



DLA Piper LLP (US)
400 Capitol Mall, Suite 2400
Sacramento, California 95814-4428
www.dlapiper.com

Steven G. Churchwell
steve.churchwell@dlapiper.com
T 916.930.3266
F 916.403.1632

Election Law White Paper

Registering Voters in California Electronically Using a Touch Screen Device

Question Presented

If a registered voter receives the National Voter Registration Act form via the Internet and signs it using the secure electronic signature technology described below, is the registration valid in California?

Summary

Yes. California law allows an eligible voter to use the national voter registration form. The form must then be “mailed or delivered” to the correct county elections official. “Delivery” is not limited in the statutory provision, and therefore includes any method that would get it to the elections official, including *electronic* delivery (e.g., email). Electronic registration is far more secure and accurate than, and just as verifiable as, the present paper system.

Introduction

California’s current voter registration system is outdated, costly and inaccurate. Citizens and election officials alike experience the burdens of a paper-based process that fails to utilize proven technology. As a result, tens of thousands of eligible voters never register and others who bravely attempt to vote are rejected at the polls. The impact on our democratic system of government should concern us all. A recent study estimates that more than two million voters nationwide were unable to cast a ballot in the 2008 general election due to registration problems.¹

¹ “2008 Survey of the Performance of American Elections” at p. 59, Caltech/MIT Voting Technology Report (2009).

Over the last two election cycles (2006, 2008), California led the nation in some categories it would rather forget. California had the highest number of provisional ballots cast at its polls, meaning that people went to the trouble of going to the polls but were not registered to vote there. More than one in twenty Californian voters were forced to cast provisional ballots. Worse, more provisional ballots were rejected in California than in any other state. Of all ballots rejected nationwide because the voter was ultimately determined to be “not registered,” over 30% were cast in California.



So how can we be this far behind solving a basic problem that was laid bare in the 2000 Presidential election as the entire country watched in horror? There is only one word: paper. Mounds and mounds of paper piled up where electronic voter registration should be. The Help America Vote Act (“HAVA”), enacted by Congress in 2002 in the wake of the *Bush v. Gore* debacle, required the establishment of an electronic statewide voter database in each state. The deadline was January 1, 2004. California received an extension to January 1, 2006, but four years later, it still has no central place for voters to register.

Far worse is the potential for fraud in the current paper system where bounty hunters organize voter-registration drives. Everyone by now is aware of the allegations involving such drives by the Association of Community Organizations for Reform Now (ACORN). If more voters already were registered, and could do so in the safety of their own homes, there would be far less incentive for such groups to conduct registration drives. Most important, online registration and electronic sharing of voter information among state agencies would help elections officials do their most fundamental duty more accurately and far more cheaply.

Our election system should not rely upon 19th Century methods of collecting voter information: handwriting on a paper card; mailing it via snail mail, or worse, driving a piece of paper to a public official’s faraway office; entry of handwritten data manually onto voter lists; and requiring California’s mobile population to update information with every relocation. These outmoded practices and procedures create a system that is susceptible to human error from start to finish, and result in massive piles of registration cards flooding election offices just before an election when they are busiest.

Voter registration is becoming easier and more accessible for voting eligible citizens through the growing trend of online voter registration. This new election reform has the potential to be a revolutionary and cost-effective method of enfranchising more Americans, especially as applied to the electronic transmission of applications through voter registration agencies under the National Voter Registration Act (“NVRA”).

Currently, three states – Arizona, Washington, and Kansas – have implemented online voter registration. Five more – Colorado, Indiana, Louisiana, Oregon, and Utah – plan to begin electronic registration this year.

With only 77% of eligible voters registered in the U.S. in 2008, online voter registration is a desperately needed reform, particularly for young Americans who are simultaneously the most likely to have Internet access (88%) but least likely to be registered to vote (61%), according to a 2009 *Project Vote* study. According to the 2008 *Cooperative Congressional Election Survey* in which Pew and numerous academic institutions participated, recent relocation is one of the most relevant factors in predicting whether voters will have a registration problem. This was found to apply with much greater frequency to students and young voters who are new to the process and are most likely to move compared to other age groups.

