

ELECTION DAY LEGAL SUMMARY

Introduction

This booklet is intended to provide an overview of the Massachusetts General Laws which address some common situations that may arise on Election Day. Other information contained in the booklet includes Election Day activities. Activities in the polling locations include those provisions that apply to candidates and their observers as well as the rules and regulations pertaining to poll workers. For official information, please refer to the General Laws and Code of Massachusetts Regulations cited.

Polling Hours

The minimum hours polls are open are set by state law, although city council and town selectmen actually set the hours in conjunction with these statutes and local ordinances and by-laws. For state elections and city elections, polling locations must be open at least thirteen hours and for town elections, polling locations must be open at least four hours. G. L. c. 54, § 64 (2002 ed.). For state primaries, polling locations must be open at least thirteen hours. G. L. c. 53, § 43 (2002 ed.). For certain city preliminaries, the polling locations must be open at least six hours. G. L. c. 43, § 44A (2002 ed.).

Activities in the Polling Location

On Election Day, certain activities are prohibited within the polling location and within 150 feet of the polling place. General Law chapter 54, section 65 prohibits within 150 feet of a polling location, among other things, the posting, exhibition, circulation, or distribution of material--including pasters, stickers, posters, cards, handbills, placards, pictures or circulars--intended to influence the action of the voter. G. L. 54, § 65 (2002 ed.). Consistent with the activities restricted by statute, the implementing regulations prohibit the solicitation of votes for or against, or any other form of promotion or opposition of, any person or political party or position on a ballot question, to be voted on at the current election. 950 C.M.R. § 54.04(22)(d). Accordingly, a person standing within 150 feet of a polling location, including observers in the polling location, may not: hold any campaign sign; hand any person literature intended to influence the voter's action at the polls; wear any campaign buttons or identifying signage; solicit a person's vote for or against a candidate or question on the ballot; or, distribute stickers. Circulators of nomination papers, initiative and referenda petitions are also restricted from soliciting signatures within 150 feet of a building entrance door to a polling place. G. L. c. 54, § 65 (2002 ed.). This is true even where the nomination papers, initiative petition or referendum have nothing to do with the current election.

General Law chapter 54, section 65, does not limit the voter themselves from bringing material into the voting booth. They can bring preprinted brochures or pamphlets, or their own notes. The voter may also bring with them a sticker, handed to

them on their way into the polls by one of the write-in candidates, to affix to the ballot. However, there are criminal penalties for exhibiting such materials. Accordingly, voters should not display campaign literature while in the polling location. Additionally, it is incumbent on the election officers to check the voting booths regularly to see that no one has left any materials behind. 950 C.M.R. § 54.04(22)(b).

Political Signs

Signs intended to influence the action of voters are subject to both statutory and regulatory directives. It is well settled that no person may hold a sign that attempts to influence the voter, or leave such a sign unattended, within 150 feet of a polling location. G. L. c. 54, § 65 (2002 ed.). However, other issues often arise on Election Day relative to the holding and posting of unattended signs. There are no state statutes addressing unattended signs on public property. However, if the sign is on state land, for example on a rotary or highway, the state police will remove it where they believe it to be a traffic or safety hazard. On the municipal level, it is quite common for a by-law to exist, either regulating or forbidding the posting of signs on public property.

Frequently municipalities also have by-laws regulating the posting of signs on private property. By-laws regulating the posting of political signs have included regulation of: the size of the sign, the number of signs on a piece of property, and the time period during which the sign may be exhibited. If the municipality has such a by-law, it is the law in that municipality, and must be complied with. Please check with city or town hall for copies of such rules.

Observers

Observers are allowed inside the polling place, outside the guardrail, unless they are disorderly or obstruct the access of voters. 950 C.M.R. § 54.04(22)(a). Such observers may keep notes including marked voting lists. *Id.* The poll workers at the check in table must announce the names of the voters loud enough for the observers to hear. 950 C.M.R. § 54.04(5). The pertinent regulation states:

To achieve the legal requirement that the election be held in public view, observers shall be allowed inside the polling place, outside the guardrail, unless they are disorderly or obstruct the access of voters. Observers may keep notes including marked voting lists. If there are so many observers in the polling place that they obstruct voters, they may be asked to cooperate in collecting information. The warden may exclude from the polling place any person who is disorderly or who obstructs the access of voters.

