KLRD




James Fisher
Research Analyst
785-296-3181
James.Fisher@klrd.ks.gov




# State and Local Government

## I-1 Addressing Abandoned Property Using Legal Tools

Vacant and abandoned property has long been an issue in small and large Kansas communities. According to testimony received on various bills heard by the Kansas Legislature, these properties are a familiar part of the American landscape, and these structures can devastate neighborhoods and undermine neighbors' quality of life. Additionally, these properties diminish the value of nearby properties, resulting in reduced local property tax revenue, and can cost some cities millions for policing, cleaning vacant lots, and demolishing derelict buildings.

Research describes tools that may be used to deal with abandoned and vacant property, with property registration, land banking, and receivership programs receiving the most attention. Researchers caution not all of these tools will work for every market and the approach a municipality takes should be designed with its particular issues in mind.

### Vacant Property Registration

Vacant property registration is described as the first step a municipality can take to gather more information about the particular abandoned property issues the community is facing, and it may help prevent abandonment altogether. A report from GSBS Richman Consulting (GSBS), prepared for Oklahoma City in 2013, suggests that, at a minimum, a registry should include a maintenance plan for the identified property and a fee structure (*https://www.okc.gov/home/showdocument?id=2518*). Best practices for this tool include:

- Registration of foreclosed properties at the time of notice of default or foreclosure;
- Submission of a maintenance plan at time of registration;
- Purchasing insurance coverage for unoccupied buildings;
- Establishing minimum levels of exterior maintenance;
- Posting owner contact information on the property;
- Frequent inspections by the municipality;
- Installing exterior nighttime lighting; and
- Code enforcement for non-compliance.

According to the U.S. Department of Housing and Urban Development (HUD), these registrations help municipalities track vacancy issues in their jurisdictions. HUD and GSBS also suggest that fees for registration should escalate the longer the property remains vacant to create a disincentive for owners and encourage the return of these properties to productive use. Additionally, the fees for these registrations could be utilized to offset cost associated with vacant properties.

The Unified Government of Wyandotte County and Kansas City, Kansas, adopted a registration ordinance in February 2018. The ordinance requires the owner of any building or structure that becomes vacant to register within 60 days of the first date of vacancy. The registration must be accompanied by a written comprehensive plan of action containing a timeline for corrective action for any code violations, rehabilitation (if required), and maintenance while the building is vacant. The annual fee is $200. The ordinance also outlines other provisions, such as inspection of the property and notification for change of ownership.

Vacant building registration is not without opponents. In 2013, in response to the GSBS report, Oklahoma City enacted a vacant property registration program. That program included a $285 registration fee that increased by $190 every year the property remained vacant. However, in 2014, the Oklahoma Legislature passed legislation preventing such ordinances from being enacted, ending the Oklahoma City program.

## Land Banks

Another tool some municipalities utilize to deal with vacant properties is land banking. HUD's Neighborhood Stabilization Program describes a land bank as a public or community-owned entity created for the purpose of acquiring, managing, maintaining, and re-purposing vacant, abandoned, and foreclosed properties. The Center for Community Progress (CCP) estimated there were 170 land banking programs in the United States as of January 2018. Land banks are most often associated with municipalities that have large-scale blight and abandonment issues within their jurisdictions.

**Best practices.** Land banks are typically created *via* local ordinances, pursuant to authority provided in state law. Occasionally, they are also created within existing entities, such as redevelopment authorities, housing departments, or planning departments. Their authority varies greatly, depending on how the land bank is created. Typically, they are granted special powers and authority in the state's enabling statute. According to CCP, comprehensive land bank legislation usually grants the following powers:

- The ability to obtain property at low or no cost through the tax foreclosure process;
- The ability to hold land tax-free;
- The ability to obtain clear title, extinguish back taxes, or both;
- The ability to lease properties for temporary uses; and
- The ability to negotiate sales based on the outcome that most closely aligns with a community's needs.

The Lincoln Institute of Land Policy (LILP) identifies Ohio's land bank enabling statute as a possible example of comprehensive land bank legislation. In Ohio, land banks have the following statutory purposes:

- Facilitate the re-utilization of vacant, abandoned, and tax-foreclosed real property;
- Efficiently hold such property pending re-utilization;
- Assist entities to assemble and clear the title of such property; and
- Promote economic and housing development.

Ohio Rev. Code Ann. § 1724.02 established an exhaustive list of powers that may be granted to land banks in the state, many of which align with the examples provided above. These powers include the ability to apply for tax exemption for the property, negotiate the purchase and sale of

property, and lease the property for temporary use.

**Land banks in Kansas.** Kansas cities may establish land banks under the authority of KSA 2018 Supp. 12-5901 *et seq.*, and Wyandotte County is authorized to establish a land bank under the authority of KSA 2018 Supp. 19-26,103 *et seq.* According to CCP, there are eight land banks in the state: Arma, Arkansas City, Hutchinson, Kansas City/Wyandotte County, Lyon, McPherson, Olathe, and Overland Park. Other sources add Junction City to that list.

Kansas law allows property to be transferred to land banks by the city, county, another city, or another taxing subdivision in the county. Land banks can choose to accept any transferred property, and these properties are not subject to any bidding requirements and are exempt from law requiring public sale. They also have the authority to acquire property by purchasing it. The board of directors established pursuant to the law is required to manage its property, keep an inventory of such properties, and sell or otherwise dispose of the property. The board is allowed to sell any property without competitive bidding under terms necessary to assure the effective re-utilization of the property. Land banks in the state are also exempt from property taxes, except for special assessments levied by a municipality, and the county treasurer is required to remove from the tax rolls all taxes and other charges due on the property when it is acquired by the board. Land banks in Kansas are required to operate on a cash basis; however, at the time of establishment, the governing body of the establishing municipality may advance operating funds to the bank to pay for certain expenses. Kansas law also has several transparency and reporting requirements for land banks.

When comparing Kansas land banking law to the referenced best practices, Kansas law incorporates most best practices. The exclusions are the ability to lease properties for temporary use and the clear directive for obtaining a clear title.

