



Wisconsin Elections Commission

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DATE: July 11, 2024

TO: Wisconsin Municipal Clerks
Wisconsin County Clerks
City of Milwaukee Election Commission
Milwaukee County Election Commission

FROM: The Wisconsin Elections Commission

SUBJECT: **Litigation Update: *Priorities USA v. WEC*¹**
RE: Unstaffed drop boxes; municipal clerk discretion; *Teigen v. WEC*.²

ATTACHMENTS: **Attachment A** - Drop Box Resources from the United States Election Assistance Commission

On July 11, 2024, the Wisconsin Elections Commission (“the Commission”) held a public meeting to review and issue guidance following the Wisconsin Supreme Court’s decision in *Priorities USA v. WEC*. The Commission passed the following motion unanimously:

The Wisconsin Elections Commission approves and issues the Clerk Communication and FAQ in Attachment A, including questions 1-16, as amended by discussion. The Commission directs staff to make edits to the *Election Administration* and *Election Day* manuals consistent with its discussion, and to bring revised pages back for Commission approval at a future meeting.

The Commission is issuing this guidance in the interest of answering common questions it has received from clerks, voters, and the media since the decision was published by the Wisconsin Supreme Court. The Commission may issue additional guidance in the future to address new questions or aspects of drop box administration and policy ahead of the November 2024 General Election.

Priorities USA v. WEC **Frequently Asked Questions** **July 11, 2024**

Decision Issued: On July 5, 2024, the Wisconsin Supreme Court overruled its prior decision, in part, in *Teigen v. WEC*, and held that secure drop boxes were permitted under state law as a valid method of absentee ballot return. The decision is binding on all lower Wisconsin courts. The use of drop boxes is not mandatory and is at the discretion of the municipal clerk.

¹ 2024 WI 32. Wisconsin Supreme Court Number: 2024AP000164; Dane County Circuit Court Number: 2023CV1900

² 2022 WI 64, 403 Wis. 2d 607; 976 N.W.2d 519.

Wisconsin Elections Commissioners
Ann S. Jacobs, chair | Marge Bostelmann | Don M. Millis | Carrie Riepl | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

1. Does the decision affect all municipal clerks?

Yes. The decision permits all municipal clerks to choose to use secure absentee ballot drop boxes in their jurisdiction if they wish, starting immediately.

2. What does the decision say?

The Wisconsin Supreme Court determined that the statute that permits voters to return their absentee ballots “to the municipal clerk issuing the ballot or ballots” refers to a person, not a location. The court asserted that this interpretation of state law is consistent with Wisconsin’s highly decentralized system whereby municipal clerks have broad statutory discretion to administer elections in their jurisdiction. Accordingly, since voters may return their absentee ballots to the municipal clerk, or his or her authorized representatives, they may do so via drop box, if that’s a method the municipal clerk chooses to utilize.

3. Does the decision change any established practice?

Yes. The decision reverses a prior Wisconsin Supreme Court decision, in part, and holds that secure drop boxes are a legal method of absentee ballot return under Wisconsin law.

4. Do clerks have to use drop boxes?

No. The decision explicitly states that it does not require clerks to use drop boxes, it just says that the law permits clerks to utilize them if they choose. So if a municipal clerk decides not to use drop boxes in an exercise of clerk election administration discretion, they will not be violating the *Priorities USA* decision. Clerks should note, however, that choosing not to use drop boxes because of a belief that they are not legal is likely inconsistent with the reasoning of the decision, and raises the risk of a legal challenge.

5. Can a clerk be successfully sued if he or she chooses not to utilize drop boxes?

Likely not. If a clerk chooses not to use drop boxes in upcoming elections, it is very unlikely that a challenger would be successful in arguing that *Priorities USA* requires them to be used.

6. Are the Commission’s previous memos related to drop boxes prior to the *Teigen* decision back in effect?

No. The Commission withdrew memoranda dated March 31 and August 19, 2020 relating to drop boxes as part of the *Teigen* litigation on February 16, 2022. The *Priorities USA* decision does not mean either of those memoranda are back in effect.

This memorandum, dated July 11, 2024, is the Commission’s sole issued guidance document related to drop boxes as of this date.

7. Did the decision discuss where drop boxes may be located and who can set them up?

Yes. The decision stated that drop boxes are set up, maintained, secured, and emptied by the municipal clerk, which includes their authorized representatives. A single person need not set up, maintain, secure, and empty all drop boxes in a municipality. The drop boxes may be placed in a location other than the municipal clerk’s office, and may be placed in any location that the municipal clerk, within his or her statutory discretion, designates.

8. Do drop boxes need to be secure? What should clerks consider when examining drop box security?

Yes. The decision held that state law permits clerks to lawfully utilize secure drop boxes in an exercise of their statutorily conferred discretion. The decision did not provide guidance on what it means for a drop box to be “secure.” The Commission recommends that clerks keep the following non-exhaustive security considerations in mind when planning to utilize drop boxes, which are consistent with guidance from the U.S. Election Assistance Commission (EAC) and the U.S. Cybersecurity and Infrastructure Security Agency (CISA). These considerations are merely a starting point—the Commission recommends that clerks thoroughly complete a security assessment for each intended drop box location prior to deployment. The Commission recommends the following best practices:

Best Practices: Physical Security of the Drop Box Itself

- The drop box be securely affixed to the ground or the side of the building, or secured such that the drop box cannot be removed or tampered with.
- If located outside, the drop box be sturdy enough to withstand the elements so the ballots inside will remain unspoiled.
- The drop box be secured against unlawful access or emptying.
- The slot of the drop box be appropriately sized so that only an absentee ballot can be deposited and not other objects or liquids.
- Any damage to or tampering with the drop box be documented and the drop box be inspected to ensure that it remains secure for the purpose of depositing absentee ballot envelopes.
- The drop box be clearly marked or labeled that the drop box is for the purpose of collecting absentee ballots in return envelopes.
- The time of final retrieval of ballot return envelopes be clearly marked on or near the drop box. After the time of final retrieval, the drop box be secured to prevent the submission of absentee ballot return envelopes.

