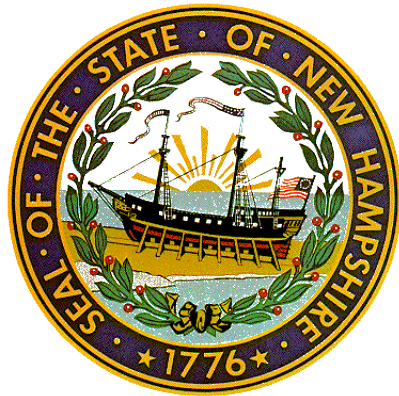


# *2020 What is New Election Law Changes*



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# Election Operations during the Public Health Crisis

Summary of the August 19, 2020 Joint Guidance issued by the Secretary of State and the Attorney General.



In the continuing the tradition of New Hampshire's well-run elections, we will rely on the skill of our election officials in solving the problems the coronavirus poses in the election context, and imbuing voters with confidence and assurance that they can efficiently, effectively and safely cast their ballots during this pandemic. We are confident that the upcoming elections will be as successful as ever, again, due to your efforts and skill.



Q1: Can towns and cities adopt the “drive-up” voting procedures that were used during the 2020 municipal and school meetings for the 2020 September Primary and November General Elections?

A: No.

This answer is addressing Outside Accessible Voting (curbside) under RSA 659:20-a.



During the 2020 municipal and school meetings, New Hampshire Laws of 2020, Chapter 8 allowed towns, village districts, and school districts to conduct their municipal meetings using a “drive-up” voting process. However, an entirely different set of statutes and procedures governs Primary and General Elections. Those statutes and procedures preclude using this process in the upcoming Primary and General Elections.



Q2: Can election officials designate locations at the town or city clerk's office and/or at the polling place where completed absentee ballots can be delivered?

A: Yes, subject to the guidelines below.



## Prior to Election Day

The law provides that a completed absentee ballot may be returned to the town or city clerk by: (a) the absentee voter or his/her delivery agent (defined below) personally delivering the completed absentee ballot package; or (b) the absentee voter or his/her delivery agent mailing the completed absentee ballot package to the town or city clerk. RSA 657:17, I.



These statutes allow for election officials to provide a “dropbox” at the town or city clerk’s office before Election Day. If officials choose to use a “dropbox” at the town or city clerk’s office, **it must be staffed by a properly trained election official throughout the course of its use.**





## On Election Day

For the 2020 Primary and General Elections only, voters can appear at the polling place and deliver their own completed absentee ballots in the same manner they would deliver an absentee ballot to the clerk prior to Election Day.



Election officials can utilize a “dropbox” at the polling place on Election Day. The following procedures must be followed:

1. The “dropbox” must be staffed by a properly trained election official throughout the course of its use on Election Day.



2. The delivery agent must show identification to the election official at the “dropbox” and complete a “Return of Ballot” form. RSA 657:17, III; RSA 657:17-a.
3. The 5:00 PM cutoff on Election Day must be observed and procedures for marking and retention of ballots after that time must be followed.



Voters who deliver absentee ballots after 5:00 PM on Election Day shall be told that their absentee ballots cannot be accepted, in accordance with RSA 657:22, but they can still vote by entering the polling place or by voting curbside under RSA 659:20-a.



Review RSA 657:17, II.

"delivery agent" means:

(a) The voter's spouse, parent, sibling, child, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild;  
or



(b) & (c) For residents of nursing homes or residential care facilities, the administrator or a designee.

(d) A person assisting a blind voter or a voter with a disability who has signed a statement on the affidavit envelope acknowledging the assistance. Limited to 4 absentee ballots at any one election.



Q4: What discretion do moderators have to not require or require voters to wear a face covering/mask inside the polling place?

A: Moderators have broad authority to regulate the conduct of polling within their jurisdictions.



That includes the authority to choose whether to not require or to require a face covering/mask at their respective polling places. Moderators who choose to implement face covering/mask requirements, therefore, must provide registration and voting alternatives to voters who either cannot or will not wear face coverings/masks inside the polling location.





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. It has been further recommended by federal and state health officials that people wear masks in public settings, especially when other social distancing measures are difficult to maintain.



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 other voters casting in-person ballots. For others, some polling places may allow for social distancing and other protective measure, and moderators may choose not to require a face covering/mask.



The moderator has broad authority to manage the polling location. This includes choosing to not require or to require a face covering/mask in order to enter the polling place.



