



Wisconsin Elections Commission

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MEMORANDUM

DATE: For the December 1, 2021, Wisconsin Elections Commission meeting

TO: Members, Wisconsin Elections Commission

FROM: Meagan Wolfe
Administrator

SUBJECT: Overview and Analysis of the Legislative Audit Bureau's
November 2020 Election Administration Audit Report

This memorandum is intended to provide background information to the Commission on the recommendations outlined in the Wisconsin Legislative Audit Bureau's (LAB) 2020 Election Administration Report and to facilitate the Commission's discussion and deliberation of next steps. There are multiple resources incorporated in this memo as follows:

1. **Memorandum.** This memorandum is intended to provide the Commission detailed overview and background information on each of the LAB's recommendations. The details in this report will not be presented at the December meeting, but the hope is that this memo serves as a comprehensive reference guide for the Commission as they consider next steps.
2. **Chart of LAB Recommendations.** This document precedes this memo and will serve as the guide for the December 1, 2021 meeting. The chart assigns a number to each of the LAB's recommendations. The chart also has columns for statutes related to each recommendation and the status of each recommendation for the Commission to consider. This chart will also serve as the tracker for the Commission's progress in anticipation of the audit follow-up hearing which will be held sometime after March 31, 2022.
3. **Draft Initial Response Letter.** Other agencies that are audited by LAB have typically been given the opportunity to provide an initial response to the audit, which is published with the report when it is released. This response is typically short and highlights the good work of the agency and the LAB and makes a promise to follow up on recommendations in the report. While WEC is still awaiting an answer from the LAB on whether WEC's official response will be incorporated as part of the record of the report, WEC staff has drafted an initial response letter for the Commission's consideration. If the Commission approves an initial response, by majority vote, WEC staff will submit the response to the LAB and ask that the response be included with the official report.

Wisconsin Elections Commissioners

Ann S. Jacobs, chair | Marge Bostelmann | Julie M. Glancey | Dean Knudson | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

Recommendation 1

LAB recommendation #1 relates to updating existing administrative rule EL 12 to reflect a recent legislative change to the training terms for municipal clerks and to reflect the brand name “WisVote” instead of the generic term “statewide voter registration system (SVRS).”

Background and Current Practice

The full text of the current Administrative Rule EL 12 can be found here:

https://docs.legis.wisconsin.gov/code/admin_code/el/12

The current rule references a clerk training term that ends with the general election cycle in November of even-numbered years. In 2019 the law was changed so that the training period coincides with the calendar year and now begins on January 1 of an even-numbered year and ends on December 31 of the following year.

The LAB recommendation also suggests amending that rule to reflect a change in the name of the “statewide voter registration system” administered by WEC, and there are two sections in EL 12 that use this term. While the name of the system did change in 2016 to WisVote, WEC specifically and purposefully uses the generic term “statewide voter registration system” as a security precaution and to avoid the rule or training becoming outdated should the brand name of the system change in the future.

Recommendations 2 and 3

LAB recommendation #2 suggests that the WEC should amend Admin. EL 12 to include very specific information on the method used to contact the governing bodies when municipal clerks do not report sufficient training.

LAB recommendation #3 suggests that once WEC amends Admin. EL 12 to include the specific method for contacting governing bodies, it should then follow said rule.

Background and Current Practice

The full text of the current Administrative Rule EL 12 can be found here:
https://docs.legis.wisconsin.gov/code/admin_code/el/12

[Wis. Stat. § 7.315](#) requires that the Commission promulgate an administrative rule prescribing the content of training for municipal clerks to achieve certification, which is currently accomplished in Admin. EL 12. [7.315\(2\)](#) further states that the rule should include the method used for contacting the governing body for a clerk who “fails to attend required training.” EL 12 currently outlines the training requirements and states that WEC will contact governing bodies of clerks who do not take and report all required training in a term. The rule does not, however, specify the way the governing body should be contacted.

It is true that the WEC did not contact the head elected official for each municipality whose clerk did not meet training requirements prior to the start of the 2020 election cycle. Staff instead posted information regarding each clerk’s training status to the agency website and conducted outreach to non-compliant clerks to inform them of the training requirements and provide suggested training opportunities.

It should also be noted that there is no central list of 1,850 municipal governing bodies. WEC does not have a reason or requirement to track city council members or town or village boards. Therefore, this requirement has been previously accomplished (including in 2019) by publicly posting a list of clerks who have not reported sufficient training.

Further, it is important to note that clerks are currently reporting their training for the 2020-2021 training period. WEC can implement the suggestion to contact governing bodies directly — rather than by public posting — right away and will work with local associations to attempt to obtain a reliable list of municipal governing bodies but will likely continue to post the list publicly to ensure that there is transparency into the process.

Recommendation 4

LAB recommendation #4 suggests that the WEC should promulgate an administrative rule that specifies the content of training provided to special voting deputies (SVD) and election inspectors (poll workers).

Background and Current Practice

[Wis. Stat. § 7.315\(1\)\(a\)](#) requires the commission to promulgate an administrative rule that prescribes the contents of training municipal clerks provide to election inspectors and special voting deputies (SVDs). Currently [Admin. EL 12](#) outlines general provisions of clerk training but does not specify the content of SVD and election inspector training.

As background, the scope statement for this rule was approved by the Commission in 2017. The scope statement was drafted and submitted to the Governor for approval where it was allowed to expire for lack of action prior to promulgation. No feedback was received as to why the scope was allowed to expire.

LAB's review of training for election inspectors and Special Voting Deputies pointed out that those materials "contained relevant information," and emphasis on those comments are not to downplay the significance of the administrative rule-making process but to highlight that even without the required rule in place, accurate and relevant training was provided for training election inspectors and SVDs.

