



*General Assembly of the Commonwealth of Pennsylvania*

**JOINT STATE GOVERNMENT COMMISSION**

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**ACT 12 OF 2020  
ELECTION LAW ADVISORY BOARD**

**PROPOSED TOPICS**

**SUMMER 2020**

The following topics, which may be of interest to Election Law Advisory Board members, were chosen by the Joint State Government Commission after an examination of the Election Code.

**Article I. Preliminary Provisions – Definitions — 25 P.S. § 2602(z.6)**

Act 12 of 2020 amended the definition of “qualified mail-in elector” from any qualified elector who is not otherwise qualified to be an absentee elector to “a qualified elector ... not includ[ing] a person specifically prohibited from being a qualified absentee elector.” The second clause could be read to mean that an elector must qualify as an absentee elector before being qualified as a mail-in elector. The Election Law Advisory Board may wish to discuss clarifying this definition if intent of the statutory scheme is to have separate requirements for mail-in electors and absentee electors.

**Article V. Election Districts and Polling Places – Polling places to be selected by county board — 25 P.S. § 2726**

Subsection (a) of 25 P.S. § 2726 provides that the “county board of elections ... may, at any time, for any reason that may seem proper to it ... change the polling place within any election district.” The recently completed primary election (conducted June 2, 2020) saw numerous instances of polling places being changed to accommodate the Governor’s orders relating to the Coronavirus outbreak. In addition to polling places being moved, voting wards were also combined at one polling place in some cases.

Given that there were a number of polling place changes during this most recent primary election cycle, it may be helpful to discuss any issues that members of the Election Law Advisory Board are aware of regarding the changing of polling stations.

**Article XIII. Voting by Qualified Absentee Electors – Qualified Absentee Electors — 25 P.S. § 3146.1**

Those permitted to vote by absentee ballot are circumscribed in this section. The most common reasons for eligibility to cast an absentee ballot are for those who will be outside of their home municipality on Election Day and those who cannot make it to the polls due to injury, illness, or disability. However, Act 77 of 2019 allows all “qualified mail-in electors” to vote by mail. A “qualified mail-in elector” is any elector who does not qualify as an absentee elector — meaning that anyone otherwise eligible to vote can now vote by mail.

The law governing mail-in voting may make it unnecessary to have a separate provision for absentee ballots. Were the provision governing absentee electors removed, the definition of qualified mail-in electors would need to be amended from its current definition to simply “any qualified elector.”

**Article XIII. Voting by Qualified Absentee Electors – Applications for Official Absentee Ballots — 25 P.S. § 3146.2**

The provision in the Election Code governing applications for absentee ballots permits a qualified elector to “apply at any time before any primary or election for any official absentee ballot in person ... or on any official county board of election form.” The provision continues in subsection (i)(1) that [a]pplication for official absentee ballots shall be on physical and electronic forms...” and that “[n]o written application or personal request shall be necessary to receive or access the application forms.” In other words, there must be a form to request an absentee ballot via the Internet, and electors may request via the Internet that an absentee ballot be mailed to them the day before an election is held.

However, there may not be enough time to process the request, mail the absentee ballot to the elector, and count the ballot until after the election is held. The process of being able to request an absentee ballot on the eve of an election and then receive and return the ballot after the election has been held may also be confusing to electors. The Election Law Advisory Board may wish to discuss amending this statutory provision to require absentee ballot electors request their absentee ballot in advance, particularly if they are making the request for an absentee ballot via the Internet.

**Article XIII-D. Voting by Qualified Mail-in Electors – Applications for official mail-in ballots — 25 P.S. § 3150.12**

This provision of the Election Code provides “(a) General Rule. – A qualified elector ... may apply at any time before any primary or election for an official mail-in ballot in person or on any official county board of election form addressed to the Secretary of the Commonwealth or the county board of election of the county in which the qualified elector's voting residence is located.”

The language of subsection (a) permits an elector to apply for a mail-in ballot the day before a primary or general election. This could cause confusion on the part of the elector if they

request a mail-in ballot over the Internet (“in electronic form” — as permitted in subsection (f)), as they will not be able to receive a copy of the mail-in ballot before the election if requested in such a short time frame.

This is the same issue described above relating to absentee ballot requests pursuant to § 3146.2.

**Article XIII-D. Voting by Qualified Mail-in Electors – Date of application for mail-in ballot — 25 P.S. § 3150.12a**

This provision of the Election Code provides that “[a]pplications for mail-in ballots shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of any primary or election.” This provision could be interpreted as prohibiting the processing of applications for mail-in ballots if they are submitted to the county board after this prescribed time frame.

The statutory language in this section appears to create a situation where an elector can request a mail-in ballot up to the day before an election but the application may not be processed if it is not received by the county election board prior to the 5 o'clock Tuesday cut-off date. The language should be amended to provide clarification to electors.

