



## 2019 Election Law Update

The 2019 legislative session saw the resolution of the issues surrounding the process for postponing town meeting and newly adopted SB 104 clarifies how that process works. In addition, several other important changes to the state election laws were signed into law. These changes affect how local election officials run their contests and give a preview for changes on the horizon. Let's talk about the changes.

### **Let's say that the recent trend of March snowstorms continues. How do we postpone town meeting?**

This year's SB 104, an NHMA Policy Bill, clarified the process for a moderator to postpone either the deliberative/business session or the official ballot voting (election) session of a town meeting. SB 104 modified RSA 40:4, 40:13, 669:1, and several other statutes. The moderator may postpone either session if the National Weather Service has issued a weather event warning and the moderator believes the event may cause the roads to be hazardous or unsafe, or if an accident, fire, natural disaster, or other emergency renders use of the meeting location unsafe. The moderator must consult, to the extent practical, with certain other town officials before deciding to postpone; and in the case of postponement of an official ballot voting session, the moderator must notify the secretary of state within two hours of the decision to postpone.

If the official ballot voting session is postponed, it must be rescheduled to the Tuesday two weeks following the originally scheduled date. In the case of a school district or village district election that is coordinated with town elections in two or more towns, the moderators of the towns involved must consult with each other, and the election may be postponed only if a majority of the moderators vote to postpone. The new law defines the terms "business session," "deliberative session," and "official ballot voting day," and contains special provisions for the use of absentee ballots at postponed elections. It also allows for the postponement of city elections in the same manner as town elections.

### **What about absentee ballots? Were any laws involving them changed?**

Yes, the list of persons who may deliver an executed absentee ballot to the town or city clerk was expanded by HB 531, modifying RSA 657:17 and :24. In addition to the voter's spouse, parent, sibling, or child, an absentee ballot may now be delivered by a grandchild, father- or mother-in-law, son- or daughter-in-law, stepparent, or stepchild. It may also be delivered by the administrator or a designated staff member of a nursing home or residential care facility where the voter resides, or by a person assisting a blind or disabled voter who has signed a statement on the affidavit acknowledging the assistance.



**Has the legislature given any thought to making ballots more accessible to the blind or disabled?**

In light of the settlement agreement between the U.S. Department of Justice and the City of Concord under the American's with Disabilities Act, the legislature passed HB 539 which established a legislative committee to study the potential use of the Accessible Ballots technology in municipal elections, the availability of and access to appropriate hardware and software, municipal administration of the technology, municipal interest in using the technology, legal conflicts to the use of the technology, and other appropriate issues. The committee is also charged with preparing generic implementation and application procedures for municipalities to follow if it determines that the technology can be used efficiently and effectively. The committee is to report its findings and recommendations by November 1, 2019.

The U.S. Department of Justice initiated an investigation in 2015 in response to a voter complaint that the City of Concord failed to provide a blind person with an accessible voting system that offered privacy and independence in local elections and, instead, offered only a paper ballot and assistance in completing the ballot. The U.S. DOJ maintained that the City's failure to provide an accessible ballot to a person who is blind or vision impaired denied qualified individuals with disabilities equal access to participate in the City's Election, in violation of Title II of the ADA and its implementing regulation. 42 U.S.C. § 12132; 28 C.F.R. §§ 35.130, 35.160. Although the settlement is only binding on Concord, presumably U.S. DOJ would apply the same standard to every municipality. If the U.S. DOJ were to sue a New Hampshire municipality in U.S. District Court and a judgment was rendered in favor of U.S. DOJ, that standard would be binding on all municipalities in New Hampshire.

**Speaking of voting and balloting issues, how do election officials determine the intent of the voter when the voter did not follow instructions relative to marking the ballot?**

The law now states that for any vote cast at a town meeting, every ballot must be counted if the intent of the voter can be determined, regardless of whether the voter followed instructions relative to marking the ballot provided before the vote thanks to HB 146, which added RSA 40:4-g.

**I understand that changes have been made on how a town votes to adopt SB 2, the Official Ballot Referendum Form of Town Meeting?**

SB 2 is no longer adopted on the official ballot. Thanks to HB 415, modifying RSA 40:14, the question to adopt SB 2 is placed on the warrant for action at the business session of the annual meeting. It must be voted on by ballot (but not official ballot), and polls must remain open and ballots accepted for at least one hour following the completion of discussion on the question. A three-fifths majority is still required to adopt the proposal. The process for rescinding SB 2 has not changed—it still must be voted on by official ballot.



**Is there anything else that we should be aware of regarding election law legislation?**

Yes, we are still waiting (as of this writing) for a court ruling on the implementation of 2018's HB 1264 which is being challenged in U.S. District Court by the New Hampshire Chapter of the American Civil Liberties Union and the New Hampshire Chapter of the Democratic Party.

HB 1264 removed the phrase "for the indefinite future" from the definition of both "Resident; Inhabitant" and "Resident" under RSA Chapter 21. At the time of its passage it was described as an attempt to clear up confusion about who's eligible to vote here and to bring New Hampshire's laws more in line with other states. However, recent press reports have indicated that this change has caused some confusion among voters, election officials and other political groups as they prepare for upcoming elections. In addition, attorneys representing the state on behalf of the New Hampshire Department of Justice have represented to the U.S. District Court that the change does not have an impact on any election law. It is hoped that the federal courts will clear up any confusion well in advance of the presidential primary although trial is not scheduled to commence until mid-January.

In addition, the court order that blocked the enforcement of the civil and criminal penalty provisions of 2017's SB 3, Laws 2017, Chapter 205, remains in effect. SB 3 added additional language to RSA 654:2 and related statutes governing domicile for the purposes of voter registration. In October 2018, after suit was brought to block its implementation, the NH Supreme Court determined that SB 3 would be effective for the 2018 elections, but a stay was issued post November 6, 2018. Trial in that matter is now scheduled for December 2019 in Hillsborough Superior Court's Northern District.

Lastly, the decision in *Mary Saucedo et al. v. William Gardner, Secretary of State*, No. 2018 DNH 160 (Dist. Ct. NH Aug. 14, 2018) effectively deleted Paragraph III of RSA 659:50, containing a signature match requirement for absentee ballots. Unfortunately, the legislature did not amend RSA 659:50, III this session to reflect that decision. As such, moderators need to be aware that RSA 659:50, III is unconstitutional and cannot be enforced.

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