



To: Pro-Voter Partners
From: ThinkTN
Date: April 6, 2020
Re: Key Election Laws Passed Before COVID-19 Recess

Before recessing in response to the COVID-19 pandemic, the General Assembly passed three key election bills that have since been signed by Governor Lee and taken immediate effect. The new laws revise last year's restrictions on voter-registration activity, introduce new penalties for threatening election security and take small steps to ensure some level of disaster preparedness.

This memo describes each new law in more detail, highlighting areas of progress and concern and outlining the new rules governing organizations that register voters. Notably, future work will be needed to address COVID-19's threat to our elections, as these laws do not specifically do that.

HB 2363: VOTER REGISTRATION

Sponsored by Senator Ed Jackson and Representative Tim Rudd, HB 2363 passed the House (75-20) and the Senate (25-5) in March and was signed by the governor on April 2.

In the 2019 legislative session, the General Assembly passed Public Chapter 250, which added criminal and civil penalties to some voter-registration drives in Tennessee. Parts of that law are now enjoined in federal court, pending a hearing in February 2021.¹

In response, this year, the Secretary of State's office promoted this new legislation related to voter-registration drives, which they claimed would "provide reasonable protections within the confines of the federal court's ruling."²

There are key differences between the new law and last year's version. HB 2363 rewrites sections of Public Chapter 250 and significantly lessens its requirements and penalties related to voter-registration drives. It removes all previous criminal penalties and reduces the instances in which civil penalties apply, removing entirely the penalties for incomplete voter-registration applications.

Though vastly more in line with policies in other states, two primary concerns remain: the vague enforcement mechanism for the civil penalties and a new section mandating reporting to the state when an individual discovers they have shared misinformation about elections. Additionally, because this legislation took effect immediately upon the governor's signature, questions exist about whether

¹ See *League of Women Voters v. Hargett* (USDC MDTN 2019); Jonathan Matisse, *Blocked Tennessee Voter Signup Penalties Set for 2021 Trial*, Associated Press (November 6, 2019), available at <https://apnews.com/d8b4f4deb99d44a8854db551aafb11e6>.

² See Letter from Tre Hargett, Secretary of State, to Members of the Tennessee General Assembly (February 14, 2020).

elections officials and/or those who seek to register voters can be adequately trained on its requirements prior to the presidential election.

Key Elements of HB 2363

- (1) HB 2363 applies to a broader range of organizations and individuals, eliminating the distinction between paid and unpaid registrars and applying even to those who register a single voter.**

Public Chapter 250's requirements and restrictions applied to individuals and groups attempting to register 100 or more people and exempted individuals and organizations that were not paid to collect voter-registration applications. In contrast, HB 2363 applies to anyone who collects a voter-registration application from another person and submits it to an Election Commission for the purposes of registering that person to vote.³

- (2) HB 2363 reduces the number of requirements and penalties placed on voter-registration drives.**

Public Chapter 250 contained multiple requirements for some individuals and organizations conducting voter-registration drives. Prior to conducting a drive, these would-be registrars had to register with the state, complete a training and submit a sworn statement that they would obey state laws and procedures regarding the registration of voters. Failure to meet these requirements was a Class A misdemeanor. Public Chapter 250 also imposed civil penalties for submitting incomplete voter-registration applications.

None of these requirements exists in HB 2363. Training is now voluntary, but organizations and individuals that participate may have their names listed on the Secretary of State's website and/or in some other publication.⁴ The law contains only a few mandates, some of which are adjustments to Public Chapter 250's requirements and others of which are new. Criminal penalties are gone, but the State Election Commission is charged with assessing and adjudicating civil penalties for violations of some of HB 2363's now-reduced requirements while other violations are subject to no penalty at all.⁵

- (3) Civil penalties of up to \$50 per offense are attached to violations of some requirements.**

Violations of the following provisions are subject to civil penalties.

a) Collected voter-registration applications must be submitted within 15 days.

Under HB 2363, voter-registration applications must be submitted within 15 days of receipt, a five-day extension of the ten-day deadline in Public Chapter 250.⁶ Applications collected within the 15-day window before the voter-registration deadline must be "delivered or mailed" no later than the voter-registration deadline.

³ See HB 2363 §3(a) (defining "voter-registration drive").

⁴ See HB 2363 §3(b).

⁵ See HB 2363 §3(g)(1).