Recommendations 5 and 6

LAB recommendation #5 asks WEC to renew a data sharing agreement with the Wisconsin Department of Transportation (DOT).

LAB recommendation #6 asks WEC to include a mechanism in the updated agreement to ensure that the agreement is kept up to date in the future.

Background and Current Practice

[Wis. Stat. § 85.61](#) requires that the WEC maintain a written data exchange agreement with the Department of Transportation. This agreement was current and in effect at the time of the November 2020 General Election. The agreement expired in January 2021 and WEC is currently finalizing the updated agreement with DOT. All terms of the agreement remain in place and functional as the agreement is being updated. This agreement establishes the use of an Application Programming Interface (API) which allows WEC to compare voter registration information against DOT driver license and ID information. While this agreement is being updated, there was no delay or gap in completing statutorily required data checks between WEC and DOT. As is stated in the LAB report, all required data checks between WEC were completed in accordance with statute.

WEC staff is currently finalizing the agreement to include a mechanism for keeping the agreement up to date by including a clause requiring the agreement to be renewed by July every four years following a presidential election. The current and updated agreements will contain the elements described below:

- Statement of intended use: a summary of the timeline and content of data exchanged between agencies and the statutory basis for the exchange.
- Data confidentiality: agreement to observe relevant state and federal laws with citations.
- Protection against unauthorized disclosure: processes to safeguard data employed by each agency.
- Review and renewal terms: periodic review process defined.
- General provisions: common clauses regarding amendment, termination, impossibility, waivers, and communications related to the agreement.
- Agency contacts: points of contact by position title (versus individual names).

Recommendation 7

LAB recommendation #7 asks the WEC to work with the Department of Transportation to “obtain the electronic signatures of individuals who register online to vote, or to request that the Legislatures modify the statutory requirement that the Wisconsin Elections Commission obtain [signatures].”

Background and Current Practice

Wisconsin state statutes do not allow for or require voter signature comparison at any point in the registration or absentee voting process. The only time that signatures are used by the WEC is if there is an investigation or referral into a voter fraud matter. In these instances, WEC can access voter signatures that are housed and secured in the DOT’s database.

While the LAB recommendation does not cite a statutory provision to support its recommendation, staff believes this section is likely referencing [Wis. Stat. § 6.30\(5\)](#), which states that as part of the online registration process WEC shall obtain a copy of voter signature information from DOT.

The LAB report goes on to state, “WEC’s staff indicated that no signatures were obtained from DOT, in part, because a significant amount of electronic space would be needed to store them.” (LAB report page 23.) The words “in part,” reference the omission of some critical facts.

The online voter registration (OVR) system was developed and implemented in accordance with 2015 Wisconsin Act 261 (Act 261), which amended subsections of Chapter 6 of the Wisconsin Statutes. Pursuant to Act 261, WEC staff provided five quarterly reports to the Wisconsin Legislature regarding the development of the OVR system. The last report, indicating system implementation, was submitted to the Wisconsin Legislature on January 12, 2017. The final requirement under Act 261 was the Commission’s determination that the OVR system was complete. The Wisconsin Elections Commission unanimously certified the system on March 14, 2017.

The Act 261 quarterly progress reports for the Wisconsin Legislature and the Commission’s ultimate certification on March 14 repeatedly and very clearly established that the Department of Transportation shall be the custodian of voter signatures. The final implementation report stated:

The voter’s signature is not included as part of the MyVote OVR process but is instead available to WEC from WI DOT’s database as needed. The Commission approved this approach at its December 2016 meeting. (WEC Commission Meeting Materials, March 14, 2017)

Put simply, the Wisconsin Legislature, the Elections Commission, and the Department of Transportation each recognized that there was no rational reason for the State of Wisconsin to spend hundreds of thousands of dollars (ultimately millions over time) to maintain duplicate sets

of data that were already: (1) in the State's possession; (2) professionally secured; (3) backed up and (4) readily available to the WEC if needed.

Finally, the data exchange agreement with DOT in effect throughout calendar year 2020 explicitly provided that the parties would work together to exchange signatures whenever needed. Staff from both agencies have agreed that the new data exchange agreement should explicitly designate DOT as custodian of the files and further define the terms and mechanisms to obtain signature files.

In a subsequent section of the LAB report, on page 41, the LAB appears to imply that election officials should use DOT data to perform signature matching, although there is no basis in law for this assertion. It should be noted that should WEC desire to change the process by which signatures are stored, the cost to the agency would exceed \$100,000 per year. This cost would be purely for the duplicative storage of data that is already accessible for the statutory requirements of WEC when needed.

Furthermore, any data transferred to the WEC would be stored and maintained by the Division of Enterprise Technology (DET), as the WEC does not possess its own data center. Therefore, the data may reside with DOT or DET, but in no event would it be in the direct custody of the WEC. It should be further noted that DOT is currently storing this data in a secure manner in compliance with state and federal privacy provisions.

Recommendation 8

LAB recommendation #8 asks the WEC to compare driver's license and identification card numbers nightly to identify duplicate numbers.

Background and Current Practice

Wisconsin clerks are asked to review potential duplicate records that the agency flags for review. Reviews have to be completed and addressed before poll books are printed for each election. Duplicate records are a common and normal circumstance. Each time a person moves within the state and re-registers they may create a duplicate registration record (one at their old address and one at their new). Even moving to a new apartment in the same town will create a new record. WEC's database makes real time comparisons of new registration records against existing registration records by looking at fields such as name, former name, address, former address, and date of birth. If a potential match is identified, the new and old registration records are flagged for the municipal clerk, who then examines the records. If they determine both records relate to the same voter, the records are merged to maintain the voter's registration and voting history as part of their new voter registration.

As the LAB report indicates, WEC's duplicate registration matching process is very effective and in 2020 alone the statewide system efficiently processed over 250,000 duplicate matches.