**Land banks and tax foreclosure.** Land banks can be used to complement or possibly replace tax foreclosure sales. Some researchers view tax foreclosure sales as a liquidation-based system composed of the sale of tax liens or public tax auctions wherein government trades its interest in tax-delinquent property to speculators or investors for modest revenue collection. Depending on the real estate market in the area, this could potentially result in real estate speculators holding onto property with little incentive to improve or maintain it. However, land banks typically have a statutory obligation to seek a new use for acquired property and to hold property in careful stewardship until a new purpose can be determined.

## Receivership Programs

Receivership is a legal tool that can be used by a court system to designate a local government or qualified non-governmental entity, such as a nonprofit, as the receiver of a vacant property. According to the LILP, this tool exists in many states, but provisions vary greatly, making them more useful in some states than others.

Generally, a receivership statute allows a municipality or a qualified non-profit entity to apply to a court to be appointed the receiver or be granted possession of the property to restore it to use. Once appointed, a receiver or possessor has control of the property, can borrow and spend money to rehabilitate it, and can place liens against the property for the amount spent. Once the property is rehabilitated, the owner may be able to regain control of the property by making the receiver whole, or the property may be sold by the court or receiver.

The City of Baltimore is considered to have a robust receivership ordinance. The ordinance allows the city or a nonprofit designee to ask a court to appoint a receiver for any property that has an outstanding vacant building violation notice. Any entity with a preexisting interest in the property, such as an owner or mortgagee, must demonstrate the ability to rehabilitate the property without delay to avoid appointment of a receiver. If a receiver is appointed, the receiver's administrative and rehabilitation expenses become a super-priority lien on the property.

Additionally, the ordinance provides notification requirements a court must determine have been met.

Massachusetts, a state the CCP considers to have a strong receivership law, utilizes a statewide abandoned housing initiative (*https://www.mass.gov/service-details/abandoned-housing-initiative*) within the Attorney General's Office (AGO). This program allows municipalities to submit addresses of abandoned residential properties to the AGO to initiate an investigation to identify delinquent owners. Once identified, the AGO attempts to contact the owner and any party with legal interest to reach an agreement to complete necessary repairs. If this is not possible, the state's Sanitary Code (*http://www.mass.gov/ago/doing-business-in-massachusetts/economic-development/abandoned-housing-initiative-ahi/ahi-receivership-manual/sanitary-code-and-receivership-statute/*) contains a provision for receivership that can be utilized to remedy code violations. According to the AGO, the Sanitary Code allows for a priority lien to be placed on the residence. A receivership can last six months to a year; at its conclusion, the owner can reimburse the receiver for the cost to clear the lien. If this is not possible, the receiver may foreclose on the lien in a manner approved by a court.

**Best practices.** A 2016 article in the *Journal of Affordable Housing* examined receivership statutes in 19 states and provided the following best practices:

- Establish formal governmental programs that allow for the appointment of private receivers from a list of qualified entities;
- Allow neighbors and other interested parties to petition to bring attention to properties that may not have received official attention and that affect a more limited group of people;
- Make grants and access to a certified list of potential receivers available to unaffiliated petitioners as resources so the petitioners need not go through the process of establishing receivership qualifications to a court;
- Create clear definitions for qualifying properties to ensure fewer petitions will be rejected;
- Require respondents to post bond to encourage serious effort to challenge a claim;
- Require petitioners to provide the court with a quarterly progress report;
- Enable receivers to rent rehabilitated property after rehabilitation, but before sale, to lessen the amount of their lien;
- Provide strict warnings and action deadlines to respondents (delinquent owners); and
- Provide strict guidance when dealing with a receiver's compensation.

The author also suggested consideration be given to the respondent's right of redemption after the property is sold or rehabilitated, noting the practice creates a larger risk to the project and makes it less attractive to other buyers.

**Kansas receivership law.** Kansas law provides for something similar to a receivership program in the provisions of KSA 2018 Supp. 12-1750 *et seq.*, particularly in KSA 2018 Supp. 12-1756a. These provisions do not use the term "receiver," but do allow for the petition of a district court by a municipality or qualified nonprofit for temporary possession of a property that meets certain requirements, such as the property being tax delinquent for two years, and be determined to meet the definition of "abandoned." Petitioners must notify interested parties 20 to 60 days prior to filing the petition. Other petitioner duties include filing an annual report with the court concerning the rehabilitation of the property, which must include statements of all expenditures made by the organization in possession, including payments for rehabilitation, operation, and maintenance; repairs; real estate taxes; mortgage payments; and lien-holder payments. The prior owner of the property is entitled to regain possession of the property by petitioning a district court. The court must determine compensation to the rehabilitating organization.

It is difficult to determine how many of the best practices can be found in Kansas' receivership law. It appears that Kansas incorporates portions of the recommendations. For instance, Kansas law allows for the establishment of formal programs allowing for the appointment of private receivers, but it would be difficult for neighbors and other interested parties to utilize these programs depending on how a municipality has implemented a program. Additionally, Kansas law contains definitions establishing what property can be considered abandoned, but there can be differences of interpretation regarding the clarity of such a definition. The law also provides action deadlines and requirements for respondents to a petition, but does not require the posting of bond to show an effort to rehabilitate. A court also has the discretion to extend these deadlines. Further, the law requires an annual progress report by a petitioner, whereas best practices suggest reports to the court should be made quarterly in order to keep the court better informed.

Kansas law does not allow for rehabilitated property to be rented before their sale and it does not provide any guidance on a receiver's compensation. It also provides for a redemption period for the prior owner, which the author of the 2016 article notes should be an item of consideration when creating these statutes.

## Additional Tools

Aside from the legal tools listed above, communities can also consider options to help slow or prevent properties from becoming abandoned or vacant, such as foreclosure prevention programs and home repair programs. Below is information on two examples of such programs.

### *Homeowners' Emergency Mortgage Assistance Program*

In 1983, Pennsylvania created the Homeowners' Emergency Mortgage Assistance Program (HEMAP). HEMAP is a loan program for homeowners who have shown they have a reasonable prospect of resuming full mortgage payments within a required time frame. The program is funded by a state appropriation. Loans are limited to a maximum of 24 or 36 months from the date of mortgage delinquency or a maximum of $60,000, whichever comes first. Additionally, all loan recipients must pay up to approximately 35.0 percent or 40.0 percent of their net monthly income towards their total housing expense. To date, the program has helped 46,000 homeowners.