⁶ See HB 2363 §3(e) (increasing the amount of time from the 10-day window Public Chapter 250 required).

b) *Compensating individuals for each application collected or establishing quotas is prohibited.*

Public Chapter 250 introduced two restrictions related to registrars that remain in HB 2363: No person or organization shall (1) establish quotas or a minimum number of voter-registration applications to be collected by individuals conducting a voter-registration drive or (2) compensate any person based on the number of voters registered.⁷ Like Public Law 250, HB 2363 does not prohibit an organization from paying registrars on an hourly or salaried basis to register voters.

c) *Copying voter-registration applications for non-voter engagement reasons.*

Under Public Chapter 250, copying or retaining voters' information for any reason was prohibited. HB 2363 allows organizations and individuals to copy or otherwise retain information other than social security numbers from voter-registration applications as long as that information is used for "voter participation, voter engagement or voter turnout."⁸ Retaining this information for other reasons without consent is prohibited.

(4) HB 2363 adds a new reporting requirement for individuals or organizations that share erroneous election information.⁹

Any person or organization who provides or publishes erroneous information about voting must immediately notify the Election Commission and the Coordinator of Elections once they discover their error. No penalties are associated with the failure to report such an error, although such a report arguably could be considered a defense against prosecution under HB 2364 (more information below), which makes it a felony to intentionally disseminate false information about an election.

Concerns Related to HB 2363

Two areas of the new law pose concerns: the vague penalty enforcement and the new reporting requirement.

(1) Vague language about how civil penalties will be assessed and enforced could lead to concerns about uneven application.

Like under Public Chapter 250, the State Election Commission has discretionary power to impose civil penalties under HB 2363: It *may* impose a maximum civil penalty up to \$50 for each violation.¹⁰ The new law includes a mechanism to appeal penalties, stating that individuals or organizations may request a waiver or contest a penalty by filing a petition with the State Election Commission.

Just how the State Election Commission determines which violations deserve penalties and how much (up to \$50) those penalties should be, however, is unclear. HB 2363 is less explicit than was Public Law 250 with respect to how violations should be tracked and presented to the State Election Commission.¹¹

⁷ See Tenn. Code Ann. §2-2-142(c)(d); HB 2363 §3 (excluding from its list of deleted §2-2-142 provisions (c) and (d)).

⁸ See HB 2363 §3(f) (requiring consent to retain information for purposes not related to voting).

⁹ See HB 2363 §3(h).

¹⁰ See HB 2363 §3(g)(1); see also HB 2363 §3(g)(2)(3) (noting that the petition would be considered under the Uniform Administrative Procedures Act).

¹¹ See Tenn. Code Ann. §2-2-143(c).

And it is silent as to what factors the State Election Commission should consider when deciding on penalties.

During discussion on the bill in its Senate committee hearing, Senator Jackson noted that its intent was to define “violation” in a manner that could translate to large fines, potentially for some groups and not others: In his opinion, each voter-registration application collected through a practice that violates the bill would qualify as a separate violation. So, for example, one organization that submits 50 applications one day past the 15-day deadline could be subject to a fee up to \$2,500 (\$50 x 50 applications), while another could be assessed a much lesser fee (*e.g.*, \$1 x 50 applications).

Chairman Dickerson introduced an amendment that attempted to clarify this process. It would have required the State Election Commission to promulgate a set of standards by which alleged violations are identified and reported, as well as to list the factors considered when determining whether a violation has occurred, whether that violation warrants a penalty and the amount of that penalty. The amendment, which also called for a two-thirds majority decision to assess penalties to ensure fairness and bipartisanship, failed.

(2) A questionable new reporting requirement could create confusion.

With this new law, individuals and organizations who discover they have shared the wrong hours for a polling location in a conversation with someone or on a social media post, are required to tell county and state officials of this mistake. There is no description of what then happens – is the state required to rectify that mistake? – and no enforcement mechanism to punish violations.

During discussion of the bill, Chairman Dickerson and Senators Yarbrow and Kelsey expressed concern with this section, acknowledging that it creates a legal requirement to report personal errors to the government. Senator Jackson stated that individuals were not required, but rather “encouraged,” to alert officials. Yet he resisted attempts to change the language of the bill from “shall” immediately notify to “are encouraged to.” Chairman Dickerson also attempted to delete this section from the bill for its vagueness and unclear purpose. That attempt failed.

HB 2364: ELECTION SECURITY AND FRAUD

Sponsored by Senator Ed Jackson and Representative Tim Rudd, HB 2364 passed the House (75-19) and the Senate (28-3) in March and was signed by Governor Lee on April 1.