950 C.M.R. § 54.04(22)(a).

Observers may not request the names and addresses directly from voters or interfere with the check in process in any way. Rather, the observers should be listening as the election workers request such information. If the observer intends to keep notes on a voting list, the observer must request copies of voting lists prior to Election Day. There is no obligation for local election officials to provide a voting list to

a candidate on Election Day or to respond to any questions from observers. Observers should only communicate with the warden of the polling location and no other poll workers or voters. If an observer cannot hear the names being announced by the poll workers, the observer should notify the warden. Additionally, observers may not use cellular phones within the polling place.

Observers are positioned behind the guard rail but close enough to be able to hear the names and addresses of voters as they check in. There is no obligation for the polling location to provide a table or other equipment for observers. Pursuant to 950 C.M.R. § 51.00, each polling location must be accessible. To meet the accessibility standards, many polling locations have little spare space. Accordingly, there may not be enough room to accommodate many observers. If the presiding officer determines that there are too many observers for the polling location, the presiding officer may ask the candidates to "pool" the information gathered by a smaller number of observers. The presiding officer, pursuant to their authority to maintain order and decorum in the polling place, and to prevent interference with the voters, may determine that the number of observers, or their behavior, is disruptive. In such situations, the presiding officer may remove an observer interfering with the election process.

Challenging Ballots

Any person may challenge a voter for any legal cause. G. L. c. 54, §§ 85, 85A (2002 ed.); 950 C.M.R. 54.04(23). Such reasons are numerous and include that a person: is not who they say they are; does not live where they say they live; is not registered in the correct district; is not qualified to vote by absentee ballot; was not registered to vote by the close of registration; or, has already cast a ballot. It is not sufficient for the challenger to simply say that a voter is not qualified; the challenger must state the specific reason for challenging the right of a person to vote, and that specific reason must be recorded on the ballot. If a person makes a challenge for an unspecified reason, the election worker should thereafter ask the challenger what specific reason they wish to have recorded. If, after being so questioned by the election official, the challenger gives no specific reason, the voter should be permitted to vote, and should not be considered a challenged voter.

Once the warden, clerk or election officer is informed that a voter's ballot is being challenged, the election officer must:

- 1) issue the challenged voter's oath to the challenged voter; (the *challenged voter's oath* is as follows: "You do solemnly swear (or affirm) that you are the identical person whom you represent yourself to be, that you are registered in this town and that you have not voted at this election.."); and**
- 2) *before the ballot is marked*, require the challenged person to write his name and current residence on the ballot;**
- 3) the warden then adds the name of the challenger to the ballot and the cause of the challenge. G. L. c. 54, § 85 (2002 ed.).**
- 4) The ballot is then cast and counted like all others.**

Please note that there are criminal penalties for challenging a qualified

voter for purposes of intimidation, or of ascertaining how they voted, or for any other illegal purpose. G. L. c. 56, § 31 (2002 ed.).

Challenging Absentee Ballots

When an absentee ballot is challenged, no challenged voter's oath may be issued, as the voter is not present. Therefore, the warden bears the responsibility of recording the name and address of the voter on the ballot. G. L. c. 54, § 96 (2002 ed.).

Should a candidate believe that there are violations of the statutes governing the application for or casting of absentee ballots, his observers must challenge those ballots as the warden announces the names of the absentee voters. Taking this proactive approach allows the ballot, and therefore, the vote contained thereon, to be identified with a specific person, and preserves the issue for a potential recount. See G. L. c. 54, § 135 (2002 ed.). If a candidate neglects to challenge such voters, the votes cast cannot be deducted from the appropriate candidate at a recount as there will be no way to link a specific ballot to a specific voter. At that point, if the candidate believes such votes will make a difference in the outcome of the election, the candidate will be forced to pursue a remedy in court. G. L. c. 56, § 59 (2002 ed.). To avoid such a result, the candidate should review the list of absentee voters required to be available prior to the election, and instruct his observers accordingly. See G. L. c. 54, § 91 (2002 ed.) (lists shall be prepared by the clerk, arranged by voting precincts, of the names and addresses of all voters on whose applications for absent voting ballots the certificate has been executed, and shall post copies of such lists for public inspection).