### *Basic Systems Repair Program*

Philadelphia offers the Basic Systems Repair Program (BSRP). The program provides free repairs to address electrical, plumbing, heating, and structural and roofing emergencies in eligible owner-occupied homes in the city. Owners are eligible if they have not received BSRP services in the previous three years, own and live in a home that has a qualifying issue, are current under their payment agreements for the property taxes and water bill, and meet the income guidelines.

For more information, please contact:

James Fisher, Research Analyst
James.Fisher@klrd.ks.gov

Joanna Dolan, Principal Research Analyst
Joanna.Dolan@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

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KLRD




Raney Gilliland
Director
785-296-3181
Raney.Gilliland@klrd.ks.gov




# State and Local Government

## I-2 Administrative Rule and Regulation Legislative Oversight

Since 1939, Kansas statutes have provided for legislative oversight of rules and regulations filed by state officers, boards, departments, and commissions. The 1939 law declared all rules and regulations of a general or statewide character were to be filed with the Revisor of Statutes and would remain in force until and unless the Legislature disapproved or rejected the regulations. It was not until 1974 the Legislature took steps to formalize an oversight process. In that year, all filed rules and regulations were submitted to each chamber. Within 60 days of submission, the Legislature could act to modify and approve or reject any of the regulations submitted. In 1984, the Kansas Supreme Court held that a procedure adopted in 1979, which authorized the use of concurrent resolutions to modify or revoke administrative rules and regulations, violated the doctrine of separation of powers under the *Kansas Constitution*.

The 1975 interim Legislative Budget Committee, under Proposal No. 33, found it "important to maintain and even enhance legislative oversight of all regulations in order to make sure that they conform with legislative intent." The 1976 Legislature agreed with that finding and enacted several amendments to the Rules and Regulations Filing Act (Act). In that same year, the Legislative Coordinating Council created the Special Committee on Administrative Rules and Regulations to review proposed administrative rules and regulations filed with the Revisor of Statutes. The law was later changed to require proposed agency rules and regulations to be reviewed as outlined below. A 1977 law created the Joint Committee on Administrative Rules and Regulations (Joint Committee).

Administrative rules and regulations are developed using the *Policy and Procedure Manual for the Filing of Kansas Administrative Regulations* developed by the Kansas Department of Administration.

### Rule and Regulation Authority—Examples

Regulations serve to implement or interpret legislation administered by a state agency. The statutory authority for the agency to adopt these rules and regulations is found in enabling legislation, as illustrated in the language found in legislation:

**Kansas Amusement Ride Act (2017 Session)**

The Secretary of Labor shall adopt rules and regulations necessary to implement provisions of the Kansas Amusement Ride Act (2017 House Sub. for SB 86, amending KSA 44-1613).

**Acupuncture Practice Act (2016 Session)**

The Board [of Healing Arts] shall promulgate all necessary rules and regulations which may be necessary to administer the provisions of this act and to supplement the provisions herein (2016 HB 2615, KSA 65-7615).

The Rules and Regulations Filing Act (KSA 2018 Supp. 77-415 through 77-438, and amendments thereto) outlines the statutory requirements for the filing of regulations by most executive branch agencies and for the Legislature's review of the agency regulations.

## The Regulation Adoption Process

There are two types of administrative rules and regulations: temporary and permanent. A temporary rule and regulation, as defined in KSA 2018 Supp. 77-422, may be utilized by an agency if preservation of the health, safety, welfare, or public peace makes it necessary or desirable to put the regulation into effect before a permanent regulation would take effect. Temporary rules and regulations take effect and remain effective for 120 days, beginning with the date of approval by the State Rules and Regulations Board and filing with the Secretary of State. A state agency, for good cause, may request a temporary rule and regulation be renewed one time for an additional period not to exceed 120 days. A permanent rule and regulation takes effect 15 days after publication in the *Kansas Register*.

KSA 2018 Supp. 77-420 and 77-421 outline the process for the adoption of permanent Kansas Administrative Regulations (KAR) in the following steps (to be followed in consecutive order):

- Obtain approval of the proposed rules and regulations from the Director of the Budget, who will conduct an independent analysis to determine whether the costs incurred by non-state government entities would be $3.0 million or less over a two-year period. The Director will approve the proposed rule and regulation for submission to the Secretary of Administration and Attorney General if it is determined the impact is less than or equal to $3.0 million. If the impact exceeds $3.0 million, the Director may either disapprove the proposed rule and regulation or approve it, provided the agency had conducted a public hearing prior to submitting the proposed rule and regulation and found the costs have been accurately determined and are necessary for achieving legislative intent;
- Obtain approval of the proposed rules and regulations from the Secretary of Administration;
- Obtain approval of the proposed rules and regulations from the Attorney General, including whether the rule and regulation is within the authority of the state agency;
- Submit the notice of hearing, copies of the proposed rules and regulations as approved, and the economic impact statement to the Secretary of State, and submit a copy of the notice of hearing to the chairperson, vice-chairperson, and ranking minority member of the Joint Committee, and to the Kansas Legislative Research Department (KLRD);
- Review the proposed rules and regulations with the Joint Committee;
- Hold the public hearing and prepare a statement of the principal reason for adopting the rules and regulations;
- Revise the rules and regulations and economic impact statement, as

needed, and again obtain approval of the Director of the Budget, Secretary of Administration, and the Attorney General;

- Adopt the rules and regulations; and
- File the rules and regulations and associated documents with the Secretary of State.

The Secretary of State, as authorized by KSA 2018 Supp. 77-417, endorses each rule and regulation filed, including the time and date of filing; maintains a file of rules and regulations for public inspection; keeps a complete record of all amendments and revocations; indexes the filed rules and regulations; and publishes the rules and regulations. The Office of the Secretary of State publishes the adopted regulations in the KAR Volumes and Supplements and on the Office's website.

In addition, new, amended, or revoked regulations are published in the *Kansas Register* as they are received. The Secretary of State has the authority to return to the state agency or otherwise dispose of any document that had been adopted previously by reference and filed with the Secretary of State.

