intended to alter this state-local relationship. Given the wording of this law, the Legislature must affirmatively establish a program's fee system under state law. It cannot rest upon a city's home rule authority to generally impose fees.

INTERPRETATIONS OF THE UNFUNDED MANDATE LAW

Linn County v. Brown (2020): In 2016, Linn County and several other counties filed a lawsuit against the state alleging that a law requiring local governments to provide paid sick leave to employees was an unfunded mandate under this law.[16] Initially, the trial court found in favor of three of the counties.[17] The Oregon Court of Appeals later reversed, and the Supreme Court affirmed. [18]

The Court of Appeals found that Oregon's paid sick leave law failed to meet the definition of a "program" under Article XI, Section 15, the aim of which it determined was to preclude the unwanted delegation of "traditional government *services*" by the state government to the local government.[19] The court reached this determination by interpreting the meaning of the word "program" in the law, looking not just at how it appears in the provision's text, but also how it appeared in other state laws at the time.[20] The court also looked at how voter pamphlets described the scope of the law to the voters, and how testimony in public hearings described the scope of the law to representatives prior to the Legislature's referral of the measure to voters.[21] Based on this analysis, the court found that a "program" is not intended to mean "matters of internal administration," such as a sick leave policy.[22] Instead, the court found Article XI, Section 15,

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[13] OR. CONST. art. XI, §§ 15(4), 15(10).
[14] *See generally* OR. CONST. art. XI, § 2 (1910).
[15] For information on cities' home rule authority, refer to the LOC white paper on *The Origins, Evolution and Future of Municipal Home Rule in Oregon*. https://www.orcities.org/application/files/5315/6036/1714/WhitePaper-OriginsEvolutionFutureHomeRule6-15-17.pdf.
[16] *See generally* Linn County v. Brown, 16CV17209, 2017 WL 11318335 (Or. Cir. Ct. July 24, 2017).
[17] *Id.*
[18] Linn County v. Brown, 297 Or App 330, 332 (2019), *aff'd* 366 Or 334, 336 (2020).
[19] *Linn County*, 297 Or App at 347 (emphasis added).
[20] *Id.* at 343-51.
[21] *Id.*
[22] *Id.*

applies where a state requires local governments to start or increase "government services to others," and does so without adequate funding to back it.[23]

The Supreme Court issued a narrower holding, finding that an employer's offer of paid sick leave simply is not a "service" and therefore is not a "program" under Article XI, Section 15.[24] The court found that the "offer of paid sick leave to employees does not fit easily into the concept of 'services'…" and that this sort of employee benefit is more aptly described as compensation for the services of county employees than as a service in its own right.[25] The court passed on the opportunity to hold that Article XI, Section 15, applies only to "traditional government services."[26] The court noted that the provision's definition of "program" is not "limited to 'government' programs, let alone 'traditional' government services, as the Court of Appeals suggested."[27] In doing so, the court left the door open for non-traditional services to be identified as "programs" under this law, so long as they are indeed services.

TEXT OF ARTICLE XI, SECTION 15, OF THE OREGON CONSTITUTION

(1) Except as provided in subsection (7) of this section, when the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity.

(2) As used in this section:

(a) "Enterprise activity" means a program under which a local government sells products or services in competition with a nongovernment entity.

(b) "Local government" means a city, county, municipal corporation or municipal utility operated by a board or commission.

(c) "Program" means a program or project imposed by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally.

(d) "Usual and reasonable costs" means those costs incurred by the affected local governments for a specific program using generally accepted methods of service delivery and administrative practice.

(3) A local government is not required to comply with any state law or administrative rule or order enacted or adopted after January 1, 1997, that requires the expenditure of money by the local government for a new program or increased level of service for an existing program until the state appropriates and allocates to the local government reimbursement for any costs incurred to carry out the law, rule or order and unless the Legislative Assembly provides, by appropriation, reimbursement in each succeeding year for such costs. However, a local government may refuse to comply with a state law or administrative rule or order under this subsection only if the amount appropriated and allocated to the local government by the Legislative Assembly for a program in a fiscal year:

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[23] *Id.* at 354.

