



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia  
Secretary Of State

**NOTICE OF AN EMERGENCY RULE**

AGENCY: Secretary Of State

TITLE-SERIES: 153-53

RULE TYPE: Legislative Amendment to Existing Rule: No

RULE NAME: ELECTION PROCESSES AND ABSENTEE  
ELIGIBILITY DURING STATE OF EMERGENCY

CITE STATUTORY AUTHORITY FOR PROMULGATING EMERGENCY RULE:

3-1A-6(e)

IF THE EMERGENCY RULE WAS PROMULGATED TO COMPLY WITH A TIME LIMIT ESTABLISHED BY CODE OR FEDERAL STATUTE OR REGULATION, CITE THE CODE PROVISION, FEDERAL STATUTE OR REGULATION AND TIME LIMIT ESTABLISHED THEREIN:

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THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY THE SECRETARY OF STATE OR THE 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST. THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Pursuant to the Governors Proclamation declaring a State of Emergency for a natural disaster on March 16, 2020, the Attorney Generals Opinion Letter entered on March 18, 2020, and the Secretary of States authority provided in W. Va. Code § 3-1A-6(e)(1), this Rule establishes guidance and clarity regarding various election processes and absentee eligibility.

Furthermore, due to the emergency nature of a State of Emergency, pursuant to W. Va. Code § 3-1A-6(e) and W. Va. Code § 15-5-6(c)(7), the Secretary of State has the authority to issue this Rule upon declaration of a State of Emergency for a natural disaster by Proclamation of the Governor without regard to the regular rule-making procedures set forth in W. Va. Code § 29A-3-1 et seq. Therefore, there shall be no public notice and comment period for Rules filed by the Secretary of State during a State of Emergency declared for a natural disaster, and this Rule shall take effect upon filing.

DOES THIS EMERGENCY RULE REPEAL A CURRENT RULE? No

HAS THE SAME OR SIMILAR EMERGENCY RULE PREVIOUSLY BEEN FILED AND OR EXPIRED? No

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

N/a

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

N/a

C. ECONOMIC IMPACT ON THE STATE OR ITS RESIDENTS:

N/a

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2020 Increase/Decrease (use "-")	2021 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
<b>2. Estimated Total Revenues</b>			

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

**BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.**

Yes

Donald Kersey--By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 153  
LEGISLATIVE RULE  
SECRETARY OF STATE

SERIES 53  
ELECTION PROCESSES AND ABSENTEE ELIGIBILITY DURING STATE OF EMERGENCY

**§ 153-53-1. General.**

1.1. Scope. -- Pursuant to the Governor's Proclamation declaring a State of Emergency for a natural disaster on March 16, 2020, the Attorney General's Opinion Letter entered on March 18, 2020, and the Secretary of State's authority provided in W. Va. Code § 3-1A-6(e)(1), this Rule establishes guidance and clarity regarding various election processes and absentee eligibility.

Furthermore, while this Rule cannot violate or alter clear statutory requirements in Chapter Three of the West Virginia Code, the law is construed in favor of enfranchisement, not disenfranchisement. Therefore, the provisions of this Rule shall be construed in favor of broader access for eligible voters to uphold the integrity of an election and ensure all eligible voters have the opportunity to cast a valid ballot in an election held during the current State of Emergency.

1.2. Authority. -- W. Va. Code § 3-1A-6(e)(1).

1.3. Filing Date. -- March 20, 2020.

1.4. Effective Date. -- March 20, 2020.

1.5. Sunset Provision. -- This rule shall terminate on the date of a subsequent Proclamation issued by the Governor declaring the State of Emergency is no longer in effect.

**§ 153-53-2. Definitions.**

2.1. "Confined" means a person who is restricted to a specific location for reasons beyond that person's control, including a recommendation by state or federal authorities for the person to self-quarantine, avoid public places or close contact with other persons.

2.2. "County clerk" means the clerk of a West Virginia county commission.

2.3. "Disaster" is defined in W. Va. Code § 15-5-2(h), which definition includes the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause, epidemic, air contamination, or other public calamity requiring emergency action.

2.4. "During or immediately preceding an election" means the time period starting with the first day of candidate filing established in W. Va. Code § 3-5-7(c), and continuing through the certification of results for any primary, general, or special election.

