

STATEMENT OF SCOPE
PURSUANT TO WIS. STAT. § 227.24
WISCONSIN ELECTIONS COMMISSION

Rule No.: EL § 6.07 Special Voting Deputies

Relating to: Emergency Procedures Pertaining to Special Voting Deputies

Rule Type: Emergency/Temporary

INTRODUCTORY CLAUSE:

The Wisconsin Elections Commission (“Commission”) unanimously approved a directive to Commission staff to draft a scope statement for an emergency administrative rule proposed below, and otherwise provide updated guidance to Wisconsin clerks and elections officials pertaining to the need for further clarification of Special Voting Deputy (“SVD”) processes in light of pandemic-related prohibitions on visitors in care facilities, including elections officials that have been deemed “non-essential” visitors. As such, the Commission now proposes an emergency addition to Chapter EL 6 of the Wisconsin Administrative Code (“Procedure”), specifically the temporary addition of EL § 6.07.

FINDING OF EMERGENCY:

The Commission finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. Throughout the COVID-19 pandemic, municipal clerks have actively sought the Commission’s guidance on ways to comply with state election statutes while ensuring that their electors are able to exercise their right to vote. This is especially true with regard to Wis. Stat. § 6.875, prompting the Commission to issue guidance several times in 2020 and 2021. In order to ensure residents of facilities normally served by SVDs would have timely access to their ballot for the 2021 Spring Election, the Commission unanimously carried a motion providing that updated, suggested guidance be provided to the 1,850 municipal clerks administering Wisconsin elections, while remaining compliant with the SVD requirements found in Wis. Stat. § 6.875. In the event that SVD in-person visits are impossible for the April 6, 2021 Spring Election, this temporary emergency rule would allow these residents additional time to receive, vote and return their ballot in time to be counted, given that SVD in-person visits remain highly likely to be disallowed by care facility staff. The previous emergency guidance to proceed with the immediate mailing of absentee ballots was based on Wis. Stat. § 6.875(6)(e), which states, “If a qualified elector is not able to cast his or her ballot on 2 separate visits by the deputies to the home or facility, the deputies shall so inform the municipal clerk or executive director of the board of election commissioners, who may then send the ballot to the elector no later than 5 p.m. on the Friday preceding the election.” That guidance has expired, and the Commission approved the new guidance pertaining to this emergency administrative rule at its March 2, 2021, meeting.

The Commission held that the emergency conditions that prompted previous guidance may remain present for an unknown number of care facilities for the upcoming April 6, 2021, election, and create a likelihood that lawful voters living in those care facilities in the state will be disenfranchised by the impossibilities created in the current pandemic-restricted care facility visitation environment, including the SVDs that have been deemed non-essential personnel for the purpose of in-person facility visitation.

State health service administrators, including the Department of Quality Assurance (DQA), which provides guidance to care facilities for accreditation, indicated throughout 2020 and early 2021 that all

facilities, both public and private, had limited visitors to essential personnel only. Commission staff also requested information on safety precautions that SVDs could take which would increase the likelihood they would be admitted. However, staff were informed there were no precautions that could be taken to ensure SVD access. This meant that not only were SVDs and statutorily-allowable observers going to be denied access if they attempted to make a visit, but clerk requirements to coordinate, schedule, and notice a visit in a care facility would be futile/rejected, thus critically delaying the mailing of absentee ballots to facility residents. Updated United States Postal Service estimates detail that voters and state officials should expect approximately one week for absentee ballots to arrive by mail, and another week for the returned ballot to arrive at the clerk's office. This creates a strong probability that a significant number of care facility voters would be denied the right to vote, by default, because the clerk/SVD requirements regarding notice and site visits would result in absentee ballots being mailed under Wis. Stat. § 6.875(6)(e) that are sent too late to be returned before the statutory deadlines detailed in Wis. Stat. § 6.86(3)(c).

Commissioners and commission staff reached these conclusions in consideration of the information provided by state public health officials, care facility and nursing home regulatory officials, postal service representatives, Wisconsin clerks, and advocates for the aging and disability communities who provided feedback to the Commission. Advocates emphasized the importance of uniformity across jurisdictions for SVD voting. The Commission is also confident that this is the only feasible solution to ensure that lawful voters are not disenfranchised through no fault of their own, due to the exigent circumstances created by pandemic-based restrictions wholly outside the control of the Commission and other government officials.

RULE ANALYSIS:

1. Statutes Interpreted:

Wis. Stat. § 6.875

2. Statutory Authority:

Wis. Stats. §§ 5.05, 7.08(3), 227.11(2)

3. Explanation of Agency Authority:

Wisconsin Statutes § 5.05(1) states:

General Authority. The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing...

Specifically, Wis. Stat. § 5.05(1)(f) also provides that the Commission may "Promulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration."

4. Related Statutes or Rules:

This proposed rule is sought as a temporary, emergency addition to Chapter EL 6 of the Wisconsin Administrative Code (EL § 6.07). It adheres to the provisions found in Wis. Stat. § 6.875(6)(e), and accounts for the temporary visitation restrictions that will prevent the in-person presence of SVD and observers in care facilities.

