

STATEMENT OF SCOPE
PURSUANT TO WIS. STAT. § 227.24
WISCONSIN ELECTIONS COMMISSION

Rule No.: Wis. Adm. Code EL Chapter 6
Relating to: Mandatory Use of Uniform Instructions for Absentee Voting
Rule Type: Emergency Rule pursuant to Wis. Stat. § 227.24(1)(a)

FINDING OF EMERGENCY:

This Statement of Scope pertains to the promulgation of an emergency rule under Wis. Stat. § 227.24(1)(a). The preservation of the public peace, safety, and welfare necessitates putting the rule into effect prior to the time it would take effect of the agency complied with the procedures. Wis. Stat. § 227.24(1)(a).

The preservation of peace, safety, and welfare of Wisconsin elections necessitates putting this rule into effect prior to the time it would take to promulgate it normally under chapter 227. In only six months, February 2024 will kick off the election cycle for a major presidential election year, which is expected to produce high voter turnout and high levels of scrutiny on Wisconsin's election procedures. Emergency rulemaking will provide the Commission an opportunity to address election administration needs ahead of the elections in 2024. There simply is not enough time to promulgate permanent rules on these topics and fully implement them before major elections in 2024, unless the Commission promulgates them as emergency rules under § 227.24(1)(a), although the Commission has directed staff to simultaneously pursue permanent rules to ensure long-term compliance.

RULE ANALYSIS

Pursuant to §§ 227.24(1)(e)1d. & 227.135(1):

a) A description of the objective of the proposed rule.

The Commission is statutorily charged with prescribing Uniform Instructions for municipalities to provide to absent electors. Wis. Stat. § 6.869. The Uniform Instructions provide voters with detailed information on how to properly complete and return their absentee ballots. Copies of the Uniform Instructions are printed by municipal clerks and included with all absentee ballots that are sent to voters in Wisconsin. The proposed administrative rule would remove an ambiguity and require municipalities to use the Commission-approved version of the Uniform Instructions, without changes, when mailing out absentee ballots for the upcoming election cycles. This would ensure that all absentee voters receive consistent information regarding the process of completing and returning absentee ballots and would eliminate the possibility of different voters receiving conflicting information.

b) Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives.

Currently, there is no statute or administrative rule in place that clearly requires municipalities to include the Commission-approved version of the Uniform Instructions in absentee ballot mailings to voters. Existing statutory language in chapter 6 of the statutes contains inconsistent references to instructions prescribed by the Commission and does not clearly instruct clerks to use only the version approved by the Commission.

The Commission expects continued scrutiny of Wisconsin's election administration in 2024, and requiring municipalities to use the same version of the Uniform Instructions will ensure that all absentee electors, regardless of voter type or municipality, are receiving instructions which are compliant with recent changes in

the law. This rule would bring the added benefit of reducing confusion that is sometimes caused by differences in election administration and legal interpretations in different municipalities. This requirement would not impact a clerk's ability to provide other instructions that do not conflict with the Uniform Instructions or otherwise violate state law. For example, clerks may wish to add additional instructions regarding their hours of operation and clerk staffing for voting functions, and would be permitted to do so under the new proposed rule.

The main alternative would be to not promulgate the rule, which would leave clerks with the Commission's prescribed instructions, but ambiguity concerning whether clerks can alter the instructions and send out their own versions. The Commission could issue guidance to all clerks to advise that they use only the Commission's instructions. However, in the absence of an administrative rule, clerks would not be required to follow Commission guidance unless directed to do so in the context of an individual administrative complaint. If clerks issue their own instructions, the Commission could only review differing versions one-by-one in the context of a complaint submitted to the Commission.

c) Detailed explanation of statutory authority for the rule (including the statutory citation and language).

General Authority pursuant to Wis. Stat. § 5.05(1): "General authority. The 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. Pursuant to such responsibility, the commission may:

- (f) 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."

Specific Authority pursuant to Wis. Stat. § 6.869: "Uniform instructions. The commission shall prescribe uniform instructions for municipalities to provide to absentee electors. The instructions shall include the specific means of electronic communication that an absentee elector may use to file an application for an absentee ballot and, if the absentee elector is required to register, to request a registration form or change his or her registration. The instructions shall include information concerning whether proof of identification is required to be presented or enclosed. The instructions shall also include information concerning the procedure for correcting errors in marking a ballot and obtaining a replacement for a spoiled ballot. The procedure shall, to the extent possible, respect the privacy of each elector and preserve the confidentiality of each elector's vote."

Agency rulemaking authority pursuant to Wis. Stats. § 227.11(2)(a): "Agency rulemaking authority. Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation."

d) An estimate of the amount of time agency employees will spend developing the proposed rule and of other resources needed to develop the rule.

WEC staff estimates that it would take approximately 60 staff hours to draft a scope statement and carry out the subsequent steps to promulgate an administrative rule.

e) A description of all of the entities that may be affected by the proposed rule.

This would primarily affect clerks and election officials, and it would be likely to provide necessary clarity, authority, and streamline the inclusion of the Commission-approved Uniform Instructions in absentee ballot mailings to voters. The proposed rule would do so by codifying existing practices and would require minimal

compliance outreach and training to clerks because of their familiarity with including Uniform Instructions as part of absentee ballot materials. The effect of the proposed rule, and subsequent processes, would not impact small businesses because all of the requirements would fall on municipal clerks. These processes have voter implications as well, but the proposed rule should minimize the risk that the ballot would be invalidated based on absentee voting or return deficiencies.

f) A summary and preliminary comparison of any existing or proposed federal regulation that addresses or is intended to address the activities to be regulated by the proposed rule.

N/A

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