Where electronic voter registration has the greatest potential to help to enfranchise our citizens is in compliance with the NVRA. Electronic, "paperless" voter registration processes can be developed, which would seamlessly integrate and transfer existing electronic data collection systems to election officials. This will reduce costs associated with needless paperwork, minimize errors and eliminate provisional voting. Electronic registration is extremely cost-effective: in Maricopa County, Arizona, for example, an electronic application costs about \$0.03, compared to \$0.83 per paper registration. The goal of registration obviously is to encourage more of our fellow citizens to turn out on election day.

Discussion

A. How It Works

A California company, Verafirma, has developed a secure, foolproof and simple way to register voters with absolutely no paper. Verafirma has years of experience² with the electronic signature pads that you use in the checkout line at retail stores everyday. That

² The Verafirma team has more than 50 years of combined experience designing and delivering electronic signature, secure document management, and electronic records processing systems to more than 400 customers.

same software, which is “open source” and has passed a barrage of privacy and security tests over the past 20 years, has been adapted for use in signing voter registration cards. The process of registering to vote in California really can be this simple!

- (1) The eligible voter sees the start page on the computer screen and is informed that they are about to register to vote online using an electronic signature. The person clicks the “Continue” button on the screen;
- (2) The eligible voter views the National Voter Registration Act form – in the format dictated by the NVRA – and reads the instructions for California;
- (3) The person fills out the blank lines on the form on the computer screen;
- (4) The eligible voter enters the telephone number or email address of his or her mobile device (currently iPhone or iPod Touch, and soon to include Blackberry Storm II, Motorola Droid, etc.) – and instantly receives an email with a link that opens a browser on the mobile device;
- (5) The eligible voter is given instruction on how to sign the registration form, then signs on the mobile device screen;
- (6) Before adding a signature to document, the person must agree to the affirmation on the form, and then click “Agree and Sign”; and
- (7) The applicable county registrar receives the registration form instantaneously and the new voter receives a copy, both via email.

B. The National Voter Registration Act and the California Elections Code Work Together to Permit Electronic Voter Registration Without the Need for Further Legislation

The question presented to me was whether a change in California law would be necessary to allow electronic voter registration as described above. I was pleasantly surprised to find that the answer is “no” – it is already allowed! California allows use of the federal NVRA registration form, and requires only that it be “mailed or delivered” to the appropriate county elections official. As explained below, delivery *on paper* is not required when the word “delivered” is not further modified in the statutory provision.

Section 2102 of the California Elections Code is the operative provision and provides in pertinent part:

- (a) A person may not be registered as a voter except by affidavit of registration.³ The affidavit shall be mailed or delivered to the county

³ Elections Code section 2162 allows the use of only two kind of affidavits in California: “(a) No affidavits of registration other than those provided by the Secretary of State to the county elections officials or the national voter registration forms authorized pursuant to the National Voter

elections official and shall set forth all of the facts required to be shown by this chapter. ... A properly executed registration shall also be deemed effective upon receipt of the affidavit by the county elections official if any of the following apply:

(1) The affidavit is postmarked on or before the 15th day prior to the election and received by mail by the county elections official.

(2) The affidavit is submitted to the Department of Motor Vehicles or accepted by any other public agency designated as a voter registration agency pursuant to the National Voter Registration Act of 1993 (42 U.S.C. Sec. 1973gg) on or before the 15th day prior to the election.

(3) The affidavit is delivered to the county elections official by means other than those described in paragraphs (1) or (2) on or before the 15th day prior to the election.

Elec. Code § 2102 (emphasis added).

Therefore, if the completed NVRA form (there is no requirement that it be paper) is delivered (regardless of the method) to the proper county elections official, the voter will be registered.