The LAB identified 70 pairs of driver's license numbers in the statewide system. With few exceptions, these were pairs of entirely unrelated voters where one person had the correct license number and the other had a license number that was one or two characters off. Further analysis by WEC staff showed that 68 of the pairs could be easily confirmed as typographical human errors. The remaining two pairs were further evaluated for any indication of illegal behavior. WEC staff found evidence of possible double voting associated with one of the remaining pairs. Upon contacting the municipality involved, staff learned that this case had been identified and referred for criminal prosecution several months earlier. Statutory authority to deactivate and merge voter records rests with municipal clerks.

While LAB's recommendation was only pertinent to a single voter record, WEC staff are implementing the LAB's suggestion to conduct a periodic review of the system for duplicate driver's license and state identification card numbers. This will serve as a double-check on top of the effective duplicate matching that WEC already conducts.

Recommendations 9 and 10

LAB recommendation #9 asks WEC to renew a data sharing agreement with the Wisconsin Department of Health Services (DHS).

LAB recommendation #10 asks WEC to include a mechanism in the updated agreement to ensure that the agreement is kept up to date in the future.

Background and Current Practice

Statutes do not require the WEC to maintain written agreements with the Department of Corrections or the Department of Health Services. However, WEC and DHS are close partners and WEC staff coordinate with them frequently. DHS provides WEC with data from the department of vital records on individuals who have died in the state of Wisconsin.

[Wis. Stat. § 6.50\(4\)](#) requires municipal clerks to identify deceased voters and inactivate their records. Wisconsin law does not require WEC to facilitate this exchange of data between DHS and local clerks. Clerks often use local sources of reliable information, like obituaries, to deactivate the records of deceased voters. However, it is WEC's long standing practice to also provide clerks with data from DHS directly into the state database that they also use to deactivate deceased records. WEC believes this is a much more efficient and effective method of ensuring deceased records are deactivated on time than if each of Wisconsin's 1,850 municipal clerks were to try to obtain this data from DHS themselves.

The WEC agrees that data exchange agreements are worthwhile and has previously held a memorandum of understanding with DHS. WEC staff is currently working to implement LAB's recommendation. As a matter of fact, WEC had already initiated discussions with DHS to begin working on an agreement prior to the LAB report. In the interim, all agencies have agreed that the current data sharing mechanisms are satisfactory and meet all statutory requirements, but all sides are open to improving the process if opportunities are presented during the agreement drafting process.

While the LAB report included no recommendations regarding the processing of death notices, the body of the report included several misleading presentations. Most notable are those in Table 3 on page 27.

The table includes a bolded line indicating, "Clerks Made No Determinations," and suggests that Wisconsin's clerks were somehow negligent. Nothing could be further from the truth. The LAB hints at the truth with a footnote, revealing that nearly all the records were *already deactivated*. The overwhelming majority of clerks made no determination because no determination was required – the voter was no longer registered to vote.

On page 26 of the report the LAB stated:

If a clerk does not act on a potential [death] match for a given individual, WEC's staff are uncertain if a clerk determined whether an individual is still alive and, therefore, whether the voter registration record is accurate. (LAB Report page 26)

This is incorrect. WEC staff possess a great deal of information about each record – most importantly the record's active or inactive status. Indeed, the LAB almost immediately acknowledges this in a subsequent sentence:

Although the data indicated that clerks had not acted on the potential matches, other data provided by WEC's staff indicated that, in fact, clerks had inactivated the records of 12,406 of the 12,565 individuals (98.7 percent) as of the November 2020 General Election and had inactivated the records of all but 8 of the 12,565 individuals as of June 2021. (LAB Report page 26)

The data, therefore, very clearly indicates that Wisconsin's local election officials are incredibly diligent in their duties and expertly managed the enormous volume of data they were forced to contend with ahead of the 2020 General Election.

Recommendations 11 and 12

LAB recommendation #11 asks WEC to renew a data sharing agreement with the Wisconsin Department of Corrections (DOC).

LAB recommendation #12 asks WEC to include a mechanism in the updated agreement to ensure that the agreement is kept up-to-date in the future.

Background and Current Practice

Statutes do not require the WEC to maintain written agreements with the Department of Corrections. However, WEC and DOC are close partners and WEC staff coordinate with them frequently. DOC provides WEC with data on voters who have been convicted of a felony and are disqualified from voting.

[Wis. Stat. § 301.03\(20m\)](#) requires the DOC to transmit to the WEC a list of living persons convicted of a felony whose civil rights have not been restored. The statutes do not require WEC to facilitate this exchange of data between DOC and local clerks. However, it has been WEC's long-standing practice to also provide clerks with data from DOC directly and regularly and to provide the data in the state database. WEC believes this is a much more efficient and effective method of ensuring the records of voters who are convicted felons are deactivated in a timely fashion.

The WEC agrees that data exchange agreements are worthwhile and has previously held a memorandum of understanding with DOC. This agreement was first put in place in 2016 and includes a clause that the terms of the agreement remain in effect indefinitely or until the agreement is replaced. However, WEC staff is currently working to implement LAB's recommendation. As a matter of fact, WEC had already initiated discussions with DOC to begin working on an updated agreement prior to the LAB report. In the interim, all agencies have agreed that the current data sharing mechanisms are satisfactory and meet all statutory requirements, but all sides are open to improving the process if opportunities are presented during the agreement drafting process.

While the LAB report included no recommendations regarding the processing of felon notices, the body of the report included several misleading presentations. Most notable is Table 4 on page 29.

The table includes a bolded line indicating, "Clerks Made No Determinations," and suggests that Wisconsin's clerks were somehow negligent. Nothing could be further from the truth. The LAB hints at the truth with a footnote, revealing that nearly all of the records were *already deactivated*. The overwhelming majority of clerks made no determination because no determination was required – the voter was no longer registered to vote.