Voting Later in Person by an Absentee Voter

A person who has completed an absentee ballot who later wishes to vote in person on Election Day may do so if her ballot has not yet been processed. The voter, at check in, may request from the presiding officer that they be permitted to vote at the polls. G. L. c. 54, § 100 (2002 ed.). If the warden determines that the voter's absentee ballot has not yet been processed and that the individual is otherwise qualified to vote—for example, the voter is asked to show identification which proves their identity and address—the warden may issue the voter a certificate allowing the person to cast a ballot at the polls. Id. The capital letter "C" should then be placed next to the voter's name, and the certificate should be attached to the voter list and be maintained as part thereof. Id. When the warden later comes across that individual's absentee ballot, the warden must mark across the face of the envelope, "Rejected as Voted in Person," and the envelope must be preserved and destroyed in the manner provided by law for the retention, preservation and destruction of official ballots. Id.

Inactive Voters

General Laws chapter 54, section 67 requires that voting lists be delivered to the officers responsible for of the check-in, and to the officers responsible for the check out. The municipality must maintain separate lists of active and inactive voters. G. L. c. 51, § 55 (2002 ed.). However, a single list may be maintained where the inactive voters are designated as such on the list. Id. General Laws chapter 51, section 59 and the applicable regulations require that when inactive voters arrive to check in, they must be presented with an ***Affirmation of Current and Continuous Residency***. G. L. c. 51, § 59 (2002 ed.); 950 C.M.R. § 54.04(6).

The check in process for inactive voters involves a number of steps. The pertinent regulation states in pertinent part:

If the name, address or party enrollment of a person claiming the right to vote appear on the voting list as an inactive voter, the presiding officer shall allow such inactive voter to vote upon written affirmation by the inactive voter of his current and continuous residence in the municipality. . . , signed under the penalty of perjury.

950 C.M.R. § 54.04(6)(a).

An inactive voter must therefore be provided with the form known as an ***Affirmation of Current and Continuous Residency***, in order to provide the voter with the opportunity to affirm in writing, signed under the penalty of perjury, that they do currently live, and have continuously lived within the municipality. *Id.* ***If the voter's name is on the inactive voters list, the poll worker must also request identification containing the voter's name and current address.*** 950 C.M.R. § 54.04(6)(b). If the voter has moved within the municipality, the voter should vote where he is listed on the voter list. *Id.* Should an inactive voter fail to show identification with his current address, **the election official must challenge the voter's ballot** in accordance with the procedures set forth in the "Challenge" section.

Identification

Because of a new federal law, the Help America Vote Act of 2002 passed by Congress, any voter who registered to vote by mail on or after January 1, 2003, will be required to show identification when he/she votes for the first time since registering by mail in 2003. 42 U.S.C. § 15483(b)(4)(A); G. L. c. 54, § 76B. Acceptable identification must include the voter's name and the address at which he/she is registered to vote, for example: a current and valid photo identification, current utility bill, bank statement, paycheck, government check, or other government document showing your name and address. If the voter does not provide such identification, the Help America Vote Act of 2002 requires that the voter may only cast a provisional ballot which will be counted later, but only after the voter's eligibility to vote has been determined.

Additionally, an election officer, authorized to do so by the local election officials, may request any voter to present written identification. 950 C.M.R. § 54.04(6B). The requests must not discriminate in any way and may therefore be: entirely random, consistent, or based on reasonable suspicion. *Id.* Please note that there is no provision which permits observers to request identification from any voter or even to communicate with voters.

Voter Assistance

A voter who informs the warden that from blindness or other physical disability or inability to read or to read in the English language that they are unable to prepare their ballot or register their vote is entitled to receive assistance to do so. G. L. c. 54, § 79 (2002 ed.). The voter may designate a person of their choice to assist them. *Id.* In

the alternative, the voter can request that two election officers, one from each major party, accompany them into the voting booth to assist them in completing their ballot. See, e.g., 950 C.M.R. § 54.04(9)(c) (where a voter requests instruction or assistance after entering the voting machine booth two election officers of different political parties may instruct or assist the voter in the voting booth).

Provisional Voting

If the name of a person claiming the right to vote is not on the voting list or is listed incorrectly, the person may seek to vote either by appearing before the municipal election official at city or town hall or may vote by provisional ballot. G. L. c. 54, § 76C. Additionally, a voter required to show identification pursuant to the Help America Vote Act of 2002 as described above, but who does not, must vote on a provisional ballot.

To cast a provisional ballot, a person must execute a provisional ballot affirmation before a precinct officer at the polling place declaring that he/she is a registered voter in the city or town and resides within the geographical boundaries of said precinct. All provisional voters must show suitable identification showing their name and current address.