C. Similar Cases in California

The truth of this is so patently obvious, that I have difficulty imaging someone trying to read the law to deny the right in California to register to vote online. However, because elections professionals seem to be skeptics by nature, I have a few examples from the California courts and Legislature that should help.

1. State Agency Trying to Read “Paper” Requirement into a Statute is Rejected by the Courts

In its decision in *PeoplePC, Inc. v. State Bd. of Equalization* (2009) WL 2853032 (Cal.App. 4th Dist.), the California Court of Appeal held in a 3-0 opinion that an Internet service provider’s distributed compact discs (“CDs”) qualified for the State’s sale/use tax exemption for circulars with printed sales messages, and therefore were not taxable gifts of tangible personal property as asserted by the Board of Equalization (“BOE”).

Registration Act (42 U.S.C. § 1973gg) shall be used for the registration of voters.”

The BOE argued unsuccessfully that the “printed circular” exemption for promotional messages was limited to messages printed on “paper” and a plastic CD could not qualify. The court noted that the statute was silent with respect to any limitation to only “paper” messages. Rather, the court said that the “Review of the history discloses no legislative attempts to require catalogs, letters, circulars, brochures or pamphlets be printed on paper to qualify for the tax exemption. Similarly, the history does not define, or even discuss, a circular as being a printing *on paper*.” (*Id.* at p. 6 (italics in original).)

2. The Meaning of “Delivered” in Section 2102 is Plain and Cannot Reasonably Be Read to Include A Specific Method of Delivery

We do not anticipate that a public official would try to add a modifier before the word “delivered” in Section 2102 where one clearly does not exist. If the voter registration form is delivered to the elections official, delivery is valid. Period. However, because people who love paper will defend it endlessly, we also should discuss that point.

Insurance Code section 662.1, is a provision for providing notice of cancellation of certain insurance policies. It allows for “mailing or delivery” of such notices. It provides in relevant part:

Proof of mailing or delivery of a notice of cancellation to a lienholder or an additional interest on a policy to which this chapter applies shall be sufficient to terminate the interest of the parties provided the notice is *mailed or delivered* at least the maximum number of days prior to termination of the parties' interest as required by Section 662. *For purposes of this section, “delivery” includes electronic transmittal or facsimile or personal delivery. ...*

(Italics added.)

The 1993 amendment (AB 2138 – Hoge), in the first sentence, inserted “or delivery” and “or delivered”; and inserted the sentence which provides that “delivery” includes electronic transmittal or facsimile or personal delivery. Previously, the statute had only permitted mailing.

So why did the Legislature not just say “delivery” and allow *any kind* of delivery, as in Elections Code section 2102? The legislative history of the bill explains:

The bill analysis prepared in June 1993 by the Senate Committee on Insurance, Claims and Corporations states at page 1 (emphasis added):

ISSUES

1) What Types of Delivery Would be Acceptable?

The bill would allow delivery of cancellation notices **but the word “delivery” is not defined either in the bill or the existing Insurance Code. This potentially means that delivery of a notice could be by a person, electronically (such as by FAX or E-Mail), or by a phone call.** It is recommended that the specific means of delivery be identified and that the delivery include a written notice.

The parallel analysis of the same bill in April 1993 by the Assembly Finance, Insurance and Public Investment Committee states similarly at page 1 (emphasis added):

COMMENTS

1) State Farm Insurance contends that this measure would save from \$250,000 to \$500,000 per year in reduced costs.

2) The language does not specifically say “electronic delivery” but “delivery”. **Other states have similarly general language in statute, and that language has been interpreted to allow electronic delivery.** However, State Farm is receptive to further clarification if required.

Thus, a fair reading of the applicable voter registration statutes is that electronic delivery of a voter registration card is not prohibited by California law.

Conclusion

Electronic voter registration is allowed in California through a reasonable reading of the overlapping federal and California laws that govern this area. We do anticipate that a lawsuit will be required to establish the right of voters to use this method of registration.