

STATEMENT OF EMERGENCY

31 KAR 5:026E.

This emergency regulation is being promulgated pursuant to both KRS 13A.190(1)(a)(1), to meet an imminent threat to public welfare, as well as, KRS 13A.190(1)(a)(3), to meet an imminent deadline for the promulgation of an administrative regulation established by state statute. Section 150 of the Kentucky Constitution requires free and fair elections in the Commonwealth; KRS 118.025(4) sets May 21, 2024, as the date for the next primary election. Since the 2020 elections, conducted during the COVID-19 pandemic, the Commonwealth has expanded the availability of mail-in absentee voting. With lessons learned from each subsequent election, administrators continue to reform the mail-in request and delivery process to ensure the highest degree of security. This is being filed as an emergency administrative regulation to ensure the administrative regulations and procedures required by statute to promote free and fair elections are in effect for the upcoming election. This emergency administrative regulation is temporary in nature and will be replaced by an ordinary administrative regulation. The companion ordinary administrative regulation is identical to this emergency administrative regulation.

ANDY BESHEAR, Governor

KAREN SELLERS, Director

STATE BOARD OF ELECTIONS
(Emergency Amendment)

31 KAR 5:026E. Ballot standards and election security.

RELATES TO: KRS 117.001, 117.025, 117.085, 117.086, 117.0861, 117.087, 117.145, 117.225, 117.228, 117.295(1), 117.365

STATUTORY AUTHORITY: KRS 117.015(1)(a), 117.085, 117.086, 117.087(3)(d), 117.145, 117.228

NECESSITY, FUNCTION, AND CONFORMITY: KRS 117.015(1)(a) authorizes the State Board of Elections to promulgate administrative regulations necessary to properly carry out its duties. Several Kentucky Revised Statutes in Chapter 117 require the State Board of Elections to promulgate administrative regulations that provide for measures that establish standards for the ballots used during elections, as well as, measures that ensure that votes cast during an election are done so in a free, fair, and secure manner. This administrative regulation provides for those measures.

Section 1. In addition to the requirements for printed ballots established in KRS 117.145, ballots caused to be printed by the county clerk of each county shall meet quality and size standards specific to the voting systems certified by both the State Board of Elections and the United States Election Assistance Commission.

Section 2. The outer envelope of all mail-in absentee ballots shall bear a barcode or other label that is unique to the individual voter and capable of being read by an electronic optical scanner. The unique barcode or label for each mail-in absentee ballot outer envelope shall be issued by the State Board of Elections. Upon the need to issue a voter a second mail-in absentee ballot pursuant to KRS 117.085(9), the outer envelope of the subsequent second mail-in absentee ballot shall bear a new unique barcode or label.

Section 3.

(1) Upon the time of certification of each candidate and each question to be voted upon, all pre-printed paper ballots shall be secured by the county clerk of each county, under lock and key, in an area under the direct control of the county clerk and approved by the county board of elections.

(2) The possession of all pre-printed ballots shall be accounted for on SBE Form 76, Ballot Reconciliation Statement.

(3) If paper ballots need to be printed at a county clerk's office, an accounting of the printed ballots shall be made on either the SBE Form 76, Ballot Reconciliation Statement, or by the printing equipment.

(4) Upon the transfer of ballots from the area under the direct control of the county clerk to a polling location, the transfer shall be noted on the SBE Form 76, Ballot Reconciliation Statement.

(5) Beginning with the in-person casting of ballots during the period described in KRS 117.076, each voted in-person ballot shall remain in a locked and sealed receptacle, until the conclusion of the period described in KRS 117.295(1).

(6) At the conclusion of each day of voting, an accounting of the number of all voted, unvoted, and spoiled ballots shall be recorded on the SBE Form 76, Ballot Reconciliation Statement.

(7) All ballots and election materials not secured in an area under the direct control of the county clerk after the close of polls shall be secured at the voting location in a secure manner, based upon the advice and recommendations of the county board of elections and the sheriff from the time described in KRS 117.076 until the conclusion of voting on the day of an election.

(8) As mail-in absentee ballots are received by county clerks, they shall have their unique barcode or label scanned.

(9) Upon each mail-in absentee ballot being processed, the unique barcode or label shall be scanned again.

