CHAPTER 10

PROVISIONAL BALLOT REQUIREMENTS

Summary of Contents:

10.1   Requirements for Provisional Ballots

Alabama Code § 17-10-2 implements the requirements of the Help America Vote Act (HAVA) of 2002, (Public Law 107-252) and Alabama law mandating provisional voting in federal, state, and local elections. It requires that voters cast a provisional ballot under six circumstances:

(a)   **Voter Not On Poll List** – A voter is required to vote by provisional ballot if their name does not appear on the list of eligible voters for the precinct in which they are seeking to vote, and they are unable to present a valid certificate from the board of registrars. §§ 17-10-2(a)(1) and 17-10-3. If a voter is not on the poll list and does not have a certificate, the poll workers may call the board of registrars. If the registrars have a record of their registration, the voter may obtain a certificate from the courthouse. Additionally, the clerk may check a list of voters from all precincts to ensure that the voter is not assigned to a different polling place.

(b)   **Voter Issued Absentee Ballot** – A voter is required to vote by provisional ballot if they have been issued an absentee

ballot. § 17-10-2(a)(5). Even if the voter has not voted the absentee ballot, they must vote provisionally to ensure that they do not vote twice.

(c)   **Court-Ordered Poll Extensions** – If a voter wishes to vote during a court-ordered extension of the poll closing time, they are required to do so by provisional ballot. AG AO 2005-012. These ballots must be segregated from all other ballots and may be counted only under court order. § 17-10-2(a)(4). However, anyone in line at the time of the closing of the polls (regular hours) may still vote by regular ballot or provisional ballot, as normal. § 17-12-1.

(d)   **Inspector Challenges** – A voter is required to vote by provisional ballot if an inspector has knowledge that they are not entitled to vote (for example, the inspector knows the proposed voter does not reside in the precinct) and challenges the individual. Only the inspector of a poll may challenge a voter. § 17-10-2(a)(2). The challenging inspector must complete a challenge form providing the facts that are the basis for their challenge. § 17-10-2(b)(4)

(e)   **No Voter ID** – A voter is required to vote by provisional ballot if they are unable to present valid form of voter identification and they cannot be positively identified by at least two election officials. §§ 17-9-30 and 17-10-2(a)(3).

(f)   **Voter Ineligible for Primary Runoff** – A voter who previously cast a ballot in one party's primary election is not eligible to vote in a different party's primary runoff election. § 17-13-7.1. If the voter objects to the party in which they are listed for runoff purposes, the voter is required to vote by provisional ballot. Ala. Admin. Code r. 820-2-6.1-.01(4)

Occasionally, a voter may cast a provisional ballot at the precinct in which their residence is located despite being registered to vote at another precinct in the same county. In such instances, the board of registrars should use that voter's reidentification form, completed at the polling place, to update that voter's registration and should then certify that the provisional ballot be counted. AG AO 2005-051.

In a municipal election, when the name of an individual voting a provisional ballot does not appear on the official list for the polling place where the individual seeks to vote, the board of registrars shall verify that

the individual is registered to vote at an address located within the municipal corporate limits or district within which the individual seeks to vote. § 17-10-2(e). If the applicant's name is not on the list, they may not vote except by provisional ballot. §§ 11-46-39 and 11-46-50.

Any voter who casts a provisional ballot must be able to ascertain whether the vote was counted or the reason why it was not counted. § 17-10-2(g). The voter may contact the board of registrars to obtain this information or may use the online tool provided by the Secretary of State on its website at myinfo.alabamavotes.gov.

10.2 Situations Where an Absentee Ballot Becomes a Provisional Ballot

10.2.1 Identification

Every voter is required to provide an acceptable form of photo identification in order to vote unless they fall into one of two narrowly prescribed exceptions. § 17-9-30. For the absentee voter, a copy of the voter's photo identification card should be submitted when applying for an absentee ballot. If an absentee ballot application is submitted on or after the eighth day prior to the election without the required photo identification, the absentee ballot will be issued as a provisional ballot. Provisional absentee voters must provide valid photo identification when they return the voted ballot or submit the photo identification to the board of registrars by 5 p.m. on the Friday following the election in order for the ballot to be counted. § 17-10-2(c)(1).

