

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 618

SPONSOR: Governmental Oversight & Productivity Committee, Ethics and Elections Committee, and Senator Cowin

SUBJECT: Early Voting

DATE: February 4, 2004      REVISED: \_\_\_\_\_

|    | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Fox     | Rubinas        | EE        | Fav/CS |
| 2. | Rhea    | Wilson         | GO        | Fav/CS |
| 3. | _____   | _____          | _____     | _____  |
| 4. | _____   | _____          | _____     | _____  |
| 5. | _____   | _____          | _____     | _____  |
| 6. | _____   | _____          | _____     | _____  |

**I. Summary:**

Committee Substitute for Senate Bill 618 makes it mandatory for supervisors to permit “*early voting*” beginning 10 days before an election (8 days before a special election or special primary election); it requires notice of early voting in a newspaper of general circulation two times at least 14 days before an election; and, prescribes the *minimum requirements* for the total number of early voting locations (one for every 100,000 registered voters; at least one location in counties with less than 100,000 registered voters) and the *minimum requirements* for hours of operation (9 a.m.-5 p.m., Monday - Friday; plus, a total of 10 hours on the weekend, with specific times at the supervisor’s discretion). Early voting locations must otherwise meet the requirements for polling places under the election code, and must be housed in public buildings owned by a governmental entity or leased by it for at least two years, on the date voting commences. The selection of early voting locations must be designed to afford all voters in the county an equal opportunity to cast an early ballot, insofar as is practicable.

The bill requires the Department of State to promulgate rules governing the early voting process, including the selection and security of early voting locations, and the security of ballots, tabulating equipment, and other voting materials at such locations. Specific authority is afforded the Department to adopt these by emergency rule for the 2004 election cycle.

The bill also moves the date for the testing of voting equipment from 10 days before the election to 10 days before the commencement of early voting, and modifies the procedure for challenged “early” voters --- requiring the challenged voter to fill out a provisional ballot (instead of a regular absentee ballot) for a subsequent determination of the voter’s eligibility by the canvassing board.

The bill takes effect upon becoming law.

This bill amends the following sections of the Florida Statutes: 101.657, 101.5612, 101.5613 and 101.62.

This bill creates section 101.659 of the Florida Statutes.

## II. Present Situation:

**A. Voting Requirements** - In 2000, the Legislature authorized “in-person absentee voting” in the main and/or branch offices of the county supervisors of elections.<sup>1</sup> “In-person absentee voting” allows Florida voters to cast ballots prior to an election in essentially the same manner as on election day. The decision whether or not to provide “in-person absentee voting” in this matter is within the discretion of the county supervisor of elections. (*See* IV.D. Other Constitutional Issues, *below*.)

“In-person absentee voting” was initially designed as a *limited* alternative to the cumbersome process of having an elector fill out a traditional absentee ballot in the supervisor’s office (multiple envelopes, signatures, and witnessing requirements). Allowing voters to deposit their voted ballots directly into a voting device for subsequent tabulation reduces the administrative burden on supervisors and their staff on election day, who previously had to open the envelopes and “feed” the voted absentee ballots into tabulators by hand. In a large county, this process could be very time-consuming.

The concept of widespread early voting with numerous satellite voting locations operating prior to election day is a Texas product. It grew out of an “in-person absentee voting” process in the early 1960’s that allowed Texas supervisors to set-up a temporary absentee voting branch location in counties where the county seat was not the largest town in the county. This made it easier for the majority of voters to cast ballots without having to travel to the county seat.

During the 2002 Florida general election cycle, certain supervisors expanded Florida’s “in-person absentee voting” process to something more akin to early voting, authorizing so-called early voting locations in libraries and other public facilities. The Secretary of State at the time and some supervisors aggressively marketed early voting as a way for voters to avoid the widely-reported election day problems experienced during the 2002 primary election. The overwhelming response to the early voting call found voters in some of the larger counties in South Florida waiting up to 2 hours to cast ballots, although this appears to have been the exception rather than the rule.

Despite the occasional delays, early voting proved popular with the electorate and emerged as one of the success stories of the 2002 elections. And, while there are numerous arguments “for” and “against” early voting,<sup>2</sup> one thing appears clear --- voters like the *convenience* and will likely be looking for improvements to the process in future elections.

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<sup>1</sup> Section 101.657(2), F.S.

<sup>2</sup> For a general discussion of some of the pros and cons of “early voting,” see Florida Senate, Committee on Ethics and Elections, *Strategies for Increasing Voter Participation in Florida*, p. 26-28 (October 1999) (available through the publications link at the Florida Senate website at [www.flsenate.gov](http://www.flsenate.gov)).

**B. Rulemaking Requirements** – Chapter 120, F.S., the Administrative Procedure Act (the “APA”), establishes a process whereby the public is notified of procedures that agencies use to perform their duties. This process is called “rulemaking.” Under the act, an “agency” is defined to mean:

- (a) The Governor in the exercise of all executive powers other than those derived from the constitution.
- (b) Each:
  1. State officer and state department, and each departmental unit described in s. 20.04.
  2. Authority, including a regional water supply authority.
  3. Board.
  4. Commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
  5. Regional planning agency.
  6. Multicounty special district with a majority of the governing board comprised of nonelected persons.
  7. Educational unit.
  8. Entity described in chapters 163, 373, 380, and 582 and s. 186.504.
- (c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

The act contains a number of entities that are specifically excluded from the APA.

