



**TO:** Municipal Clerks, Municipal Attorneys

**FROM:** Claire Silverman, Legal Counsel and Maria Davis, Assistant Legal Counsel

**DATE:** March 10, 2022

**RE:** Absentee ballot questions for the April 2022 election

Municipal clerks face the difficult task of deciding how to handle the return of absentee ballots for the April 5, 2022 election without guidance from the Wisconsin Elections Commission (WEC). Under state law, municipal clerks have “charge and supervision of elections and registration” in each municipality. Wis. Stat. § 7.15(1). Regarding absentee ballots, Wis. Stat. § 6.87(4)(b)1 provides that “the [absentee ballot] envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.”

On March 31 and August 19 of 2020, WEC issued guidance to clerks regarding delivery of absentee ballots and use of absentee ballot drop boxes under § 6.87(4)(b)1. That guidance was challenged in a lawsuit filed in Waukesha County Circuit Court. On January 20, 2022, the judge granted plaintiffs summary judgment and issued an order (Order) declaring the 2020 WEC guidance regarding absentee ballot returns invalid on the grounds that the guidance was unpromulgated administrative rules and was inconsistent with state law. According to the Order, state law provides as follows:

- An elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector’s behalf.
- The only lawful methods for casting an absentee ballot pursuant to Wis. Stat. § 6.87(4)(b)1 are for the elector to mail their ballot or deliver it in person to the clerk.
- The use of drop boxes, as described in WEC’s 2020 guidance, is not permitted under Wisconsin law unless the drop box is staffed by the clerk and located at the clerk’s office or a properly designated alternative site under Wis. Stat. § 6.855.<sup>1</sup>

Order Granting Plaintiffs Summary Judgment, *Teigen v. Wisconsin Election Comm’n*, Case No. 2021CV958, Waukesha County.

The Court of Appeals stayed the Order through February 15th and the Wisconsin Supreme Court denied a motion to vacate the court of appeals’ stay which meant that the Order did not affect the February 15 primary. However, the Supreme Court denied a motion to extend the stay through the April 5, 2022 election and the Order took effect February 16th. The Order enjoined WEC from issuing further guidance in conflict with the court’s interpretation of §§ 6.87 and 6.855 and ordered WEC to withdraw its previous guidance and notify clerks that the guidance was declared invalid. WEC complied. The Wisconsin Supreme Court agreed to have the case bypass the court of appeals and will decide the proper interpretation of these statutes. However, the Supreme Court will not decide the case until after the spring election.

In the wake of the Order and withdrawal of WEC guidance, municipal clerks have many questions about how to handle the return and counting of absentee ballots in their municipality. Ultimately, each clerk will need to decide what to do, taking into consideration both state and federal law, the different ways the absentee ballot statute can be interpreted, and the risks of choosing one option over another. Unfortunately, any decision brings with it the potential for dispute and litigation. The nature and level of risk will vary by municipality. The League attorneys do not represent individual municipalities and cannot advise municipalities how to proceed. The goal of this memo is to provide clerks with a basic overview of the situation and applicable laws and highlight some of the issues raised by the Order so that clerks are hopefully in a better position to decide how to appropriately balance the interests and risks unique to their municipality. *Clerks should make these decisions in consultation with the municipal attorney.*

#### **Is the Circuit Court order binding?**

A threshold question is whether the Order is binding statewide. Generally speaking, circuit court decisions and orders lack precedential value. In contrast to published appellate court opinions, circuit court decisions do not apply statewide and only bind the parties to the lawsuit.

Even though the Order may not be binding on municipalities, we recognize, as a practical matter, that many municipalities may want to take a more cautious approach regarding absentee ballots for the April election given the uncertainty surrounding interpretation of the applicable laws and the contentious nature of recent elections. Moreover, as a party to the case, WEC is bound by the Order interpreting §§ 6.87 and 6.855 and is responsible for resolving complaints against local election officials under Wis. Stat. §§ 5.05 and 5.06 and Wis. Adm. Code Ch. EL 20. Therefore, any complaints WEC receives will likely be decided within the context of the Order.

Clerks who believe the Order is not binding on them must still conduct the election according to their best, good faith interpretation of the applicable state and federal laws.

#### **NOTE: THE REMAINDER OF THIS MEMO ONLY PERTAINS TO MUNICIPALITIES ATTEMPTING TO FOLLOW THE ORDER.**

#### **Can municipal clerks still use absentee ballot drop boxes?**

Yes, but only if the drop box is staffed by the clerk<sup>ii</sup> and located at the clerk's office or a properly designated alternate site under Wis. Stat. § 6.855. However, the Order does not specify what it means for a drop box to be "staffed" or "located" at the clerk's office. Although it is possible to argue that a drop box is properly staffed and located when it is near the clerk's office and the clerk is intermittently checking it, we think a court is more likely to interpret the Order's requirement that drop boxes be staffed and located at the clerk's office as requiring that the drop box be inside the actual clerk's office where staff can see it. The former way is how some drop boxes were previously handled and it seems clear the circuit court intended for drop boxes to be handled in a different manner. Additionally, interpreting the Order to mean a drop box is properly staffed and located when it is directly in the clerk's office under supervision of the clerk would appear to better address the legislature's stated concern regarding election security and absentee voting as set forth in Wis. Stat. § 6.84.

