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September 17, 2020

SENT VIA EMAIL

Re: Legal Duties of Michigan Election Law Clerks for Absentee Voting

Dear Clerk:

As you know, in 2018, Michigan voters overwhelmingly approved an amendment (Proposal 3) to the Michigan Constitution, which now provides a constitutional right to vote by absentee ballot in person or by mail during the 40 days before an election. For the upcoming general election, that 40-day window begins on **September 24, 2020**. Michigan statutes also require that election clerks “immediately” issue absentee ballots to voters who apply for one—which both the Secretary of State and courts have interpreted as requiring the ballot to be mailed within 24 hours of receiving an application.

We write to emphasize how critical it is that every city and township clerk comply with these legal requirements so that the constitutional rights of all voters in Michigan are protected. Although we hope that all election clerks will comply with their legal duties, the ACLU of Michigan stands ready to enforce the rights of Michigan voters in court if necessary—as we did in the weeks leading up to the August 2020 primary election. Thus, in light of the fast-approaching general election, we offer the information and guidance below to help ensure that all election clerks are fully aware of, and comply with, their legal duties to ensure that all Michiganders’ right to vote is honored.

I. Applications for Absentee Ballots Must Be Processed Immediately.

Michigan law requires, at a minimum, that election clerks issue absentee voter ballots to voters: (1) no later than September 24 in response to any absentee ballot applications that have already been submitted by that date; and (2) within 24 hours of receipt of any absentee ballot application received on September 24 or later.¹

First, if an absentee ballot “application is received before the printing of the absent voter ballots,” the clerk must issue a ballot to the applicant “as soon as the ballots are received by the clerk.” MCL 168.761(1). This year, county clerks are required to deliver general election ballots

¹ In addition, election clerks must issue absentee ballots “in the same order in which applications are received.” MCL 168.761(4).

to municipal clerks by September 19, 2020.² To ensure compliance with the “as soon as” requirement, the Secretary of State’s office has directed that ***election clerks must issue absentee ballots in response to any pending applications no later than September 24—the start of the 40-day period during which Michigan voters have a constitutional right to cast an absentee ballot by mail.*** See E-mail from Jonathan Brater, Director, Mich. Dep’t. of Elections (February 6, 2020) (“By the 40th day before the election, AV ballots need to be available for issuance. For voters who have requested an AV ballot by mail, this means mailing ballots *on day 40.*”) (emphases added); see also Const 1963, art 2, § 4(1)(g).

Second, for applications received after the delivery of ballots to municipal clerks, election clerks must issue an absentee ballot to the voter “*immediately* upon receipt of the application.” MCL 168.761(1) (emphasis added). As the Secretary of State has directed and the Michigan Court of Appeals has recognized, this means that ***election clerks must issue absentee ballots within 24 hours of receipt of an application.*** See *League of Women Voters v Secretary of State*, ___ Mich ___; ___ NW2d ___; 2020 WL 3980216 (2020) (Docket No. 353654); slip op. at 15.

In addition, for applications that are received online by email or through the Qualified Voter File, the date that it is “received” is based on when the application is made electronically available to the clerk’s office (not when someone in your office elects to print it). See Mich. Bureau of Elections, News Update for Election Administration: Absent Voter Application through MVIC Launching Today! (June 12, 2020) (stating that each voter’s online submission via the QVF “generates an application that is automatically sent to the respective jurisdiction’s print queue,” and “[t]he date the application is received is automatically recorded as received”).

II. Offices Must Be Open for In-Person Absentee Voting.

The 2018 constitutional amendment also requires election clerks to allow all registered voters to apply for, receive, and return an absentee ballot at an in-person location from September 24, 2020 through November 3, 2020. Specifically, the Michigan Constitution provides that during the 40 days before an election:

- Registered voters shall have the “right to choose whether the absentee ballot is applied for, received and submitted in person or by mail.” Const 1963, art 2, § 4(1)(g).
- Election clerks must make available “at least one (1) location to issue and receive absent voter ballots during [the clerk’s] regularly scheduled business hours.” *Id.*
- During the “Saturday and/or Sunday immediately prior to the election”—*i.e.*, on October 31, 2020 and/or November 1, 2020—election clerks must make available at least one location to issue and receive absent voter ballots “for at least eight (8) hours.” *Id.*

² Jocelyn Benson, Secretary of State, *2020 Michigan Election Dates*, https://www.michigan.gov/documents/sos/2020_Elec-Dates-Booklet_ED-12_10-09-19_668275_7.pdf.

The failure to test ballots before the 40-day window must not prevent a ballot from being issued to a voter who applies in person: “For voters who request AV ballots in person, ballots must be available for immediate issuance—even if testing is not completed.” J. Brater E-mail (February 6, 2020) (emphasis added).

III. **Photo ID Is Not Required for Registration or Voting.**

Voters are not required to provide *photo* identification to register to vote or to vote at any point during the 40-day period before Election Day or on Election Day.