Each polling place is different and unique. The ability to appropriately social distance at one polling place may be easier than at another. In deciding whether to impose a face covering/mask requirement, moderators should consider any factors they view as relevant and important to their consideration. Factors might include, but are not limited to:



Size of polling place;

- Number of other rooms or spaces offered by the polling place;
- Other physical characteristics of the polling place;
- Volume of voters expected to vote in-person;
- Particular risk factors either of the voting population or the election officials.



These factors are not exclusive. Moderators should use their best judgment to determine whether and to what extent to encourage or mandate face coverings/masks.



Moderators who implement a face covering/mask requirement may encounter some voters who will refuse to wear face coverings/masks due to physical or medical conditions or other personal reasons. Every qualified voter, however, must be given an opportunity to cast a ballot.



To properly implement a face covering/mask requirement, therefore, moderators must establish alternative means of registration and voting for in-person voters who refuse 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/masked voter to register and vote.



We encourage moderators to consult with town or city legal counsel on these issues.



Q5: Can election officials require voters to show their faces during the voter check-in and Challenged Voter Affidavit processes?

A: Yes.

It is possible to administer the normal check-in process – or the Challenged Voter Affidavit process as applicable – while following public health guidelines.



In many cases, a voter will be identifiable even when he or she is wearing a face covering/mask.

For example, the election official can still determine the voter's eye color, hair color, and head shape. An official at the polling place may also know the voter checking-in. See RSA 659:13, II(b).



Consistent with public health advisories, if an election official requests that a voter show his or her face for verification, hand sanitizer must be used by the voter prior to and after showing the voter's face. No voter's face should be revealed for an extended period of time.



We encourage the use of the sneeze guards.

During the check-in process, the voter should remain on one side of the sneeze guard with the election official on the other.



A photograph can be taken through the sneeze guard with the voter's face showing. Hand sanitizer must be used by the voter prior to and after showing the voter's face. No voter's face should be revealed for an extended period of time. As such, we similarly encourage the use of the sneeze guards during the Challenged Voter Affidavit process.



Q6: Can election officials use two rooms inside the same polling location as voting areas?

A: Yes, provided both voting areas fully comply with all polling place requirements. All rooms used for voting purposes comply with polling place requirements. They should be adjoining rooms if at all possible.





1. Each voting room must have a moderator (assistant/deputy) present overseeing the voting. One official overseeing multiple rooms will not suffice.
2. Officials are encouraged to have a deputy or assistant clerk who can be in the second room on an ongoing basis if needed.



3. Each room must have an area where the public can observe. It need not be large, but the general public cannot be barred from the room. This likely means that some form of guardrail inside each room (i.e. rope, tape, etc.) may need to be used as opposed to using the room walls as the complete guardrail.



4. The political parties must be given notice of the additional voting area and the parties should be asked to notify campaigns. If a party wants a “challenger” present to observe both voting rooms, it may consider sending more than one challenger.



5. The aggregation of votes from the two rooms at the end of the day must be transparent and managed in a way that keeps marked ballots secure and the public present at the polling place well informed about what is going on and how the votes cast in the separate rooms will be aggregated.



Q7: Can election officials be required to wear Personal Protective Equipment (PPE)?

A: Under New Hampshire's Constitution, the moderator has the authority and responsibility to govern elections. The use of face coverings/masks by election officials is in accordance with guidance by public health officials, including the Centers for Disease Control.



A moderator's requirement that election officials wear face coverings/masks or other personal protective equipment is, in our opinion, within his or her constitutional authority. Moderators should first consult with their town or city legal counsel.



Part II, Article 32 of the New Hampshire Constitution states that the moderator has the authority and responsibility to govern elections. We believe that this grant of authority would extend to a requirement that local election officials wear face coverings/masks or other personal protective equipment.



Under the same constitutional provision, all of the selectmen (or their designees appointed under RSA 658:21-a) are required to be present at the polling place on Election Day. Because the selectmen must be present, they cannot be required to wear face coverings/masks while in the polling place if they are unwilling to do so.





However, it is within the moderator's authority to require that they remain in a designated area more than 6 feet away from other election officials and voters.

There are implications for such decisions and we encourage moderators to consult with their legal counsel. There is a risk of legal challenge involving a moderator's decision on this important issue.