(10) If a mail-in absentee ballot is found to be without the need for a signature cure, or a mail-in absentee ballot has been returned along with a completed SBE Form 77, Discrepant Mail-in Absentee Signature, the ballot shall be recorded into an optical scanner, to be deposited in a locked and sealed receptacle for the period described in KRS 117.295(1).

(11) Any completed SBE Form 76, Ballot Reconciliation Statement shall be turned over to the local Commonwealth's Attorney along with any other materials required under KRS 117.365.

Section 4. A voter who is disabled may request a mail-in absentee ballot via an online accessible ballot portal, which shall conform to web accessible design standards as established by the W3C Web Accessibility Initiative at <https://www.w3.org/WAI/>.

Section 5.

(1) Upon receipt of a valid mail-in ballot request, through the online request portal or other valid request method, the request of the voter shall be noted in the Voter Registration System, and reflected in the electronic pollbooks used by precinct election officers.

(2) If a voter noted to have requested a mail-in absentee ballot appears at a polling location to vote in-person, the precinct election officer shall communicate with the county clerk, who shall make a determination as to whether the requested mail-in absentee ballot has been completed and returned as a cast ballot by the voter.

(3) If the mail-in absentee ballot is found to have been completed and returned as a cast ballot, the voter shall not be permitted to cast an in-person vote.

(4) If the mail-in absentee ballot is found not to have been completed and returned as a cast ballot and the ballot has been returned to the county clerk no later than seven (7) days prior to the date of the election as required by KRS 117.085(8), the county clerk shall immediately cancel the issued ballot in the Voter Registration System and allow the voter to cast an in-person ballot after the voter completes Form SBE 32, Oath of Voter, copies of which shall be forwarded to the Commonwealth's Attorney.

Section 6.

(1) A voter, or an individual identified by KRS 117.0861(1), may deliver a mail-in absentee ballot to the office of the county clerk in the county where the voter is registered, to a secure ballot drop-box in the county where the voter is registered, or to a secure drop-off receptacle if one is maintained by the county clerk in the county where the voter is registered, rather than mailing the ballot via the United States Postal Service.

(2)

(a) A county choosing to use a receptacle for ballot drop-off other than a drop-box provided by the State Board of Elections, shall formally seek the State Board of Elections' approval of the receptacle before any ballot is allowed to be deposited inside.

(b) A county choosing to utilize a drop-off receptacle shall provide information about the receptacle to the State Board of Elections as required by KRS 117.086(2)(b).

(3) A drop-box or receptacle located outside a County Clerk's Office shall be located, secured, and identified as required by KRS 117.086(2)(c).

(4) A drop-box or receptacle located inside shall be under direct supervision as required by KRS 117.086(2)(d) and shall be clearly marked as for use by voters in the election, so

as to differentiate the drop-box or receptacle from any other that may be in use in the area.

(5) Any other non-elections related drop-box in use by a county clerk for any other official business shall clearly indicate that the other drop-box is not for the return of election material.

(6)

(a) The county clerk shall empty the drop box and any receptacle used each business day as required by KRS 117.086(2)(e) and secure the absentee ballots therein in a manner consistent with KRS 117.086(3).

(b) Upon each emptying of a drop-box or receptacle, the individuals collecting absentee ballots pursuant to KRS 117.086(2)(e) shall complete Form SBE 78, Daily Absentee Drop-Box Verification Sheet.

Section 7.

(1) After the receipt of a mail-in absentee ballot by the county clerk, the signature shall be examined in accordance with KRS 117.087(3)(c)2 and 5.

(2) If a signature match cannot be made, notice shall be provided to the voter as required by KRS 117.087(3)(c)5, which shall, at minimum, include the mailing of Form SBE 77, Discrepant Mail-in Absentee Signature.

(3) Upon the county board of elections, central counting board, or the county clerk determining the need for a signature cure, the ballot shall be noted in the Voter Registration System and the county clerk shall, on that same day, input the voter's address and any other required data into the SBE 77 and mail the form to the voter.

Section 8.

