



MEMORANDUM

TO: Majority Leader Scott Fitzgerald
FROM: Joseph T. Kreye, legal services manager; Staci Duros, legislative analyst
DATE: March 26, 2020
SUBJECT: Questions related to “indefinitely confined” absentee ballots

Questions

This memorandum addresses your questions regarding voters’ requests for absentee ballots as “indefinitely confined.” Specifically, you asked:

- 1.) Whether the clerks in counties like Dane¹ and Milwaukee² could legally encourage voters to request absentee ballots as “indefinitely confined;”³
- 2.) What consequences, if any, would these clerks face for issuing statements that encourage voters to request absentee ballots as “indefinitely confined;” and,
- 3.) What consequences, if any, would voters face if they requested and received an absentee ballot as “indefinitely confined,” including whether those ballots would potentially be invalidated by the Wisconsin Elections Commission (WEC) or a judge.

Background-absentee ballots as “indefinitely confined”

Current law allows a regular, eligible voter to vote by absentee ballot.⁴ Requests to vote absentee must be made by mail, online, or in-person; these requests are also subject to statutory deadlines.⁵

¹ Riley Vetterkind, “[Dane County: Voters May Cast Absentee Ballot as Indefinitely Confined to Avoid Voter ID Requirement](#),” *Wisconsin State Journal*, March 26, 2020.

² Alison Dirr and Patrick Marley, “[Absentee Voters in Milwaukee, Dane Counties Can Say They’re ‘Indefinitely Confined’ and Skip Photo ID, Clerks Say](#),” *Milwaukee Journal Sentinel*, March 25, 2020.

³ As you know, it is likely that other county clerks will issue similar guidance. The counties of Dane and Milwaukee are the two most contemporary ones as of the date of this memo.

⁴ [Wis. Stat. § 6.86 \(1\)–\(3\)](#). The statute also allows a person to request to receive absentee ballots for all elections automatically or to receive an absentee ballot by an agent or special voting deputy dispatched to a residential care facility. The use of the term “regular” is to distinguish the non-military and overseas voters from military and overseas voters.

⁵ [Wis. Stat. § 6.86 \(1\) \(b\)](#). An absentee ballot request by mail or online must be received no later than 5 p.m. on the fifth day preceding the election and the last day to receive an absentee ballot in person is the Sunday before the election.

Voters may request an absentee ballot for a specific election or for all elections within a calendar year.⁶

Also, under current law, a valid photo ID must be provided when voting by absentee ballot unless the elector is the type of voter that is either exempt by statute,⁷ or has an alternative process to verify his or her identity, including confined voters, voters residing in care facilities visited by Special Voting Deputies (SVDs), or other voters residing in other care facilities that are eligible for SVD procedures, but are not visited by SVDs.⁸

If a voter has difficulty getting to his or her polling place, that voter can apply to become a permanent absentee voter. In order to become a permanent absentee voter, an elector must meet the requirement of “indefinitely confined” by signing a statement on the application itself that he or she meets the definition of “indefinitely confined.”⁹ Under [Wis. Stat. § 6.86 \(2\)](#), an elector is considered to be “indefinitely confined” due to “age, physical illness or infirmity or is disabled for an indefinite period of time.”

The statute does not specify what it means to be indefinitely confined because of age, illness, infirmity or disability, nor does it require any voter to meet a certain threshold for qualification. Once an elector becomes a permanent absentee voter, he or she remains on the permanent absentee voter list until no longer confined or fails to return an absentee ballot. In its most recent COVID-19 update, the Wisconsin Elections Commission characterizes the operation of the statute as allowing the voter to “self-certify.”

[WEC guidance](#)

The linked guidance document above provides a good summary of how the WEC views the issue of voters requesting to receive absentee ballots as “indefinitely confined” in light of the current public health crisis with COVID-19.¹⁰

The WEC acknowledges “the concern over the use of indefinitely confined status” but “does not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin.”¹¹ WEC notes that “many voters of a certain age or in at-risk populations may meet

⁶ [Wis. Stat. §§ 6.22 \(4\) \(a\), 6.86 \(2m\) \(a\)](#).