A. **Voting In Person Does Not Require Photo Identification.**

Election clerks are required to *ask* for photo identification of registered voters who are voting at a polling location or voting an absentee ballot in person at the clerk’s office or satellite office. ***But if a registered voter cannot provide identification upon request, the clerk cannot prevent that voter from voting.***³ Instead, the clerk must offer the voter the option to complete an affidavit indicating that the voter is “not in possession of photo identification.”⁴ This affidavit option applies to both (1) a voter who does not possess a qualifying photo identification; and (2) a voter who possesses photo identification but failed to bring it with them.⁵

B. **Registering to Vote In Person Does Not Require Photo Identification.**

Election clerks are required to *ask* for photo identification when an individual appears in person to register to vote. ***But if an individual cannot provide photo identification upon request, the clerk cannot prevent that individual from registering to vote.*** Instead, the clerk must offer the individual the option to complete an affidavit indicating that the individual is “not in possession of photo identification.”⁶ This affidavit option applies to both (1) an individual who does not possess a qualifying photo identification; and (2) an individual who possesses photo identification but failed to bring it with them.⁷

C. **Registering to Vote In Person May Require Proof of Residency.**

Prior to October 20, 2020, an individual does *not* need to provide proof of residency when registering to vote in person at a clerk’s office or satellite office.

³ Secretary of State, “What is the Voter ID requirement?”
https://www.michigan.gov/sos/0,4670,7-127-5647_12539_29836-182649--,00.html.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Beginning on October 20, 2020, voters must provide proof of residency in order to register to vote and be eligible to vote in the election on November 3. ***Proof of residency may include but is not limited to photo identification.*** Voters may also provide proof of residency in the form of a current utility bill; bank statement; paycheck or government check; or other government document.

Conclusion

The 40-day window before the November 3 general election is fast approaching. We know that you and the other clerks around the state are working hard to ensure that the rights of Michigan voters are respected and enforced. The ACLU sincerely hopes that every clerk's office will comply with its legal duties as outlined above, and that as a result, more voters than ever will be able to make their voices heard in our democracy this year. Please do not hesitate to contact us if we can provide assistance or further guidance at this busy time.

Sincerely,



Sharon Dolente, Voting Rights Strategist
Daniel Korobkin, Legal Director
ACLU of Michigan
(313) 678-6838

Cc: Secretary of State Jocelyn Benson, secretary@michigan.gov

Attachment:
Feb. 6 Jonathan Brater Email

From: Brater, Jonathan (MDOS) <BraterJ@michigan.gov>
Sent: Thursday, February 6, 2020 10:30 AM
To: Brater, Jonathan (MDOS)
Subject: Absent Voter Ballot Issuance

Dear Clerks:

As we all experience our first election of the 2020 cycle, I know you are working hard, as we are, to successfully administer our first statewide election since the constitutional changes enacted by voters in 2018. As we strive to provide the best possible experience for our voters, we understand the challenges associated with adjusting to these new laws, including the no-reason absent voter ballot rules. Most jurisdictions are administering either their first election or their first high-turnout election under the new laws.

The constitution requires that absent voter ballots be made available to voters upon application within 40 days of an election. This, coupled with the fact that all Michigan voters now have the right to vote an AV ballot, has put increased emphasis on the importance of issuing ballots in a timely fashion. Completing this task is inherently difficult because the 60-day certification deadline leaves little time for proofing, printing, delivering, testing, and issuing AV ballots—particularly if there are any errors in any stage of the process. We also understand that this year, vendors delivered ballots to many jurisdictions later than in the past.

Michigan’s constitution provides all voters “the right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail.” Mich. Const. Art. II, § 4. The Michigan Election Law requires clerks to issue AV ballots “immediately upon receipt of the application or, if the application is received before the printing of the absent voter ballots, as soon as the ballots are received by the clerks.” MCL 168.761. **In order to comply with the constitution and the election law, clerks must immediately issue AV ballots upon application within this 40-day window.**

In our collective efforts to ensure that every voter who has requested an AV ballot receives that ballot 40 days prior to the election and that every voter who requests a ballot within 40 days of an election is issued a ballot immediately, I am writing to reinforce some priority points from our guidance on AV ballot issuance.

1. Ballots should be tested early. As we have instructed in the past, ballots should be tested as soon as possible upon receipt and before the bulk of your ballots are issued.
2. By the 40th day before the election, AV ballots need to be available for issuance. For voters who have requested an AV ballot by mail, this means mailing ballots on day 40. For voters who request AV ballots in person, ballots must be available for immediate issuance—even if testing is not completed. Keep in mind that if an issue is discovered upon testing, these ballots can be duplicated on election day. The number of ballots issued in person in this window will likely be small.
3. Although some degree of batch mailing is appropriate and advisable, AV requests should be processed, and ballots issued, within 24 hours of receipt of an application (if it’s a Friday, this means by Monday unless it’s the Friday before the election).

We know there is a tremendous amount of work that goes into preparing and mailing absent voter ballots, and we know that ensuring the priorities above are met can be difficult when ballots arrive later than expected. Going forward, the Bureau will be taking additional steps to help ensure counties can and do deliver ballots to cities and townships by the

45th day before the election, and that cities and townships have as much time as possible to test ballots, process applications, and have ballots available to voters for the entirety of the 40-day period.

First, the Bureau will ensure ballots are proofed (and if correct, approved), as close as possible to the 60-day certification deadline. This year the majority of county requests were processed within 1 to 2 business days after the 60-day deadline, but we will find a way condense this further. We'll also work with counties to help ensure we get ballots for review as early as possible.

Second, we will take steps to make sure vendors get ballots to you more quickly. If you experienced an undue delay receiving printed ballots, please let us know and we'll work with you and the vendor to ensure it doesn't happen again.

If there are other steps we can take or other assistance we can provide to facilitate AV ballot delivery and issuance, please let us know. We want to do everything we can to support you in ensuring our voters enjoy the full extent of their constitutional rights. We appreciate the hard work you do, and we are committed to finding and implementing solutions to issues that may arise.

Sincerely,

Jonathan Brater

Director of Elections

Michigan Department of State

Secretary of State Jocelyn Benson

Bureau of Elections