

Clearinghouse Rule 24-032

DRAFT ORDER OF THE WISCONSIN ELECTIONS COMMISSION CREATING RULES

The Wisconsin Elections Commission proposes an order to **create** Chapter EL 4, relating to the conduct, regulation, and accommodation of election observers.

Analysis Prepared by the Wisconsin Elections Commission

1. Statutes Interpreted: Sections 5.02(6m), 5.25(4)(a), 5.35(4), 5.85, 7.41, 6.82, 6.87(5), 6.875(6)(c)1., 6.875(7) 6.34(3), 5.35(5), 7.37(2), 6.86(1)(b), 6.855, 6.88, 9.01(3), 7.52(1)(a), Stats.

2. Statutory Authority: Sections 7.41(5), 5.05(1), 5.05(1)(f), 7.08(3), 227.11(2)(a), Stats.

3. Explanation of Agency Authority:

Section 7.41(5), Stats., requires the Commission to promulgate rules concerning the conduct of election observers and their interactions with election officials.

Section 5.05(1), Stats., established the statutory authority and framework for regulation and administration of elections. It specifically states: “[t]he 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.”

Section 5.05(1)(f), Stats., allows the Commission to “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.”

Section 7.08(3), Stats., requires the Commission has authority to prepare and publish an election manual, that can be “easily understood by the general public explaining the duties of the election officials, together with notes and references to the statutes as the commission considers advisable.”

Section 227.11(2)(a), Stats., authorizes the commission to promulgate rules interpreting the statutes administered by the agency.

4. Related Statutes or Rules:

Because election observers will observe in person and absentee voting processes, many elections statutes are related. The most directly related statutes are sections 6.875(7), 7.52(1)(a), which directly extend the ability to observe the voting process to voting with Special Voting Deputies and processing of absentee ballots at a board of absentee ballot canvassers location, respectively. Section 9.01(3) explains the ability to observe at a recount.

5. Plain Language Analysis:

The Commission intends through this order to promulgate its required rule on election observers. The rule intends to clarify and bring uniformity to election observation for the benefit of voters, election officials, and observers. The rule will clarify the who is able to observe elections, define the rights and limitations of what election observers may do, differentiate election observers from election inspectors, and create a

more stream-lined and accessible set of instructions for election observers to follow during the election process.

Section EL 4.02 defines terms relevant to observing elections, which should allow the process to proceed from known standards.

Section, EL 4.03 then address the conduct of election officials, explaining how they may limit the number of observers, check in and provide information to observers, establish observation areas so that observers can election processes, make observation areas accessible, warn observers, and remove observers from the location.

Section EL 4.04 describes the conduct of observers, explaining how to check in as an observer, move between observable locations, ask questions, challenge voters, take or not take images, and the general decorum expected of individuals observing voting.

Section EL 4.05 details requirements specific to the different kinds of locations that may be observed, namely polling places, clerk offices or alternate sites, board of absentee ballot canvassers locations, Special Voting Deputy served facilities, and recounts.

Sections EL 4.07 explains opportunities for media members to arrange with election officials times for reporting on voting.

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

The Federal Government does not implement a specific approach to election observing and it instead vests broad power to the states to decide individually how to conduct their elections.

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

The Commission held a virtual open session meeting on the statement of scope on January 17, 2023. Eleven members of the public attended the public meeting, many of whom commented on negative experiences they had as an Election Observer. The comments included concerns on how to coordinate Elections Observers from certain parties and concerns on the recommended amount of space that Election Observers should be positioned away from voters. Additionally, some of the comments suggested that the Commission assemble an advisory committee of key stakeholders to share insights concerning the Election Observers scope statement. Additionally, a number of observers commented that they were not allowed to use chairs or bathrooms that were available in the location. Some suggested that observers be allowed to go to the polling place prior to the election to give feedback on the layout of the polling place set up. Generally, the comments were in favor of the Commission addressing the issues presented in rulemaking.

8. Comparison with Similar Rules in Adjacent States:

Illinois, Michigan, Iowa, and Minnesota all have different terms for their versions of election observers, and all have processes outlined in statute that differ from section 7.41, Stats. Rather than election observers Illinois has “Poll-Watchers.” The qualifications and credentials needed to be a Poll-Watcher in Illinois are laid out in the state’s statutes as well as their rights and limitations. While there are strict qualifications to becoming a Poll-Watcher in Illinois, that is not the case in Michigan. Anyone, other than a candidate for elective office, can serve as a Poll-Watcher and may observe elections in Michigan.