Indeed, the LAB almost immediately acknowledges how effectively WEC and clerks process

both death and felon matches in this subsequent sentence:

Although the data indicated that clerks had not acted on the potential matches, other data provided by WEC's staff indicated that, in fact, clerks had inactivated the records of 12,406 of the 12,565 individuals (98.7 percent) as of the November 2020 General Election and had inactivated the records of all but 8 of the 12,565 individuals as of June 2021. (LAB Report page 26)

The data, therefore, very clearly indicates that Wisconsin's local election officials are incredibly diligent in their duties and expertly managed the enormous volume of data they were forced to contend with ahead of the 2020 General Election.

Recommendation 13

LAB recommendation #13 asks the WEC to establish a schedule for regularly obtaining each type of ERIC data. ERIC is the Electronic Registration Information Center.

Background and Current Practice

The LAB report discusses reports obtained from the Electronic Registration information Center (ERIC) beginning on page 31. [Wis. Stat. § 6.36\(1\)\(ae\)](#) requires the chief election officer to enter into an agreement with the ERIC data sharing consortium and to comply with the terms of the membership agreement. There are 32 ERIC member states. The [ERIC Membership Agreement](#) requires states to provide ERIC data every 60 days and to request data from ERIC once every calendar year.

Wisconsin exceeds ERIC minimum data exchange requirements and is fully compliant with the ERIC Membership Agreement.

Unfortunately, the LABs discussion of ERIC contains numerous inaccuracies. In particular, the ERIC data chart on page 32 (Table 5) implies that Wisconsin missed many opportunities to obtain data. This is wrong. In fact, the WEC obtains all ERIC data sets when they are made available to Wisconsin, with the full approval of the Elections Commission, and in full compliance with statutory requirements. Each ERIC report has specific periods of availability and several of the reports did not even exist when Wisconsin first joined ERIC. For example, the duplicate records report is a relatively recent creation only made available after a General Election. Likewise, the data analyzing multiple voters was not available to Wisconsin prior to 2018. WEC staff communicate with ERIC almost weekly, actively participate on the ERIC Board of Directors, and fully conform to the ERIC user agreement. The LAB report summary misleadingly implies the agency is noncompliant.

Per the ERIC agreement, members must:

1. Upload data to ERIC at a minimum of every 60 days (WEC does this every 30 days).
2. Request List Maintenance Reports, at least one report every 425 days. ERIC recommends at least once a year. (WEC does this quarterly).
3. Act on and certify List Maintenance Reports, initiate contact within 90 days after data sent.
4. Request and act on Eligible but Unregistered Reports, initiate contact by Oct. 1 or 15 days before close of registration of the next Federal General Election.

Finally, the comparison to other states starting on page 34 is out of place. Each state has its own state and federal laws that uniquely dictate when it can accept or utilize ERIC reports. For example, other ERIC states are beholden to the National Voter Registration Act (NVRA), which sets parameters for list maintenance. Wisconsin is exempt. Also, ERIC reports can only be accepted as they are compatible with unique state election cycles. There will be great variation in state and local election cycles in each member state. Therefore, the comparison between the

timeline for Wisconsin and other states is not helpful. The LAB could have accurately substituted “Wisconsin” for each of the statements they included.

- ~~Illinois~~ *Wisconsin* indicated that it regularly obtained all types of the available data, as required by its statutes, including some types as frequently as six times per year and other types as infrequently as once every two years (note: Wisconsin exchanges data with ERIC almost monthly).
- ~~Iowa~~ *Wisconsin* indicated that it annually obtained some types of the available data and planned to obtain all types of the available data each month beginning in 2022.
- ~~Michigan~~ *Wisconsin* indicated that it obtained some types of the available data every 18 months to 24 months.
- ~~Minnesota~~ *Wisconsin* indicated that it obtained all types of the available data each month.

Recommendation 14

LAB recommendation #14 relates to the absentee ballot certificate envelope and a field on the certificate for the witness' printed name.

Background and Current Practice

The first concern identified in the audit report addresses the format and requirements of the certificate envelope. Specifically, the LAB recommends that the Commission ensure that the absentee ballot certificate template made available to municipalities requires witnesses to print their names on the certificate. Discussion of this recommendation is complicated as it requires a review of statutes that prescribe the format of the certificate and statutes that identify the reasons for which an absentee ballot may be rejected.

State law provides that the certificate envelope should have a field for the printed name of the witness. The requirements for the witness certification section are outlined in [Wis. Stat. § 6.87\(2\)](#) and are as follows:

The witness shall execute the following:

I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen** and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

...(Printed name)

...(Address)***

Signed

* — An elector who provides an identification serial number issued under s. 6.47 (3), Wis. Stats., need not provide a street address.

** — An individual who serves as a witness for a military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of Wisconsin under s. 6.10, Wis. Stats., need not be a U.S. citizen but must be 18 years of age or older.

*** — If this form is executed before 2 special voting deputies under s. 6.875 (6), Wis. Stats., both deputies shall witness and sign.

It should be noted that Wis. Stat. 6.87(2) also states that the certificate shall be in *substantially* the prescribed form, which implies that some variation is allowable under statute. The determination for which elements of the certificate are required is also complicated by a review of statute for reasons to reject a returned absentee ballot. Statute lists the reasons to reject an absentee ballot, and a missing printed name of a witness is not one of them. Specifically, [Wis. Stat. § 6.87\(6d\)](#) states that an absentee ballot may not be counted in the witness address is missing and Wis. Stat. § 9.01(1)(b)(2) (recount statutes) indicates that “an absentee ballot envelope is defective only if it is not witnessed or if it is not signed by the voter or if the certificate accompanying an absentee ballot that the voter received by facsimile transmission or electronic mail is missing.”

