



## Q & A ON ELECTION RECOUNT PROCESSES AND PROCEDURES DURING A GLOBAL PANDEMIC

November 16, 2020

County governments around the State continue to face unprecedented situations and issues in response to the COVID-19 pandemic. In light of the close presidential election results in Wisconsin, county and municipal clerks throughout the state are preparing for a potential election recount. The Wisconsin Counties Association and its general counsel, von Briesen & Roper, s.c., have received many questions surrounding election recount procedures, particularly surrounding what safety measures may be implemented in light of the ongoing pandemic.

Our general counsel has prepared the Q & A below to provide information related to election recount procedures based upon the questions received. This Q & A will focus on questions surrounding the public's right to monitor the recount process and safety measures that may be implemented due to the pandemic. A broader overview of the election recount process in Wisconsin can be found in the Wisconsin Elections Commission's ("WEC") [Election Recount Procedure Manual](#).

This information should be reviewed carefully with corporation counsel and WEC guidance to ensure county compliance with other applicable laws and regulations, including its own policies and procedures.

### Election Recount Procedures

**Q: Who conducts a recount, and when does the recount begin?**

**A:** *In a presidential election, the county boards of canvassers conduct the recount process for the counties in which the contested votes are cast. WEC recommends that the same people who initially canvassed the election results make up the board of canvassers for the recount. However, other qualified individuals may be appointed to fill the temporary vacancy if necessary. For a presidential election, the board of canvassers must convene and begin the recount process no later than 9 a.m. on the third day following the county clerk's receipt of the WEC's order to commence the recount.*

**Q: Who may observe the recount?**

**A:** *Any member of the public may observe the recount. Generally, the candidates and/or their representatives or legal counsel, and media representatives are the typical attendees observing the recount process. However, the statute also permits all other "interested persons" to attend and observe as well.*

**Q: Is the board of canvassers required to allow the public to observe the recount process in person?**

**A:** *Yes. Those who wish to observe the recount are entitled to do so in person. The relevant statutory language provides that “[t]he petitioner, all opposing candidates and interested persons shall be entitled to be present in person and by counsel to observe the proceedings.”<sup>1</sup> (emphasis added).*

**Q: May the board of canvassers require virtual observance in place of in person attendance?**

**A:** *No, those who wish to observe the recount are entitled to attend in person. However, nothing prohibits the board of canvassers from making virtual observation available and encouraging the public to observe the recount process virtually rather than by attending in person. Any notices or communications regarding virtual observation should make it clear that in person attendance is permitted in order to avoid any confusion.*

**Q: What does it mean to “observe” the recount process? What are observers entitled to do?**

**A:** *All steps of the recount process must be performed publicly and the board of canvassers must allow the candidates and their representatives and/or legal counsel to view and identify the election materials. The candidates, the person demanding the recount and their authorized representatives and counsel may also object to the counting of any ballot. However, an important distinction from the general right to attend and observe the recount is that other “interested persons” (e.g., members of the general public) do not have the right to view and identify election materials. This right is reserved to the person demanding the recount, candidates and their representatives/legal counsel. Furthermore, only the canvass board members and the tabulators are permitted to handle and touch the ballots and other election materials.*

**Q: May the board of canvassers require social distancing or restrict the areas in which observers may be present?**

**A:** *The board of canvassers may require social distancing to an extent. Importantly, the board of canvassers is authorized to exercise reasonable control over the conduct of the recount.<sup>2</sup> This is to ensure that the canvassers and tabulators do not experience interference from any person observing the recount. All persons who are not under the supervision of the board of canvassers are considered observers and are subject to the observer rules established by the WEC and the board of canvassers.<sup>3</sup> All observers are also required to wear badges or nametags identifying themselves and their role (candidate, media, etc.).<sup>4</sup>*

*The board of canvassers’ authority includes the ability to establish marked observer areas that observers must remain within unless otherwise permitted by the board of canvassers.<sup>5</sup> However, candidates and their representatives/legal counsel must still be able to actually*

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<sup>1</sup> Wis. Stat. § 9.01(3).

<sup>2</sup> [Election Recount Procedure Manual](#), p. 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

view and identify the election materials.<sup>6</sup> WEC also advises that preference should be given to candidates and their representatives if there is not sufficient room for all observers to view the election materials. While it is apparent that extra safety measures, such as social distancing requirements, are reasonable under the circumstances, there is no clear direction in statute or the administrative code regarding the imposition of such measures. Nonetheless, it would seem prudent to seek voluntary compliance with social distancing and other reasonable safety measures.

Further, the board of canvassers may issue a warning if any observer engages in disruptive behavior that in the opinion of the board of canvassers threatens the orderly conduct of the recount.<sup>7</sup> The board of canvassers may then order the observer's removal if the observer does not cease the offending conduct.<sup>8</sup> Given this, a person may be warned and subsequently ordered removed, if necessary, if he/she fails to stay in restricted areas and the failure causes a disturbance.

**Q: May the board of canvassers require observers to wear masks/face coverings?**

**A:** Yes. While the public is entitled to observe the recount process in person, this right is not unlimited. As noted above, the board of canvassers is authorized to exercise reasonable control over the conduct of the recount. Again, additional safety measures will likely be considered "reasonable" because of the pandemic. Further, the Governor's mask mandate remains in effect (currently until November 21, 2020) statewide and also imposes face covering requirements in all public places.<sup>9</sup>

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<sup>6</sup> As noted above, other "interested persons" are not entitled to view and identify the election materials.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See [Executive Order #90](#) and [Emergency Order #1](#).