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Client Alert: Absentee Voting by Mail in South Carolina: A Slow Moving Target

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FINAL UPDATE – 10.06.2020: The umpires have called the ping-pong match. Last night the Supreme Court weighed in on the South Carolina mail-in absentee votes. WITNESSES ARE NOW REQUIRED for the vote to count. Despite three members who did not support any exceptions, the Justices left open a small window for the people who have already mailed their ballots: any ballots mailed prior to the decision AND received within two days of the decision do not have to be witnessed to count. South Carolina voters may also vote in-person absentee without a qualifying reason; polls opened yesterday.

SECOND UPDATE – 09.28.2020: This article serves as an update and supplement to our Client Alert of September 23, 2020 relating to Absentee Voting by Mail in South Carolina: A Slow Moving Target.

The ping-pong match continues, and the confusion in South Carolina is real. Late Friday night on September 25th, the Fourth Circuit Court of Appeals agreed to hear the appeal en banc. This effectively overruled the three judge panel which, only a day earlier, had overruled Judge Michelle Childs' initial ruling on witnesses on the South Carolina mail-in absentee ballots. That means once again witnesses are NOT required. Note, however, that a final ruling has not been issued, as there now must be a final ruling by the en banc Court. At this time, it is not determined whether oral arguments will be required, or whether the Court of Appeals will rule based on briefs. Nor do we know when the ruling will be issued.

So what should a South Carolina voter do? It is impossible to give final advice on this. Out of abundance of caution, voters who decide to vote absentee by mail-in ballot should get a witness until the final ruling is issued. There are other options for absentee early voting which begin on October 5th, including in-person voting at a location near you.

FIRST UPDATE – 9.25.2020: Last night, the Fourth Circuit Court of Appeals overturned Judge Michelle Childs' order concerning the witness requirement for South Carolina mail-in ballots. This means that witnesses ARE required for ballots being submitted via the mail-in absentee voting process in South Carolina. Undoubtedly, there will be confusion about this, as the messaging has ping-ponged back and forth in the last two weeks. The Fourth Circuit moved quickly with their ruling, which hopefully will help get the word out, so that voters know the requirements before they submit their absentee mail-in ballots. At this time, if you or your clients plan to vote absentee by mail-in ballot in South Carolina you MUST have your signature witnessed. Note that there are other absentee voting options available, without needing a reason to do so. In-person absentee voting will be available in South Carolina beginning on October 5th. Check with your local County or Board of Elections for locations near you.

Original Client Alert of September 23, 2020 below:

On September 16, 2020, Governor Henry McMaster signed into law emergency measures for all South Carolina residents to be able to vote absentee due to the COVID-19 pandemic. For this year's general election, South Carolina voters do not have to meet the usual criteria for casting their ballot absentee. As the press continues to cover the hurdles some states place for absentee voting (such as Pennsylvania, where two envelopes are required for a vote to count), South Carolina voters need to know that our own requirements for a "proper" mail-in ballot are somewhat in flux.

The law that was signed by Governor McMaster included the requirement that voters have a witness sign the mail-in ballot, as well as the voter. This requirement was also a part of absentee voting for the June primaries. In both cases, a Federal Judge has ruled that the witness requirement shall not be enforced. Most recently, this past Friday, Judge Michelle Childs ruled that the pandemic, and the possibility of transmission of the COVID-19 virus, made such a witness requirement overly burdensome. She also ordered the State Election Commission to advertise that a witness is not required on mail-in ballots.

Now for the confusion.

Last night, this ruling was appealed. The appellants are citing election security, and the possibility of fraud. The clock is ticking, however, as absentee voting begins in South Carolina on October 5. No timeline has been set for a hearing on the appeal, which will be heard by the Fourth Circuit Court of Appeals. It could take weeks.

The South Carolina Election Commission is now advising everyone who wants to vote absentee by mail to go ahead and get a witness signature, just in case. Voters, they say, should hedge their bets in light of the appeal. If Judge Childs' ruling is overturned, and the voter fails to get a witness, then the mail-in ballot would be void and would not count.

So, for now, if you are planning to vote by mail-in ballot in South Carolina, get that ballot witnessed!

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