~~[(1)] [A voter unable to provide proof of identification as required under KRS 117.225, and as defined under KRS 117.001(15), shall:]~~

~~[(a)] [Meet the requirements of KRS 117.228(1)(e) by executing SBE Form 71, Voter Affirmation Form; and]~~

~~[(b)] [Provide alternative proof of identification as required by KRS 117.228(2).]~~

~~[(2)] [A voter personally known to an election officer may cast a ballot in accordance with KRS 117.228(4) upon the election officer executing SBE Form 72, Election Officer Affirmation Form.]~~

~~[(3)] [Both the SBE 71 and SBE 72 shall be forwarded to the local Commonwealth's Attorney following the election.]~~

~~[Section 9.]~~ A voter may make application to cast an excused in-person absentee ballot pursuant to KRS 117.076(2) by completing SBE Form 44E, Excused In-Person Absentee Ballot Application.

Section 9. ~~[Section 10.]~~ The status of the tamper-resistant seal and the number on the public counter shall be recorded as required by KRS 117.076(12) before and after each day of in-person absentee voting, on SBE Form 79, Daily Voting Machine Verification Sheet, which cumulatively shall be collected by the County Clerk.

Section 10. ~~[Section 11.]~~ Incorporated by Reference.

(1) The following material is incorporated by reference:

(a) "Oath of Voter", Form SBE 32, 04/2022;

(b) "Ballot Reconciliation Statement", Form SBE 76, 04/2022;

(c) "Discrepant Mail-in Absentee Signature", Form SBE 77, 08/2022;

~~[(d)] ["Voter Affirmation Form", Form SBE 71, 04/2022;]~~

~~[(e)] ["Election Officer Affirmation Form", Form SBE 72, 04/2022;]~~

(d) ~~[(f)]~~ "Excused In-Person Absentee Ballot Application", Form SBE 44E, 04/2022;

(e) ~~[(g)]~~ "Daily Voting Machine Verification Sheet", Form SBE 79, 04/2022; and

- (f) ~~(b)~~ "Daily Absentee Drop-Box Verification Sheet", Form SBE 78, 04/2022.
- (2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the State Board of Elections, 140 Walnut Street, Frankfort, Kentucky Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m.
- (3) This material may also be obtained on the board's Web site at <https://elect.ky.gov>.

KAREN SELLERS, Executive Director

APPROVED BY AGENCY: April 12, 2024

FILED WITH LRC: April 15, 2024 at 10:56 a.m.

PUBLIC HEARING AND COMMENT PERIOD: A public hearing on this administrative regulation shall be held on May 31, 2024, at 10:00 a.m. ET, at the Office of the State Board of Elections. Individuals interested in being heard at this hearing shall notify this agency in writing by five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing was received by that date, the hearing may be cancelled. This hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until May 31, 2024. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Taylor Brown, General Counsel, 140 Walnut Street, Frankfort, Kentucky 40601, phone (502) 782-9499, email TaylorA.Brown@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Taylor Brown

(1) Provide a brief summary of:

(a) What this administrative regulation does:

This administrative regulation establishes standards for the ballots used during elections, as well as, measures that ensure that votes cast during an election are done so in a free, fair, and secure manner.

(b) The necessity of this administrative regulation:

This administrative regulation is necessary to ensure that the mail-in request and delivery process has the highest degree of security possible.

(c) How this administrative regulation conforms to the content of the authorizing statutes:

KRS 117.015(1)(a) authorizes the State Board of Elections to promulgate administrative regulations necessary to properly carry out its duties.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes:

This administrative regulation assists in the free and fair administration of elections in the Commonwealth as applied throughout KRS Chapter 117.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation:

This amendment guarantees that two mail-in absentee ballots cannot be issued at the same time with the same barcode or unique label should a voter request a second mail-in absentee ballot under KRS 117.085(9).

(b) The necessity of the amendment to this administrative regulation:

Without clear definition, county clerks have been left unclear on how to handle subsequent mail-in absentee requests under KRS 117.085(9).

(c) How the amendment conforms to the content of the authorizing statutes:

KRS 117.015(1)(a) authorizes the State Board of Elections to promulgate administrative regulations necessary to properly carry out its duties.

(d) How the amendment will assist in the effective administration of the statutes:

This amendment will offer clear guidance to county clerks on how to handle subsequent mail-in absentee requests under KRS 117.085(9).

