

STATE OF NEW HAMPSHIRE

MEMORANDUM

TO: New Hampshire Election Officials

FROM: Gordon J. MacDonald, Attorney General

RE: Election Operations during the COVID-19 Public Health Crisis

DATE: **August 20, 2020**

***Note: This guidance is based on health guidelines and Emergency Orders issued as of the date of this memorandum and is subject to updates as necessary.**

Yesterday, Secretary Gardner and I issued guidance regarding Election Day Operations in light of the ongoing public health emergency. The purpose of this document is to provide further, more detailed guidance on some of the concepts raised in yesterday's Memorandum.

If you have specific questions, please direct them to Assistant Attorney General Nicholas Chong Yen, who leads the Election Law Unit. Attorney Chong Yen may be reached at (603) 271-3650.

Again, thank you for your continued efforts to serve the voters of New Hampshire amidst the unprecedented challenges posed by the novel coronavirus (COVID-19) public health emergency.

Q1: Can local officials require voters appearing in-person at a polling location, to wear face coverings/masks to enter the polling place room used by voters wearing face coverings/masks?

A: Yes. Moderators have broad authority to manage the polling location. The right to vote, however, cannot be denied to an otherwise eligible voter who is unable or unwilling to wear a face covering/mask. Moderators who implement face covering/mask requirements, therefore, must provide registration and voting alternatives to voters who either are unable or unwilling to wear face coverings/masks inside the polling location.

As discussed below, the Centers for Disease Control ("CDC") and the New Hampshire Division of Public Health ("DPH") recommend face coverings/masks as one component of the COVID-19 mitigation strategy, and emerging evidence suggests that

face coverings/masks can significantly reduce transmission of the virus in some situations. For many moderators, requiring face coverings/masks inside the polling place may be critical to Election Day operations, both for the comfort and safety of Election Day volunteers and for voters casting in-person ballots.

Some voters, however, will be unable or unwilling to wear face coverings/masks, due to physical or medical conditions or other personal reasons. Moderators may not deny the right to vote based on a voter's inability or unwillingness to wear a face covering/mask. To implement a requirement that everyone inside of a polling location wear a face covering/mask, moderators must establish alternative means of registration and voting for in-person voters who are unable or unwilling to wear face coverings/masks.

While there are no hard and fast guidelines, alternative means must allow the voter to register and vote efficiently, privately, and in a manner that best allows the realization of the full extent of that voter's right to vote. The alternatives cannot, through inefficiency or difficulty of use, make it harder for a non-face covered voter to register and vote. We encourage moderators to consult with town or city legal counsel on these issues, but we believe that, properly implemented, a mandate that everyone inside a polling location wear face coverings/masks can be accomplished without violating voting rights.

The following provides some examples of registration and voting alternatives moderators might employ in the event that they implement a face covering/mask mandate. This list is not intended to include all possible options.

1. Separate Entrance, Exit, Registration Area, and Voting Area

If, at all possible, moderators should establish separate entrances, exits, registration areas, and voting areas for those who are unable or unwilling to wear face coverings/masks. Moderators considering this option should contact their local Emergency Management Director to explore ways to implement it using the resources available at the polling place, while following public health guidelines. Generally, however:

- A separate entrance and exit may be utilized for those voters who are unable or unwilling to wear a face covering.
- A separate area inside the polling place, which can be set up with a guardrail, socially distant voting booths or screens, and supervised by election officials wearing Personal Protective Equipment, can be set up for such voters.

- Ballot clerks in this scenario may need to shuttle back and forth from the voter to the check-in table for purposes of verifying the voter and marking the checklist and to bring a ballot to the voter.
- A ballot box or ballot counting machine can be utilized in this separate voting area to collect completed ballots
- If a separate ballot box or machine is employed, completed ballots can later be transferred over to the primary voting area, provided that the transfer is announced at the polling place before it takes place and the process is made public.

With respect to voter registration in this separate area, officials should provide a supervisor of the checklist table pursuant to the same requirements governing the general registration area.

2. Outdoor Space

Moderators may also consider whether they can create an outdoor space for voting by erecting a tent or shelter of sufficient size to allow for the registration and voting of non-face covered voters. Any such arrangement must comply with the polling place requirements, such as having both a voting booth and screen available to the voter and a writing surface, and the requirements included in paragraph 1 above. The tent may contain a ballot box or ballot counting machine. If a ballot box is used, the ballot box must remain in full view of the public. This alternative must include a process through which voter check-in can occur, and the election official staffing the tent/shelter or serving the voter who needs to use the tent/shelter, must have constant control over the ballot box whenever it contains any marked ballots.

3. Accessible Voting on Election Day

Moderators must provide accessible voting options. *See* RSA 659:20-a. *See also New Hampshire Election Procedure Manual: 2020-2021*, Pgs. 8-9. For some voters, this may provide an alternative means to vote. All procedures and protocols governing accessible voting must be followed.

Q2: What should election officials do if a voter chooses not to absentee vote prior to Election Day, is unable or unwilling to wear a face covering/mask at the polling place, and rejects the alternative voting options offered at the polling place?

A: In light of the severity of COVID-19, if a voter is unable or unwilling to wear a face covering at the polling place and also rejects the alternatives offered for registration and voting, election officials may inform the voter that he/she cannot enter the polling place to vote.

We understand that in some instances, it may be difficult for individuals to wear face coverings/masks. As stated above, no otherwise eligible voter should be denied the right to vote if he or she is unwilling or unable to wear a face covering/mask. For that reason, we have indicated that moderators provide appropriate, alternative means to vote.

If a voter declines to avail himself or herself themselves of an appropriate, alternative means to vote, we strongly encourage moderators to do all they can to engage constructively with these voters to encourage them to either wear a face covering/mask while in the polling place or vote by the alternative means. If all reasonable means to persuade the voter are exhausted, we believe that current law would likely support a moderator's decision to inform the voter that he or she cannot enter the polling place.

Moderators have broad discretion with respect to the conduct of elections. A moderator's decision to impose a face covering/mask requirement is clearly a lawful exercise of that discretion, directed at advancing the compelling interest to protect the health of election workers and other voters, provided that an alternative is available tailored to the interests of those who are unable or unwilling to wear a face covering/mask. The alternative must facilitate an individual's right to vote. We know of no legal authority that would require a moderator to waive a face covering/mask requirement if a voter declines to use an alternative.

We encourage moderators to consult with their legal counsel on this issue. As stated above, we are available to respond to questions up to and including on Election Day.