



Office of the Secretary of the State
165 Capitol Avenue
Hartford, CT 06106

MEMORANDUM OF OPINION

To: All Town Clerks and Registrars of Voters

From: Office of the Secretary of the State

Date: June 3rd, 2022

Re: Absentee Ballot Statutory Changes

This opinion provides guidance regarding recent legislative changes to the absentee voting laws of Connecticut. In Public Act No. 22-2, entitled “An Act Revising Certain Absentee Voting Eligibility Statutes,” the Legislature amended the statutory language of Connecticut General Statutes §§ 9-135 and 9-137. These amendments align General Statutes §§ 9-135 and 9-137 with the broader language contained in *article sixth*, §7 of the Connecticut Constitution.

This opinion is issued pursuant to Connecticut General Statutes § 9-3 which states, “(a)The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the secretary’s regulations, declaratory rulings, instructions and opinions, if in written form, and any order issued under subsection (b) of this section, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title, except for chapters 155 to 158, inclusive, and shall be executed, carried out or implemented, as the case may be, provided nothing in this section shall be construed to alter the right of appeal provided under the provisions of chapter 54. Any such written instruction or opinion shall be labeled as an instruction or opinion issued pursuant to this

section, as applicable, and any such instruction or opinion shall cite any authority that is discussed in such instruction or opinion....”

Public Act No. 22-2 revised the eligibility qualifications of absentee voting in C.G.S. §§ 9-135 and 9-137 as follows:

Section 1. Section 9-135 of the 2022 supplement to the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

(a) Any elector eligible to vote at a primary or an election and any person eligible to vote at a referendum may vote by absentee ballot if such elector or person is unable to appear at such elector's or person's polling place **[during the hours of voting]** on the day of such primary, election or referendum for any of the following reasons: (1) Such elector's or person's active service with the armed forces of the United States; (2) such elector's or person's absence from the town of such elector's or person's voting residence; **[during all of the hours of voting; (3) such elector's or person's illness; (4) such elector's or person's] (3) sickness; (4)** physical disability; (5) the tenets of such elector's or person's religion forbid secular activity on the day of **[the]** such primary, election or referendum; or (6) the required performance of such elector's or person's duties as a primary, election or referendum official, including as a town clerk or registrar of voters or as staff of the clerk or registrar, at a polling place other than such elector's or person's own during all of the hours of voting at such primary, election or referendum. **]; or (7) for the state election in 2020, and any election, primary or referendum held on or after June 23, 2021, but prior to November 3, 2021, the sickness of COVID-19. As used in this section, "COVID-19" means the respiratory disease designated by the World Health Organization on February 11, 2020, as coronavirus 2019, and any related mutation thereof recognized by said organization as a communicable respiratory disease.]**

(b) No person shall misrepresent the eligibility requirements for voting by absentee ballot prescribed in subsection (a) of this section, to any elector or prospective absentee ballot applicant.

Sec. 2. Section 9-137 of the 2022 supplement to the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

[(a)] Each absentee ballot shall be returned to the municipal clerk, inserted in an inner envelope which shall be capable of being sealed and which shall have printed on its face a form containing the following statements:

"I hereby state under the penalties of false statement in absentee balloting that I am eligible to vote at the primary, election or referendum in the municipality in which this absentee ballot is to be cast and that I expect to be unable to appear at my polling place ~~[during the hours of voting at]~~ on the day of such primary, election or referendum for one or more of the following reasons: (1) My active service in the armed forces; (2) my absence from the town in which I am eligible to vote; ~~[during all of the hours of voting; (3) my illness or physical disability; (4)]~~ (3) sickness; (4) physical disability; (5) the tenets of my religion which forbid secular activity on the day of ~~[the]~~ such primary, election or referendum; or ~~[(5)]~~ (6) my duties as a primary, election or referendum official.

Date

.... (Signature)"

~~[(b) Notwithstanding the provisions of subsection (a) of this section, for the state election in 2020, and any election, primary or referendum held on or after June 23, 2021, but prior to November 3, 2021, each inner envelope in which an absentee ballot is returned to the municipal clerk shall have printed on its face a form containing the following statements:~~

~~"I hereby state under the penalties of false statement in absentee balloting that I am eligible to vote at the primary, election or referendum in the municipality in which this absentee ballot is to be cast and that I expect to be unable to appear at my polling place during the hours of voting at such primary, election or referendum for one or more of the following reasons: (1) My active service in the armed forces; (2) my absence from the town in which I am eligible to vote during all of the hours of voting; (3) my illness or physical disability; (4) the tenets of my religion which forbid secular activity on the day of the primary, election or referendum; (5) my duties as a primary, election or referendum official; or (6) the sickness of COVID-19.~~

~~Date~~

~~.... (Signature)"]~~

These changes bring C.G.S. §§ 9-135 and 9-137 into closer alignment with *article sixth*, § 7 of the Connecticut Constitution, which provides:

The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness, or physical disability or because the tenets of their religion forbid secular activity.