2.5. "Natural disaster" means a disaster caused by the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural cause, including fire, flood, earthquake, wind, snow, storm, epidemic, air contamination, blight, drought, infestation or other public calamity requiring emergency action.

2.6. “Other medical reason” means any threat to a person’s health posed by an epidemic, pandemic, outbreak, disease, virus, or other medical emergency, which creates potential harm to the public interest, peace, health, safety, or welfare of citizens or voters.

2.7. “Poll worker” or “poll workers” mean one or more poll clerks or election commissioners assigned to a precinct by a county clerk for election-related duties in an election.

2.8. “Team” means two poll workers of opposite or different political parties assigned to a precinct by a county clerk for election-related duties in an election.

**§153-53-3. Absentee-By-Mail Voting Eligibility.**

3.1. Pursuant to W. Va. Code § 3-3-1(b), registered and other qualified voters in all West Virginia counties are authorized to vote an absentee ballot by mail under the following conditions:

3.1.1. If the voter is confined to a specific location and prevented from voting in person throughout the period of voting in person because of disability, illness, injury, or other medical reason;

3.1.2. The voter marks the first box in Section 4.A. on the West Virginia Absentee Ballot Application for “*Illness, injury or other medical reason which keeps me confined*”; and

3.1.3. All other requirements and deadlines for voting an absentee-by-mail ballot set forth in W. Va. Code § 3-3-1 *et seq.* are satisfied.

3.2. The procedures for applying for and receiving an absentee-by-mail ballot from a county clerk set forth in W. Va. Code § 3-3-5 shall remain in full force and effect during a State of Emergency.

3.3. The following statutory crimes set forth in the West Virginia Code related to absentee ballot voting, election fraud, or voting fraud shall remain in full force and effect during a State of Emergency. The Secretary of State shall exercise the authority provided in Chapter 3 of the West Virginia Code to fully investigate and refer for criminal prosecution any person that commits any election crime, including but not limited to:

3.3.4. Any person who, with the intent to commit fraud, obtains, removes, or disseminates an absent voter’s ballot, intimidates an absent voter, or completes or alters an absent voter’s ballot, which is a felony pursuant to W. Va. Code § 3-9-19;

3.3.5. Improper removal or possession of any ballot outside of its statutory storage place or location, which is a felony pursuant to W. Va. Code § 3-9-2;

3.3.6. Vote buying or promising a thing of value to any person as consideration for the voter to cast a vote for or against any candidate for any office, which is felony pursuant to W. Va. Code § 3-9-13;

3.3.7. Falsely swearing on any affidavit related to an absentee-by-mail applications, ballot, or other election-related affidavit, which is a misdemeanor pursuant to W. Va. Code §§ 3-3-4 and 3-9-3;

3.3.8. Counseling, advising, aiding or abetting another in the commission of false swearing, which is a misdemeanor pursuant to W. Va. Code §§ 3-3-4 and 3-9-3;

3.3.9. Signing the name of a voter without the voter's consent on any certificate, application, ballot, report, statement or writing with intent to mislead and deceive, which is a misdemeanor pursuant to W. Va. Code § 3-9-1(h);

3.3.10. Inducing, attempting to induce, or conspiring with any voter to write, paste or otherwise place on the ballot a name of any person, or any sign or device of any kind, as a distinguishing mark by which to indicate to any other person how such voter voted, which is a misdemeanor pursuant to W. Va. Code § 3-9-8; and

3.3.11. Illegal voting by any person who knowingly votes when not legally entitled, which is a misdemeanor pursuant to W. Va. Code § 3-9-17.

**§ 153-53-4. Absentee Ballot Processing.**

4.1. Absentee ballots received in a county clerk's office prior to Election Day may be processed in the usual manner, at the same time and under the same procedures for early voting pursuant to W. Va. Code § 3-3-3 and other applicable laws and regulations.

4.2. Absentee ballots received after the last day of the early voting period, and up to Election Day, may be processed in the usual manner set forth in W. Va. Code §§ 3-3-7 and 3-3-8.

4.3. Absentee ballots received after Election Day shall be processed in the usual manner as set forth in W. Va. Code § 3-6-6.

4.4. If a county cannot process absentee ballots received at any time due to reasons beyond the county's control, including but not limited to an unanticipated increase in absentee ballot volume or lack of staff or resources, absentee ballots may be processed at the county clerk's discretion at the most appropriate time and in the most appropriate manner according to law leading up to canvass.