⁷ Voters that are exempt from having to show a photo ID when voting absentee are confidential electors [under [Wis. Stat. §§ 6.79 \(6\)](#)], electors who have surrendered his or her ID [under [6.79 \(7\)](#)], or military or overseas electors [under [6.87 \(4\) \(b\) 1.](#)].

⁸ [Wis. Stat. §§ 6.86 \(1\) \(ar\), 6.86 \(2\) \(a\), and 6.87 \(4\) \(b\) 2.—5.](#) In lieu of providing proof of identification, a witness statement can be used under [Wis. Stat. § 6.87 \(4\) \(b\) 5.](#) For the process of voting by SVD, see [Wis. Stat. § 6.875.](#)

⁹ [Wis. Stat. § 6.86 \(2\)](#).

¹⁰ For more information on WEC’s guidance regarding election procedures and COVID-19, see Meagan Wolfe, [Communication on Guidance Regarding Election Procedures and COVID-19 Public Health Emergency](#), March 12, 2020.

¹¹ Meagan Wolfe, [Communication on COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment](#), March 22, 2020, 4. This communication is included as an attachment to this memo.

that standard of indefinitely confined until the crisis abates.”¹² WEC directs the clerks to contact voters for confirmation of his or her indefinitely confined status if the clerk does not “believe a voter understood the declaration they made when requesting an absentee ballot.”¹³ WEC advises that “[c]lerks should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status” adding that “[a]ny request for confirmation of indefinitely confined status should not be accusatory in nature.”¹⁴

At no point in its guidance does WEC direct or recommend to clerks that they encourage all voters in a municipality to request absentee ballots in order to avoid exposure to COVID-19.

Now that the necessary background information on the subject of your request has been covered, the memo will address your specific questions in the following sections. Since questions 1 and 2 are related, they will be answered together.

Question 1 and 2

Question 1: Are clerks in counties like Dane and Milwaukee legally allowed to encourage voters to request absentee ballots as indefinitely confined?

Question 2: What consequences, if any, would these clerks face for issuing statements that encourage voters to request absentee ballots as indefinitely confined?

With regard to the first question, it would be appropriate, and consistent with WEC guidance, to encourage voters who are indefinitely confined because of age, illness, infirmity, or disability to request an absentee ballot without having to submit voter identification as certain at-risk populations may not be aware of that option. In that case, assuming the clerks make a good faith effort to determine if the voter understands his or her declaration, it would simply be a matter of public outreach.

However, and importantly, it would not be appropriate to encourage voters to claim to be indefinitely confined because of the governors “safer at home” order as a way to avoid presenting voter identification when requesting an absentee ballot.

[Emergency Order 12](#) requires residents to stay at home, but provides a number of key exceptions.¹⁵ For example, an individual may leave his or her residence to work for or obtain services at any health care operation or simply to buy groceries or household products. Restaurants are allowed to stay open for take-out and delivery, which means that restaurant employees will be leaving home to provide an essential service. Residents who are employed at essential businesses or provide

¹² Meagan Wolfe, [Communication on COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment](#), March 22, 2020, 4.

¹³ Meagan Wolfe, [Communication on COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment](#), March 22, 2020, 4.

¹⁴ Meagan Wolfe, [Communication on COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment](#), March 22, 2020, 4.

¹⁵ [Emergency Order 12](#).

essential services may also leave their residence to go to work. The order does not even require that those who are ill from COVID-19 or at high-risk for becoming sick from it stay at home, but, instead they are “urged to stay at their home or residence to the extent possible except as necessary to seek medical care.”

These many exceptions demonstrate that not all Wisconsin residents are indefinitely confined to their homes. For this reason, it would seem inconsistent with current law for a clerk or other election official to suggest that every individual in this state is indefinitely confined for purposes of receiving an absentee ballot, and without providing voter identification, because of emergency orders issued by DHS relating to a public health emergency that do not require residents to remain at home for all purposes. Some residents for health reasons may be confined to their homes, but this determination must be made on a case-by-case basis and not applied as a blanket policy to all voters.