10.2.2 Precinct List

After receiving the absentee ballot application where the absentee election manager determines that the voter is registered to vote but is not identified as appearing in the precinct for which the voter seeks a ballot, the ballot will be issued as a provisional ballot. § 17-10-2(c)(2).

10.2.3 Inspector Knowledge

An absentee ballot will become a provisional ballot when the absentee inspector has knowledge that the individual is not entitled to vote at the voting place applicable to the voter's ballot and challenges the voter's right to vote a particular ballot. The absentee election manager follows

the same general procedure used for inspector challenges in polling places, including mailing a copy of the challenge statement to the absentee voter. § 17-10-2(c)(3).

10.2.4 Objection to Political Party Designation for Runoff

An absentee ballot will become a provisional ballot when the absentee voter objects to the political party identified for them on the list of registered voters for primary runoff election and the voter insists on being permitted to vote in the primary runoff election of their choice. Ala. Admin. Code r. 820-2-6-.07(2).

10.3   Establishing a Procedure for a Provisional Ballot

The procedure for provisional ballots requires the judge of probate in each county to appoint a **Provisional Ballot Officer (PBO)** for each precinct. In some counties, the judges appoint the inspector or chief clerk. In other counties, another election official is appointed to handle this responsibility. The PBO is to be placed under oath as is any other election official. The PBO is responsible for instructing voters on all aspects of provisional voting and is responsible for administering all requirements of provisional voting in the precinct. Ala. Admin. Code r. 820-2-6-.03.

10.3.1 At the Beginning of Election Day

Prior to the opening of the polls, the PBO will take the **Provisional Ballot Supply Box (PB Box)** and remove all provisional ballot supplies. This PB Box will serve as a ballot box for all provisional ballots cast on election day. The PBO will also need to place an identifying precinct sticker on the PB Box or write on the PB Box the location of the precinct and the precinct box number.

10.3.2 During Election Day

A voter is required to cast a provisional ballot when:

> (a)   The voter's name does not appear on the list of registered voters (active or inactive);
>
> (b)   The voter's registration status cannot be determined by the poll workers;

(c)   The voter disputes the determination that they are not registered or eligible or both;

(d)   The voter does not have an approved form of identification and two (2) election officials cannot positively identify the voter;

(e)   The list of registered voters indicates that the voter requested an absentee ballot;

(f)   Inspector has knowledge the voter is not entitled to vote at that precinct and challenges the voter;

(g)   A federal or state court extends the time for closing the polls; or

(h)   Voter objects to the political party identified for the voter on the list of registered voters for the primary runoff election. § 17-10-2; Ala. Admin Code r. 820-2-6-.07.

When one of the above issues arises regarding a voter, the poll worker should bring this issue to the attention of the PBO. If a voter's name is not on the poll list, the PBO should make reasonable efforts to contact the judge of probate or board of registrars. If the voter's eligibility and registration are confirmed, then an update form, with "verification" checked will allow the voter to vote a "regular" ballot. If the eligibility and registration are confirmed, the PBO should fill out the back of the update form and indicate which registrar confirmed the information. The PBO shall write the source of the verification in the designated area.   Ala. Admin. Code r. 820-2-6-.04.

If the PBO is unable to verify the voter's eligibility and registration, then the PBO should instruct the voter on how to vote a provisional ballot. Ala. Admin. Code r. 820-2-6-.05. The voter may request voting assistance from another person and that person shall be allowed to accompany and assist the voter during the process of provisional voting. Ala. Admin. Code r. 820-2-6-.04.

10.4   Casting a Provisional Ballot

The procedure for casting a provisional ballot at the polling place is specifically set out in the Help America Vote Act. 52 U.S.C. § 21082(a).