[24] Linn County v. Brown, 366 Or 334, 354 (2020) (citing the "specified services" that a local government must provide for Article XI, Section 15 to apply).

[25] *Id.* at 342.

[26] *Id.*

[27] *Id.*

(a) Is less than 95 percent of the usual and reasonable costs incurred by the local government in conducting the program at the same level of service in the preceding fiscal year; or

(b) Requires the local government to spend for the program, in addition to the amount appropriated and allocated by the Legislative Assembly, an amount that exceeds one-hundredth of one percent of the annual budget adopted by the governing body of the local government for that fiscal year.

(4) When a local government determines that a program is a program for which moneys are required to be appropriated and allocated under subsection (1) of this section, if the local government expended moneys to conduct the program and was not reimbursed under this section for the usual and reasonable costs of the program, the local government may submit the issue of reimbursement to nonbinding arbitration by a panel of three arbitrators. The panel shall consist of one representative from the Oregon Department of Administrative Services, the League of Oregon Cities and the Association of Oregon Counties. The panel shall determine whether the costs incurred by the local government are required to be reimbursed under this section and the amount of reimbursement. The decision of the arbitration panel is not binding upon the parties and may not be enforced by any court in this state.

(5) In any legal proceeding or arbitration proceeding under this section, the local government shall bear the burden of proving by a preponderance of the evidence that moneys appropriated by the Legislative Assembly are not sufficient to reimburse the local government for the usual and reasonable costs of a program.

(6) Except upon approval by three-fifths of the membership of each house of the Legislative Assembly, the Legislative Assembly shall not enact, amend or repeal any law if the anticipated effect of the action is to reduce the amount of state revenues derived from a specific state tax and distributed to local governments as an aggregate during the distribution period for such revenues immediately preceding January 1, 1997.

(7) This section shall not apply to:

(a) Any law that is approved by three-fifths of the membership of each house of the Legislative Assembly.

(b) Any costs resulting from a law creating or changing the definition of a crime or a law establishing sentences for conviction of a crime.

(c) An existing program as enacted by legislation prior to January 1, 1997, except for legislation withdrawing state funds for programs required prior to January 1, 1997, unless the program is made optional.

(d) A new program or an increased level of program services established pursuant to action of the Federal Government so long as the program or increased level of program services imposes costs on local governments that are no greater than the usual and reasonable costs to local governments resulting from compliance with the minimum program standards required under federal law or regulations.

(e) Any requirement imposed by the judicial branch of government.

(f) Legislation enacted or approved by electors in this state under the initiative and referendum powers reserved to the people under section 1, Article IV of this Constitution.

(g) Programs that are intended to inform citizens about the activities of local governments.

(8) When a local government is not required under subsection (3) of this section to comply with a state law or administrative rule or order relating to an enterprise activity, if a nongovernment entity competes with the local government by selling products or services that are similar to the products and services sold under the enterprise activity, the nongovernment entity is not required to comply with the state law or administrative rule or order relating to that enterprise activity.

(9) Nothing in this section shall give rise to a claim by a private person against the State of Oregon based on the establishment of a new program or an increased level of service for an existing program without sufficient appropriation and allocation of funds to pay the ongoing, usual and reasonable costs of performing the mandated service or activity.

(10) Subsection (4) of this section does not apply to a local government when the local government is voluntarily providing a program four years after the effective date of the enactment, rule or order that imposed the program.

(11) In lieu of appropriating and allocating funds under this section, the Legislative Assembly may identify and direct the imposition of a fee or charge to be used by a local government to recover the actual cost of the program. [Created through H.J.R. 2, 1995, and adopted by the people Nov. 5, 1996]