I. Under Public Act No. 22-2, A Voter No Longer Must Be Unable To Appear at a Polling Place “During All Hours Of Voting” in Order To Vote By Absentee Ballot

Article sixth, § 7 of the Connecticut Constitution empowers the General Assembly to permit voting by absentee ballot when a voter is “unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants.” Prior to Public Act No. 22-2, the General Assembly required that a voter be unable to appear due to an absence from town “during all hours of voting.” In Public Act No. 22-2, the General Assembly deleted the requirement that a person be absent “during all hours of voting,” i.e. 6:00am to 8:00pm. Under Public Act No. 22-2, therefore, the fact that a voter is physically present in their town during some portion of voting hours does not per se prohibit the voter from voting via absentee ballot if the voter is unable to appear at their polling place on the day of the election because of his or her absence from the town. The determination about whether a voter is unable to appear at the polling place on the day of the election because of his or her absence from town is made by the individual voter. *See Fay v. Merrill*, 338 Conn. 1, 33-34, 57, 256 A. 3d 622, 643-644, (2021) .

II. A Voter Is No Longer Required to Have A Personal Illness In Order To Vote By Absentee Ballot under C.G.S. §§ 9-135 and 9-137

Article sixth, § 7 of the Connecticut Constitution empowers the General Assembly to permit voting by absentee ballot “because of sickness, or physical disability.” Prior to Public Act No. 22-2, the General Assembly required that a voter be unable to appear at the polling place because of “such elector’s or person’s illness”, which was read to mean personal illness of the voter. However, *Article sixth, § 7* is not limited to the voter’s personal illness. *Fay v. Merrill*, 338 Conn. at 33. Rather, the constitution uses the word “sickness,” which encompasses a voter’s illness and also has a second meaning beyond a particular voter’s “condition of being sick” insofar as it encompasses a “a particular disease or malady.” *Id.* at 34. In *Fay*, the Connecticut Supreme Court interpreted “sickness” to include an identified disease such as COVID-19 that has created a public health emergency. *Id.* at 35-36. Further, the constitution does not contain language tying the sickness to the particular voter, and the Supreme Court therefore held that the

constitution does not require that the individual voter personally be sick in order to vote absentee. *See id.* at 35-36, 46.

Through Public Act No. 22-2, the legislature removed the phrase “such elector’s or person’s illness” in C.G.S. § 9-135 and removed the phrase “my illness” from C.G.S. § 9-137, and replaced those phrases with the more capacious word “sickness.” As used in the constitution and interpreted in *Fay*, the word “sickness” includes personal sickness as well as a widespread “disease” such as a pandemic or public health emergency like Covid-19 which poses a risk to a voter’s health. Accordingly, a voter is permitted to vote by absentee ballot if exposure to a pandemic disease or public health emergency poses a health risk to the voter. And since the word “sickness” is not tied to an individual voter’s own illness, it permits a voter to vote by absentee ballot if, for example, the voter is a caretaker of an individual afflicted by either personal sickness or whose condition may be aggravated by exposure to sickness. One such example would be a caretaker for an immunocompromised individual whose risk of severe illness could be exacerbated by exposure to a sickness like Covid-19. In that situation, the caretaker may determine that this risk of sickness renders them unable to appear at their polling location. Therefore, the caretaker would be eligible to vote absentee due to “sickness.”

Much like the determination about whether a voter is unable to appear at the polling place on the day of the election because of his or her absence from town, the determination of whether a voter is unable to appear at the polling place because of sickness is made by the voter. Further, the *Fay* Court instructed that *article sixth*, § 7 is to be read liberally so as to effectuate the right to vote. This not only furthers the franchise and is consistent with Connecticut Supreme Court precedent, it also avoids an unintended consequence of a potential chill on voters’ use of absentee balloting. If voters fear that their reasonable determination will be subject to close scrutiny and second-guessing by election officials or others, they may be reluctant to vote by absentee ballot. The application of the *Fay* Court’s capacious reading of “sickness” strikes the appropriate balance between ensuring that election officials do not become embroiled in investigations scrutinizing voter’s intent and that individual voters whose circumstances make them eligible to vote absentee are not chilled in their exercise of that right because they fear they will later be second guessed in their determination to vote by absentee ballot to protect themselves and others from sickness.

III. The Removal of “my disability” from C.G.S. §§ 9-135 and 9-137

Similarly, the legislature changed the language related to disability to bring it in line with the language in *article sixth*, § 7. With the Public Act No. 22-2 changes, it is clear that a voter is eligible to vote absentee if the person is unable to appear at the polls because of his or her own disability or because he or she cares for another disabled individual. As a result of this change,

eligibility for absentee voting is extended to any voter who is unable to appear at the polling location or who may only be able to appear with the assistance of another or through great personal exertion. The voter's inability to appear in person is a determination made by the individual and "is entirely subject to the individual actions and motivations of the voter." *Id.* at 36. The court in *Fay* reasoned that a voter's frailty as a result of age or medical conditions such as heart disease, arthritis, and/or diabetes may render them "unable to appear" such that without the assistance of others, they would be unlikely to appear at the polls due to their condition. *Id.* The court favored this interpretation of the statute as the proper furtherance of the right to vote in that it reflects the voter's expectations of their capabilities on election day. *Id.*

IV. Summary

Public Act No. 22-2 expanded absentee voter eligibility by adopting the constitutional language found in *article sixth*, § 7. Public Act No. 22-2 removed the requirement that a voter be absent from their town for all hours of voting and the language limiting sickness and disability to the individual voter. These changes provide continuity between the eligibility requirements of the Connecticut Constitution and the absentee ballot statutes, C.G.S. §§ 9-135 and 9-137. A voter's individual determination that he or she is unable to appear at their polling location due to absence from town, sickness or disability, should be accorded deference with the presumption in favor of the right to vote and to avoid undue chill on the ability to vote by absentee ballot.