



Wisconsin Elections Commission

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DATE: For the March 18, 2020 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Meagan Wolfe, Administrator
Wisconsin Elections Commission

SUBJECT: **COVID Planning – In-Person Absentee Voting Hours**

Are municipal clerks required to conduct in-person absentee voting hours or may they eliminate that process given concerns regarding exposure to COVID-19 and the challenge of conducting voting under the public health guidance related to sanitation and social distancing?

Commission staff has received increasing contacts from municipal clerks and the public regarding adjustments made to in-person absentee voting hours, including the specific issue of which local official is authorized to establish those hours. In some cases, it appears that either the municipality's chief executive officer (mayor, village board president, town board president) or the governing body may be issuing or considering directives to establish absentee voting hours or to eliminate in-person absentee voting due to concerns regarding the COVID-19 virus. In other cases the municipal clerk is considering changes to the absentee voting hours which were published in Type E Notices last week. Staff has prepared the following additional questions for consideration by the Commission.

1. May a clerk decline to accommodate in-person absentee voting?

No. Under Wis. Stat. § 6.86(1)(b) and the federal court decision in *One Wisconsin Institute*, electors may request an absentee ballot in person at the municipal clerk's office or an alternate location until the Sunday before the election. While the statutes do not mandate specific times or a minimum number of hours where in-person absentee voting must take place, the clear intent is that electors have reasonable opportunities to exercise those rights. The municipal clerk is required to establish and publish the hours for in-person absentee voting, which may include voting by appointment only. However, limitations on the hours must be reasonable based upon the number of voters and the demand for late registration and in-person absentee voting. In the opinion of WEC staff, municipal clerks do not have the authority or discretion to eliminate all opportunities for late registration or in-person absentee voting, at least absent an emergency declaration of the Governor or directive of state or local health officials to do so.

2. What if a mayor, village board president, town board chair, or local governing body orders restrictions on or the elimination of late registration or in-person absentee voting?

The election laws do not provide local elected officials the authority to place limits on or eliminate registration or voting options established by the statutes absent directives from state or local public health officials. Wis. Stat. § 6.86(1)(b) states that "A municipality shall specify the hours" in the Type E

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Notice published on the fourth Tuesday prior to the Spring Election. That statute does not specify whether the clerk, governing body, or chief executive order designates the hours for each election. Wis. Stat. § 7.15(1) provides that the municipal clerk “has charge and supervision of elections and registration in the municipality.”

In some municipalities the governing body traditionally establishes the absentee voting hours and in many cases the clerk has established those hours. WEC staff has interpreted Wis. Stat. § 7.15(1) to authorize the municipal clerk to authorize absentee voting hours without requiring approval of the local governing body. The question arises as to when there is a difference or dispute between hours which the municipal clerk wishes to establish and those which may be directed by the local governing body or chief elected official of the municipality.

Commission staff believes that, under the election statutes, the municipal clerk has authority to establish those hours, and we have advised that clerks may change the hours that were published in the Type E Notice given the public health circumstances which have changed since decisions regarding the voting hours were originally made. Commission staff, however, has not undertaken a thorough review regarding other statutes affecting the authority of clerks and other elected officials, and there may be local ordinances defining the relationship and lines of authority among those officials. The Commission should be aware that staff is being asked for its opinion and in some cases to intervene to resolve which official has the authority to establish absentee voting hours.

3. Can a county or municipal health department order that restrictions be placed on the in-person registration or in-person absentee voting processes?

The Governor’s emergency order designates the Wisconsin Department of Health Services as the lead agency for implementing decisions related to the COVID-19 virus. WEC staff is in close contact with the Department and the Governor’s Office related to developments and decisions which could impact administration of elections. Local health agencies may also issue directives for events, facilities and individuals within their jurisdictions.

Because of the potentially unprecedented nature of the impacts on individual behavior and public events, and because the circumstances will remain fluid for the foreseeable future, it is not possible to anticipate the exact impact of health directives on the conduct of the election. WEC staff has advised clerks that directives to limit the number of people gathering in one location do not translate into the elimination of in-person absentee voting. Steps can be taken to minimize the health risks to electors, municipal staff and election inspectors. Clerks may, for example, limit the number of individuals in the office at one time for absentee voting and require others to wait in line outside the office or the building. Appropriate social distancing practices may also be implemented for electors waiting in line.

Staff has also advised that, if a municipal clerk believes they are required to eliminate in-person absentee voting based on a directive of either local elected officials or a county or local health agency, the clerk should immediately contact the WEC before implementing such a directive. Eliminating those processes without proper justification or authority risks a complaint being filed with the WEC, or an order being issued by the WEC, or litigation being initiated against the municipality. For that reason, the WEC encourages including the municipal attorney in any discussions regarding limiting voting opportunities that are not supported by a statewide emergency order.

4. What are the possible remedies if a municipality eliminates all in-person absentee voting opportunities?

As with other decisions of local election officials, Wis. Stat. § 5.06 allows a resident to file a complaint with the Commission alleging that the municipality is not complying with election laws or has abused its discretion in implementing those laws. After reviewing the written submissions of both the complainant and the municipality, the Commission may issue corrective orders if it concludes there was noncompliance with the election laws or an abuse of discretion. That process, however, typically takes weeks or months to resolve and either party may then appeal the decision to circuit court.

Wis. Stat § 5.06(4) also permits the Commission, on its own motion, to investigate and determine whether any election official has failed to comply with the election laws or abused their discretion in administering the laws. The Commission may order an election official to conform their conduct to the law after completing an investigation, pursuant to Wis. Stat. § 5.06(6). If the local election official declines to alter their decision or action, the Commission may ask the Department of Justice to initiate court action to convert the Commission's order into an enforceable court order.