After voting on a provisional ballot, the person places it in a specially marked envelope, seals that envelope and returns it to the precinct election official. The ballot will then be set aside until a determination of the person's eligibility can be made.

After the election, the person's eligibility will be determined using the information provided in the affidavit. The municipal election official will review available records, at least those for the last three (3) years, to determine eligibility.

If the person's eligibility is confirmed, the ballot will be removed from the sealed envelope and grouped with similar ballots and counted in a manner that provides the greatest secrecy. If the person's eligibility cannot be confirmed, the ballot will remain sealed in the envelope until such time as it is required to be kept and then will be destroyed without being viewed.

A person may contact the Elections Division, Office of the Secretary of the Commonwealth at 1-800-462-8683 or 617-727-2828, or their municipal election official to find out if their ballot was counted. The information is available seven (7) days after a primary and twenty (20) days after an election. When calling, the person must provide their name, address, date of birth and provisional ballot number to receive the information.

Spoiled Ballots

A voter may request a new ballot if they make a mistake in marking their ballot. G. L. c. 54, § 81 (2002 ed.). If a voter spoils a ballot, the voter may obtain two others, one at a time, upon returning each spoiled one. A ballot that is spoiled by a voter is marked "Spoiled" and then sealed in an envelope without being examined.

Closing of Polls

Any voters in line at the time set for the closing of the polls must be allowed to

vote. G. L. c. 54, § 70 (2002 ed.). The polling location must remain open after the closing of the polls so that the public may observe the counting of votes from outside the guardrail. The voting lists and all ballots removed from the ballot box shall be kept in open view of the voters present until enclosed and sealed up, and all proceedings in the canvass and counting of votes shall be public and in open view of the voters. G. L. c. 54, § 105A (2002 ed.). However, only election officers may take part in the actual process of counting and sealing the voting materials. Id. During this process, the observers must stand outside the guard rail. G. L. c. 54, § 70 (2002 ed.).

Counting Votes

The process of counting the ballots differs depending on the type of voting equipment used. However, the basic requirements are the same. The clerk must record the final register number on the ballot box. G. L. c. 54, §§ 105, 105A (2002 ed.). A count must be made of the voters on both the check in and check out lists, and the voting lists must thereafter be sealed in an envelope. Id.; see also G. L. c. 54, § 107 (2002 ed.) (procedure for sealing voting lists and ballots; applicable to all of the materials required to be sealed as indicated below).

The election officers shall canvass and count the ballots if paper ballots are used, and otherwise, the election officers shall read the vote totals from the counting device after the polls close, either by a printer mechanism or otherwise. G. L. c. 54, §§ 105, 105A (2002 ed.). The ballots not able to be read by the machines must be hand counted. Id. Election officers may not hold a pen or any other kind of marking device during the counting of the ballots, except for the person actually recording the votes. G. L. c. 54, § 80 (2002 ed.). Furthermore, such election officials may only use red pencils or red ink to record or tabulate votes. Id. For the purpose of ascertaining the results of a state election, city election, or a town election where official ballots are used, or of any question submitted to the voters, the election officials must use the blank forms and apparatus provided by the Secretary of the Commonwealth. G. L. c. 54, § 104 (2002 ed.).

The unused and spoiled ballots must also be counted, placed in a container under seal, and the clerk must record the numbers. G. L. c. 54, §§ 105, 105A (2002 ed.). The counted ballots are placed into a designated container, which is then sealed a certificate is affixed thereto stating that only ballots cast and no other ballots are contained therein. Id. The total tally sheets are placed in an envelope, sealed, and the warden and clerk also sign the outside of the envelope. Id. In communities using a central tabulation facility, the ballots will then be transported thereto, and then transmitted to the city or town clerk who must retain them in a secure location. G. L. c. 54, § 105A (2002 ed.). In all other communities, the sealed envelopes and containers will be returned directly to the city or town clerk who must retain them in a secure location. G. L. c. 54, §§ 105, 105A (2002 ed.).

What to Do if a Problem Arises on Election Day

If a person encounters a problem at a polling location on Election Day, the person should approach the warden or the presiding officer with the issue. As the warden or presiding officer is in charge of the polling location, they should be able to resolve any issues. However, if the problem persists, a person should contact the city or town clerk who is the chief election officer of the municipality. If the problem is still not

resolved, a person may contact the Secretary of the Commonwealth's Elections Division at 617-727-2828 or 1-800-462-8683.