A state agency, such as a department, is a creature of statute and, as such, it has only those rights and privileges given to it by the Legislature in statute.<sup>3</sup> A department is created in the executive branch and, therefore, is subject to the administrative control of an executive officer who is appointed by, and serves at the pleasure of, the Governor or a Cabinet officer. Nevertheless, the powers and duties which the department is authorized to execute are delegated by the Legislature:

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals.<sup>4</sup>

As a result, the Legislature has placed more limitations upon agency rulemaking to ensure that agencies do not go outside the standards contained in statute. Section 120.536(1), F.S., states:

<sup>3</sup> *Seaside Properties, Inc., v. State Road Department*, 190 So.2d 391 (3<sup>rd</sup> DCA 1966).

<sup>4</sup> *Lee v. Division of Florida Land Sales and Condominiums*, 474 So.2d 282 (5<sup>th</sup> DCA 1985).

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provision setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Chapter 120, F.S., permits emergency rulemaking under certain circumstances. Section 120.54(4), F.S., permits an agency to adopt an emergency rule if the agency finds that an immediate danger to the public health, safety, or welfare requires emergency action to address the danger. That section also specifies that rules pertaining to the public health, safety, or welfare include rules pertaining to perishable agricultural commodities.

The agency is permitted to adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.
2. The agency takes only that action necessary to protect the public interest under the emergency procedure.
3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. Such findings are judicially reviewable.

An emergency rule becomes effective immediately on filing or within a specified date 20 days thereafter. Further, an emergency rule is not effective for a period of longer than 90 days and is not renewable, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rule.

### **III. Effect of Proposed Changes:**

The bill makes early voting mandatory, beginning on the 10<sup>th</sup> day before an election (8<sup>th</sup> day for a special election or special primary election) and concluding at 5 p.m. on the eve of the election. It requires notice of early voting in a newspaper of general circulation two times at least 14 days before the election. And, it prescribes the minimum requirements for the:

- Total number of early voting locations (one for every 100,000 voters registered to vote in the election; at least one location in counties with less than 100,000 registered voters); and,
- Hours of operation for early voting locations (9 a.m.-5 p.m., Monday - Friday; plus, a total of 10 hours on the weekend, at the supervisor's discretion).

Early voting locations must otherwise meet the requirements for polling places under the election code, and must be housed in public buildings owned by the state, county, or municipality or leased by such governmental entity for at least two years, on the date early voting commences. The selection of early voting locations must be designed to afford all voters in the county the same opportunity to cast an early ballot.

The bill requires the Department of State to promulgate rules governing the selection and security of early voting locations, along with the security of ballots, tabulating equipment, and other voting materials at such locations. Such rules may be adopted by emergency rule for the 2004 election cycle.

The bill also moves up the date for the testing of tabulating equipment, from not more than 10 days before an election to not more than 10 days prior to the commencement of early voting.

Finally, the bill modifies the procedure for challenged "early" voters --- requiring the challenged voter to fill out a provisional ballot instead of a regular absentee ballot for subsequent determination of the voter's eligibility by the canvassing board.

The bill takes effect upon becoming law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. Other Constitutional Issues:**

There is some question as to whether Florida's current permissive system of early voting violates the Equal Protection Clause of the 14<sup>th</sup> amendment to the U.S. Constitution, since voters in some Florida counties may have an opportunity to cast an early ballot

while others participating in the same election may not be afforded that opportunity.<sup>5</sup> Making early voting mandatory and prescribing uniform, minimum standards for the number, location, and hours of operation of early voting facilities should redress many of these concerns.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

Widespread early voting may increase the overall costs of elections by requiring campaigns to advertise for a longer period of time leading up to election day. Campaign advertising historically peaks in the last few days before an election --- the so-called “last-minute” media blitz. Extending the voting period out to 10 days may force campaigns to aggressively compete for votes throughout the *entire* voting period, which may mean having to raise more money in campaign contributions.

### C. Government Sector Impact:

Widespread early voting will likely increase the overall costs of elections, although some reports suggest there may be a reduced *cost-per-vote* if turnout increases. Additional manpower, equipment, and security precautions must be adopted to successfully implement an early voting campaign.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

- A similar bill passed the Senate in 2003, and died in House messages (CS/CS/SB 1732).
- For purely bill drafting purposes, the bill moves the existing provision for casting a *sealed* absentee ballot in the office of the supervisor of elections from section 101.657(1), F.S., to a newly-created section, 101.659, F.S. The in-office, sealed absentee ballot process is *not being repealed or amended*, merely relocated to another section in the Florida Statutes.
- Section 120.54(4), F.S., permits an agency to adopt an emergency rule if the agency finds that an immediate danger to the public health, safety, or welfare requires emergency action to address the danger. That section also specifies that rules pertaining to the public health, safety, or welfare include rules pertaining to perishable agricultural commodities. The committee substitute does not specifically state that early voting rules are emergency rules in all cases, but the committee substitute provides authority to the Department of State to utilize emergency rulemaking procedures if circumstances require.

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<sup>5</sup> The U.S. Supreme Court’s landmark decision resolving the 2000 U.S. Presidential election contest acknowledged that “the problem of equal protection in election processes generally presents many complexities.” *Bush v. Gore*, 121 S.Ct. 525, 532 (2000).

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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