Wis. Stat. § 6.84(2) provides the interpretation of the absentee voting statutes and identifies which provisions shall be construed as mandatory. Wis. Stat. § 6.87(3) is not listed as mandatory:

6.84(2) INTERPRETATION. Notwithstanding s. 5.01 (1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

In addition, Wis. Stats. § 6.88 and 7.52 provide the procedures for canvassing absentee ballots both at the polling place and at a central count facility, but these statutes do not define the requirements for a certificate envelope and just refer to a “properly executed certificate.”

Finally, 2017 Wisconsin Act 369 made a slight change to Wis. Stat. § 6.87(2), providing the witness certification requirement be changed from “name” to “printed name,” but no updates were made to the certificate envelope in response to this change. In 2017, the Commission approved the version of the certificate envelope used for the 2020 General Election and that revision did not include the printed name field for the witness. A field for printed name was on the proposed updated template presented to the Commission for consideration during their May 20, 2020 public meeting but the Commission directed staff to not pursue the larger revision of the certificate envelope at that time.

Recommendation 15

LAB recommendation #15 relates to augmenting existing training or providing new training related to the requirement that clerks initial absentee certificate envelopes when issuing ballots during in-person absentee voting.

Background and Current Practice

LAB's sampling of absentee ballot certificate envelopes found that in offices they reviewed, clerks did not consistently comply with statutes that require them to provide their initials on the certificate when issued to an eligible voter during in-person absentee voting.

Wis. Stat. § 6.87(2) requires that a clerk or deputy clerk initial the certificate envelope during in-person absentee voting to indicate they have verified the voter has provided an acceptable photo ID prior to receiving a ballot. The recommendation in the report suggests clerks would benefit from additional training from WEC on this requirement. In-person absentee voting procedures are detailed in the Election Administration manual and other existing training materials but the requirement to initial the certificate envelope could be emphasized moving forward.

Recommendation 16

LAB recommendation #16 relates to the promulgation of an administrative rule regarding guidance issued by the Commission in 2016 relating to municipal clerks' ability to correct or add missing witness information on returned absentee ballot certificate envelopes.

Background and Current Practice

This recommendation discusses guidance issued by the Commission in 2016 in reference to absentee ballots returned to municipal clerks with missing or incomplete witness address information. The requirement for witnesses to provide their addresses was new in 2016 and statute does not define what constitutes a complete address for this purpose, which the LAB specifically acknowledges on Page 40 of its report. The Commission received concerns from municipal clerks regarding the implementation of this new requirement and the potential for thousands of absentee ballots to be rejected because a witness failed to include part of his or her address, such as "WI" or the name of the municipality on the envelope. Given this concern, the Commission consulted with the Department of Justice, which advised that a reasonable, defensible interpretation of the law would be to allow a local election official to add a missing piece of the witness address to the certificate if the information could be reasonably ascertained by the clerk. The clerk could also reach out to the voter or witness, if possible, to obtain the information. The Commission issued guidance directing clerks to add missing witness address information to a certificate envelope if they could obtain that information from the voter or find it through other sources such as the voter rolls or municipal tax records. As part of the guidance, the witness address must include a street number, street name and municipality and if any additions were made by clerks, they were to initial that information on the certificate.

The issue of correcting missing witness address information was raised in the recount litigation after the November 2020 Election: *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568. The majority determined that Wis. Stat. § 6.87(6d) does not say which portion of the address the witness must provide. Furthermore, the guidance that the Commission created has been followed statewide since October 2016, including in the 2016 Presidential Election. The majority concluded that striking the ballots exclusively in Milwaukee and Dane counties, years after this guidance has been issued and relied on, was unreasonable and prejudicial. The concurrence stated that it is clear that Wis. Stat. § 6.87(6d) would prohibit counting a ballot if the entire address is absent from the certification. However, if the witness provided only part of the address, it is not clear which parts of the address satisfy the statutory directive (i.e., street address, state name, zip code, etc.). The WEC, other election officials, the Legislature, and others may wish to examine witness address information being added to a certificate as a valid administrative concern and may also wish to examine if the requirements of the applicable statute and measures involving the guidance and practice of these practices are currently sufficient to avoid future problems.

Recommendation 17

LAB recommendation #17 relates to the suggestion that the WEC promulgate an administrative rule that clarifies the use of drop boxes by municipalities.

Background and Current Practice

The use of secure drop boxes for absentee ballot collection is another area where LAB recommends WEC staff work with the Commission on a potential administrative rule. While drop boxes in various forms have been used in Wisconsin elections for years, they gained popularity last year due to the increase in by mail absentee voting. Clerks and voters were looking for secure ways for absentee ballot return that were safe, convenient, and trustworthy. In response to this, the Commission directed staff to provide best practices regarding the establishment, monitoring, emptying, and security of drop boxes, which also incorporated recommendations from a resource developed by the U.S. Cybersecurity and Infrastructure Security Agency (“CISA”) and other experts on elections infrastructure. In practice, many clerks repurposed existing drop boxes used for tax collection or municipal billing purposes to collect absentee ballots prior to the general election, while others established drop boxes specific for this purpose.

This issue is currently being litigated and staff will work with the Commission to implement any decision issued by the courts when these cases are resolved. See *Teigen, et al. v. WEC* (Waukesha Cir. Ct., Case No: 2021CV0958; *Kleefisch v. WEC* (Petition for Original Action, Wis. Sup. Ct, Case No: 2021AP001976). WEC is also willing to work with the legislature on further legislation that would regulate the use of drop boxes in Wisconsin elections. Given the pending litigation on this specific recommendation, the Commission may wish to wait until these cases are resolved by the courts.

Recommendation 18

LAB recommendation #18 suggests that the Commission promulgate an administrative rule specifying the situations when municipal clerks should not send Special Voting Deputies to residential care facilities and qualified retirement homes.