With regard to the second question, there are consequences for clerks and election officials who intentionally or willfully neglect their statutory responsibilities. Under [Wis. Stat. § 5.05 \(1\) \(c\)](#), WEC may bring a civil action to require a forfeiture for any violation of chapters 5 to 10 and 12. Under [Wis. Stat. § 5.05 \(1\) \(d\)](#), WEC may also sue for “injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief as may be appropriate to enforce any law regulating the conduct of elections.”

A number of penalties under [Wis. Stat. Chapter 12, Prohibited Election Practices](#) also apply. For example, under [Wis. Stat. § 12.13 \(2\) \(a\)](#), the “willful neglect or refusal by an election official to perform any of the duties prescribed under chs. 5. to 12.” is in violation of the prohibitions under chapter 12, and that official may be disqualified to serve as an election official for a term of 5 years after conviction.¹⁶ In addition, if in the course of a person’s official duties that person intentionally violates an election law provision or intentionally causes another to violate such a provision,¹⁷ that person is guilty of a Class I Felony.¹⁸

Finally, and perhaps most importantly, a public officer or public employee who acts in a manner that the person knows is in excess of his or her authority or forbidden by law to do in his or her official capacity may be adjudicated to have violated Wisconsin’s misconduct in office law, which is a Class I Felony.¹⁹

Question 3

Question 3: What consequences, if any, would voters face if they requested and received an absentee ballot as indefinitely confined, including whether those ballots would potentially be invalidated by the Wisconsin Elections Commission (WEC) or a judge?

¹⁶ [Wis. Stat. § 12.60 \(3\)](#).

¹⁷ [Wis. Stat. § 12.13 \(2\) \(b\) 7.](#)

¹⁸ [Wis. Stat. § 12.60 \(1\) \(a\)](#).

¹⁹ [Wis. Stat. § 946.12 \(2\)](#).

Because absentee voting allows voters, who are unable or unwilling to travel to a polling place to cast his or her ballot, an opportunity to cast their ballots, special procedures are provided in law to protect both the elector and the absentee process. An elector must follow all absentee voting procedures (such as completing and signing the certificate on the ballot envelope, and having the certificate witnessed) or risk having his or her ballot rejected by election officials at the polling place.

With regard to the third question, [Wis. Stat. § 12.13 \(1\)](#) prohibits *intentional* actions carried out by electors that would violate ch. 12. For example, under [Wis. Stat. § 12.13 \(1\) \(b\)](#), an elector would violate ch. 12 if he or she intentionally “falsely procure[d] registration or ma[de] false statements” to an election official – whether or not the elector was under oath. If an elector participated in such an action, he or she is subject to a Class I Felony.²⁰ Moreover and specifically, under [Wis. Stat. § 12.13 \(3\) \(i\)](#), no person may “falsely make any statement for the purpose of obtaining or voting an absentee ballot.”

If a voter votes absentee knowing that he or she is not confined because of age, illness, infirmity, or disability, he or she could not only face civil and criminal penalties, but also have their vote challenged during the canvass. A court would need to determine whether a voter, in committing this act, relied in good faith on the instructions of a municipal clerk.

Conclusion

Clerks must follow the law in advising voters on whether they may be considered indefinitely confined for purposes of absentee voting. Emergency Order 12 by its very terms does not render all Wisconsin residents indefinitely confined. Civil and criminal penalties apply both to voters and election officials who violate Wisconsin’s election and voting laws. The current public health emergency does not permit clerks to misapply Wisconsin’s elections laws.

If you have any questions or require additional information, please feel free to call us at 608-504-5888 (for Staci) or 608-504-5857 (for Joe) or e-mail us at staci.duros@legis.wisconsin.gov or joseph.kreye@legis.wisconsin.gov.

²⁰ [Wis. Stat. § 946.12 \(2\)](#).