



MEMORANDUM

TO: Senate President Chris Kapenga

FROM: Joseph Kreye, senior coordinating attorney; Michael Gallagher, senior coordinating attorney; Staci Duros, legislative analyst

DATE: November 16, 2020

SUBJECT: Post-election procedures

This memorandum addresses your questions regarding post-election procedures, including procedures for certifying the results of the general election, convening the presidential electors, and conducting a recount. Please note that all of these activities are governed either by state statute or federal law and that any change to the post-election procedures under state law would require that the legislature pass a law, subject to the governor's approval.

Canvass and certification

[Section 7.53](#) of the Wisconsin statutes provides that the municipal board of canvassers must publicly canvass the results of every election. The canvass may begin no earlier than the time that the board of canvassers receives the returns from all polling places on election night and no later than 9 a.m. on the Monday after the election. The board reconciles the poll list of the individuals who vote by absentee ballot with the corresponding poll list of the individuals who vote in person to ensure that no elector is allowed to cast more than one ballot. If an individual who votes in person has submitted an absentee ballot, the absentee ballot is void. The board then compares the return statement for all votes cast.

[Section 7.60](#) of the Wisconsin statutes provides that the county board of canvassers must convene no later than 9 a.m. on the Tuesday after the election to open and publicly examine the returns. The board must certify the election results and send the certified statement of those results to the Wisconsin Elections Commission (WEC). In order to ensure that the board receives full returns and is able to remedy any "informalities or defects" in the ballots, the board may not adjourn for more than one day at a time and no more than two days total. After the canvass is complete, the county clerk is required to submit a certified statement of the results to WEC. The statement is due to WEC no later than 14 days following the general election. Under that timeline, we anticipate that the county canvass for all 72 counties will be complete on or before Tuesday, November 17, 2020.

Pursuant to [Wis. Stat. §7.70](#), WEC receives the certified statements from the counties and records the election results. WEC is required to “file and carefully preserve” the certified statements. The commission chairperson or chairperson’s designee must examine the certified statements to ensure they are correct. If WEC finds an error in a return statement it notifies the county to correct the error or explain the discrepancy. The chairperson or designee is required by law to certify the results of the general election no later than December 1.

In addition to certifying the results, following each general election, the WEC must oversee a performance audit of the voting systems in this state to determine the error rate of such systems in counting valid votes.¹ If the error rate is greater than the standard determined by the Federal Elections Commission, WEC must order the affected counties and municipalities to take remedial action.² The audit is accomplished by having reporting units in selected municipalities perform an audit of their voting equipment. The number of reporting units selected to conduct the 2020 audit will be 5 percent of the total number of reporting units in this state and at least one equipment performance audit will be conducted in each county.³ The audit is typically completed prior to the December 1 certification deadline and WEC had initially set a November 25, 2020, deadline for completing this year’s audit.⁴ However, WEC has recently recommended that the municipalities temporarily delay the audit because of the potential for a statewide recount.⁵

Finally, there is an additional process that WEC must complete in a presidential election year:

For presidential electors, the commission shall prepare a certificate showing the determination of the results of the canvass and the names of the persons elected, and the governor shall sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services. The governor shall also prepare 6 duplicate originals of such certificate and deliver them to one of the presidential electors on or before the first Monday after the 2nd Wednesday in December.⁶

Presidential electors

[Article II, section 1, clause 2 of the U.S Constitution](#) requires each state to appoint presidential electors “in such manner as the legislature thereof may direct.” In Wisconsin, the legislature has directed that presidential electors be appointed by a vote of the people at the presidential election. Under [Wis. Stat. §5.10](#), a vote for the candidates for president and vice president named on the ballot is a vote for those candidates’ electors. As mentioned above, after the presidential election, WEC must certify the slate of presidential electors of the presidential and vice presidential candidates winning the election. Wisconsin is a “winner-take-all” state. Under [Wis. Stat. § 7.75 \(1\)](#), the electors meet at the state capitol at noon on the first Monday after the second

¹ [Wis. Stat. §7.08 \(6\)](#).

² Id.

³ Wisconsin Elections Commission, [2020 Post-Election Voting Equipment Audit Information](#).

⁴ Id.

⁵ Id. It is possible, and perhaps likely, that a recount and an audit would occur in the selected municipalities simultaneously in order to complete both by December 1.

⁶ [Wis. Stat. §7.70 \(5\) \(b\)](#).

Wednesday in December.⁷ In 2020, that date is December 14. Under [Wis. Stat. § 7.75 \(2\)](#), when the state’s presidential electors convene, they are generally required to “vote by ballot for that person for president and that person for vice president who are, respectively, the candidates of the political party which nominated them.”