10.4.1 Initial Provisional Ballot Procedures

When voter identification or registration problems cannot be resolved, the PBO utilizes the following procedure in the Provisional Balloting process: First, the PBO requests if the voter will sign the oath on a PB-3 provisional verification statement. If the voter responds "No" or refuses then the voter cannot vote a provisional ballot. If the voter responds "Yes" or otherwise consents, then the PBO notifies the individual that they may cast a provisional ballot in that election. The PBO gives the individual written information which states that any individual who casts a provisional ballot will be able to ascertain whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted. § 17-10-2(b); *see also Ala. Admin. Code § 820-2-6-.10 and .11.*

10.4.2 Voter Affirmation

The individual who consents to vote a provisional ballot must execute the written affirmation printed on the PB-3 form in the presence of the PBO. This affirmation states the following:

> State of Alabama, County of _____ I do solemnly swear (or affirm) that I am a registered voter in the precinct in which I am seeking to vote and that I am eligible to vote in this election.

_____
Signature or Mark

_____
Printed Name of Voter

_____
Printed Residence Address of Voter

_____
City, State, Zip Code

_____
Date of Birth (month/day/year)

_____
Phone Number

_____
Date (month/day/year)

10.4.3 Forms

The voter must also complete a voter reidentification "update" form prescribed by the Secretary of State for use in updating the state voter registration list. § 17-10-2(b)(3). This form indicates whether it is associated with a provisional ballot.

10.4.4 Inspector Challenges

Where a provisional ballot is required on the basis of an inspector's challenge, the inspector signs a statement under penalty of perjury setting forth facts which the inspector believes supports their belief that the individual is not qualified to vote in the precinct in which the voter is seeking to vote. The challenge statement of the inspector is written on a multi-part form established by the Secretary of State. The inspector places the original challenge statement in the provisional ballot box, gives one copy to the provisional voter, and attaches one copy to PB-3 form to be returned to the board of registrars in a sealed envelope. § 17-10-2(4); Ala. Admin. Code r. 820-2-6-.12.

10.4.5 Submitting Provisional Ballot

The voter casts the provisional ballot and places it into a sealed ballot box separately identified and utilized for provisional ballots. Any ballot used as a provisional ballot must be altered in at least one of three ways:

(a)   clipping or cutting the upper left corner of the ballot;

(b)   placing an official provisional ballot label over the timing marks on the ballot; or

(c)   shading or coloring in a bubble on another area of the ballot that will identify the ballot as a provisional ballot.

This identification ensures that a provisional ballot is rejected by electronic tabulation equipment if the provisional voters mistakenly attempt to place their provisional ballots in the tabulation equipment on the day of the election. Ala. Admin. Code r. 820-2-6-.09.

10.4.6 Voting by Provisional Ballot at New Precinct

A voter who has moved to a different precinct within the county but failed to update their registration address before the 14-day cutoff is entitled to vote a provisional ballot at the voter's new polling place. Such a voter will be required to supply their current address on a reidentification

portion of the PB-3 form. This form will then be used by the board of registrars to determine whether the provisional ballots should be counted. The provisional ballot will only be counted if the voter does not cast a ballot in the precinct from which the voter moved. AG AO 2005-081.

10.5   Procedures for the Provisional Ballot Officer (PBO)

10.5.1 Preparing the Provisional Ballot (PB) Materials

The PBO is responsible for administering the provisional balloting process within the precinct. Before the polls open, the PBO should prepare the PB materials. All materials should be removed from the PB Box, and the box should be resealed with the label provided. The provisional ballot roster should be prepared along with provisional ballots, to be ready when necessary. The provisional ballot roster must include the name and number of the precinct, the name and date of the election, and the name of the county, city, or town in which the election is being held. Ala. Admin. Code rr. 820-2-6-.03 and 820-2-6-.06.

10.5.2 Confirming Provisional Voters

If a voter's name is not on the poll list, the clerk should notify the PBO. At this point, the PBO should make reasonable efforts to contact the board of registrars to check the voter's registration status. In municipal elections, the city clerk should be contacted instead. If the voter's eligibility and registration are confirmed, then an update form, with "verification" checked will allow the voter to vote a "regular" ballot. The PBO shall also write the source of the verification (the name of the registrar or clerk) in the designated area. Ala. Admin. Code r. 820-2-6-.04.