The law creates a new prohibited election-related practice, the violation of which is a Class E felony, and expands the scope of acts prohibited as election interference. Its focus on increasing election security is in line with national efforts.

(1) HB 2364 makes the knowing dissemination of false, election-related information a felony.

HB 2364 creates a new Class E felony, which applies to someone who, with an *intent* to deceive or to disseminate information that person *knows to be incorrect*, provides or publishes false or misleading information regarding (1) the qualifications and requirements to register to vote, (2) whether an

individual is eligible to register or is currently registered to vote and (3) general election information like voter-registration deadlines and polling dates, times and locations.¹²

This requirement may interact with the aforementioned similarly worded section in HB 2363, which adds a new reporting requirement, albeit one without penalties for violations, for individuals or organizations that share erroneous election information.¹³

(2) HB 2364 expands the scope of, and increases penalties for, prohibited acts of election interference.

Previously, Tennessee law prohibited tampering with, mutilating or defacing voting machines, the violation of which was a Class E felony. HB 2364 prohibits a broader range of acts related to election interference and increases from a Class E felony (up to six years in prison) to a Class D felony (up to twelve years in prison) the penalties for violations.¹⁴

New on HB 2364's list of prohibited practices are acts such as damaging pieces of election infrastructure like electronic poll books, vote-tabulating devices or ballot-tally software; interfering with the voter-registration database and election websites and attempting to substitute forged or counterfeit election results.¹⁵

HB 2362: STEPS TOWARD DISASTER PREPAREDNESS

Sponsored by Senator Todd Gardenhire and Representative Mike Carter, HB 2362 passed the House (91-0) and the Senate (24-2) in March and was signed by Governor Lee on April 2.

Discussed in legislative committees in the days following the Super Tuesday tornadoes, the new law takes some initial steps toward addressing natural disasters' potential impact on election administration. In addition to adjustments to standard procedures to reflect new voting machines in some counties, the new law makes two primary changes: (1) redefines who may serve as a poll worker, and (2) creates new emergency provisions for consolidating polling places. Attempts to amend the bill to include measures specifically addressing the COVID-19 pandemic, including to allow for no-excuse absentee voting while it persisted, failed.

(1) HB 2362 expands the pool of eligible poll workers to include government employees and increases flexibility to hire younger and part-time workers.

City, county and federal government employees were previously prohibited from serving as election officials or members of a county primary board. HB 2362 removes that restriction, allowing election officials to recruit those employees to serve as poll workers in future elections. Immediate family members and direct employees of candidates on the ballot are excluded.

¹² See HB 2364 §1(a)(b).

¹³ See HB 2363 §3(h).

¹⁴ See HB 2364 §2; Tenn. Code Ann. §40-35-111 (outlining penalties for felonies).

¹⁵ See HB 2364 §2(a).

In testimony, the Coordinator of Elections described the move as helping to address an existing challenge with poll worker recruitment, one that has been made even more challenging by the tornadoes' disruption of Super Tuesday's election process. In response to concerns about potential conflict of interest for government employees, the bill was amended in the Senate State and Local Government Committee hearing to include a sunset clause. This provision will expire on July 1, 2021.

In addition to government employees, the eligibility pool was extended by lowering the eligibility age from 17 to 16. While previously required to work a full day, HB 2362 also allows for part-time shifts for poll workers other than the officer of elections.¹⁶

(2) HB 2362 creates new flexibility for county election officials responding to an emergency.

HB 2362 adds a new section to Tennessee code allowing certain changes to election administration procedure predicated by an emergency. Emergency is defined as an "occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, that results in a polling place being unavailable or unsuitable for voting. A natural threat includes disease, outbreaks and epidemics."

When an emergency necessitates, the Coordinator of Elections can approve county decisions to consolidate polling locations to create "supersites" in the event some become unusable.¹⁷ Counties may also designate the county election commission or other centrally located sites as a polling location for any voter in the county. Counties are instructed to provide notice of any changes as widely as possible.

CONCLUSION

These three election laws were deemed "mission critical" so as to be discussed and voted on in the final week before the General Assembly recessed due to the COVID-19 pandemic. Because they took immediate effect, organizations conducting voter registration will need to be well aware of the new restrictions they place on some activity, and of the accommodations they make for some natural disasters.

Future work is needed to address the unique threat COVID-19 poses to Tennessee's upcoming elections.

¹⁶ See HB 2362 § 5 and §6.

¹⁷ See HB 2362 § 4(b).