## Legislative Review

The law dictates that the 12-member Joint Committee review all proposed rules and regulations during the 60-day public comment period prior to the required public hearing on the proposed regulations. Upon completion of its review, the Joint Committee may introduce legislation it deems necessary in the performance of its review functions. Following the review of each proposed rule and regulation, the Joint Committee procedure is to forward comments it deems appropriate to the agency for consideration at the time of its public hearing on the proposed rules and regulations. The report expressing comments by the Joint Committee may include a request that the agency reply to the Joint Committee in writing to respond directly to the comments made, and to detail any amendments in the proposed rules and regulations made after the Joint Committee hearing and any delays in the adoption or the withdrawal of the rules and regulations. KLRD staff maintains a database of responses to Joint Committee comments and reports on those responses to the Joint Committee. A limited number of rules and regulations are exempt from the review process of the Joint Committee. In addition, certain permanent regulations have a defined statutory review period of 30 days, rather than the 60-day review period.

Each year, KLRD prepares a report on the oversight activities of the Joint Committee; this electronic report is available from KLRD.

As part of its review process, the Joint Committee examines economic impact statements, as required by law, that are prepared by agencies and accompany the proposed rules and regulations. Provisions of 2018 HB 2280 require cost-benefit analyses and analysis of the effect on the Kansas economy, including specific businesses, of each rule and regulation.

The Director of the Budget will review the agency's economic impact statement and prepare a supplemental or revised statement and an independent analysis (2018 HB 2280, sec. 1(c)).

The Legislature is also permitted to adopt a concurrent resolution expressing its concern regarding any permanent or temporary rule and regulation. The resolution may request revocation of the rule and regulation or amendment as specified in the resolution. If the agency does not respond positively in its regulation to the recommendations of the Legislature, the Legislature may take other action through a bill. Recent legislative changes to the Act have not changed this review process.

## 2008 Legislative Action

During the 2008 Legislative Session, SB 579 was enacted. This legislation requires state agencies to consider the impact of proposed rules and regulations on small businesses. (These provisions were expanded in 2018.) The bill defined "small businesses" as any person, firm, corporation, partnership, or association with

50 or fewer employees, the majority of whom are employed in the State of Kansas.

## 2010 Legislative Action

During the 2010 Legislative Session, House Sub. for SB 213 revised the Act by removing obsolete language and allowed for future publication of the KAR in paper or electronic form by the Secretary of State. In addition, the bill made changes in the definitions used in the Act and in the exclusion of certain rules and regulations from the Act. Certain procedures to be followed in the rule-making process and procedures were also revised. One provision requires state agencies to begin new rule-making procedures when the adopted rules and regulations differ in subject matter or effect in a material respect. Under these conditions, the public comment period may be shortened to not less than 30 days.

## 2011 Legislative Action

During the 2011 Legislative Session, HB 2027 amended the Act by deleting definitions of "rule and regulation," "rule," and "regulation," including several provisions exempting specific rules and regulations from formal rule-making under the Act, and replacing them with a simplified definition.

It also expanded the definition of "person" to include individuals and companies or other legal or commercial entities.

The bill gave precedential value to orders issued in an adjudication against a person who was not a party to the original adjudication when the order is:

- Designated by the agency as precedent;
- Not overruled by a court or other adjudication; and
- Disseminated to the public through the agency website or made available to the public in any other manner required by the Secretary of State.

The bill also allowed statements of policy to be treated as binding within the agency when directed to agency personnel concerning their duties or the internal management or organization of the agency.

The bill provided that agency-issued forms, the contents of which are governed by rule and regulation or statute, and guidance and information the agency provides to the public do not give rise to a legal right or duty and are not treated as authority for any standard, requirement, or policy reflected in the forms, guidance, or information.

Further, the bill provided for the following to be exempt from the Act:

- Policies relating to the curriculum of a public educational institution or to the administration, conduct, discipline, or graduation of students from such institution;
- Parking and traffic regulations of any state educational institution under the control and supervision of the State Board of Regents; and
- Rules and regulations relating to the emergency or security procedures of a correctional institution and orders issued by the Secretary of Corrections or any warden of a correctional institution.

Similarly, statutes that specify the procedures for issuing rules and regulations will apply rather than the procedures outlined in the Act.

Finally, the bill created a new section giving state agencies the authority to issue guidance documents without following the procedures set forth in the Act. Under the terms of this section, guidance documents may contain binding instructions to state agency staff members, except presiding officers. Presiding officers and agency heads may consider the guidance documents in an agency adjudication, but are not bound by them.

To act in variance with a guidance document, an agency must provide a reasonable explanation for the variance and, if a person claims to have reasonably relied on the agency's position, the explanation must include a reasonable

justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interests. The bill required each state agency to maintain an index of the guidance documents; publish the index on the agency's website; make all guidance documents available to the public; file the index in any other manner required by the Secretary of State; and provide a copy of each guidance document to the Joint Committee (may be provided electronically).

## 2012 Legislative Action

During the 2012 Legislative Session, SB 252 made several changes to the Act.

The bill changed notice requirements from 30 days to 60 days for new rule-making proceedings when an agency proposes to adopt a final rule and regulation that:

- Differs in subject matter or effect in any material respect from the rule and regulation as originally proposed; and
- Is not a logical outgrowth of the rule and regulation as originally proposed.

In addition, the bill changed the Act by removing language that stated the period for public comment may be shortened to no less than 30 days, as the Act already stated the notice provided by state agencies constitutes a public comment period of 60 days.

## 2013-2014 Legislative Action

The only legislative action during the 2013 Legislative Session was the passage of HB 2006, which amended the Act to remove "Kansas" from the name of the Act. No amendments were made to the Act during the 2014 Legislative Session.

## 2015-2016 Legislative Action

The Act was not amended.

## 2017 Legislative Action

The Act was not amended.

## 2018 Legislative Action

During the 2018 Legislative Session, HB 2280 made several changes to the Act.

HB 2280 revised the Act pertaining to economic impact statements, granted new authority to the Director of the Budget to review and approve proposed rules and regulations, added a member of the minority party and a representative of an appropriations committee to the State Rules and Regulations Board, added a ranking minority member to the Joint Committee, requires reports to the Legislature from that committee after each meeting, and requires the Legislative Division of Post Audit evaluate the implementation of the new provisions contained in the bill in 2021.