5. Brief Summary of the Proposed Rule:

The proposed rule would authorize clerks to attempt proper notice and site visits for SVD voting activity at care facilities in strict accordance with Wis. Stat. § 6.875 if feasible, or otherwise maintain compliance with Wis. Stat. § 6.875(6)(e) if in-person site visits are prohibited, by authorizing in-person or electronic attempts to conduct/arrange site visits. If facility administrators rebuff such attempts on two occasions, clerks will have properly adhered to the first component of Wis. Stat. § 6.875(6)(e) (residents will be deemed unable to vote during two, actual/attempted site visits by SVDs), and the clerks or executive director of a board of election commissioners may proceed with the second component of Wis. Stat. § 6.875(6)(e) (the mailing of an absentee ballot to qualified electors).

6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations:

There are no existing or proposed federal statutes or regulations that address the topic of this proposed rule. There also exists no uniformity in the manner in which the laws in each of the fifty states address the need to provide this service to care facility residents, although some state have enacted similar laws to those of certain counterparts. However, the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services, has provided:

The Centers for Medicare & Medicaid Services (“CMS”) is affirming the continued right of nursing home residents to exercise their right to vote. While the COVID-19 Public Health Emergency has resulted in limitations for visitors to enter the facility to assist residents, nursing homes must still ensure residents are able to exercise their Constitutional right to vote. States, localities, and nursing home owners and administrators are encouraged to collaborate to ensure a resident’s right to vote is not impeded.

Compliance with Residents’ Rights Requirement Related to Nursing Home Residents’ Right to Vote (Oct. 5, 2020), <https://www.cms.gov/files/document/qso-21-02-nh.pdf> (last visited March 4, 2021).

That said, the CMS, other federal/state/local health officials, and public/private care facility administrators/owners have all continued to affirm the requirements of visitor restrictions. However, it should be noted that CMS guidance only pertains to specific types of facilities accepting federal funding. Other facilities, particularly those which are privately owned, retain a great deal of control over access and visitation. These restrictions, and the overall lack of uniformity, necessitated the emergency administrative rule request directed by the Commission and put forth herein.

7. If Held, Summary of Comments Received During Preliminary Comment Period and at Public Hearing on the Statement of Scope:

N/A

8. Comparison with Rules in Adjacent States:

Each state administers voting in care facilities in a unique manner. Special Voting Deputies, and the laws that govern that process, are unique to the state of Wisconsin. Other states, including Indiana and

Arizona, made changes to their processes for voting in care facilities in 2020 to account for restrictions on visitors because of COVID-19. In Indiana, the process was modified to allow care facility staff to administer voting, something currently prohibited under Wisconsin law. Other states facilitate voting in care facilities by either mailing ballots or using mobile polling places where the voting administrators do not enter the care facility.

9. Summary of Factual Data and Analytical Methodologies:

The Commission proposes this rule will ease financial and logistical burdens on various parties, and avoid the possible disenfranchisement of voters, by formally acknowledging and counteracting the effects of COVID-19 visitation restrictions for SVDs. The timing of statutory clerk start dates, notice and visitation requirements, and postal delivery estimates combine to create a high likelihood that many voters will be disenfranchised if the Commission does not provide this guidance to clerks. This reasoning is supported by the Commission's formal assessment and directive, Commission staff's coordination with a variety of local/state/federal government officials, care facilities assessments, Clerk input and public comment, and other due diligence that has been performed to date. According to the Disability Vote Coalition, Wisconsin has more than 87,000 beds in facilities that may be covered by SVD voting, including more than 28,000 in nursing homes, 34,000 in community-based residential facilities, 8,000 in adult family homes, and 16,000 in residential care apartment complexes.

10. Analysis and Supporting Documents Used to Determine Effect on Small Businesses or in Preparation of an Economic Impact Analysis :

There would be no economic impact on small businesses.

11. Effect on Small Business:

The effect of the proposed emergency rule, and subsequent processes, will have little to no impact on small businesses. If an impact exists, it would likely result in a net positive for small business. Care facility staff, resources, and budgets will be less strained if they do not have to facilitate the physical visits required for SVD voting processes on at least two occasions, including the potential purchase of additional personal protective equipment and other associated equipment and supplies. No administrative or financial burden on small businesses is anticipated. The proposed emergency rule also minimizes potential COVID-19 exposure to the many at-risk populations that live and vote in care facilities.

Municipal clerk outreach and comment has also highlighted that these officials believe that proceeding with a futile attempt to conduct in-person SVD site visits, and the associated pre-planning, will only result in an unnecessary drain on local resources and budgets, which are directly tied to Wisconsin taxpayers. Essentially, the current process, without the enactment of this emergency administrative rule, will prompt clerks to commit time, personnel, and budget to processes that represent an impossibility of completion.

12. Estimate of the Amount of Time Agency Employees Will Spend Developing the Proposed Rule and of Other Resources Needed to Develop the Rule:

WEC staff estimates that it will take approximately 40 staff hours to draft a scope statement and carry out the subsequent steps to promulgate an administrative rule.

13. Agency Contact Person:

Jim Witecha, Staff Attorney
(608)266-0136, james.witecha@wisconsin.gov

14. Place Where Comments are to Be Submitted and Deadline for Submission:

The deadline for submitting comments will be the start time/date of the public hearing stated in the Notice of Hearing. (*See* Wis. Stat. § 227.136). Submit comment(s) to:

Mailing Address:

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