Background and Current Practice

The WEC first discussed Special Voting Deputies in relation to the COVID-19 pandemic prior to the April 7, 2020, Presidential Preference Vote and Spring Election. WEC staff received reports from municipal clerks in early March that facilities normally served by SVDs were closed to visitors due to the COVID-19 pandemic and that SVDs would not be granted access. Care facilities stated an obligation to protect their residents from exposure to the virus following reports that COVID-19 had disproportionately impacted nursing home and care facility residents. These issues continued throughout the 2020 election cycle where municipal clerks, public health officials and advocates for the aging and disability communities all provided information to the Commission that SVDs would not be allowed into care facilities to administer voting. Rather than waste precious time that voters in these facilities need to receive, vote, and return their absentee ballots, the Commission directed clerks to proceed with the statutory process (Wis. Stat. § 6.875(6)(e)) allowing absentee ballots to be sent to residents normally served by SVDs if those deputies were not available or were unable to access the facility during SVD voting periods. Statute does not provide the Commission, municipal clerks or SVDs the ability to require a facility to grant them access to conduct voting with residents. This reality prompted clerks to request uniform guidance from the Commission in these situations to ensure residents of care facilities could exercise their right to vote.

LAB recommends that the Commission promulgate an administrative rule that addresses these situations. WEC already undertook the process of drafting an emergency rule regarding this issue in the spring of 2021, but the Commission opted not to further pursue the rulemaking process after the election was completed. The future of that proposed rule's guidelines and procedures may be revisited for future pandemic-impacted elections, or on a longer-term basis for other emergencies. This issue is also the subject of litigation recently filed with the Wisconsin Supreme Court. See *Kleefisch v. WEC* (Petition for Original Action, Wis. Sup. Ct, Case No: 2021AP001976). One of the issues presented to the Court is whether WEC guidance regarding special voting deputies at care facilities and qualified retirement homes is contrary to law and that any such guidance must be enacted through administrative rulemaking.

Given the pending litigation on this specific recommendation, the Commission may wish to wait until this case is resolved by the Court. The Commission has, however, already added an item to their legislative agenda that would define SVDs as essential visitors in situations where public access to these facilities is restricted. The Commission directed staff to send the memorandum presented to the Commission that outlined several potential statutory changes regarding this issue to both the Legislature and Governor after their public meeting on September 9, 2021. This memorandum and minutes of this meeting can be found here:

<https://elections.wi.gov/index.php/node/7369>.

Recommendation 19

LAB recommendation #19 asks the Commission to rescind or amend a 12-page memorandum issued by the Wisconsin Elections Commission to all Wisconsin election officials on October 22, 2020 that informed clerks and board of canvass members about end-of-night procedures for election day and the ability of the canvass to adjourn prior to completion.

Background and Current Practice

Recommendation 19 references a 12-page memorandum issued to all Wisconsin Election Officials on October 22, 2020, that informed clerks and board of canvass members that Wis. Stat. § 7.51(1) requires canvasses to be continuous – meaning no adjournment until the canvass of all ballots cast and received on or before election day is completed. The single sentence the LAB objected to in the memo was included because local election officials were asking the WEC what to do if election inspectors who had not yet completed the canvas became unable (due to health and emergency conditions) to continue late into the night. This single sentence tried to account for this real, on-the-ground contingency. The rest of the memorandum clearly stated that election officials could not adjourn and had to keep going until the canvass was done. The memorandum is posted on the Commission’s website here: <https://elections.wi.gov/node/7198>. The Commission’s guidance is that municipal clerks may not adjourn before counting all ballots, which is clear in the memorandum. The line in question related to unforeseen circumstances is as follows: “Under unforeseen circumstances, if one of the previous deadlines is missed then all efforts need to be made to both count all eligible ballots accurately and to meet the ultimate deadline of state certification on December 1.”

If the Commission believes the sentence should be removed from this memorandum from October 2020, the Commission staff can do that and repost it to the website.

Recommendation 20

Recommendation 20 suggests the Commission consider promulgation of a rule to allow municipal clerks to adjourn in certain circumstances before ballot counting is complete.

Background and Current Practice

The statutory requirement and guidance issued by the Commission on this topic is clear, which is that canvassing is to be continuous – meaning no adjournment until all ballots are counted. The Commission should discuss whether an administrative rule is an appropriate recommendation here, given the statutory language and that any rule would likely create exceptions or conflict with that language. The Commission should also consider this recommendation in tandem with recommendation #19.

Recommendation 21

LAB recommendation #21 suggests that the Commission rescind or amend a memorandum issued regarding relocating polling places. The memorandum in question was specific to the April 2020 election and Executive Order #72.

Background and Current Practice

The Commission met March 12, 2020 and approved the guidance about relocating polling places from facilities that were no longer available based upon the then-emerging pandemic and the issuance of Executive Order #72 by Gov. Evers that same day. The executive order proclaimed a public health emergency, and those orders had not yet been evaluated by a court, or other relevant parties, as the pandemic progressed.

The Commission directed staff to provide additional instruction to clerks regarding necessary process adjustments after the March 12 meeting. The following motion was passed by a 6-0 vote in that public session:

In light of Executive Order #72 and directives of the Department of Health Services, the Commission finds that it is impossible or inconvenient for municipalities to conduct Election Day voting at nursing homes, other care facilities, and other facilities as designated by the Department of Health Services or local health officials. The Commission finds that the municipal clerk or municipal elections commission executive director may relocate such polling places without obtaining the prior approval of the local governing body or municipal elections commission.

WEC staff believe the guidance at issue pertained only to the April 2020 election and was not reissued prior to subsequent 2020 elections.