For more information, please contact:

Raney Gilliland, Director
*Raney.Gilliland@klrd.ks.gov*

Jill Shelley, Principal Research Analyst
*Jill.Shelley@klrd.ks.gov*

Jordan Milholland, Research Analyst
*Jordan.Milholland@klrd.ks.gov*

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

KLRD




Isaac Elyacharshuster
Fiscal Analyst
785-296-3181
Isaac.Elyacharshuster@klrd.ks.gov




# State and Local Government

## I-3 Board of Indigents' Defense Services

The *U.S. Constitution* grants certain rights and protections to criminal defendants, including the right to be represented by an attorney. This right has been interpreted by the U.S. Supreme Court and the Kansas Supreme Court to require the State to pay for attorneys to represent indigent defendants at most key stages in the criminal justice process.

In Kansas, this requirement is met by the Board of Indigents' Defense Services (BIDS). BIDS provides criminal defense services through:

- Public defender offices in certain parts of the state;
- Contract attorneys (attorneys in private practice contracted by BIDS); and
- Assigned counsel (court-appointed attorneys compensated by BIDS).

In addition to providing trial-level public defenders and assigned counsel, BIDS operates offices tasked with handling defense of capital cases, cases in which conflicts of interest prevent local public defenders from representing a particular defendant, and post-conviction appeals. BIDS is also responsible for paying the other costs associated with criminal defense, such as for expert witnesses and transcription fees. Finally, Legal Services for Prisoners, Inc., a non-profit corporation, is statutorily authorized to submit its annual rating budget to BIDS and provides legal assistance to indigent inmates in Kansas correctional institutions.

### Public Defender Offices

BIDS operates nine trial-level public defender offices throughout the state:

- 3rd Judicial District Public Defender (Topeka);
- Junction City Public Defender;
- Sedgwick County Regional Public Defender;
- Reno County Regional Public Defender;
- Salina Public Defender;
- 10th Judicial District Public Defender (Olathe);
- Western Kansas Regional Public Defender (Garden City);
- Southeast Kansas Public Defender (Chanute); and

- Southeast Kansas Public Defender Satellite Office (Independence).

*Note:* The Western Regional Public Defender Office closed a satellite branch in Liberal on September 1, 2009, after determining it was no longer cost effective. That caseload is now handled by assigned counsel.

BIDS also operates the following offices in Topeka:

- Appellate Defender;
- Death Penalty Defense Unit;
- Capital Appeals;
- Capital Appeals and Conflicts;
- Northeast Kansas Conflict Office; and
- State *Habeas* Office.

Finally, BIDS operates two other special offices outside of Topeka:

- Wichita Conflicts Office; and
- Death Penalty Defense Unit—Sedgwick County Satellite Office.

BIDS officials report it monitors cost per case for each of its offices quarterly to determine the most cost-effective system to deliver constitutionally required defense services and makes changes as needed to maintain its cost effectiveness.

## Assigned and Contract Counsel

It is not possible for state public defender offices to represent all criminal defendants who need services. For example, if two individuals are co-defendants in a particular matter, it would present a conflict of interest for a single public defender's office to represent both individuals. Additionally, BIDS has determined it is not cost effective to operate public defender offices in all parts of the state, based on factors such as cost per case and caseload in these particular areas. Instead, BIDS contracts with private attorneys in those areas to provide these services and compensates willing attorneys appointed as assigned counsel by local judges.

BIDS has been directed to monitor assigned counsel expenditures and to open additional public defender offices where it would be cost effective to do so.

Effective January 18, 2010, assigned counsel were compensated at a rate of $62 per hour as the result of a BIDS effort to reduce costs and respond to budget cuts. For FY 2016, the rate was increased to $65 per hour, and for FY 2017, the rate was increased to $70 per hour. During the summer of 2018, BIDS voted to increase the rate for FY 2019 to $75 per hour.

Total fees for defense in felony cases are capped at various levels depending on the classification of the felony and the disposition of the case. However, if there is a judicial finding that a case is "exceptional" and requires the assigned attorney to work more hours than the cap allows, BIDS is required to exceed these caps. These exceptional fees are included in BIDS' overall budget for assigned counsel payments.

The 2007 Legislature changed the language of the assigned counsel compensation statute to allow BIDS to negotiate rates below the mandated (at that time) $80-per-hour rate as an alternative cost-savings strategy. BIDS conducted public hearings in 11 counties where it was determined that it was not cost effective to utilize assigned counsel at $80 per hour. BIDS responded to local requests to maintain the assigned counsel system in these counties by negotiating reduced compensation rates. The negotiation was successful, and rates of $62 per hour and $69 per hour were implemented. BIDS has determined these rates are more cost effective than opening additional public defender offices.

The 2006 Legislature approved an increase in compensation rates from $50 per hour to $80 per hour for assigned counsel beginning in FY 2007. This rate had previously been raised from $30 per hour to $50 per hour by 1988 legislation in response to a Kansas Supreme Court ruling.

Prior to FY 2006, BIDS paid assigned counsel expenditures from the operating expenditures account in its State General Fund appropriation. All professional services were treated as

assigned counsel costs, including attorney fees, transcription fees, and expert witness fees. The FY 2006 budget added a separate line item for these other expenditures to more accurately account for assigned counsel costs.

## Other Costs Affecting BIDS

### *Expert Witness and Transcription Fees*

BIDS is required to pay the fees for expert witnesses and transcription. Most experts utilized by the agency have agreements to work at a reduced rate. However, the agency reported these costs have risen steadily since FY 2008 due to higher transcription costs mandated by the Kansas Supreme Court, new legal requirements for expert testimony, and the expansion of what is effective assistance of defense counsel and defense services.

### *Death Penalty Cases*

Kansas reinstated the death penalty in 1994, following the end of a national moratorium imposed by the U.S. Supreme Court. (More information about the death penalty in Kansas is available in *G-4 Death Penalty in Kansas* in this Briefing Book).

The Death Penalty Defense Unit was subsequently established to handle the defense of cases in which the death penalty could be sought. As with all cases handled by public defenders, conflicts of interest and other circumstances raise the possibility that outside counsel will have to be contracted to represent defendants.