Michigan differentiates its Poll-Watchers from what it calls Election Challengers. Michigan details its rules and parameters in a document provided by the Michigan Bureau of Elections and ratified by the State of Michigan's Secretary of State. Contrary to the previously covered states, Minnesota does not authorize poll-watching. Minnesota sets out in statute how to become an appointed Election Challenger in addition to the rights, limitations, and appointment process to becoming one. Lastly, and with a method similar to the state of Michigan, Iowa has its poll-watching parameters set in both statute and a guide prepared by the Office of the Iowa Secretary of State. This guide provides a corresponding Iowa statute that solidifies each of the suggested actions for poll-watchers as law. The guide labels a poll-watcher as a person who has official permission to be at the polling place on election day or in the room where absentee ballots are counted before the polls close. If a poll-watcher is acting as a challenger however, Iowa requires a different set of requirements to be allowed to challenge.

9. Summary of Factual Data and Analytical Methodologies Used and How Any Related Findings Support the Regulatory Approach Chosen:

N/A

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

N/A

11. Effect on Small Business (initial regulatory flexibility analysis):

N/A

12. Agency Contact Person:

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13. Place where comments are to be submitted and deadline for submission:

Written comments may be emailed to brandon.hunzicker@wisconsin.gov. While email is preferred, comments can also be mailed to P.O. Box 7984, Madison, WI 53703-7984. The deadline to submit comments concerning the Economic Impact Statement is March 11, 2024. An upcoming notice of a public hearing will contain a deadline for comments concerning the rule text.

RULE TEXT

SECTION 1. EL 4 is created to read:

EL 4.01 Right to vote. Nothing in this chapter shall be construed to distract, disrupt, obstruct, slow, or prevent a qualified elector from casting a lawful ballot or registering to vote.

EL 4.02 Definitions. In this chapter:

- (1) “Accessibility reviewer” means an individual authorized by the Commission who monitors compliance with s. 5.25(4)(a), Stats. An accessibility reviewer is not an observer under this chapter.
- (2) “Commission” means the Wisconsin Elections Commission.
- (3) “Chief inspector” means the chief inspector at a polling place, under s.7.30(6)(b), Stats.
- (4) “Clerk” means the municipal clerk, or the executive director of a municipal board of election commissioners, under s. 5.02(10), Stats.
- (5) “Communications media member” means an individual who communicates to the designated election official that the individual seeks to record or report information outside the voting area. Except as provided in s. EL 4.07(3), a communications media member is not an observer under this chapter.
- (6) “Confidential information” means information that is not part of the public aspects of the voting process, including an operator’s license or identification card number issued by the Wisconsin Department of Transportation, a birth date, a Social Security number or any portion thereof, accommodation information on a voter registration form, information concerning a confidential elector, guardianship information, a voted ballot, and a communication by a voter to a person rendering voting assistance under ss. 6.82, 6.87(5), or 6.875(6)(c)1., Stats. Confidential information does not include the type of document that is submitted for photo identification as defined by s. 5.02(6m) Stats. or for a proof of residency document as defined by s. 6.34(3) Stats., but includes the information provided thereon.
- (7) “Designated election official” means the chief inspector, if the observable location is a polling place, or the clerk, or any other election official designated by a chief inspector or clerk to carry out the election responsibilities under this chapter. At a facility served by special voting deputies, designated election official means the special voting deputies. At a recount, designated election official means the board of canvassers.
- (8) “Electioneering” has the meaning given in s. 12.03(4), Stats.

(9) “Election official” means an individual who is charged with any duties relating to the conduct of an election. An individual authorized by the Commission to conduct any election related activities is an election official in this chapter.

(10) “Inspector” or “election inspector” means an individual appointed pursuant to s. 7.30, Stats., to conduct an election.

(11) Member of the public” means an individual, excluding an election official, a candidate appearing on the ballot at that observable location, or a registered write-in candidate for an office voted on at that observable location.

(12) “Observable location” means a polling place, a municipal clerk’s office that is located in a public building, an alternate absentee ballot site, a meeting location of a board of absentee ballot canvassers, a facility served by special voting deputies, a central count location, or a recount location during those hours specified in this chapter as permitting observation.

