

LEGAL MEMORANDUM

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RE: 2021 Redistricting Process and Census Delay

DATE: February 9, 2020

BACKGROUND

The U.S. Census Bureau (the “Bureau”) adjusted its 2020 operations due to the COVID-19 pandemic resulting in delays to the Bureau’s reporting and publishing of data (“P.L. data”) necessary to redistrict at the county and municipal levels of government. The P.L. data is typically received no later than April 1, but now is not expected until at least July 30, 2021. Because of these delays, counties will not be able to commence the redistricting process within the timeframe required by statute, and, depending on the extent of the delay, counties may be unable to complete the redistricting process prior to the December 1 deadline for filing nomination papers for the 2022 spring election.

This memorandum provides a brief overview of the statutory deadlines in the county redistricting process, the difficulties faced by counties due to the delayed release of the P.L. data, and potential options to address these issues.

ANALYSIS

A. Key Federal Deadlines

In the typical redistricting process, the Bureau must provide states with the P.L. data no later than March 31 of the year following the census (*i.e.*, March 31, 2021 for the 2020 census). 13 U.S.C. 141(c). However, the Bureau has announced it will not be able to provide the P.L. data until at least July 30, 2021.¹ Importantly, the Bureau has indicated July 30 is the earliest the P.L.

¹ <https://www.npr.org/2021/01/27/961247853/census-numbers-for-dividing-up-house-seats-delayed-until-april-30-bureau-says>

data would be released and has not provided any indication of when counties may actually expect receipt of the P.L. data.

B. State Statutory Deadlines for Counties

1. Step 1 – County Tentative Plan (60 days, but no later than July 1)

The county and municipal redistricting process commences once the state receives the P.L. data and the data is made available to counties. Wis. Stat. § 59.10(3)(b)1. When the P.L. data becomes available, every county has 60 days to create a tentative redistricting plan,² hold a public hearing³ on the tentative plan, and adopt the tentative plan (collectively, “Step 1”). Wis. Stat. § 59.10(3)(b)1. However, Wis. Stat. § 59.10(3)(b)1. also contains a hard deadline of July 1 to complete Step 1 in its entirety (*i.e.*, not simply commence Step 1 by the July 1 deadline). Obviously, the July 1 deadline is impossible for counties to meet given the P.L. data will not be released until sometime after July 30, 2021.

2. Step 2 – Creation of Municipal Wards (60 days)

Counties must then transmit the tentative plan and also a written statement regarding the proposed location of wards to each municipality within the county. Wis. Stat. § 59.10(3)(b)1. Each municipality must then create wards or adjust its ward lines in accordance with the tentative county plan⁴ within 60 days of receipt of the tentative plan (“Step 2”). Wis. Stat. § 59.10(3)(b)2.

3. Step 3 – Adoption of Final County Plan (60 days)

Finally, every county board must hold a public hearing⁵ and adopt a final supervisory district plan within 60 days after every municipality in the county completes Step 2 (“Step 3”). Wis. Stat. § 59.10(3)(b)3. During a typical redistricting process, Step 3 would be completed no later than the end of October. This then gives county clerks sufficient opportunity to prepare for the nomination paper circulation period for the next spring election (the first election utilizing the new districts). The nomination paper circulation period commences on December 1. Wis. Stat. § 8.02.

² The tentative plan must set forth the number of supervisory districts proposed by the board and tentative boundaries or a description of boundary requirements. Wis. Stat. § 59.10(3)(b)1.

³ The public hearing is subject to the Class 3 notice requirements in Wis. Stat. § 985.07, which would require three insertions in the county’s official newspaper.

⁴ Municipalities are not required to strictly comply with the county’s tentative plan, but must (1) make a good faith effort to accommodate the tentative plan for the county or counties in which it is located; and (2) to divide itself into wards in a way that permits the creation of supervisory districts that conform to the population requirements of the tentative plan.

⁵ Like the public hearing on the tentative plan, the public hearing on the final plan is subject to the Class 3 notice requirements in Wis. Stat. § 985.07, which would require three insertions in the county’s official newspaper

C. Consequences for Failure to Adhere to Statutory Deadlines

While there are no direct penalties associated with missing the July 1 statutory deadline discussed above, there are a multitude of consequences and downstream effects that will result from not completing the redistricting process in time.

As mentioned above, the nomination paper circulation period for the 2022 Spring election commences on December 1. The existing county redistricting plan will remain in effect if the redistricting process is not completed prior to this date. See Wis. Stat. § 59.10(3)(b)4. (providing that a final redistricting plan remains in effect until the plan is superseded by a subsequent plan enacted pursuant to statute and filed with the Secretary of State). This scenario would be problematic for several reasons, including:

1. County supervisors are required to be qualified electors and residents of their respective districts. If redistricting is completed after the nomination paper deadline for the 2022 spring election, there could be situations in which candidates for certain districts are no longer residents of their district based on the new redistricting plan. Likewise, if the process is completed after the spring election, county supervisors could automatically vacate their office if they are no long a resident of their district under the new redistricting plan. Wis. Stat. § 17.03(4)(c).
2. Possible legal challenges for failure to comply with the statutory deadlines for redistricting.
3. Possible legal challenges under constitutional redistricting principles (*i.e.*, “one person, one vote” principles) if existing supervisory districts no longer satisfy constitutional tests based on new P.L. data.

D. Potential Solutions.

There are potential solutions to the problems identified above, but implementation would require amendments to existing statutes. Potential solutions include the following:

1. **Solution #1:** Postpone county and municipal redistricting until 2022. This solution requires explicit language providing that the new redistricting plan does not take effect until the 2024 spring election (to avoid the county supervisor vacancy issues discussed above). In addition, an amendment would need to provide express exceptions to Wis. Stat. §§ 5.15(4)(a) and 59.10(3)(c), which currently requires municipalities and counties to redistrict (outside of the normal decennial process) in certain situations after redistricting by the Legislature pursuant to Article IV, Section 3 of the Wisconsin Constitution.
2. **Solution #2:** Delay and condense the county and municipal redistricting schedule provided under current law. For example, the process could be condensed from a 60-60-60 schedule to a 30-30-30 schedule (this would be

the maximum amount of time available if the P.L. data is received by August 1, 2021). However, this solution is problematic because the Bureau has not indicated when the P.L. data will actually be received (the data may be received too late for a sufficient timeframe to be possible). Further, certain county officials have indicated certain counties will simply be unable to comply with a condensed schedule given meeting dates and the public hearing notice requirements.

3. **Solution #3:** Hybrid approach of Solution #1 and Solution #2. Solution #2 would take effect if the P.L. data is actually received and available by August 1, 2021. If the P.L. data is not available by that time, the county and municipal redistricting process would proceed under Solution #1. However, all of the same problems as identified under Solution #2 above still exist.

CONCLUSION

Due to delays in the 2020 U.S. census process, counties will not be able to commence the redistricting process within the timeframe required by statute, and, depending on the extent of the delay, completion of the redistricting process prior to the December 1 deadline for filing nomination papers for the 2022 spring election may be impossible. A statutory change is required to address this issue so that counties and municipalities do not run afoul of their statutory duties and also to avoid downstream consequences resulting from the failure to redistrict in the time provided under current law.

If you have any questions surrounding this memorandum, please do not hesitate to contact us. We appreciate the opportunity to be of service to the Association and its member counties.