Capital cases are more costly than other matters handled by BIDS. Not only do these cases take more time for trial, but they also require defense counsel to be qualified to handle the complexities and special rules of death penalty litigation. According to a report issued by the Kansas Judicial Council Death Penalty Advisory Committee (Advisory Committee) in 2004, a "capital case requires more lawyers (on both prosecution and defense sides), more experts on both sides, more pre-trial motions, longer jury selection time, and a longer trial."

The Legislative Division of Post Audit (LPA) issued a Performance Audit in December 2003 called "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections."

This report noted several findings and recommendations related to the cost of death penalty cases in Kansas:

- BIDS usually bore the cost of defending capital murder cases;
- Contracted attorneys for such cases were paid $100 per hour, with no fee cap; and
- It recommended BIDS ensure it had qualified attorneys in its Death Penalty Defense Unit and consider establishing a conflicts office (which it later did).

A follow-up study, also conducted by the Advisory Committee, was released on February 13, 2014, and updated cost data for the costs first reported in LPA's 2003 report. The Advisory Committee found BIDS spent an average of $395,762 on capital cases that went to trial and where prosecutors sought the death penalty, compared to an average of $98,963 on other death penalty-eligible cases that went to trial without the prosecutor seeking the death penalty.

## List of Other Offices Administered by BIDS

### *Appellate Defender Office*

The Appellate Defender Office is located in Topeka and provides representation to indigent felony defendants with cases on appeal.

### *Northeast Kansas Conflict Office*

The Northeast Kansas Conflict Office, located in Topeka, was established to deal with a large number of conflict cases in Shawnee County. The office also handles off-grid homicide cases in Lyon County.

### *Sedgwick County Conflict Office*

The Sedgwick County Conflict Office was established to defend conflict cases that cannot be handled by the Sedgwick County Public Defender Office, and is located in Wichita.

### *Death Penalty Defense Unit*

The Death Penalty Defense Unit was established after the reinstatement of the death penalty. BIDS determined it was more cost effective to establish an office with attorneys specially qualified to handle defense in capital cases rather than relying on contract or assigned counsel.

### *Capital Appeals and Conflicts Office*

The primary function of the Capital Appeals and Conflicts Office is to handle representation throughout the long and complex appellate process that follows the imposition of a death sentence. The Office also handles some cases from the Appellate Defenders Office, as time allows.

### *Capital Appeals Office*

The Capital Appeals Office was established in 2003 to handle additional capital appeals. Specifically, the office was created to handle the appeals of Reginald and Jonathan Carr, who were both convicted of murder in Sedgwick County and sentenced to death. Due to conflict of interest rules, the existing Capital Appeals and Conflicts Office could only represent one of the two men. The establishment of the Capital Appeals Office resolved that conflict and doubled BIDS' capacity for handling death penalty appeals.

### *State* Habeas *Office*

The State *Habeas* Office was established in FY 2015 to handle death penalty defense after a death sentence is upheld by the Kansas Supreme Court and petition for a writ of *certiorari* has been unsuccessful for the defense.

### *Legal Services for Prisoners*

Legal Services for Prisoners, Inc., provides legal services to inmates in Kansas correctional facilities. The goal of the program is to ensure that prisoners' right to access the courts and pursue non-frivolous claims is met. Legal Services for Prisoners submits its annual budget to BIDS. Although Legal Services for Prisoners is not a state agency, its funding is administered through BIDS.

For more information, please contact:

Isaac Elyacharshuster, Fiscal Analyst
Isaac.Elyacharshuster@klrd.ks.gov

Robert Gallimore, Principal Research Analyst
Robert.Gallimore@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

KLRD




Katelin Neikirk
Research Analyst
785-296-3181
Katelin.Neikirk@klrd.ks.gov




# State and Local Government

## I-4 Election Security

As further information has been released related to the scope of the attempted interference in the U.S. election process, election security has become an increasingly important policy topic at all levels of government. This article will examine the major election vulnerabilities and summarize election security activities being undertaken at the federal level as well as in Kansas and other selected states.

Recent reports, including the following examples, illustrate needed election security:

- In January 2017, the Office of the Director of National Intelligence released a declassified version of its report on interference in the 2016 election. The report states Russian intelligence obtained and maintained access to multiple U.S. state and local election boards. The Department of Homeland Security (DHS) stated the types of systems Russian actors targeted or compromised were not involved in vote tallying;
- In September 2017, DHS informed election officials in 21[1] states that hackers had targeted their voting system and sent more than 100 phishing e-mails to local election officials across the country before the 2016 election;
- In May 2018, hackers successfully shut down the Knox County, Tennessee, website and gained access to the server on that county's primary election day. The hackers shut down the website for an hour, but did not affect the outcome of the election;
- In July 2018, the U.S. Department of Justice (DOJ) announced indictments against 12 members of the Main Intelligence Directorate of the Russian General Staff (known as GRU). The indictment alleges that 11 members conspired to hack into computers and steal and release documents in an effort to interfere with the 2016 election, while 1 conspired to infiltrate computers of organizations responsible for administering elections; and
- In July 2018, the Federal Bureau of Investigation (FBI) informed Maryland officials that in 2015, without the State's knowledge, a Russian investor had purchased ByteGrid LLC, a software vendor that maintains part of the Maryland State Board of Elections' voter registration system.

## Tools Used in Elections

There are many tools and resources used to increase the efficiency and security of elections. Since a majority of election tools are electronic, cybersecurity and tampering are major issues concerning election security. The tools and resources examined in this article include: online voter registration systems, electronic poll books, election personnel, voting devices, storage and tallying of ballots, transmission of vote tallies, and post-election audits.

**Online voter registration systems.** As with any online system, there are benefits and risks. Online voter registration can expedite new voter registration, updates to existing voter registrations, and finding other relevant information, such as locating polling places. However, online voter registration systems are at risk of a multitude of cyberattacks, as was seen when hackers targeted voting systems, including voter registration systems, in 21 states. While Arizona and Illinois were the only states with confirmed breaches of their voter registration systems, an NBC News article indicated five other states' voter registration systems were compromised with varying levels of severity. To date, no evidence has been found that any voter information was altered or deleted. However, the August 2018 Defcon conference (one of the world's largest hacking conventions), an 11-year-old was able to hack a replica of the Florida Secretary of State website and change election results in 10 minutes.