(13) “Observe” means to see or hear and does not include physically handling election related materials or materials provided by the voter.

(14) “Observer” means a member of the public who has signed in as an observer at an observable location and is present at an observable location to observe an election or the absentee ballot voting process.

(15) “Organization” means an organization represented by an observer at an observable location under this chapter and shall not be construed to be limited to political parties, candidates, or campaigns.

(16) “Posting and distribution of election-related material” has the meaning given in s. 12.035, Stats.

(17) “Public aspects of the voting process” means the election activities that take place at an observable location during those hours specified in this chapter as permitting observation, except for inspection of confidential materials as defined in sub. (6).

(18) “Representing the same organization” means individuals who were deployed, assigned, trained by, or who identify as representing the same organization.

(19) “Voting Area” is that area at an observable location where electors receive, prepare, or deposit their ballots, or where electors cast their votes on a voting machine.

EL 4.03 Conduct of election officials.

(1) Due to physical limitations or the orderly administration of elections, or both, the designated election official may reasonably limit the number of observers representing the same organization who are present at any one time at an observable location. If the designated election official acts under this subsection, all organizations shall be limited in a uniform manner and the designated election official shall document the actions taken and the reasons why. The designated official may use a copy of an inspectors’ statement or other incident log to comply with this subsection.

(2) The designated election official shall maintain an observer log and shall require a member of the public intending to exercise the right to observe an election under s. 7.41, Stats., to enter the required information under EL 4.04(1) into the observer log and shall ensure that the photo ID presented reasonably resembles the observer and the name entered.

(a) After completing the log, an observer shall be offered a summary of the rules governing election observers at the observable location, and be informed of the following:

1. To whom at the observable location the observer may direct questions during the day,
2. How the observer may move between observation areas throughout the day, and
3. The location where a ballot may be remade, if applicable.

(b) After the requirements of par. (a) have been met, an observer shall then be directed to an area of the observable location established by the designated election official as an observation area. An observer log shall be returned to the municipal clerk after the election activities at an observable location have concluded.

(3) The designated election official shall provide each observer with a sticker, badge, or other item that identifies an individual as an observer and distinguishes observers from election officials.

(4) The designated election official shall establish at least one observation area to enable observers to readily observe all public aspects of the voting process during the election without disrupting the

voting process. An observation area shall be not less than 3 feet nor more than 8 feet from each table at which electors announce their names and addresses to be issued voter numbers or at which election officials announce the name of absentee voters; not less than 3 feet nor more than 8 feet from each table at which electors may register to vote; and not less than 3 feet nor more than 8 feet from each table at which election inspectors remake any ballots.

(5) An election official shall repeat, once and then at the election official's discretion, a name or address upon request.

(6) The designated election official shall position an observer area to minimize contact between observers and voters and election officials.

(7) An observation area shall be accessible to observers with disabilities and shall include sufficient space for mobility equipment, chairs, or other disability aids brought by an observer.

(8) The designated election official shall permit an observer access to any available chair within the observable location and with the same access to restrooms available to election officials at the observable location.

(9) The designated election official of any observable location that is unable to accommodate the observation areas as described in sub. (4) shall record the reason the requirements were not met and shall send a copy of that record to the Commission within 60 days of the election for which the observable location was active.

(10) In a manner established by the designated election official, election officials shall allow an observer to observe absentee ballot certificate envelopes that have been set aside to be rejected.

(11) An election official shall permit an observer to observe the poll lists, excluding the confidential portions of the lists maintained under ss. 6.36(4) and 6.79(6), Stats., at such times as election officials determine that doing so does not interfere with or distract electors under s. 5.35(5) Stats., and does not interfere with the conduct of the election under s. 6.45(1m), Stats.

(12) No election official may permit an observer to handle an original version of any official election document.

(13) No election official may permit an observer to observe any confidential information.

(14) If an observer violates a provision of this chapter or any applicable election statute the designated election official shall, verbally or in writing, warn an observer one time to cease the offending conduct.

(a) If an observer does not cease the offending conduct following a warning under this section, the designated election official may order an observer to depart from the observable location. If the designated election official is a person other than the Chief Inspector or municipal clerk, the designated election official shall notify the Chief Inspector or municipal clerk.

