STATE OF NEW HAMPSHIRE

MEMORANDUM

TO: New Hampshire Election Officials

FROM: William M. Gardner, Secretary of State
Gordon J. MacDonald, Attorney General

RE: Elections Operations During the State of Emergency

DATE: April 10, 2020

On April 3, 2020, Governor Sununu issued Executive Order 2020-05 continuing the State of Emergency relating to the outbreak of Novel Coronavirus 2019 (COVID-19). As we confront the many challenges posed by this public health crisis, it is important that we take steps to ensure that the fundamental right to vote is protected and that we work together to ensure that New Hampshire continues its long tradition of conducting fair and well-run elections.

As clerks, moderators, and other local election officials, you provide critical services to your local communities. Our offices remain open and are available to assist you. Please do not hesitate to contact us if we can be of assistance.

Secretary of State: (603) 271-3242 Elections Division: (800) 540-5954 / (603) 271-8241
elections@ sos.nh.gov; nhvotes@sos.nh.gov

Attorney General: (866) 868-3703 / (603) 271-3658
electionlaw@doj.nh.gov

In response to questions from local election officials and others prompted by the ongoing public health emergency, we provide the following guidance with respect to absentee ballots.

Absentee Ballots

1. Municipal Elections to be held in 2020

With respect to any upcoming municipal elections, we offer the following guidance as to who is eligible to vote by absentee ballot in light of the current public health crisis. As explained below, in light of the current public health state of emergency, Emergency Orders #16 and #26, and current public health guidance on social distancing and avoiding being in public in groups of 10 or more, all voters have a reasonable ground to conclude that a "physical disability" exists within the meaning of RSA 657:1. Therefore, all voters may request an absentee ballot on that basis.

2. Analysis

Under existing New Hampshire law, RSA 657:1, a voter may vote by absentee ballot when the voter:

- Will be absent on the day of the election;
    - Absence is defined to include:
        - Being physically absent from the city, town, or incorporated place where domiciled;
        - Being unable to appear at the polling place because of an employment obligation;
        - Employment obligation includes:
            - Where scheduled work hours, including commuting time leave the voter unable to vote in person during polling hours.
                - This applies even where the person's employment is in the town or ward where the voter is domiciled;
            - The care of children or infirm adults, with or without compensation.
                - This would include a voter caring for a person quarantined for COVID-19, including self-quarantine based on general medical advice issued to the public by health officials.

- Cannot appear in public on Election Day because of his or her observation of a religious commitment; or

- Cannot vote in-person by reason of disability.
    - This would include any medical condition where medical advice is that the voter not go out in public.
    - This includes a voter who is quarantined, including self-quarantine, for any reason due to COVID-19. Compliance with general medical advice issued to the public by health officials is sufficient, individualized advice from the voter's personal physician is not required. Current general medical advice is that all household members of a person self-quarantined for cause, also self-quarantine.

Given this broad interpretation of the term "disability" with respect to absentee voting, it is worth noting that the term's above-described application can occur outside emergencies as well. Absentee voting is permitted in any circumstance where the voter is under medical advice – whether it is individualized advice or general advice to the public – to avoid being in places like a polling place.

In light of the current public health advisories related to COVID-19, any voter who in the voter's judgment is being advised by medical authorities to avoid going out in public, or to self-quarantine, would qualify to vote by absentee ballot. This applies equally to voters who are experiencing symptoms of COVID-19 or any other severe communicable flu, and those who are self-quarantining as a preventative measure. As the law does not define the term "disability" for

the purpose of absentee voting, particularly in light of this guidance, any voter's reasonable determination that he or she qualifies satisfies the law.

3. Procedure

As a result, voters with either a disability, as construed above, or an employment obligation, including caring for another, are entitled to mark the absentee ballot application form indicating

- "I am unable to vote in person due to a disability;" or
- "I cannot appear at any time during polling hours at my polling place because of an employment obligation. For the purposes of this application, the term "employment shall include the care of children and infirm adults, with or without compensation."

RSA 657:1; RSA 657:4.

Similarly, these voters are entitled to sign the Absentee Voter Affidavit envelope indicating:

> a) Absence from City or Town. A person voting by absentee ballot because of absence from the city or town in which he or she is entitled to vote shall fill out and sign the following certificate:
>
> I do hereby certify under the penalties for voting fraud set forth below that I am a voter in the city or town of _____, New Hampshire, in ward _____; that I will be unable to appear at any time during polling hours at my polling place because I will be working on election day, or I am voting on the Monday immediately prior to the election, the National Weather Service has issued a winter storm warning, blizzard warning, or ice storm warning, and I am elderly or infirm, have a physical disability, or have to care for children or infirm adults, or I will be otherwise absent on election day from said city or town and will be unable to vote in person; that I have carefully read (or had read to me because I am blind) the instructions forwarded to me with the ballot herein enclosed, and that I personally marked the ballot within and sealed it in this envelope (or had assistance in marking the ballot and sealing it in this envelope because I am blind). For the purposes of this certification, the term "working" shall include the care of children and infirm adults, with or without compensation.
> (Signature) _____

Or

(b) Absence Because of Religious Observance or Physical Disability. A person voting by absentee ballot because of religious observance or physical disability shall fill out and sign the following certificate:

I do hereby certify under the penalties for voting fraud set forth below that I am a voter in the city or town of _____, New Hampshire, in ward _____; that I will be observing a religious commitment which prevents me from voting in person or that on account of physical disability I am unable to vote in person; that I have carefully read (or had read to me because I am blind) the instructions forwarded to me with the ballot herein enclosed, and that I personally marked the ballot within and sealed it in this envelope (or had assistance in marking the ballot and sealing it in this envelope because I am blind).
(Signature) _____

RSA 657:7.

4. September 8, 2020 Primary and November 3, 2020 General Elections

It is impossible to predict the course of the COVID-19 public health crisis or how it might be affecting our state in September and November 2020 when the Primary and General Elections will be held. Nonetheless, it is important for election officials, voters, and candidates to have a clear understanding now about how public-health related concerns will be addressed.

It is reasonable to anticipate that voters may feel apprehension about voting in person in the September 2020 Primary and November 2020 General Elections. Voters should not have to choose between their health and exercising their constitutional right to vote. Thus, any voter who is unable to vote in person in the September 8, 2020 Primary Election or the November 3, 2020 General Election because of illness from COVID-19 or who fears that voting in person may expose himself/herself or others to COVID-19 will be deemed to come within the definition of "disability" for purposes of obtaining an absentee ballot. Any voter may request an absentee ballot for the September 2020 Primary and November 2020 General Elections based on concerns regarding COVID-19. We anticipate providing further guidance to election officials about planning for and accommodating what could be a significant increase in absentee ballots.

5. Enforcement

Suspicion or evidence that a person is trying to vote by absentee ballot, when not entitled by law to do so, is **never** a legal ground for rejecting an absentee ballot. As a general matter, beyond reporting suspected violations to the Attorney General, local election officials do not have a role in determining the legitimacy of an absentee voter's claim to absence or disability.

Local officials must cast and count absentee ballots that are otherwise lawfully submitted, even if there is a suspicion the person did not qualify to vote absentee.

RSA 657:24 establishes enforcement authority for "misusing absentee ballots." No voter whose conduct is consistent with the guidance in this Memorandum will be prosecuted under the second sentence of that statute.