While the U.S. Supreme Court has repeatedly held that U.S. Const. art. II, § 1, cl. 2. confers upon state legislatures the “broadest power of determination” with respect the manner of appointment of presidential electors, that power is couched in the lawmaking process.⁸ A state legislature may reserve to itself by law the authority to appoint the state’s presidential electors, and several states did just that for a number of years following ratification of the U.S. Constitution. Conversely, a state legislature may, again by law, give the people of the state the power to appoint presidential electors at an election, as is the case now in Wisconsin and every other state.

However, if, as in Wisconsin, state law gives the people of the state the power to appoint presidential electors at an election, the legislature has no unilateral authority to reverse the choice of the people of the state. While it is true that the state legislature, “after granting the franchise in the special context of Article II, can take back the power to appoint electors”⁹, once the state legislature gives the people the franchise with respect to the appointment of presidential electors, equal protection rules governing the right to vote apply, especially the rule of one person, one vote. As a result, the state legislature may not reverse or otherwise interfere with the choice of the people of the state at a presidential election. The U.S. Supreme Court spoke to this point directly in *Bush v. Gore*:

When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. . . . The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966) (“Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”).¹⁰

In summary, while the legislature has broad power under the U.S. Constitution to determine by law the manner of appointment of the state’s presidential electors, because the Wisconsin Legislature has given the people of the state the power to elect presidential electors at the

⁷ This date coincides with the date set by federal law under [3 U.S.C. § 7](#) for the meeting of electors.

⁸ See, for example, [Chiafalo v. Washington, 140 S.Ct. 2316 \(2020\)](#).

⁹ See, [Bush v. Gore, 531 U.S. 98, 104 \(2000\)](#).

¹⁰ *Id.* at 104-05.

presidential election, for the reasons discussed above, the legislature has no power to reverse that determination after the election.

Recount

Your final question relates to the recount process and whether that process would affect the timeline for certifying the results of the general election and convening the presidential electors. In order to answer that question, the memorandum provides a brief description of the recount procedures.

Wisconsin law does not have an automatic recount provision. Instead, any candidate voted for at any election who qualifies as an “aggrieved party,” may petition for a recount.¹¹ In an election for an office for which more than 4,000 votes were cast, an “aggrieved party” is a candidate who trails the leading candidate by no more than 1 percent of the total votes cast for the office.¹²

To request a recount, an aggrieved party must file a petition that specifies the wards or municipalities in which he or she wants a recount¹³ and states that he or she believes that “a mistake or fraud has been committed in [those] ward[s] or municipalit[ies] in the counting and return of the votes cast” or states that he or she believes that another specific “defect, irregularity, or illegality occurred in the conduct of the election.”¹⁴ Along with the petition, a filing fee is required at the time of filing if the difference between the votes cast for the aggrieved party and the votes cast for the leading candidate is greater than 0.25 percent of the total votes cast for the office they seek.¹⁵

A petitioner seeking a statewide recount of an election for a national office files the petition and filing fee with WEC.¹⁶ For the office of the president, a petition for a recount must be filed “not later than 5 p.m. on the first business day following the day on which the [Wisconsin Elections Commission] receives the last statement from a county board of canvassers for the election following canvassing of all valid provisional ballots.”¹⁷ As noted previously, the deadline for receiving the last statement from the county board of canvassers is Tuesday, November 17. Therefore, the deadline for requesting a statewide recount is 5 p.m., Wednesday, November 18.

Upon the receipt of a valid recount petition, the WEC delivers a copy of the petition “to each opposing candidate for the same office whose name appears on the ballot”¹⁸ and issues an order

¹¹ [Wis. Stat. § 9.01 \(1\) \(a\) 1.](#)

¹² [Wis. Stat. § 9.01 \(1\) \(a\) 5. b.](#)

¹³ [Wis. Stat. § 9.01 \(1\) \(a\) 3.](#)

¹⁴ [Wis. Stat. § 9.01 \(1\) \(a\) 2.](#) The Wisconsin Elections Commission (WEC) provides a sample recount petition document (EL-186) on their website.