(b) If the offending observer who is ordered to depart under par. (a) declines or otherwise fails to comply with the designated election official's order to depart, the official may summon law enforcement to remove the offending observer consistent with s. 7.37(2), stats. The designated election official shall provide a written order to the observer which includes the reason for the order and the signature of the designated election official.

(c) If the designated election official who has issued an order to an observer to depart has been appointed from a list provided by a political party under s. 7.30 (4) Stats. an election official representing the opposite political party than the designated election official, if available timely on a timely basis, shall be offered the opportunity to sign the written order, and to note any concurrence or disagreement with that order. Failure of that election official to sign the written order, or the unavailability of that official to review the order in a timely fashion, does not affect the enforceability of that order.

(d) If an observer is ordered to leave an observable location, the incident shall be recorded and the designated election official shall, within 60 days of the incident, provide to the Commission a copy of the order and any other documentation of the incident. The designated official may use a copy of an inspectors' statement or other incident log to comply with this subsection.

EL 4.04 Conduct of observers.

- (1) A member of the public intending to exercise the right to observe an election under s. 7.41, Stats., shall notify the designated election official of that intent upon entering the observable location and shall sign the election observer log acknowledging that the observer understands the applicable rules and will abide by them. An observer shall present photo identification showing the observer's name to the designated election official and shall legibly print the observer's full name, street address and municipality, and the name of the organization the observer represents, if any, on the observer log. The photo identification does not need to conform to the requirements of s. 5.02(6m), Stats.
- (2) An observer shall comply with the designated election official's commands or shall be subject to removal from the observable location pursuant to EL 4.02(14)(a).
- (3) If more than one observation area is established within an observable location, an observer may move between such areas in a manner established by the designated election official.
- (4) An observer may direct questions to the designated election official or other election officials as determined by the designated election official and communicated to observers when they sign the observer log pursuant to s. EL 4.03(2)(a)1.
- (5) Any challenges brought by a qualified observer against a voter for cause shall be directed to an election official in accordance with ss. 6.925, 6.93, 6.935 Stats., and Ch. EL 9 Wis. Admin. Code.
- (6) No observer may engage in any loud, boisterous, or otherwise disruptive behavior, that, in the discretion of the designated election official, threatens the orderly conduct of the election or interferes with voting or registration.
- (7) No observer may create or transmit photographs, videos, or audio recordings of any observable location except as expressly permitted by this chapter.
- (8) An observer shall keep conversation to a minimum and shall conduct whatever conversation is necessary at a low enough volume to minimize distraction to electors and election officials.
- (9) No observer may engage in electioneering as defined in s. 12.03, Stats., or the posting or distribution of election-related material as defined in s. 12.035, Stats.

(10) No observer may display the name or likeness of, or text related to, a candidate, party, or referendum position appearing on the ballot, or display text which describes, states, or implies that the observer is an election official.

(11) No observer may engage in any conversation concerning a candidate, party, or question appearing on the ballot.

(12) No observer may use a communication device inside an observer area to make an audio or video communication. Text messaging, email, and other non-audible uses of such a device are permissible except as otherwise prohibited by this chapter.

(13) No observer may initiate a conversation with a voter. If a voter initiates a conversation with an observer inside an observable location, except as allowed by subsection (13), the observer may briefly respond to the voter if such response does not disturb other voters or the orderly administration of the election. The observer may also refer the voter to an election official for any election related questions, and briefly explain to the voter that the observer is observing the election and is not an election official. A brief wave or greeting to an individual known to the observer does not constitute a violation of this section.

(14) An observer may communicate with the designated election official and any other election officials at the discretion of the designated election official.

(15) Nothing in this chapter shall be construed to prevent an observer from assisting an elector in accordance with ss. 6.82, 6.87(5), or 6.875(6)(c)1., Stats., provided that the elector requests the observer's assistance.

EL 4.05 Location specific requirements.

(1) POLLING PLACE.

(a) An observer shall be allowed to observe beginning at 7 a.m. or whenever machines are zeroed out on Election Day, whichever is earlier, and ending at 8 p.m. or when the last voter who was in line to vote at or before 8 p.m. has finished voting. After 8 p.m., or after the last voter who was in line has voted, whichever is later, an observer may remain at the polling place to observe

canvassing under Wisconsin's open meetings law. If any observer is allowed access outside of the time frame provided herein, all observers shall be allowed the same access.