4.5. In administering, superintending, processing, storing and managing absentee-by-mail ballots during a State of Emergency, the county clerk and county staff shall protect the integrity of the election and ensure all eligible voters have the opportunity to cast a valid ballot according to law.

4.6. All laws setting forth absentee ballot requirements for tracking, counting, separating, storing, and protecting the integrity of the ballot and voters' personal information are in full force and effect during a State of Emergency.

**§ 153-53-5. Poll Worker Training.**

5.1. Pursuant to W. Va. Code § 3-1-46(c), poll workers are required to attend an instructional program within thirty days of an election.

5.2. For counties that held an election in the year 2020, those poll workers have already and recently attended the same or similar instructional program, which includes one or more audio-visual programs produced by the Secretary of State in conjunction with the State Election Commission.

5.3. In light of the State of Emergency and risk of an epidemic being spread to any potential poll workers who attend the training held by the county clerk, any person who has attended an instructional program for a county's special election held in the year 2020 may satisfy the requirements of W. Va. Code § 3-1-46 under the State of Emergency if all of the following conditions are met:

5.3.1. The earlier instructional program included in-person training on the safe, secure and proper operation of the voting system in use for the 2020 Primary Election;

5.3.2. The person attends or views an approved instructional program provided by the county clerk's office in digital or electronic format during the time period required by law; and

5.3.3. The person swears or affirms in a manner approved by the county clerk that he or she attended by viewing the digital or other instructional program. Acceptable forms of proof of such attendance include but are not limited to a signed affidavit or oath that is received or administered by the county clerk (or county clerk's designee) at any time prior to working as a poll worker.

5.4. County commissions have the authority to determine the appropriate poll worker training salary pursuant to W. Va. Code § 3-1-44.

**§ 153-53-6. Poll Worker Availability on Election Day.**

6.1. Pursuant to W. Va. Code § 3-1-29(a), each precinct shall have two teams of poll workers, and one additional election commissioner.

6.2. Pursuant to W. Va. Code § 3-1-30(j), if a poll worker fails to appear at a precinct polling place on Election Day, the polling place may open for in-person voting under the following conditions:

6.2.1. There is a team of poll workers assigned to process voters at the check-in table, and an additional team of poll workers assigned to monitor the ballot box(es) or precinct scanner(s);

6.2.2. The election officials present contact the county clerk for assistance in filling the vacancy on Election Day; and

6.2.3. If the election officials are unable to contact the county clerk within a reasonable time, they shall diligently attempt to fill the position when an eligible person of the same political party that nominated the person who is absent until a qualified person has agreed to serve.

6.3. If two teams of poll workers are present at the precinct polling place, the fifth election commissioner to be appointed may belong to any political party.

6.4. If less than two teams of poll workers are present at the opening of the precinct polling place, or at any time during the voting process on Election Day, under the direction of the county clerk all poll workers shall ensure all eligible voters have the opportunity to cast a valid ballot in an election held during the current State of Emergency under the following conditions:

6.4.1. No voter may be issued a ballot without a team of poll workers being present at the check-in table;

6.4.2. No voter may cast a ballot without a team of poll workers present at the ballot box(es) or precinct scanner(s); and

6.4.3. At least one team of poll workers shall be present for each part of the voting process that requires a team of poll workers.

6.5. Pursuant to W. Va. Code § 3-1A-6(e) and the Attorney General's Opinion referenced in Section 1.1 of this Rule, all election officials and poll workers shall construe this Rule to support broader access for eligible voters to uphold the integrity of an election under the law.

**§ 153-53-7. Precinct Polling Place Location Changes.**

7.1. Pursuant to W. Va. Code § 3-1-7(f), if for any reason a designated precinct's polling place location is unavailable during a State of Emergency, the county clerk may direct the poll workers for that precinct to hold the election at the nearest place which can be secured for the purpose of voting, which may include combining multiple precincts into a new or existing polling place location pursuant to Section 7.4. of this Rule.

7.2. Under the direction of the county clerk, the poll workers assigned to the relocated precinct shall provide the affected voters with the address and directions to the new polling place location by (1) proclamation to the voters present at the original polling place at the time for opening the polls, and (2) posting a notice at or near the entrance of the original polling place location.