¹⁵ [Wis. Stat. § 9.01 \(1\) \(ag\) 1.](#) and [3.](#)

¹⁶ [Wis. Stat. § 9.01 \(1\) \(ar\) 1.](#) Technically, the statute states that the petitioner files a recount petition with the same filing officer with whom he or she filed nomination papers. For the office of the president, the filing officer is the Wisconsin Elections Commission. See [Wis. Stat. § 8.16 \(7\).](#)

¹⁷ [Wis. Stat. § 9.01 \(1\) \(a\) 1.](#)

¹⁸ [Wis. Stat. § 9.01 \(2\).](#)

to “the county boards of canvassers to commence the recount.”¹⁹ The recount process commences “no later than 9 a.m. on the 3rd day after” the county boards of canvassers receive WEC’s order.²⁰ The boards generally must use voting equipment to tabulate the ballots, but they may determine to count the ballots by hand instead, or to count the ballots of certain wards or election districts by hand.²¹ However, a candidate may petition the court for an order that would require the recount to be conducted using a particular tabulating method.²² The boards are responsible for making “specific findings of fact with respect to any irregularity raised in the petition or discovered during the recount” and have the authority to “administer oaths, certify official acts, and issue subpoenas.”²³

Assuming that WEC would issue the recount order shortly after receiving a valid petition and the county boards of canvassers would begin the recount within the statutorily prescribed deadline, the recount could be completed in time for the December 1 certification, although the timeline is incredibly tight. For example, the 2016 recount of the presidential election in Wisconsin requested by Jill Stein took only 10 days to complete, but WEC did not make its certification until December 12, 2016, a week prior to the day on which the presidential electors were to meet.²⁴ WEC wanted to make that certification at least 6 days prior to the meeting of the electors to avail themselves of the “safe harbor” provision under federal law.

Under [3 U.S.C. §5](#), if, prior to the election, the state has adopted procedures for settling contested elections and has applied those procedures, election results certified 6 days prior to the day on which the electors meet are considered conclusive and will apply to the counting of electoral votes. Therefore, at the very least, WEC would want the recount completed no later than December 8, the day on which results must be determined in order to satisfy the federal “safe harbor” provision. However, an appeal of any recount determination could further delay certification.

A candidate aggrieved by the recount has the right to appeal the recount determination and may start the process by filing notice with the WEC “within 5 business days after the completion of the recount.”²⁵ For a statewide election, the chief justice of the Wisconsin Supreme Court appoints a circuit judge to hear the appeal²⁶ and review the recount determination.²⁷ Importantly, the court may not “receive evidence not offered to the board of canvassers...”²⁸ and may not

¹⁹ [Wis. Stat. § 9.01 \(1\) \(ar\) 3.](#)

²⁰ [Wis. Stat. § 9.01 \(1\) \(ar\) 3.](#)

²¹ [Wis. Stat. § 5.90 \(1\).](#)

²² [Wis. Stat. § 5.90 \(2\).](#)

²³ [Wis. Stat. § 9.01 \(5\) \(a\).](#)

²⁴ [Completed Wisconsin recount widens Donald Trump’s lead by 131 votes.](#) Wisconsin State Journal, December 13, 2016.

²⁵ [Wis. Stat. § 9.01 \(6\) \(a\).](#)

²⁶ [Wis. Stat. § 9.01 \(6\) \(b\).](#)

²⁷ [Wis. Stat. § 9.01 \(8\).](#)

²⁸ [Wis. Stat. § 9.01 \(8\) \(c\).](#) But the statute makes exceptions for “evidence that was unavailable to a party exercising due diligence at the time of the recount or newly discovered evidence that could not with due diligence have been

“substitute its judgment for that of the board of canvassers... as to the weight of the evidence on any disputed finding of fact.”²⁹ Any of the parties aggrieved by the circuit court’s decision has the right to appeal that decision to the court of appeals “within 30 days after entry of the order of the circuit court.”³⁰ It should be noted that the recount process under state law “constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process.”³¹

Conclusion

The timing for the steps in the post-election process, and much of the process itself, is set forth under the statutes. The goal is to ensure a fair, efficient, and orderly process for counting the valid ballots after the election and certifying a result that we can trust is accurate. In almost all cases, WEC and the municipalities and counties perform their duties so as to meet all statutorily mandated deadlines. However, a statewide recount, although intended to ensure a fair and accurate result, may make it difficult for WEC to certify the election results by December 1. Furthermore, upon completion of the recount, if a candidate appeals the recount determination, it may be difficult for WEC to certify the results prior to December 8, the federal “safe harbor” date or December 14,³² the meeting of the presidential electors.

Please let us know if the LRB can provide any additional assistance.

obtained during the recount” and “evidence not offered at an earlier time because a party was not represented by counsel in all or part of a recount proceeding.”

²⁹ [Wis. Stat. § 9.01 \(8\) \(d\).](#)

³⁰ [Wis. Stat. § 9.01 \(9\) \(a\).](#)

³¹ [Wis. Stat. § 9.01 \(11\).](#)

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