(b) No observer may create or transmit photographs, videos, or audio recordings of the interior of the observable location until the public canvassing meeting has begun.

(2) MUNICIPAL CLERK OFFICE OR ALTERNATE SITE.

(a) An observer shall be permitted to observe the in-person issuing and voting of absentee ballots under s. 6.86(1)(b), Stats., during the hours such activities may occur at a municipal clerk's office whose office is located in a public building, or at an alternate absentee ballot site under s. 6.855, Stats. The return of voted by-mail absentee ballots to a municipal clerk's office or alternate site by the US Postal Service is not covered by this chapter unless it occurs in the same location and during the same hours as the issuing and voting of absentee ballots.

(b) An observer shall be permitted to observe the initial enclosing and securing of an absentee ballot required under s. 6.88, Stats., that is received under par. (2)(a).

(3) BOARD OF ABSENTEE BALLOT CANVASSERS.

(a) An observer shall be permitted to observe during all hours when a board of absentee ballot canvassers is meeting to canvass absentee ballots, and observation shall not start later than the zeroing of election equipment.

(b) An observer may create or transmit photographs, videos, or audio recordings of the observable location. However, an observer may not create or transmit any photographs, videos or audio recordings of any individual depositing an absentee ballot or correcting, under s. 6.87(9), Stats., an absentee ballot certificate envelope.

(4) ABSENTEE VOTING IN RESIDENTIAL CARE FACILITIES AND RETIREMENT HOMES.

(a) Only one observer from each of the 2 political parties whose candidate for governor or president received the greatest number of votes in the municipality in the last general election may accompany the special voting deputies to absentee voting locations described in s. 6.875, Stats. Each party wishing to have an observer present shall submit the name of the observer to the

clerk or board of election commissioners no later than the close of business on the last business day prior to the visit to the facility.

(b) An observer shall be permitted to accompany the special voting deputies during the hours when the deputies will be administering voting in accordance with s. 6.875, Stats.

(c) An observer shall comply with any requirements imposed on visitors by a facility served by special voting deputies.

(d) An observer shall be permitted to observe the process of absentee ballot distribution in the common areas of the home or facility.

(e) The Special Voting Deputies may not permit any person other than a Special Voting Deputy or relative of the elector assisting the elector in marking the ballot to hear any discussion regarding the electoral choices of the elector. Special Voting Deputies must enforce the voter's constitutional right to cast a secret ballot, just as the individual is entitled to in other absentee or polling place settings.

(f) An observer shall not be permitted to enter a voter's private room, however the observer shall be permitted to observe such voting from a common area in accordance with sub. (4)(d). The voter may elect to close their door or otherwise secure their voting privacy.

(5) RECOUNT.

(a) An observer shall be permitted to observe during all hours when a recount is occurring.

(b) The petitioner, all opposing candidates, interested persons and their counsel, as described in 9.01(3), Stats., are not subject to the limitations of this chapter.

(c) The designated election official shall establish at least one area in which observers may observe the proceedings.

(d) An observer may create or transmit photographs, videos, or audio recordings of the observable location.

(6) CENTRAL COUNT.

(a) An observer shall be permitted to observe all counting of ballots occurring at a central counting location.

(b) An observer may create or transmit photographs, videos, or audio recordings of the observable location.

4.06 Post-observation practices.

(1) After all voting activity has concluded within the observable location, candidates may be present and the prohibition of creating or transmitting photographs, videos, and audio recordings does not apply unless such action is disruptive or interferes with the administration of the election.

4.07 Communications Media

(1) A communications media member shall identify him or herself and any organization the communications media member represents to the designated election official upon arriving at the observable location. At the discretion of the designated election official, a communications media member may use video and still cameras outside of the voting area, provided the cameras are not used in a manner that allows the recording of any confidential information, including voted ballots, or that disrupts or interferes with voting or the orderly conduct of the election.

(2) The designated election official may limit the amount of time any communications media member may use video and still cameras. Any limitations, rules, and regulations imposed on communications media members shall be uniformly applied.

(3) A communications media member may act as an observer, but when so doing is subject to the provisions of this rule.

SECTION 2. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2), Stats.