In making the decision, local officials should consider that some voters may feel uncomfortable voting in an environment where election officials are not wearing face coverings/masks. In addition, it may be hard to attract sufficient volunteers to staff local election locations unless a face covering/mask requirement is in place.



Q9: Can the moderator utilize pro tem election officers inside the guardrail who are not domiciled in the polling location's town or ward?

A: No. A pro tem appointed poll worker can be used only for those roles that are outside the guardrail.



New Hampshire law requires that an election officer who works inside the guardrail be domiciled in the town or city ward where the polling place is located.



Moderators may utilize assistant appointed poll workers (not election officers) who are not domiciled in the town or city ward of the polling place, provided those assistant poll workers are only permitted to work outside the guardrail. (i.e. Ballot Clerk check-in table, Assistants to the Supervisors of the Checklist table, Greeter, etc.).



Just as the position of greeter is not explicitly provided for in statute, an assistant poll worker will be appointed by the moderator, supervisors, or clerk, take an oath, but will not be an election officer.



A assistant poll worker assisting with voter registration can help the voter complete the voter registration form, help organize the applicant's proof documents or, if needed, help the applicant complete a domicile and/or qualified voter affidavit, but may not make the final decision to approve the applicant.



The completed application form and proof of qualifications must be reviewed and approved by an elected supervisor or a assistant supervisor who is domiciled in the town or ward.





The election officials and appointed assistants counting the ballots must be voters in the town or ward.



RSA 658:25 states in relevant part, that “[t]wo of the inspectors, one from each of the 2 political parties, shall be designated by the moderator at the opening of the polls to act as ballot clerks.” We do not construe this to prohibit the Moderator from designating officials other than inspectors of elections as ballot clerks.



In present circumstances, however, when necessary a town or city may use individuals, for example non-resident municipal employees, to be appointed and sworn in as assistant poll workers to assist at the election provided the non-residents are assigned only to tasks outside the guardrail.



The Attorney General has issued further, more detailed guidance. The document dated August 20, 2020 has been distributed to all election officials and is available on the Secretary of State's web site in the "Elections" tab, under "Local Election Officials" in the right hand column. Please also review this document.



The 2020-2021 Election Procedure Manual is being mailed to local election officials. An electronic version is available on the Secretary of State's web site:

<https://sos.nh.gov/>

in the "Elections" tab, under "Local Election Officials" in the right hand column.



The 2020-2021 Election Procedure Manual has extensive special guidance on COVID-19, starting on page 1. Guidance from the CDC on polling places is included.



State Epidemiologist Dr. Benjamin Chan, MD MPH provided a webinar on best practices for managing your polling place at the upcoming elections which addressed guidance issued by the CDC. The webinar is available on-demand, it is approximately 1 hour long. A link to view the webinar has been emailed to all election officers and will be available on the Secretary of State's web site.



## 2019-2020 Law Changes

HB 1266 and partial pre-processing of absentee ballots is covered in a separate webinar.

It is presented live and is also available on-demand.





## Intent of the Voter

For town and city elections, a new law provides: “In any vote conducted pursuant to this chapter, every ballot shall be counted if the intent of the voter can be determined, regardless of whether the voter followed any instructions relative to marking the ballot provided before the vote.” RSA 40:4-g.

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The New Hampshire Supreme Court has established this intent of the voter standard, as the rule for counting all ballots, most recently in Appeal of McDonough (Ballot Law Comm'n), 149 N.H. 105, 112, (2003).

See: What Constitutes a Legal Vote at page 98 of the 2020-2021 Election Procedure Manual.

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# VOTING ABSENTEE WILL BE ABSENT

Absentee voting is available to a person who “will be” absent. The law previously applied to a person who “is” absent, however, the need to apply for and submit absentee ballots in advance of the election meant the voter would not know for certain if he or she would actually be absent until election day.



## STORM WARNING & CONCERN FOR SAFETY WHEN TRAVELING

When the National Weather Service has issued a winter storm, blizzard, or ice storm warning for election day that is applicable to the town or city, a person who would have voted in person, but has concerns for his or her safety traveling in the storm, can vote absentee the day before the election.



## CARE OF CHILDREN/INFIRM ADULTS

Absentee voting is available on the day before the election to a person who cares for children or infirm adults who reasonably anticipates that school, child care, or adult care will be canceled. RSA 657:1, II.