However, if it is confirmed that a voter must cast a provisional ballot, the PBO will explain the process to the voter using an instructional sheet provided by the Secretary of State. Ala. Admin. Code r. 820-2-6-.10. The voter may request voting assistance from another person and that person shall be allowed to accompany and assist the voter during the process of provisional voting. Ala. Admin. Code r. 820-2-6-.04.

10.5.3 Provisional Ballot Roster

First the voter must sign the provisional ballot roster. Either the voter or voter's assistant must fill out the information required on the roster. Ala.

Admin. Code r. 820-2-6-.06.

10.5.4 Verification Statement and Identification Update Form

Next, the voter must complete a PB-3 provisional verification statement with attached voter identification update form. Before giving the voter this form, the PBO should write the election date, precinct number, ballot style, and voter's roster line number in Section 1 of the PB-3. The PBO should also check the appropriate box indicating the reason why a provisional ballot is required. The PBO should then give the voter the PB-3. The voter should complete the information in Section 4 and the update form. The PBO should make sure that they sign the sworn statement before the voter returns the form. Ala. Admin. Code r. 820-2-6-.07

10.5.5 Casting the Provisional Ballot

After collecting the PB-3, the PBO may issue the voter a provisional ballot along with the PB-1 inner (secrecy) envelope and the PB-2 outer envelope. Before giving these materials to the voter, the PBO should write the voter's name and roster line number on the PB-2 outer envelope. Ala. Admin. Code r. 820-2-6-.06.

The voter should be directed to a private area to fill out the provisional ballot in secret. The PBO should instruct the voter **not to remove** any stickers placed over the provisional ballot's timing mark area. **Additionally, the PBO should not allow the voter to take their ballot into the area used by regular voters in order to prevent them from accidentally placing their ballot in the ballot counter.**

Once the voter has completed their ballot, the PBO should make sure that the voter places the ballot directly into the PB-1 inner envelope and seals it, before placing it into the PB-2 outer envelope and sealing that. After double-checking that the voter's name and roster line number are listed on the PB-2, the PBO should direct the voter to deposit the envelope into the slot on the end of the PB box. Ala. Admin. Code r. 820-2-6-.13.

The PBO should also make sure the voter has an instruction sheet and that the provisional voter understands how to find out if their provisional vote counted. The Secretary of State has a facility on its website for finding out the result of a provisional vote at myinfo.alabamavotes.gov. If the reason for the provisional vote was lack of identification, the PBO should also instruct the voter as to when to submit identification to the board of registrars.

169

10.5.6 After the Polls Close

Once the polls close, the PBO must complete their administrative responsibilities. The PBO must sign the provisional ballot roster. Any inspector challenge statement should be attached to the PB-3 form of the challenged voter. Then they place the roster and all PB-3 statements in the PB-4 Envelope and seal the envelope. The PBO is also required to seal the slot on the Provisional Ballot Box and write on the seal the total number of ballots deposited in the PB Box. The PBO returns the PB-4 Envelope and the PB Box to the sheriff at the designated place on election night. The envelope will then be delivered to the board of registrars, while the sheriff will retain the Provisional Ballot Boxes and Ballots until delivery to the canvassing board. Ala. Admin. Code rr. 820-2-6-.14 and 820-2-6-.15.

10.5.7 Duties If No Provisional Ballots are Cast in Precinct

Even if no provisional ballots are cast in a precinct the PB Box must still be returned. After retrieving the PB roster and PB-4 envelope, the PBO reseals the box, writes "0" on the seal, and writes "none" across the PB roster. The PBO must place the identifying sticker from election supplies on the front of the envelope. Finally, the PBO must write "None" across the front of the PB-4 envelope. Ala. Admin. Code r. 820-2-6-.14.