According to the United States Computer Emergency Readiness Team (US-CERT), potential cyberattacks on voter registration systems could include: phishing[2] attempts, injection flaws,[3] cross-site scripting vulnerabilities,[4] denial-of-service (DoS) attacks,[5] server vulnerabilities, and ransomware.[6]

US-CERT outlines several ways to protect voter registration systems, including patching applications and operating systems, application whitelisting,[7] restricting administrative privileges, input validation,[8] using firewalls, backing up voter registration data and storing it offline, conducting risk analysis, training staff on cybersecurity, having an incident response and business continuity plan in place and tested, and penetration testing.[9] The National Conference of State Legislatures (NCSL) also cited several approaches used to ensure security, including registrants' providing their driver's license number or last four digits of their Social Security number; automatic "time outs" after a certain period of inactivity; "captcha" boxes, where registrants must decode images that a computer cannot decode; data encryption; highlighting unusual activity; and multi-screen systems, which offer one question on a screen.

**Electronic poll books.** In January 2014, the Presidential Commission on Election Administration recommended jurisdictions transition to electronic poll books (EPBs). As of March 2017, NCSL noted 30 states, including Kansas, permit the use of EPBs in some form. EPBs replace paper poll books and allow poll workers to access the list of eligible voters, check in voters more efficiently, and prevent voters from checking in more than once. EPBs are electronically connected to a central registration database. However, the Brennan Center for Justice (Brennan Center) notes there are no accepted technical standards and there are concerns about security and fraud prevention, especially for those connected to remote computers *via* the Internet. EPBs are vulnerable to many of the same risks as other computer tablets. The Center for Internet Security (CIS) identifies six major risks associated with EPBs: risks associated with established (whether persistent or intermittent) Internet connectivity; network connections with other internal systems, some of which may be owned or operated by other organizations or authorities, including private networks for EPBs; security weaknesses in the underlying commercial off-the-shelf product, whether hardware or software; security weaknesses in the dedicated components, whether hardware or software; errors in properly managing authentication and access control for authorized users, including permissions for connecting to networks and attaching removable media; and difficulties associated with finding and rolling back improper changes found after the fact.

The Election Assistance Commission (EAC) provides regulations created by Indiana, Ohio,

Pennsylvania, and Virginia. Based on regulations and guidance from these states, some ways in which EPBs can be secured include the use of secure sockets layer security,[10] use of a virtual private network,[11] and proper security training for staff.

**Election personnel.** One of the largest cybersecurity risks is human error. Potential security issues associated with election personnel include phishing e-mails; malware disguised as system patches; or the creation of unintentional gaps in cybersecurity, physical security, or both. One group of election personnel with a direct and important role on Election Day is poll workers. Poll workers are election officials, usually volunteers, responsible for ensuring proper and orderly voting at polling stations. Depending on the state, election officials may be identified as members of a political party or nonpartisan. Their duties can include issuing ballots to registered voters, registering voters, monitoring the voting equipment, explaining how to mark a ballot or use voting equipment, or counting votes.

An EAC 50-state survey of requirements for poll workers states that in all states and territories, poll workers must be at least 18 years old (with some exceptions); be registered to vote in that state; and be a resident of the county or district in which they will work, though some states have broader restrictions. A majority of states, including Kansas, require poll workers to be trained, but the type, frequency, intensity, and requirements for who is trained varies greatly. Most states, including Kansas, and many precincts do not require poll workers and other election personnel to be subject to background checks, which could allow "bad actors" unrestrained access to voting equipment and data.

**Voting devices.** In response to issues arising from the 2000 presidential election, Congress passed the 2002 Help America Vote Act (HAVA). The law provided almost $3.3 billion to help states replace voting systems and improve election administration. Voluntary technical standards for computer-based voting devices were first developed in the 1980s, but HAVA codified the development and required regular updating of voting device standards by the EAC. While the EAC guidelines are voluntary, most states, including Kansas, require their voting devices conform to EAC guidelines. On September 12, 2017, the EAC released a draft of new guidelines, which would require voting devices to produce a paper record that can be verified and audited. The new guidelines are expected to be approved in 2018. Below are descriptions of the two main types of voting devices in use today.

According to the Brennan Center, during the 2018 mid-term elections, 43 states and Washington D.C. were to use voting devices that are no longer manufactured; 13 states were to use paperless voting devices in some counties and towns; and 5 states were to use paperless voting devices statewide.

In July 2018, one of the top voting equipment manufacturers and software vendors, Election Systems & Software (ES&S), admitted to a Congressperson that ES&S installed remote-access software[12] on its voting devices between 2000 and 2006. In 2006, the source code for ES&S' remote-access software was stolen, which would allow hackers to examine the code and find vulnerabilities to exploit. Once discovered, ES&S informed customers; however, it was the customers' responsibility to remove the software. At least 60.0 percent of ballots cast in 2006 were tabulated on ES&S systems. However, ES&S announced in August 2018 it had formed new partnerships with multiple DHS offices to help conduct cyber-hygiene scans of ES&S public-facing Internet presence, monitor and share cyber-threat information, detect and report indicators of compromise, develop and distribute election security best practices, and raise election security awareness. ES&S also has installed ALBERT network security sensors[13] in its voter registration environments. The company has become a member of two Information Sharing and Analysis Centers (ISAC), including the Elections Infrastructure ISAC and the Information Technology ISAC, organizations that aim to improve cyber-threat information sharing between the private and public sectors.

*Optical scan device.* The most widely used device is the optical scan device, which is used in at least some polling places in every state. Voters

mark choices on paper ballots by hand or use an electronic ballot marking device and the ballots are read by an electronic counting device. Optical scan devices are regarded as more secure than direct recording electronic devices due to the fact the devices create a voter verifiable paper audit trail (VVPAT), meaning votes can be verified and cannot be altered electronically. However, as optical scan devices typically use electronic mechanisms to count ballots, vote counts are still vulnerable to cyberattacks, though an audit of the paper ballots is likely to catch any irregularities.

