

**The statute addressed in this opinion has changed.
Please consult current Florida law.**

August 11, 2004

The Honorable Donna Bryant
Supervisor of Elections
Osceola County
P.O. Box 420759
Kissimmee, Florida 34741

RE: DE 04-07
Early Voting; §§ 97.021(7), 101.015(4),
101.131, 101.5612(2), 101.5613, and
101.657, Florida Statutes

Dear Ms. Bryant:

This is in response to your request for an advisory opinion regarding whether section 101.131, Florida Statutes, regarding poll watchers applies to early voting sites. You are the Supervisor of Elections for Osceola County and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you.

You essentially ask the following questions:

1. Does s. 101.131, F.S., apply to early voting sites? If so, what would be the deadline for appointing poll watchers for early voting sites? Would one designation be acceptable for every day of early voting or would it be necessary to submit a separate designation for each day?
2. Are there other statutes regarding polling places which would need to be modified to apply to early voting sites?

The short answer to both Questions 1 and 2 is no. On its face, the provisions of section 101.131, Florida Statutes, which authorizes and regulates poll watchers, do not apply to "early voting." While the "poll watcher" provision is not applicable in the context of "early voting" for the reasons described below, all early voting sites, ie. the supervisor of elections main or branch offices, city halls and public libraries, are open to the public and "early voting" activities will be generally observable by any person who is present in the public areas of the early voting site and any elector who is present at an early voting site may challenge any voter who they believe to be

ineligible. The Department, therefore, would encourage the Supervisors of Elections to provide the same public accessibility to early voting activities as was previously provided to in-person absentee voting activities.

As you are aware, the 2004 Florida Legislature passed Chapter 2004-252, Laws of Florida, which creates "early voting." A review of the staff analysis related CS/SB 2346 & 516, which became Chapter 2004-252, reveals no discussion of the "early voting" provisions of the law. Accordingly, we are left with little guidance from the Legislature of their intent as to the applicability of any other sections of the Florida Election Code to the concept of "early voting" and must rely solely on the adopted statutory language. In order to put these changes in context, a brief discussion of the "early voting" provisions contained in Chapter 2004-252 may be helpful.

Specifically, Sections 9, 10, 11, 12, and 13 of that law create a process referred to as "early voting." These provisions of law became effective on July 1, 2004. "Early voting" is now defined in section 97.021(7), F.S., as "casting a ballot prior to election day at a location designated by the supervisor of elections and depositing the voted ballot in the tabulation system." Section 10 of the new law requires Supervisors of Elections to establish written procedures related to early voting to assure accuracy and security and to submit any resulting revisions to their security procedures to the Department of State at least 45 days before early voting commences. Section 11 incorporates Logic and Accuracy testing of tabulating equipment to be used for early voting into section 101.5612, F.S. Section 12 requires a representative of the supervisor of elections, rather than a member of the election board, to occasionally examine the face of the voting device and the ballot information during early voting to determine that the device and the ballot information have not been damaged or tampered with.

Finally, in Section 13 of the new law, the Legislature strikes the method of "Voting Absentee Ballots In Person" that had been contained in section 101.657, F.S., which had been used as a method for voters to cast their ballots prior to election day (early) using actual voting machines, and substitutes the method of "early voting" in its place, which permits the same thing.

Section 101.657, F.S., now titled "Early voting," requires the supervisor of elections to allow an elector to vote early in the main or branch office of the supervisor by depositing the voted ballot in a voting device used by the supervisor to collect or tabulate ballots. This is the same voting procedure that was previously permitted for the casting of in-person absentee ballots. Section 101.657, F.S., now goes on to specify what constitutes a branch office of the supervisor for purposes of early voting. The statute also allows the supervisor to designate any city hall or public library as early voting sites, as long as such sites are geographically located so as to provide all voters in the county an equal opportunity to cast a ballot, insofar as is practicable.

