

Preclearance of Electronic Voting Devices and Devices for Disabled Voters:

What are the Issues?

There are actually two issues. First is whether you have to preclear the use of your electronic voting devices. A related question, though, relates to preclearance of any devices that will be used specifically for disabled voters.

This memo discusses in detail the issues related to preclearance of electronic devices. In the League's opinion, though, the use of any electronic voting devices you will use to assist disabled voters must be precleared as well. Since in most cases municipalities will use the same devices as the county, the simplified procedure spelled out at the bottom of this memo can probably be used to obtain preclearance for devices that will be used to assist disabled voters.

What Has to Be Done?

The answer to this question depends on your current local situation. Under Alabama law, municipalities which wish to use electronic voting devices must adopt an ordinance specifying "the particular type of equipment to be used." Section 17-7-21, Code of Alabama, 1975. If you already have adopted an ordinance and the type machine you will be using hasn't changed since that ordinance was adopted AND you have had that ordinance precleared by the U.S. Department of Justice, you do not have to take any action.

If, on the other hand, you haven't adopted an ordinance specifically identifying the type machine that you will use in your municipal election, the council must adopt an ordinance doing so. Once the ordinance has been passed, you must contact the Department of Justice and have your ordinance precleared.

A couple of points are important here. First, if you have previously passed an ordinance approving the machine that will be used, but have NOT had the ordinance precleared, you must have it precleared before that device can be used to conduct elections in your municipality. This is the case even if you used that particular type device in previous elections but haven't precleared your ordinance. Additionally, Section 17-7-21 provides that a copy of the ordinance must be filed with the Secretary of State. This can be done while simultaneously seeking approval from the Department of Justice.

Second, if you have an ordinance in place but the device you will use is different from the device identified in that ordinance, perhaps because the device the county has available has changed, you will need to adopt a new ordinance and have your ordinance precleared by the Department of Justice. Again, you will also need to file a copy with the Secretary of State.

Why is This Necessary?

The federal Help America Vote Act (HAVA) required numerous changes to voting procedures throughout the country, including here in Alabama. One change required the state to approve electronic voting devices as compliant with HAVA. The devices used in some counties did not comply with HAVA, and, as a result, these counties had to change to use an approved device. These counties have had the use of these devices in their elections precleared. A copy of the submission and a copy of the preclearance letter are attached.

The approval for use in county elections does not authorize municipalities within those counties to use the same devices in their elections. Instead, because the municipality runs its own election, it must adopt its own ordinance adopting the specific electronic device, and then get preclearance of that change, as explained above.

Is there a Deadline?

There is no deadline specified by Section 17-7-3. However, you must adopt the ordinance early enough to ensure compliance with other election deadlines. For example, the number of election officials and necessary supplies may vary, depending on the device you will use. Therefore, you should make sure you have an ordinance in place and that it has been precleared as soon as possible.

Additionally, by statute, the Department of Justice has 60 days to review a preclearance submission. If your municipality requires a submission, you should make it as soon as possible and request expedited review.

What are the Consequences for Not Obtaining Preclearance?

Election changes cannot be implemented until they are precleared. Therefore, you cannot use an electronic device in your election unless your use of that device has been precleared. Implementation without preclearance can be enjoined in federal court.

What is Preclearance?

Several questions have indicated some confusion regarding preclearance. Preclearance is required by the U.S. Voting Rights Act. Under Section 5 of this Act, changes in laws or procedures that affect elections must be precleared by the Department of Justice. The term preclearance should not be read to require approval prior to adoption, however. You must adopt your ordinance as required by state law before it can be submitted for preclearance. Then, you must obtain preclearance before implementing or enforcing the change.

A recent United States Supreme Court case explains how to determine what constitutes a change in election procedure that requires preclearance this way: A local law which applied only to one county in Alabama, and which purported to allow mid-term vacancies on a county commission to be filled by special election rather than by appointment by governor, was never "in force or effect," as required for this local law to constitute a "baseline." To determine whether an

election practice constitutes a “change” with respect to voting, for which a covered jurisdiction may have to obtain preclearance pursuant to the preclearance requirements of the Voting Rights Act, the court compares the election practice with the covered jurisdiction's “baseline,” which is the most recent practice that was both precleared and in force or effect or, absent any change since the jurisdiction's coverage date, the practice that was in force or effect on that date. Alabama does not need to go through the preclearance hoops of Section 5 of the Voting Rights Act to return to governor appointment as the means to fill midterm county commissioner vacancies in Mobile County. *Riley v. Kennedy*, --- S.Ct. ---, 2008 WL 2167990 (U.S.2008)

A Simplified Method

If you are using the same devices as the county, and the county has precleared its use of those devices you may be able to simplify the preclearance procedure.

The City of Jasper was recently able to preclear the use of their electronic voting devices by faxing a statement to a contact person in the Department of Justice Voting Rights Section indicating that the City had approved the use of the same electronic devices that would be used by the Walker County. To use this procedure you must be using the exact same type electronic device as the county, and the county must have obtained preclearance (check the attachments to see if your county was included in the Attorney General-coordinated submission; check with the county if your county was not included in that submission). If you are using the county equipment and the county's use of that equipment was precleared, contact the Department of Justice and discuss this simplified procedure with them. They will want you to send them a statement explaining that the municipality will use the same type of device, along with a copy of your ordinance adopting the use of this device.

To discuss whether you can utilize this simplified preclearance process, call the Department of Justice Voting Rights Section at (800) 253-3931 or at (202) 307-2767. The fax number is (202) 307-3961.

We're hopeful that the Department of Justice will expedite approval. If you plan to use the same devices as your county, and these devices have been precleared for county elections, you should refer to the fact that you will use the same devices that have been approved for county elections. This may help expedite preclearance.

SAMPLE RESOLUTION OF GENERAL AND PERMANENT NATURE ESTABLISHING THE USE OF ELECTRONIC VOTE COUNTING DEVICES

STATE OF ALABAMA

COUNTY
CITY OF _____

RESOLUTION

WHEREAS, Chapter 7 of Title 17 of the Alabama Code of 1975, and the regulations adopted pursuant thereto by the Alabama Electronic Voting Committee, provide for the use of Electronic Vote Counting Systems; and

WHEREAS, Section 17-7-21 of the Code of Alabama 1975 provides that a municipality may, in its discretion, by adoption of an appropriate resolution, authorize, adopt, and direct the use of electronic vote counting systems for use in all elections held in such municipality;

NOW, THEREFORE, BE IT RESOLVED by the City [Town] Council of the City [Town] of _____ that for all elections held subsequent to the passage of this resolution, the use of _____ electronic voting device, a system which complies with Section 17-7-21 of the Code of Alabama and any regulations adopted pursuant thereto, is hereby authorized for the reporting, counting, and tabulating of any and all election results.

NOW, THEREFORE, BE IT ORDAINED by the City [Town] Council of _____ that for all elections held subsequent to the passage of this ordinance, the use of _____ device to assist disabled voters, a system which complies with Section 17-2-4 of the Code of Alabama, is hereby adopted for use in all elections for the City/Town of _____, both general and special, from and after the date of adoption.

BE IT FURTHER RESOLVED, that the Mayor of the City [Town] of _____ is hereby directed to file a copy of this resolution with the Secretary of State as provided in Section 17-7-21 of the Code of Alabama 1975.

ADOPTED THIS THE ____ DAY OF _____, 20__.

Presiding Officer

ATTEST:

City [Town] Clerk