

WISCONSIN ELECTIONS COMMISSION

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MEMORANDUM

TO: Wisconsin Municipal Clerks
City of Milwaukee Election Commission
Wisconsin County Clerks
Milwaukee County Election Commission

FROM: Meagan Wolfe
Interim Administrator

DATE: March 25, 2019

SUBJECT: Circuit Court Ruling in *League of Women Voters v. Knudson*

As you may have read, Dane County Circuit Court Richard Niess issued a ruling to enjoin the implementation of all actions resulting from the Legislature's extraordinary session in December 2018, including several election-related provisions in 2017 Act 369 ("Act 369") which we previously outlined in a December 13, 2018 Clerk Communication. Due to separate federal court orders and existing administrative rules, the Commission staff believes the decision of the Dane County Circuit Court will not have any significant impact on voting rules for the Spring Election.

As we stated in a January 7, 2019 January 7, 2019 Clerk Communication, Judge Peterson's order in the *One Wisconsin Institute* case had enjoined the provision in Act 369 which limited the start of in-person absentee voting hours. It also enjoined provisions of Act 369 regarding the use of expired student ID cards and receipts for temporary State ID cards. As a result, a student ID card may continue to be used as photo ID even if it is expired, and receipts issued by the Division of Motor Vehicles to an elector using the ID Petition Process continue to be valid for up to 180 days. Judge Peterson's previous decision also preserves the ability of municipalities to conduct in-person absentee voting at more than one location, even though that provision of Act 369 has been enjoined as a result of the Dane County Circuit Court ruling.

Similarly, despite Act 369 being enjoined, the separate federal court consent decree, which permits temporary overseas electors to use the Federal Write-In Absentee Ballot and to receive ballots electronically, remains in place (Judge Peterson's decision permits all absentee voters to receive ballots electronically). Finally, the WEC's administrative rule permitting technical college ID cards to be used as photo ID is still in effect even though that provision of Act 369 has been enjoined.

There is one enjoined provision of Act 369 that is not otherwise enforced due to other legal authority. Act 369 removed the statutory requirement that the witness for a military or overseas absentee voter must be a U.S. citizen. While the legal effect of Judge Niess' decision is to reinstate the prior statute

which required military and overseas absentee voters to use a witness who is a U.S. citizen, the practical impact is likely to be minimal for several reasons.

First, the potential number of voters who are impacted will be very low. As of Friday, March 22, 2016, a total of 296 absentee ballots had been requested by and issued to military electors, who are likely to have a U.S. citizen available to act as a witness, and 45 of those ballots have already been returned to municipal clerks. A total of five absentee ballots had been requested by and issued to temporary overseas electors (who have an intent to return to Wisconsin) and none had been returned. Permanent overseas electors who have no intent to return to Wisconsin may vote only for federal offices and therefore they may not receive absentee ballots for the Spring Election, both under Wis. Stat. § 6.24(2) after Act 369 and Wis. Stat. § 6.34(1)(b) prior to Act 369.

Second, there has never been a requirement that the absentee voter's witness submit proof of U.S. citizenship or that clerks or inspectors attempt to determine whether the witness is a U.S. citizen. The only avenue for assessing whether the witness is a U.S. citizen would be for an election inspector to challenge the ballot for failure to adhere to a voting requirement pursuant to Wis. Stat. § 6.92 (members of the public may only challenge a ballot based on voter qualifications). In addition, an inspector would need to have firsthand knowledge that the witness is not a U.S. citizen in order to challenge the ballot. Challenged ballots of absentee voters are counted and marked as challenged to preserve any issue to be resolved in a potential recount.

As a result of these factors, the Commission staff does not expect significant issues to arise related to the question of whether a witness for a military or temporary overseas elector needs to be a U.S. citizen for the Spring Election. If you encounter a specific issue related to the U.S. citizen requirement, please feel free to contact the WEC.

In short, election officials and voters should see virtually no difference in the conduct of the Spring Election as a result of the ruling last week in the *League of Women Voters* case.

If you have questions regarding these matters, please contact the Help Desk at 608-261-2028 or elections@wi.gov.