This issue is also the subject of litigation recently filed with the Wisconsin Supreme Court. See *Kleefisch v. WEC* (Petition for Original Action, Wis. Sup. Ct, Case No: 2021AP001976). One of the issues presented to the Court is whether WEC guidance as to consolidating polling places is contrary to law and that any such guidance must be enacted through administrative rulemaking. Given the pending litigation on this specific recommendation, the Commission may wish to wait until this case is resolved by the Court.

Recommendation 22

LAB recommendation #22 relates to the potential need for a long-term administrative rule or addition to the Commission's legislative agenda to account for future pandemics, natural disasters, and similar catastrophic events that impact polling place locations or necessitate last-minute changes.

Background and Current Practice

Statute requires municipalities to establish their polling place plans 30 days prior to an election and requires the governing body to approve the polling place plan. State law does not account for scenarios where a polling place location becomes unavailable, for any reason, after that deadline. Many municipalities utilize private facilities for some of their polling places and access to those facilities may change without any ability for the municipality to challenge or contest that decision. While there may be a contract in place that outlines a usage agreement for the facility, those agreements are not required by law and municipalities have no way to compel access to private facilities if they are denied access after the 30-day deadline. An administrative rule could provide relief in these scenarios and provide municipal clerks and their governing bodies with a process to amend their polling place plans in limited situations.

Recommendation 23

LAB recommendation #23 suggests clerks and election inspectors would benefit from additional training from WEC in regard to ballot processing and post-election data entry of election statistics into the statewide voter registration system.

Background and Current Practice

The ballot processing section of the LAB report identified some inconsistencies with data provided to WEC during the reconciliation process in the statewide voter registration system after the November 2020 General Election. Staff provide continuous guidance to clerks during this voluntary reconciliation process and are always willing to make changes to the system to increase the accuracy of data collected. Staff also provide direct support to clerks who have concerns with their ability to complete the process and interactive training regarding this process currently exists for system users. Updated, or more extensive, training could be incorporated into the current training program for the upcoming election cycle.

In addition, the report identified some discrepancies and/or deficiencies in how ballots were processed by election inspectors on election day. While training on these procedures exists and additional training specific to processing high volumes of absentee ballots was provided to clerks prior to the November 2020 General Election, additional training can be developed and existing training can be adjusted to account for these concerns.

Recommendation 24

LAB recommendation #24 suggests the Commission should provide more, or updated, training on the pre-election test of voting equipment required before each election.

Background and Current Practice

Wis. Stat. § 5.84(1) requires “that not more than 10 days prior to the election day on which the equipment is to be utilized, [the clerk shall] have the equipment tested to ascertain that it will correctly count the votes cast for all offices and on all measures.” The LAB report identified that several municipalities did not publicly test all their voting equipment in the required 10-day window prior to the 2020 General Election. The report noted that only 88 of 175 reviewed tests were completed within that window, but three municipalities are responsible for all the non-compliant tests. In addition, all three of these municipalities publicly tested one machine as part of their public test but completed tests of additional equipment used in the election outside of the required window.

Please note multiple options for training on this topic already exist for use by Wisconsin election officials, and all these materials are clear about the 10-day window for conducting the public test. These options include references in the election calendar WEC produces, manuals, videos, and webinars. Public test requirements are often reviewed during a webinar WEC holds prior to each statewide election. Staff, however, acknowledge there is always room for improvement and are currently exploring ways to provide improved training on these topics. Any updated training materials will include an emphasis on the timeline for conducting a public test and a reminder that each test deck used to conduct the test has requirements to include overvoted ballots.

Recommendation 25

LAB recommendation #25 relates to a suggestion from LAB that WEC provide training to municipal clerks on reviewing Election Day forms after each election and investigating relevant issues, including those related to tamper-evident seals.§

Background and Current Practice

Recommendation 25 was made as a result of LAB's review of election day Inspector's Statement forms for required information regarding the tamper-evident seal information that must be verified by election inspectors both prior to the opening of polls and after the polls close at 8:00 p.m. on election day. Specifically, LAB found that roughly 13% of all forms they reviewed lacked at least one set of the required initials and additional training could be provided by WEC so that clerks review those forms after each election to determine the cause of any missing initials. The purpose of this review and any subsequent investigation would be to determine the integrity of the equipment and if the clerk should provide additional training or instruction to their election inspectors. It is unclear if the LAB surveyed clerks if they currently conduct this type of review and investigation after each election and there is currently no statutory provisions that require these actions.

A more comprehensive voting equipment security training is being planned that will also emphasize the review of tamper-evident seals both prior to the opening of polls and at the close of polls and could include the suggestion of additional review of the Inspector's Statement after each election.

Recommendation 26

LAB recommendation #26 details the need for required administrative rule promulgation pertaining to electronic voting equipment and software security.

Background and Current Practice

Wisconsin Administrative Code Chapter EL 7 already deals extensively with electronic voting system approval and testing requirements, both in Wisconsin and nationally. Applications for approval of electronic voting systems require, among other things, an itemization of all specifications for hardware/firmware/software, technical manual reviews, independent testing requirements that ensure conformance with all standards required by the federal elections commission, and a listing of other jurisdictions using the systems.

This LAB recommendation is particularly relevant, as the topic was previously explored by the Commission several years ago. A motion was passed formally authorizing staff to act and move forward with rule promulgation. A scope statement was submitted that contemplated the addition of a ballot and electronic voting equipment security provision to existing administrative code. This action was part of a larger effort to consolidate the old Chapter GAB 5 into the new administrative code provisions, while also minimizing overlap and bringing sections 5 and 7 together into one. The scope statement for this proposed rule/chapter expired without formal promulgation on March 5, 2020, but the Commissioners may opt to resume promulgation of relevant portions of that prior attempt, while also considering any new components.

Recommendation 27

LAB recommendation #27 states WEC should ensure equipment vendors provide additional training to municipal clerks on ensuring that ballots are counted accurately when paper jams occur in electronic voting equipment.