Newly created section 101.657(1)(b), F.S., requires that early voting begin on the 15th day before an election and end on the day before the election. In the case of a special election held pursuant to section 100.101, F.S., early voting shall begin on the 8th day before the election and end on the day before the election. Early voting must be provided for at least 8 hours per weekday during

the applicable period and shall also be provided for 8 hours in the aggregate for each weekend during the applicable period.

Section 101.657(2)(a), F.S., now requires the “early voting” elector to “provide identification” and complete an “Early Voting Voter Certificate,” the content of which is the same as the certificate previously used for “in-person absentee voting,” but without the witness requirement. The identification to be provided by the voter for purposes of “early voting” would be the same identification required at the polling places on election day, as enumerated in section 101.043, F.S. Section 101.657(2)(b), F.S., provides that “any elector may challenge an elector seeking to vote early” using the provisions of section 101.111, F.S., just as electors were previously permitted to challenge an elector seeking to cast an in-person absentee ballot. A challenged early voter is required to vote a provisional ballot, the validity of which will be determined by the canvassing board by majority vote. Additionally, although not addressed by the Legislature in this bill, section 302(a) of the federal Help America Vote Act of 2002¹ would require that a provisional ballot be provided to any individual attempting to vote at an early voting site whose name does not appear on the voter register rolls used at that site. Persons receiving provisional ballots must also be provided with written information regarding the free access system related to such ballots.

Looking at the legislation in its totality, one must conclude that the Legislature was merely attempting to take the concept of in-person absentee voting, which has long been commonly referred to as “early voting” and which was previously provided at the discretion of the supervisor, apply the commonly used title to this particular voting method and provide some mandatory requirements with regard to the dates, times and places at which it will occur. Therefore, this act of substitution of one pre-election day voting method for another, combined with the Legislature’s failure to amend any other provisions of Florida law relating to Election Day voting, strongly suggests that the Legislature did not intend to make Election Day provisions such as “poll watchers” applicable to the “early voting” process. Notably, the time frames for some statutory provisions associated with Election Day voting activities, such as appointing and approving poll watchers, are not achievable in the context of the time frames set by the Legislature for “early voting.” As you know, section 101.131(2), F.S., states that each party and each candidate requesting to have poll watchers shall designate, in writing, poll watchers for *each precinct* prior to noon of the second Tuesday preceding the election, i.e., 14 days before the election. The “election” in this context would be Election Day². However, as noted above, “early voting” begins on the 15th day before the election. Further, section 101.131(2), F.S., specifically refers to designating poll watchers for each “precinct.” Precincts are specific geographical areas within a county which are created by the board of county commissioners and which are numbered and as practicable, composed of contiguous and

¹ Public Law 107-252, 42 U.S.C. §§ 15301 through 15545.

² Section 97.021(8), F.S., defines “election” as “any primary election, special primary election, special election, general election, or presidential preference primary election.” Further the definition of “general election” contained in s. 97.021(12), F.S., specifies that the term means an election which is held on a particular day, ie. the first Tuesday after the first Monday in November in even numbered years. Finally, the exact day upon which primary elections are to be held is also specified by statute. See sections 100.061 and 100.091, F.S.

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compact areas.³ Supervisors of Elections designate a polling place at a suitable location within each precinct. Early voting sites are not precincts. Therefore, having chosen not to amend the time frames or the reference to “precincts” contained in section 101.131(2), F.S., it appears that the Legislature did not intend to make the poll watchers provision applicable to “early voting.”

SUMMARY

Section 101.131, Florida Statutes, relating to poll watchers does not apply to the “early voting” process. However, while the “poll watcher” provision is not applicable in the context of “early voting”, all early voting sites, ie. the supervisor of elections main or branch offices, city halls and public libraries, are open to the public. Therefore, “early voting” activities will be generally observable by any person who is present in the public areas of the early voting site and any elector who is present at an early voting site may challenge any voter who they believe to be ineligible.

Sincerely,

Dawn K. Roberts
Division Director

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³ See section 101.001(1), F.S.