The clerk's office must be open on the day immediately prior to the election, from at least 3PM until 5PM, to receive absentee ballot applications, issue ballots, and receive back completed absentee ballots sealed in the affidavit and outer envelopes. RSA 652:20; RSA 657:1, II (c).



## DELIVERY OF ABSENTEE BALLOTS

Marked absentee ballots in the affidavit and outer envelopes may be delivered to the clerk by:

- Personal delivery by the voter;
- Personal delivery by a voter's "delivery agent;"
- Mail: U.S. Postal Service or commercial delivery service/courier (UPS, FedEx, DHL, etc.).



## MISUSING ABSENTEE BALLOTS

In 2019, the legislature amended the law which makes it a misdemeanor to show or exhibit a marked unsealed absentee ballot prior to the processing of the ballot, to exempt a voter who because of disability receives assistance, as allowed by RSA 657:17, with marking the absentee ballot and any person assisting that voter. RSA 657:24.





# DRIVER'S LICENSE/NON-DRIVER ID MAY BE IN COLOR OR BLACK AND WHITE

The legislature amended RSA 263:40, I to allow use of black and white licenses and IDs. This will be seen most frequently with a temporary license/ID.



## Unofficial Notice of Death

While not required by RSA 654:37-a, best practice is to exhaust reasonable efforts to obtain an official notice of death instead of sending an inquiry.



- If a supervisor or the clerk personally knows a member of the family of the deceased voter, consider informally seeking that person's assistance with obtaining a copy of the death or burial certificate.
- If you can identify the funeral home that served the family, usually reported in an on-line obituary, the funeral home may also be of assistance. RSA 654:37-a.



## Right-to-Know Law

“Contact information, including but not limited to a phone number and email address, provided to the secretary of state or other election officials for the purpose of receiving information about elections” shall be treated as confidential information.

These governmental records are exempt from the public disclosure provisions of the Right-to-Know law, Chapter 91-A.



No cost or fee may be charged for the inspection or delivery, without copying, of governmental records.

There also may be no cost or fee if the requesting party makes a copy with his or her own equipment.

RSA 91-A:4, IV.



For the purposes of felon disenfranchisement, the legislature defined “final discharge” to be “release from incarceration.” This does not change the current effect of the law on registration and voting.



The change to law requires the correctional facility to provide a felon who is paroled or given a suspended sentence written notice that he or she may vote.

RSA 607-A:2.



# RIGHT-TO-KNOW LAW – DELAY OR DENIAL OF ACCESS TO RECORDS

When records are not immediately available and cannot be provided within 5 business days of the receipt of the request, provide a written statement of:





I. A specific date by which a substantive response to the request will be made. A substantive response may be:

- A search has been completed and you possess no records that are responsive to the request;
- Providing access to the responsive records found;



- Providing access to redacted versions of responsive records found. (Consult town/city legal counsel).



2. A short explanation of the reason for the delay. Examples:

- Time is required to complete a search to determine if you possess responsive records;
- Time is required to obtain legal advice regarding the response to the request;
- Time is required to prepare redacted records;
- Other legitimate reasons may exist – consult town/city legal counsel. RSA 91-A:4, IV.



When denying access to records, in whole or in part, provide a written statement of the specific exemption authorizing withholding the record and a brief explanation of how the exemption applies to the record withheld.

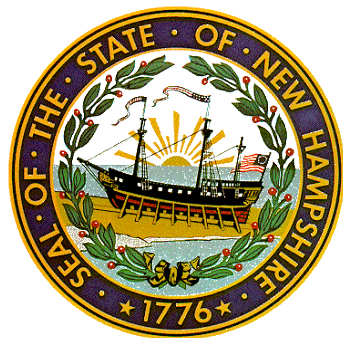


- RSA 654:31 sets forth when checklist and voter information is publicly available.
- RSA 654:31-a sets forth the exemption of certain governmental records from public disclosure.
- Consult your town or city legal counsel if it is unclear whether you may disclose particular governmental records that have been requested. RSA 91-A:4, IV.



## Adopting or Rescinding SB2

RSA 40:14 (HB 415 – 2019 Ch 131) changed the manner of voting whether to adopt official ballot referendum form of government (SB2) from the question being on the official ballot to being a vote taken during the traditional meeting.



Thank you!



If you have questions after today's presentation, please e-mail:

[NHVotes@sos.nh.gov](mailto:NHVotes@sos.nh.gov)

Attorney General's Office Election Line

1-866-868-3703

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