7.3. For any precinct polling place location changes made pursuant to W. Va. Code § 3-1-7(f) and Section 7.1 of this Rule, the county commission shall take all reasonable measures to issue public notice to all affected voters regarding the precinct polling place location change. Such notice may include but is not limited to newspaper legal ads, social media outreach, statewide or local media coverage, website banners or notices, postcards or any other form or medium of public notice deemed appropriate by the county commission under a State of Emergency.

7.4. A precinct which must be relocated during a State of Emergency may be combined into a new or existing polling place location under the following conditions:

7.4.1. The appropriate number of teams of poll workers are assigned to each precinct combined into the same polling place location;

7.4.2. Each precinct's voter check-in table and poll books are kept and maintained separately;

7.4.3. All poll workers in the combined location may provide general assistance to all voters and other poll workers within the polling place location, which assistance includes but is not limited to assisting voters with setting up and using the electronic voting machines, sanitizing voting machines and other election materials, objects or surfaces, assisting other poll workers in an emergency, gathering or delivering general supplies or materials at the county clerk's discretion, and providing information and comfort to voters concerned with long lines or health risks; and

7.4.4. Pursuant to W. Va. Code § 3-1-5(a), each precinct shall be operated separately and independently with separate voting booths, ballot boxes or scanners, poll workers, counting boards and whenever possible in separate rooms. *Provided*, that county clerks and poll workers must ensure that all eligible voters have the opportunity to cast a valid ballot and uphold the integrity of the election during a State of Emergency.

7.5. A polling place precinct location change shall be in effect only during the State of Emergency. No subsequent order or action by a county commission is necessary to reestablish the original precinct polling place location after the State of Emergency is lifted.

**§ 153-53-8. Canvassing the Election.**

8.1. The county commissioners in each county sitting as the ex officio board of canvassers shall initially convene canvass on the fifth day (Sunday excepted) after the election held in their county pursuant to W. Va. Code § 3-6-9(a)(1).

8.2. At the initial canvass, the board of canvassers shall determine whether additional time is required for the county clerk to process the election returns prior to canvassing the election.

8.3. In making its determination, the board of canvassers shall consider all health and safety information regarding the State of Emergency provided by the Governor, Department of Health and Human Resources, federal Center for Disease Control and Prevention, other relevant state or federal agencies and the county clerk's opinion regarding staff and resources available to properly process the election returns and prepare for canvass.

8.4. If, upon the considerations set forth in Section 8.3. of this Rule, the board of canvassers determines that the canvass of the election can begin immediately in a timeframe that does not disenfranchise voters, including those who submitted absentee-by-mail ballots, the board of canvassers may initiate the canvass pursuant to W. Va. Code § 3-6-9.

8.5. If, upon the considerations set forth in Section 8.3. of this Rule, the board of canvassers determines pursuant to W. Va. Code § 3-6-9(a)(3) that additional time is needed to receive and process the election returns received during a State of Emergency, the board of canvassers may establish a later date to reconvene canvass, but which later date shall be no longer than absolutely necessary and does not otherwise conflict with any deadline set forth in Chapter 3 of the West Virginia Code.

8.6. All procedures, deadlines, and requirements set forth in W. Va. Code § 3-6-9 shall remain in full force and effect for canvassing an election held during a State of Emergency.

**§ 153-53-9. Special Authority, Procedures and Applicability of this Rule under a State of Emergency.**

9.1. This Rule applies only upon declaration of a State of Emergency for a natural disaster by Proclamation of the Governor, and shall remain in effect only during the time that a State of Emergency is in effect.

9.2. Pursuant to W. Va. Code § 5-3-1, the West Virginia Attorney General has issued a written opinion addressing the Secretary of State's authority to issue emergency rules upon a declaration of a State of Emergency for a natural disaster by Proclamation of the Governor. This Rule is promulgated in accordance with the opinion of the Attorney General, which is available on the Attorney General's website at the following URL:  
<https://ago.wv.gov/publicresources/Attorney%20General%20Opinions/Documents/March%2018%20Opinion.pdf>.

9.3. Due to the emergency nature of a State of Emergency, pursuant to W. Va. Code § 3-1A-6(e) and W. Va. Code § 15-5-6(c)(7), the Secretary of State has the authority to issue this Rule upon declaration of a State of Emergency for a natural disaster by Proclamation of the Governor without regard to the regular rule-making procedures set forth in W. Va. Code § 29A-3-1 *et seq.* Therefore, there shall be no public notice and comment period for Rules filed by the Secretary of State during a State of Emergency declared for a natural disaster.