In contrast to voting, which the legislature characterizes as a constitutional right, "the vigorous exercise of which should be strongly encouraged," the legislature characterizes voting by absentee ballot as a "privilege exercised wholly outside the traditional safeguards of the polling place." Wis. Stat. § 6.84 The legislature finds that the privilege of voting by absentee ballot must be "carefully regulated to prevent the potential for fraud or abuse . . ." Wis. Stat. § 6.84(1).

Accordingly, municipalities may choose to:

- Forgo using drop boxes altogether. If choosing this option, all municipal drop boxes should either be removed, sealed, or affixed with prominent signage stating they are not to be used for absentee voting and that deposited absentee ballots will not be counted. Additionally, municipalities could modify the openings in existing drop boxes to decrease the likelihood that an absentee ballot envelope would fit through.
- Allow absentee ballots to be delivered to a drop box only during office hours when the clerk, or an authorized representative, is present and only if the drop box is physically located inside the clerk's office.

### **What should the clerk do if an absentee ballot is delivered improperly?**

Any drop boxes or drop slots that are not considered to be staffed and located in the clerk's office should be clearly marked or sealed off to prevent absentee ballots from being delivered there. We suggest signs indicating that ballots deposited there will not be counted in accordance with Wis. Stat. § 6.84(2), which prohibits ballots cast in contravention of the applicable laws from being counted. If absentee ballots are deposited despite those measures, clerks may want to attempt to contact the voter to let them know the ballot's delivery was improper and the ballot will not be counted. If time permits, clerks may consider asking the voter if they want to correct the defect. While there is no specific statutory authorization for this, a similar practice set forth in Wis. Stat. § 6.87(9) allows clerks to reach out to voters to offer an opportunity to correct mistakes relating to absentee ballot certificates. There is also § 6.87(6) which provides that the municipal clerk shall not return a ballot to an elector who mails or personally delivers an absentee ballot to the municipal clerk, except as authorized by § 6.87(5) and (9). However, under the Order, a ballot delivered to an unlawful drop box would not be considered personally delivered to the clerk and so arguably § 6.87(6) would not apply.

### **Does the Order prohibit third-party delivery of absentee ballots?**

Yes, unless such delivery is explicitly authorized by law. The circuit court interprets Wis. Stat. § 6.87(4)(b)1 as requiring electors to personally mail or deliver their absentee ballot except where the law explicitly authorizes an agent to act on an elector's behalf. Clerks need to consider any applicable Wisconsin statutes<sup>iii</sup> and the requirements of the federal Voting Rights Act (VRA) and Americans with Disabilities Act (ADA).

The VRA provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or an agent of that employer or officer or agent of the voter's union. 52 U.S.C. § 10508. Arguably, the assistance required by federal law includes both help to complete the ballot and also to return the ballot so it may be counted. Additionally, under the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.” 42 U.S.C. § 12132. The ADA has been interpreted “to apply to all aspects of voting, including voter registration, site selection, and the casting of ballots, whether on Election Day or during an early voting process.”<sup>iv</sup>

The statutes do not require clerks to confirm that a person is in fact returning their own ballot and requesting identification may be considered unlawfully imposing additional qualification requirements. Nonetheless, if clerks see something that causes them to suspect there is a problem, they should address the situation. For example, if they see someone returning multiple envelopes, they should inform the individual they are only allowed to deliver their own ballot unless they are specifically authorized by law to deliver a ballot on behalf of a third party.

## **What consequences may be imposed for any given absentee ballot-related decision?**

Clerks who accept ballots contrary to the Order may be accused of facilitating or committing voter fraud under Wis. Stat. § 12.13(2)(a) or (b)(7) or find themselves the subject of complaints to WEC. But given that the election fraud statutes involve willful neglect or refusal to perform election duties or intentional violations, and the law regarding delivery of absentee ballots and use of drop boxes is unsettled, prosecution for election fraud is unlikely where a clerk is acting in good faith based on a considered interpretation of the law. Clerks who refuse to accept absentee ballots delivered by third parties on behalf of disabled electors may face claims they effectively prevented those voters from voting and face litigation under the ADA, the VRA, or both.

Ultimately, any decision brings the potential for dispute and litigation. This memo is intended to provide options and context that we hope assist with the decision-making process.

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<sup>i</sup> A municipal governing body must act to designate an alternate absentee ballot site for returning voted absentee ballots at least 14 days before absentee ballots are available for the primary or, if there is no primary, at least 14 days before absentee ballots are available for the election. If such sites are designated, then absentee balloting activity may not occur in the municipal clerk's office. Wis. Stat. § 6.855(1). Given that absentee ballots must be available by March 15, 2022 for the upcoming spring election, this is not an option for municipalities unless they have already designated alternative voting sites.

<sup>ii</sup> "Municipal clerk" includes the clerk's authorized representatives. See Wis. Stat. § 5.02(10).

<sup>iii</sup> For example, Wis. Stat. §§ 6.875 and 6.86(3).

<sup>iv</sup> U.S. Dep't of Justice, "The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities," available at <https://www.justice.gov/file/69411/download>.