

The statement of scope for this rule, SS 089-22, was approved by the Governor on October 20, 2022, published in Register No. 803A3 on November 21, 2022, and approved by the Wisconsin Elections Commission on February 2, 2023.

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 227.11(2)(a), Stats., authorizes an agency 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. Section 5.25 (4) (a) requires all polling places to be accessible to individuals with disabilities.

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 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 establishes procedures for election officials so that they may designate areas for observers to observe election processes, make observation areas accessible, limit the number of observers, check in and provide information to observers, warn observers of disruptive or disallowed conduct, 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, and board of absentee ballot canvassers locations. Additionally, this section covers the observation of Special Voting Deputy served facilities, which is restricted to two individuals and is governed by s. 6.875 (7), Stats., and recounts, which is distinct from observing voting processes and is governed by s. 9.10 (3), Stats.

Section 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 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, and there are strict qualifications to becoming a Poll-Watcher in Illinois.

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.

Minnesota sets out in statute how to become an appointed Election Challenger in addition to the rights, limitations, and appointment process to becoming one.

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:

The Commission's proposed rule is based on information obtained during two advisory committee meetings. The Commission held a preliminary hearing on January 17, 2023, and gathered initial thoughts from members of the public, which focused on observers being able to see and hear and having access to chairs and restrooms. After the hearing, the Commission decided to form an advisory committee made up of clerks, poll workers, observers, political party representatives, and election-related organizations. The first advisory committee meeting was held on March 8, 2023, and Committee members provided comments on specific terms within the governing statute, s. 7.41, as well as comments concerning accommodations, challenges, and other observable locations. It also allowed members to present any additional comments. On April 28, 2023, the Commission voted to create a draft based on the first advisory committee meeting, including competing language for the commission to consider in cases for which the Commission received conflicting recommendations from the committee. The second advisory committee meeting was held on June 29, 2023, and discussed the Commission's initial draft and provided line by line feedback. The draft was revised with conflicting elements still present for the Commission's consideration. After the second meeting, the Commission met several times to discuss the draft language and to make changes to the document.

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 was March 11, 2024. The comment period for the rule text was March 20 to April 24.

RULE TEXT

SECTION 1. Chapter EL 4 is created to read:

CHAPTER EL 4

ELECTION OBSERVERS

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

EL 4.02 Definitions. In this chapter:

(1)

“Chief inspector” means the chief inspector at a polling place, appointed pursuant to s.7.30 (6) (b), Stats.

(2) “Clerk” has the same meaning as “municipal clerk” under s. 5.02 (10), Stats.

(3) “Commission” means the Wisconsin elections commission.

(4) “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.

(5) “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 voter, 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 proof of residency as defined by s. 6.34 (3) Stats., but includes the information provided thereon.

(6) “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.

(7) “Electioneering” has the meaning given in s. 12.03 (4), Stats.

(8) “Election official” has the meaning given in s. 5.02 (3m), Stats. An individual authorized by the commission to conduct any election related activities is an election official in this chapter.

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

(10) “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.

(11) “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.

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

(13) “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. An accessibility reviewer is an individual authorized by the commission who monitors

compliance with s. 5.25 (4) (a), Stats., and an accessibility reviewer is not an observer under this chapter.

(14) “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.

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

(16) “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).

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

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

EL 4.03 Procedures for election officials.

(1) The designated election official shall do all of the following:

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

(b) Ensure that an observation area is not less than 3 feet nor more than 8 feet from any of the following:

1. Each table at which voters announce their names and addresses to be issued voter numbers or at which election officials announce the name of absentee voters.
2. Each table at which voters may register to vote.
3. Each table at which election inspectors remake any ballots.

(c) Ensure that an observation area is accessible to observers with disabilities and includes sufficient space for mobility equipment, chairs, or other disability aids brought by an observer.

(2) OBSERVER CHECK-IN PROCESS

(a) 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 s. EL 4.04 (1) into the observer log and shall ensure that the photo identification presented reasonably resembles the observer and the name entered.

(b) After completing the log, the designated election official shall offer to an observer a summary of the rules governing election observers at the observable location, and inform an observer of all 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.
3. The location where a ballot may be remade, if applicable.

(c) After the requirements of pars. (a) and (b) have been met, the designated election official shall provide an observer with a sticker, badge, or other item that identifies an individual as an observer and distinguishes observers from election officials and direct the observer to an area of the observable location established by the designated election official as an observation area.

(d) The designated election official shall return an observer log to the municipal clerk after the election activities at an observable location have concluded.

(3) 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.

(4) 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 due to physical limitations or the orderly administration of elections, or both. If the designated election official acts

under this subsection, the designated election official shall limit observers from all organizations in a uniform manner and shall document the actions taken and the reasons therefore on a copy of an inspectors' statement or other incident log.

(5) The designated election official of any observable location that is unable to accommodate the observation areas as described in sub. (1) 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.

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

(7) 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.

(8) 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 voters under s. 5.35 (5) Stats., and does not interfere with the conduct of the election under s. 6.45 (1m), Stats.

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

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

(11) 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. Following a warning, the designated election official shall, if necessary, carry out the following procedures:

(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., the designated election official shall offer an election official representing the opposite political party than the designated election official, if he or she is available on a timely basis, 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, an election official shall record the incident 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. An observer is not required to be affiliated with or represent an organization. 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 s. 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) An observer who is an elector shall direct any challenges for cause against a voter to an election official in accordance with ss. 6.925, 6.93, and 6.935, Stats., and ch. EL 9.

(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 voters and election officials.

(9) No observer may engage in electioneering, as defined in s. 12.03, Stats., or post or distribute any 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 sub. (15), 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 a voter in accordance with s. 6.82, 6.87 (5), or 6.875 (6) (c) 1., Stats., provided that the voter requests the observer's assistance.

EL 4.05 Location specific requirements.

(1) POLLING PLACE.

(a) The designated election official shall permit an observer 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) The designated election official shall permit an observer 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. This chapter does not cover the return of voted by-mail absentee ballots to a municipal clerk's office or alternate site by the United States postal service unless it occurs in the same location and during the same hours as the issuing and voting of absentee ballots.

(b) The designated election official shall permit an observer to observe the initial enclosing and securing of an absentee ballot required under s. 6.88, Stats., that is received under par. (a).

(3) BOARD OF ABSENTEE BALLOT CANVASSERS.

(a) The designated election official shall permit an observer 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 returning 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) The designated election official shall permit an observer 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) The designated election official shall permit an observer to observe the process of absentee ballot distribution in the common areas of the home or facility, but shall not permit an observer to enter a voter's private room. A voter may opt to close his or her door or otherwise secure his or her voting privacy

(e) The special voting deputies may not permit any person other than a special voting deputy or relative of the voter assisting the voter in marking the ballot to hear any discussion regarding the electoral choices of the voter. 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.

(5) RECOUNT.

(a) The designated election official shall permit an observer to observe during all hours when a recount is occurring.

(b) The petitioner, all opposing candidates, interested persons and their counsel, as described in s. 9.01 (3), Stats., are not subject to this chapter, however, they must state to the designated election official that they are either the petitioner, an opposing candidate, an interested person, or counsel for any such individual.

(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) CENTRALCOUNT.

(a) The designated election official shall permit an observer 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.

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 place and use video and still cameras only 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. The designated election official shall uniformly apply any limitations, rules, and regulations imposed on communications media members .
- (3) A communications media member may act as an observer, but when so doing is subject to the provisions of this chapter.

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.