For instance, it could be amended to provide that only in-person requests for a mail-in ballot can be made to the county board of election up to the day before an election. For electronically-submitted requests for a mail-in ballot, the Election Law Advisory Board may want to consider moving the deadline to allow for time to process the electronic request. Further, the Election Law Advisory Board may want to consider amending § 3150.12a(a) to clarify that in-person applications for mail-in ballots will be processed up to the day before the election but that requests sent to the county election board by other means (such as via the Internet) have a cut-off date for processing.

**Article XIV. Returns of Primaries and Elections – Secretary of the Commonwealth to tabulate, compute and canvass returns — 25 P.S. § 3159**

With the new amendments to the Election Code permitting mail-in voting by any qualified elector who applies to do so, there has been some question regarding how quickly the election results can be tabulated. Because § 3150.12 permits an elector to request a mail-in ballot up to the day before the election, there may be a lag in time between when the elector postmarks the ballot and when it is received by the county election office to be tabulated. For that reason, Governor Wolf announced that Allegheny, Dauphin, Delaware, Erie, Montgomery and Philadelphia counties must wait until 5 p.m. on June 9, 2020 to receive and count all absentee and mail-in ballots. To be counted, the ballots must have been postmarked no later than June 2, 2020.

Section 3150.16 of the Election Code requires that a mail-in elector “on or before eight o'clock P.M. the day of the primary or election” mail or deliver by hand their ballot to the county

board of elections. However, the Election Code also appears to require that absentee and mail-in ballots must be received by 8 o'clock P.M. on the day of the election in order to be canvassed. Section 3146.8(g)(1)(ii) states that the absentee ballot or mail-in ballot "shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election."

It is unclear if absentee or mail-in ballots — which could be mailed in compliance with § 3150.16 and be received later than 8 o'clock P.M. on the day of the election or primary — are canvassed differently if received outside of this timeframe, or if such ballots are barred from being counted. The Election Law Advisory Board may wish to discuss amending the Election Code to ensure the timely and orderly receipt of absentee and mail-in ballots.

### **Article XVI. Primary and Election Expenses – Advertising — 25 P.S. § 3258**

Subsection (b) of this provision prohibits a candidate from running a campaign advertisement mentioning an opposing candidate within 120 hours of an election, unless the candidate who wishes to run such an ad complies with a process laid out in the subsection. In 1980, the Pennsylvania Commonwealth Court struck down this statute, holding that "Section [3258] sweeps far too broadly and, in so doing, impermissibly intrudes upon constitutionally protected speech." Commonwealth v. Wadzinski, 422 A.2d 124 (Pa. Commw. 1980).

Given that this section of the law was struck down by the Commonwealth Court, the Election Law Advisory Board may wish to recommend repealing this language.

### **Title 25 Pa. C. S. A. § 1901 — Removal of Electors**

Under the federal National Voting Rights Act, each state is required to have a procedure for removing persons who are no longer eligible to vote from the voter rolls. Pennsylvania's law establishes registration commissions in each county. Each of these commissions is charged with enforcing the federally-mandated voter removal provision of 25 Pa. C. S. § 1901 within its jurisdiction.

The voter removal provision requires that the county send a notice "to any registered elector who has not voted nor appeared to vote during the period beginning five years before the date of the notice and ending on the date of the notice." If an elector who receives such a notice fails to respond, they are to be placed on an inactive vote list. Further, if such an elector has not voted in the last two federal elections, the commission appears to be required to remove them from the voter rolls.

There has been recent federal litigation over how the registration commission in several counties within the Commonwealth are carrying out these duties. The plaintiff, Judicial Watch, a non-profit law firm, alleges that Bucks, Chester, and Delaware counties are not utilizing the voter removal process described above to remove voters. The counties and the Pennsylvania Department of State appear to counter that removing active voters once they move residences is

sufficient to fulfill their obligation under the NVRA, and that they do not need to send out notices to voters who have not voted in the preceding five years.<sup>1</sup>

It is unclear what result this litigation will have. However, the Election Law Advisory Board may want to discuss the issue presented in this lawsuit — removing inactive or ineligible voters from the county voter rolls — as well as ancillary issues such as uniformity in application of the election laws across the counties, the oversight of the county boards of election by the Pennsylvania Department of State, and how the Commonwealth oversees the county boards of election.

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<sup>1</sup> Judicial Watch, Inc. v. Commonwealth of Pennsylvania, et al., Case No. 1:02-at-06000-UN, M.D. PA (Apr. 28, 2020). <https://www.judicialwatch.org/wp-content/uploads/2020/04/JW-v-PA-NVRA-complaint-06000-1.pdf>.