Background and Current Practice

The report also indicates that better training can be provided by voting equipment vendors regarding voting equipment ballot jams and determining whether a ballot has been counted when the jam notification screen appears. The recently approved precinct optical scan tabulators display a message on the screen to the voter or election inspector when a ballot jam occurs that indicates if the ballot in question was counted or not. The message displays for a set amount of time so if the voter or election inspector misses it they may not be able to determine if the ballot that caused the jam was counted before the jam was cleared. In these situations, caution is exercised, and the ballot is reinserted into the machine so that a voter is certain to have their votes counted. In circumstances where the ballot was counted prior to the jam being cleared a ballot may be counted twice if the voter or election inspector did not see the message in time. These incidents are uncommon and should be recorded on the Inspector's Statement and are identified during the post-election audit if there is a reconciliation problem between the hand count totals and machine tape results.

When a jurisdiction implements a new voting system the vendor generally provides training manuals and resources to municipal clerks and election inspectors as part of this process. WEC staff has never provided specific training on individual pieces of equipment as staff are not the subject matter experts on each of these machines. This recommendation could be addressed by including additional voting system certification requirements that include training specific to how to handle ballot jams.

Recommendation 28

LAB recommendation #28 is that WEC should comply with statutes by calculating an error rate for each type of electronic voting equipment used in each General Election.

Background and Current Practice

The final recommendation in this section concerns the calculation of an error rate identified during the post-election voting equipment audit for each type of equipment used in Wisconsin for a General Election. LAB indicated staff did not provide this information to the Commission as required by statute. The final audit report did contain a discussion of errors identified during the audit and explained the probable cause of each error.

The report also includes a discussion of how the error rate, as defined by statute, is based on the 2002 federal standard for initial system certifications and how this standard does not account for anomalies caused by voter marked ballots used during a live election. Staff did not provide a precise error rate for each piece of equipment because statute does not properly define what constitutes an error and does not account for issues when human error complicates the review.

Many of the issues identified by the 2020 post-election voting equipment audit were caused or compounded by human error. For example, one optical scan tabulator identified creases through the write-in area on ballots as good marks the voter made in those contests when voting by absentee ballot. These ballots were identified by the equipment as having been overvoted for those contests, but in many instances election inspectors did not follow the prescribed administrative procedures that would have mitigated this issue. When processing an absentee ballot, if an election inspector gets a warning that a contest, or contests, are overvoted, they are required to have the ballot returned to them so they can review the contest, or contests, in question to determine any possible voter intent. If this procedure was followed in this situation, the election inspector would have recognized the issue and would have remade the ballot so that it could be processed accurately on the equipment. Instead, the election inspector used the override function on the equipment which caused no votes to be counted for the contest the machine identified as overvoted.

When the post-election audit identified this problem, the Commission amended the certification for this piece of equipment so that this problem would not occur in the future. The lack of a specific error rate calculation in the final audit report did not negatively impact the effectiveness of the audit or hinder the ability of the audit to identify any problems with how votes were tabulated for the 2020 General Election.

Recommendation 29

LAB recommendation #29 relates to LAB's suggestion that WEC promulgate administrative rules for considering complaints alleging violations of election laws.

Background and Current Practice

Wisconsin statutes, administrative code provisions, and authority delegated to the Administrator in consultation with the Chair and the full Commission, set forth the procedures for handling Wis. Stat. Section 5.05 and Wis. Stat. Section 5.06 complaints.

The current administrative rule in place for complaints (Ch. EL 20) was superseded by statute for Wis. Stat. Section 5.05 complaints, as the statute provides a detailed set of procedures, including how the complaint must be filed, how soon a respondent must respond, the burdens of proof, the types of decisions the Commission can make in response to a complaint, etc. Wis. Stat. Section 5.06 complaints are processed using the timelines set forth in the current administrative rule, in conjunction with the statute that provides the subject matter, standing, and right to appeal to circuit court if an aggrieved party so chooses. While the agency staff will discuss this issue with the Commission, it is not clear what additional information should be included in this recommended rule that is not present within the statute (Wis. Stat. Section 5.05) itself. The process under the statute has been in place since the WEC has existed and has worked well.

Recommendation 30

LAB recommendation #30 suggests using newly purchased customer service software to track and report customer contacts.

Background and Current Practice

The acquisition of software to help manage contacts with the public and to help ensure consistent responses to common questions may help with tracking some of the concerns received through the website, but any additional tracking or reporting of these website concerns would need to be decided by the Commission. Commission staff will certainly discuss tracking capabilities within the software with the Commission and decide what additional reporting to the Commission may be needed, if any, to keep them informed.

The LAB makes recommendations related to concerns that are not filed as complaints. There is no statutory requirement that the Commission provide a section on its website to accept election related concerns, but the WEC uses the “Report a General Concern” section to identify broad trends within the concerns and to triage specific issues that may emerge.

Election concerns are not sworn complaints, and in many instances the information received through the “Report a General Concern” area of the website is opinions from voters or statements about what people may have seen in the news that do not require any action or response by WEC staff. Items that do require a response from WEC staff are sent out to the appropriate staff members and their supervisor. The WEC is informed of the number of concerns that are received, topic trends, and other issues that the full Commission needs to be aware of to potentially discuss in a meeting. Additionally, requests to send a message to the full Commission on a particular topic are provided on a semi-regular basis.

WEC staff complied with required statutes and responded to an unprecedented number of public contacts and sworn complaints during four statewide elections in 2020 conducted during a worldwide public health crisis. LAB found that complaints were tracked appropriately and WEC staff regularly informed the Commission with relevant information about complaint. LAB also found that WEC staff met the statutorily required timeframes for processing complaints and the Administrator in consultation with the Chairperson acted in a timely manner when considering complaints about the conduct of election officials.