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation:

This administrative regulation will affect voters of the Commonwealth, county clerks, and the State Board of Elections.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment:

To comply with this administrative regulation, voters may need to complete a form or follow absentee ballot delivery instructions, while county clerks and the State

Board of Elections will need to take steps to ensure the security of their elections.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3):

The State Board of Elections estimates that the implementation of this administrative regulation will have minimal costs.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3):

Compliance with this new administrative regulation will benefit all in ensuring that all elections conducted in the Commonwealth are done so in a free, fair, and secure manner.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially:

The cost of the implementation of this administrative regulation for the State Board of Elections will be minimal as it will require only the creation of the new Forms incorporated by reference.

(b) On a continuing basis:

The only continuing cost will be the price associated with printing any copies of the SBE Forms that are necessary.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation:

Funds from the State Board of Elections' administrative budget will be used in the implementation and enforcement of this administrative regulation.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment:

Implementation of this administrative regulation can be achieved without an increase in fees or funding by the General Assembly.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees:

No fees are associated with this administrative regulation.

(9) TIERING: Is tiering applied?

Tiering is not used in this administrative regulation, as a desired result of the promulgation of this administrative regulation is uniform procedures for the administration of elections throughout all of the counties in the Commonwealth.

FISCAL IMPACT STATEMENT

(1) Identify each state statute, federal statute, or federal regulation that requires or authorizes the action taken by the administrative regulation.

KRS 117.015(1)(a) and 117.085(9) require and authorize the actions taken by this administrative regulation.

(2) Identify the promulgating agency and any other affected state units, parts, or divisions:

This administrative regulation will affect the promulgating agency, the State Board of Elections.

(a) Estimate the following for the first year:

Expenditures:The State Board of Elections expects that this administrative regulation amendment will cost no more to administer than is currently expended.

Revenues:It is not expected or intended that this administrative regulation will generate any revenue.

Cost Savings:The State Board of Elections expects that this administrative regulation will not generate any specific cost savings.

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

The State Board of Elections does not anticipate expenditures, revenues, or cost savings to differ in subsequent years.

(3) Identify affected local entities (for example: cities, counties, fire departments, school districts):

This administrative regulation will affect county clerks.

(a) Estimate the following for the first year:

Expenditures:The State Board of Elections expects that this administrative regulation amendment will cost no more to administer than is currently expended.

Revenues:It is not expected or intended that this administrative regulation will generate any revenue.

Cost Savings:The State Board of Elections expects that this administrative regulation will not generate any specific cost savings for the regulated entities.

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

The State Board of Elections does not anticipate expenditures, revenues, or cost savings to differ in subsequent years.

(4) Identify additional regulated entities not listed in questions (2) or (3):

This administrative regulation will affect voters desiring to vote by mail-in absentee ballot.

(a) Estimate the following for the first year:

Expenditures:The State Board of Elections expects that this administrative regulation amendment will cost no more to administer than is currently expended.

Revenues:It is not expected or intended that this administrative regulation will generate any revenue.

Cost Savings:The State Board of Elections expects that this administrative regulation will not generate any specific cost savings for the regulated entities.

(b) How will expenditures, revenues, or cost savings differ in subsequent years?

The State Board of Elections does not anticipate expenditures, revenues, or cost savings to differ in subsequent years.

(5) Provide a narrative to explain the:

(a) Fiscal impact of this administrative regulation:

The State board of Elections expects that this administrative regulation will have little to no fiscal impact on the regulated entities, outside those expenditures already undertaken.

(b) Methodology and resources used to determine the fiscal impact:

This determination of this administrative regulation's fiscal impact is made by the listed contact person and other agency staff based on their collective experience with the subject matter.

(6) Explain:

(a) Whether this administrative regulation will have an overall negative or adverse major economic impact to the entities identified in questions (2) - (4). (\$500,000 or more, in aggregate)

The State Board of Elections does not expect that this administrative regulation will result in a negative or adverse major economic impact to the entities identified in questions (2)-(4).

(b) The methodology and resources used to reach this conclusion:

This conclusion is made by the listed contact person and other agency staff based on their collective experience with the subject matter.