Best Practices: Security of the Drop Box Surroundings

- The drop box be located in a safe location with adequate parking and safe access for pedestrians.
- The drop box be located in a well-lit area.
- The drop box be clearly visible, and the path to the drop box be accessible with clear and level ground space in front.

Best Practices: Security of Ballot Retrieval/Emptying

- The drop box be emptied often enough to avoid the box from being filled with ballots, and a record of the times and dates of retrieval, number of ballots retrieved and the person or persons participating in the retrieval be maintained.
- Ballots retrieved from a drop box be securely transported to the office of the clerk.
- The drop box be equipped with unique locks or seals to secure ballots.

- Absentee ballots that are returned via drop box be secured and transported in the same manner as all other absentee ballots received by clerks. Please refer to page 104 of the Election Administration Manual for guidance on how to secure and transport voted absentee ballots.

The Commission recommends that clerks review the following resources from the EAC and CISA as a starting point for procedures on the secure administration of drop boxes:

- EAC Quick Start Guide on Drop Boxes (PDF)
 - https://www.eac.gov/sites/default/files/electionofficials/QuickStartGuides/Ballot_Drop_Boxes_EAC_Quick_Start_Guide_508.pdf
- EAC Election Management Guidelines, Pages 53, 80, 100 (PDF)
 - https://www.eac.gov/sites/default/files/electionofficials/EMG/EAC_Election_Management_Guidelines_508.pdf
- EAC Sample FAQ Language for How Drop Boxes Work that Can be Adapted for Wisconsin
 - <https://www.eac.gov/how-do-drop-boxes-work>
- CISA Drop Box Considerations
 - https://www.cisa.gov/sites/default/files/2023-07/Ballot_Drop_Box.pdf

9. Does the governing body of the municipality need to be the one to designate drop box locations?

No. The governing body of the municipality designates the location of alternate absentee voting sites under Wis. Stat. § 6.855. The *Priorities USA* decision clearly states that state law “...requires only that the ballot be delivered to a location the municipal clerk, within his or her discretion, designates.”³ The municipal clerk has the authority to designate drop box locations.

10. Who can return a ballot to a drop box?

A voter may return his or her own ballot. An individual may also return the ballot of anyone he or she is lawfully assisting, such as a voter with a disability or a hospitalized voter. An individual is permitted to provide assistance to more than one disabled or hospitalized absentee voter. These principles were issued in Commission guidance following the litigation in *Carey v. WEC*, and are unchanged by the *Priorities USA* decision.⁴

The decision does not say that drop boxes need to be staffed, nor does the decision require a clerk to ask any questions of a voter who is attempting to return a ballot to a drop box.

11. What steps should clerks take if they want to display their drop box locations on MyVote ahead of the August 13, 2024 election?

Once implemented, clerks will be able to add drop box locations and information to WisVote under Election Specific Absentee Options, which will make the drop box locations viewable to voters in their municipality on MyVote. Registered voters in these municipalities will be able to see the information under “Find My Local Absentee Options” button from the Vote Absentee section (<https://myvote.wi.gov/en-us/VoteAbsentee>). Clerks will receive detailed instructions when this functionality becomes available again.

Clerks are encouraged to communicate to voters as to the dates, times, and locations of drop boxes, as well as final retrieval dates and times.

³ *Priorities USA v. WEC*, 2024 WI 32, P26. The *Priorities USA* decision also states that Wis. Stat. § 6.855 “...simply does not apply to drop boxes.” *Id.* at P29.

⁴ Available at: <https://elections.wi.gov/memo/guidance-absentee-ballot-return-options-under-federal-voting-rights-act>.

12. Does the decision require clerks to track which ballots are received by drop box?

No. Nothing in the decision requires clerks to track, mark, or otherwise separate or indicate which returned absentee ballots were received via secure drop box.

13. May a clerk place an insert informing voters of the availability of drop boxes?

Yes. Clerks may place an insert informing voters of the availability of drop boxes for the return of absentee ballot envelopes. Those inserts are recommended to include the locations of the drop boxes, dates and times of availability, and date and time of final retrieval of absentee ballot envelopes. Such an insert would be considered additional administrative or logistical instructions pursuant to administrative rule EL § 6.05(2).

14. Will there be additional training on drop boxes?

Yes. Commission staff intend to provide training to clerks in ElectEd that will be consistent with the Commission’s guidance.

15. Are private citizens permitted to watch drop boxes if they are located in public?

Yes, but not if the watching interferes with voting. Whoever “interrupt[s] or disturb[s] the voting...proceedings” may be fined not more than \$1,000, or imprisoned not more than 6 months or both.⁵ Additionally, anyone who “by abduction, duress, or any fraudulent device or contrivance, impede[s] or prevent[s] the free exercise of the franchise at an election” is guilty of a Class I felony.⁶

Clerks immediately contact law enforcement if anyone tampers with, defaces, destroys, unlawfully empties, or interrupts, impedes, or prevents the use of a drop box.

16. What should I do if I still have questions?

If you have additional questions, please email elections@wi.gov.

⁵ See Wis. Stat. §§ 12.13(3)(x), 12.60(1)(b).

⁶ See Wis. Stat. §§ 12.09(2), 12.60(1)(a).