10.6 Extension of Voting Hours by Court

When the time for casting votes is extended by a court, then all ballots cast during the extended voting period are provisional ballots and must be kept separate from other provisional ballots. However, anyone in line at the time of the closing of the polls (regular hours) may still vote by regular ballot or provisional ballot, as normal. When the time for casting votes is extended by a court, the election official should place a note at the bottom of the roster stating that beginning with Voter # all provisional votes cast were during extended hours. The PBO checks the extended hours box on the PB-3 form to clarify the status of these provisional voters and segregates the provisional ballots cast during court extended hours from other provisional ballots. § 17-10-2(a)(4).

10.7 Duties of Elected and Appointed Officials in Provisional Balloting Process

10.7.1 Sheriff

The sheriff receives the PB-4 envelopes containing the provisional voter information and the PB Box from the inspectors of each precinct in the county. The sheriff delivers the PB-4 envelopes to the board of registrars prior to noon the day after the election. The sheriff also preserves and secures the PB Box and delivers the PB Box to the appointing board before noon seven days after the election. § 17-10-2(d); Ala. Admin. Code r. 820-2-6-.15(1).

10.7.2 Board of Registrars

The board of registrars receives the PB-4 envelopes from the sheriff before noon the day after the election. The board determines whether or not to count provisional ballots and indicates the board's finding and reason on the back of the PB-3 statements. The board delivers the PB-3 Statements to the canvassing board prior to noon seven days after the election. § 17-10-2(e); Ala. Admin. Code r. 820-2-6-.15(2-4).

The board of registrars determines whether provisional ballots are entitled to be counted and the canvassing board tabulates the provisional ballots that have been certified by the board. If a voter casts a provisional ballot at a precinct in which the voter's residence is located and the voter is not registered to vote in that precinct, but the voter is registered to vote in a different precinct within the county, the board of registrars should certify that the provisional ballot be counted and use the voter's reidentification form to update that voter's registration. AG AO 2005-051.

The board of registrars should not certify that a provisional ballot be counted if the voter does not reside in the precinct and is not registered to vote in the precinct where they are attempting to vote. If the board determines that a voter is not a resident of the precinct in which the provisional ballot is cast, the board should not certify the counting of that provisional ballot. AG AO 2005-052.

The board of registrars cannot update a voter's registration record for purposes of an upcoming election when the information is submitted during the 14-day period before that election. This information may,

171

however, be used to update the voter's registration for subsequent elections. AG AO 2005-081.

10.7.3 Canvassing Board: Judge of Probate, Sheriff, and Circuit Clerk

The canvassing board comprised of the judge of probate, sheriff, and circuit clerk canvasses the result at noon seven days after the election.   In addition, the canvassing board examines the back of PB-3 Statements received from the board of registrars to determine which provisional ballots to count. The board has to determine which Precinct Provisional Ballot Boxes contain the provisional ballots to be counted and opens and removes all PB-2 envelopes that have been designated "Count Ballot" on back of the PB-3 Form. The results of the tabulation are placed on a separate Certificate of Results which is signed by the appointing board members. The actual ballots are returned to the sheriff to be preserved and secured until the contest period has expired. The results are reported by precinct and posted in the courthouse. § 17-10-2(f).

10.8   Provisional Voting in Municipal Elections

In municipal elections, if a person's name does not appear on the list of qualified voters for that ward or box, the person may not vote except by provisional ballot. § 11-46-39.

The Alabama Supreme Court has addressed the issue of whether provisional ballots are required in municipal elections. In *Townson v. Stonicher,* 933 So. 2d 1062 *(*Ala. 2005), the court principally addressed whether absentee voter identification requirements must be met at the time an absentee ballot is cast, or whether they can be cured later during an election contest.   The court held that the absentee voter must meet identification requirements at the time the vote is cast. However, the court also noted that the provisional ballot procedures in § 17-10-1 et. seq are applicable to municipal elections, except in cases "where the provisions of this title are inconsistent or in conflict with the provisions of a law governing municipal elections." *Id.* at footnote 6.

Additionally, in determining whether provisional ballots should be counted in municipal elections, the Board of Registrars should consult the municipal clerk on issues involving residency in the municipality. Ala. Admin. Code r. 820-2-6-.15(4).