

# WISCONSIN ELECTIONS COMMISSION

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## MEMORANDUM

**DATE:** For the December 3, 2018 Commission Meeting

**TO:** Members, Wisconsin Elections Commission

**FROM:** Meagan Wolfe  
Interim Administrator

Prepared and Presented By:  
Michael Haas                      Nathan Judnic  
Staff Counsel                      Senior Elections Specialist

**SUBJECT:** 2018 Extraordinary Session Legislation- AB 1070 and AB 1071

This memorandum summarizes provisions of two bills which will be considered by the Legislature this week in extraordinary session. WEC staff has also prepared draft testimony for the Commission's review. The Joint Committee on Finance has scheduled a public hearing at 12:30 p.m. on December 3, 2018, with an executive session immediately following. Due to the potential conflict with the Commission meeting, staff intends to submit written testimony for the legislative hearing.

### Assembly Bill 1071

This bill would create a separate election for the 2020 Presidential Preference Primary to be held on the second Tuesday in March (March 10) rather than concurrently with the Spring Election on the first Tuesday in April. If the bill is enacted, the Presidential Preference election would be held three weeks after the Spring Primary on February 18 and four weeks before the Spring Election on April 7.

Based on cost data collected from local election officials after prior spring elections, the WEC has estimated that, as a starting point, creating an additional election would result in additional costs to municipalities and counties of approximately \$6.4 million to \$6.8 million. As indicated in the draft testimony, this estimate likely does not include all local costs and it does not include additional WEC costs to revise training and information resources and to make changes to agency IT applications.

In addition to the financial implications, WEC staff and local election officials have identified several process challenges related to conducting a third spring election within a span of seven weeks. Those challenges include creating ballots, programming voting equipment, and administering absentee voting for two elections simultaneously; abbreviating time periods for completing post-election tasks, including

potential recounts, while preparing for the next election; and ensuring adequate staffing and election inspectors to conduct three consecutive elections.

Assembly Bill 1071 also changes the allowable period for in-person absentee voting. Under current statutes, a qualified elector may apply for an absentee ballot in-person no earlier than the third Monday preceding the election and no later than the Friday preceding the election. The statutes require that in-person absentee voting take place only on Monday to Friday between the hours of 8 a.m. and 7 p.m. As the Commission is aware, however, in 2016 a federal court struck down those restriction in combination with other absentee voting restrictions, and municipalities may now conduct in-person absentee voting at times of their choosing from the date that absentee ballots are available until the Sunday prior to an election. That court case is on appeal and we have been awaiting a decision from the 7<sup>th</sup> Circuit Court of Appeals since April of 2017.

AB 1071 would limit the period of in-person absentee voting to the period from the third Saturday preceding an election until the Friday before the election, and to the days of Monday through Saturday between the hours of 8 a.m. and 7 p.m. Absentee voting by mail would still be available anytime after ballots are delivered to municipal clerks. Due to the pending litigation and the interaction of this provision with the court's decision, if AB 1071 is enacted the Commission would need to consult with the Attorney General's office to determine the allowable time period for in-person absentee voting, in order to minimize legal exposure to the State and municipalities.

Finally, AB 1071 would make changes to the voting procedures for temporary overseas electors. Individuals who are traveling or residing out of the country would be specifically permitted to receive absentee ballot by fax or email, and to use the Federal Write-In Absentee Ballot if they do not have time to receive and return an official ballot. These changes have been requested by the Federal Voting Assistance Program for several years in order to make Wisconsin statutes consistent with federal law and would codify the terms of a federal court consent decree executed by the U.S. Department of Justice, Wisconsin Attorney General's Office, and the WEC earlier this year.

### Assembly Bill 1070

This bill proposes numerous changes related to the authority of administrative agencies, the Legislature, Governor and Attorney General. Provisions with specific impacts on election administration and agency operations include the following:

1. The WEC's administrative rule clarifying that technical college identification cards constitute a student ID and are an acceptable form of photo ID for voting would be codified in the Statutes. The original Photo ID Law did not specify whether technical college ID cards were included in the definition of a student ID.
2. Agencies must submit quarterly reports to the Joint Committee on Finance listing all expenditures of the preceding calendar quarter except aides to individuals and organizations. This provision would create an additional reporting task for the agency's financial staff.
3. The statutory presumption that agencies properly promulgated administrative rules would be eliminated. Also, a recent court decision eliminating court deference to administrative rules

would be codified and agencies would be prohibited from seeking such deference in the course of litigation.

4. Agency guidance documents, including manuals and official communications, would be subject to new requirements. Any form, pamphlet or other informational material published by an agency must include citations to applicable provisions of federal and state law that “supports any statement or interpretation of law that the agency makes.” Guidance documents would need to be published by the Legislative Reference Bureau for public comments before they could be adopted, and they would not have the force of law even after publication. Individuals may petition agencies to promulgate a rule in place of a guidance document and could challenge interpretations in the guidance documents. Any documents that do not comply with the requirements within six months would be considered to be rescinded.

WEC staff has identified several concerns regarding these provisions which are outlined in the draft testimony. It would be a challenge to review and edit all agency manuals, training resources, and voter information materials to insert specific statutory citations and, in some cases, to include all relevant cross references to statutes which interact to support agency guidance. It may also be counterproductive given the importance of creating guidance that is understandable to a broad audience of election officials and voters. The provisions related to public comment periods also affects the ability of WEC staff to provide timely guidance, particularly in the period close to an election. Finally, it is unclear whether WEC staff would need to include statutory citations in routine email responses to inquiries of election officials and the public.

5. An individual nominated by an agency to a position, with the advice and consent of the State Senate, may not be nominated again for the position, or perform any duties of the office or position during the legislative session biennium if the individual's confirmation for the position is rejected by the senate. Currently, there is no specific prohibition against an agency nominating the individual again for the position or appointing the individual to the position as a provisional appointment.

Given that the Commission has not had an opportunity to discuss specific provisions of these bills, WEC staff has drafted its written testimony for information only and without stating a position in support of or in opposition to either bill. The Commission may provide input and direction regarding the agency’s testimony related to Assembly Bill 1070 and Assembly Bill 1071.