*Direct recording electronic device.* The second most utilized option is the direct recording electronic device (DRE), where voters mark choices *via* a computer interface and those choices are recorded directly to an electronic memory. Delaware, Georgia, Louisiana, New Jersey, and South Carolina all exclusively used DREs with no VVPAT in the 2016 election. However, all five states are currently either in the process of replacing their DREs or considering legislation to require such a change. DREs pose a unique concern because there is no way to verify the choice a voter intended to make is the same as the choice recorded in the device's memory. To solve this problem, many states configured DREs to produce a verifiable paper record of the voter's ballot. However, a voter must still review this ballot before casting it to verify it is correct. In November 2016, a former Central Intelligence Agency (CIA) Director noted DRE voting devices as a key vulnerability.

*Limited life cycles.* The average life span of electronic voting devices is less than ten years, and most of the devices currently in use have surpassed this age. Out-of-date devices and systems are not only more susceptible to technical issues, but also to cyberattacks and other means of tampering. The Institute for Critical Infrastructure Technology (ICIT) noted many voting devices have not been patched for almost a decade and use antiquated software that is unsupported by the manufacturer. The Brennan Center estimates the initial cost of replacing voting equipment throughout the United States could exceed $1.0 billion. However, many jurisdictions do not have the funds to replace outdated technology. Kansas statutes place financial and maintenance responsibilities for voting devices with the counties.

*Storage of voting devices.* ICIT found that many voting devices are stored in locations with minimal security, allowing election personnel relatively easy and unregulated access to alter or manipulate devices, either intentionally or unintentionally.

**Storage and tallying of ballots.** While paper ballots are stored in physical ballot boxes, electronic ballots are stored on device smart cards, a device's random-access memory, or other electronic tools. Security measures, such as passwords, specific access cards, encryption, and tamper-resistant tape, limit access to stored ballots. However, there are ways to circumvent these measures.

Manipulation can also occur after the ballot storage has been removed from the device to be tallied. Ballots may be tallied at the polling place or at a central location. Paper ballots are tallied by hand or by a scanner that produces a printout of the votes. Voting devices that do not utilize paper ballots tally votes internally and produce either a printed or digital tally. It is estimated only 5.0 percent of ballots in the United States are tallied by hand; the other 95.0 percent are tallied either by voting devices or scanners. Voting devices and scanners can create issues, such as not calculating the votes correctly, not reading a ballot, or producing multiple readings of the same ballot. Tallying by hand carries the lowest risk for manipulation as it would be difficult to alter, switch, or destroy ballots without being caught. However, there is still the possibility of human error.

**Transmission of vote tallies.** After the votes have been tallied, the totals must be sent to a central location to determine the total vote tally of that race. Vote tallies are typically transmitted in one of the following ways: spoken over the phone to someone at election headquarters, who will input that data into a spreadsheet; some voting machines are equipped with modems that connect to a telephone line rather than the Internet, and can be transmitted electronically; or memory cards or sticks physically delivered

to voting headquarters, where it is turned over to election officials who will put the data storage device in their machines and download the actual results. Each of these methods has benefits and risks. Some of the risks could include "bad actors" providing altered or incorrect information; hackers infiltrating the systems used to transmit the tallies and altering or deleting the tallies; or simple human error.

**Post-election audits.** Currently, 32 states and the District of Columbia conduct some form of a post-election audit. NCSL has divided post-election audits into two categories:

- Traditional post-election audit: usually conducted manually by hand counting a portion of the paper records and comparing them to the electronic results produced by an electronic voting machine; and
- Risk-limiting audit: an audit protocol that makes use of statistical principles and methods and is designed to limit the risk of certifying an incorrect election outcome.

Twenty-nine states[14] and the District of Columbia require a traditional post-election audit, and Colorado, Rhode Island, and Virginia statutorily require risk-limiting audits. Kansas, North Dakota, and Wyoming conduct a repeat of the pre-election logic and accuracy test after the election to ensure voting machines are still tabulating accurately.

**Other notable election security resources.** States utilize a myriad of resources to protect their election infrastructure from outside attacks. These resources may include cyber-liability insurance,[15] white-hat hackers,[16] participation in interstate information sharing programs,[17] and cybersecurity services provided by private entities.[18]

## Federal Government Current Activities

The DHS National Cybersecurity and Communications Integration Center (NCCIC) helps stakeholders in federal departments and agencies, state and local governments, and the private sector manage their cybersecurity risks. The NCCIC works with the Multi-State Information Sharing and Analysis Center (MS-ISAC) to provide threat and vulnerability information to state and local officials; all states are members. The MS-ISAC composition is restricted to state and local government entities. It has representatives co-located with the NCCIC to enable collaboration and access to information and services for state chief information officers.

During the 2016 election cycle, the National Protection and Programs Directorate (NPPD) within DHS offered voluntary assistance to state and local election officials and authorities from NCCIC, which helped stakeholders in federal departments and agencies, state and local governments, and the private sector manage their cybersecurity risks. The then-Homeland Security Secretary told a Senate hearing that 18 states accepted DHS' offer to help improve cybersecurity of their election systems prior to the 2016 election. Eleven states, including Kansas, chose not to accept DHS' offer, citing concerns with federal intrusion on state elections.

On January 6, 2017, the Secretary of DHS determined that election infrastructure should be designated as a critical infrastructure sub-sector. Participation in the sub-sector is voluntary and does not grant federal regulatory authority. Elections continue to be governed by state and local officials, but with additional effort by the federal government to provide security assistance. DHS is also attempting to obtain security clearances for the top election official in each state so they will have access to classified intelligence about cybersecurity threats. As of March 2018, less than 12 states' election officials received their security clearance from DHS to receive information on election-related threats. Only 19 states have signed up for the risk assessments DHS is offering, and 14 are getting their "cyber-hygiene" scans. In July 2018, DHS announced the creation of the National Risk Management Center (Center), which will focus on evaluating threats and defending critical infrastructure against hacking. The Center will run simulations, tests, and cross-sector exercises to evaluate critical infrastructure weaknesses and threats.

In Fall 2017, the FBI established the Foreign Influence Task Force to identify and counteract the full range of foreign influence operations targeting U.S. democratic institutions. The Task Force works with personnel in all 56 FBI field offices and brings together the FBI's expertise in counterintelligence, cyber, criminal and counterterrorism, to root out and respond to foreign influence operations.

On February 20, 2018, the U.S. Attorney General ordered the creation of the DOJ Cyber-Digital Task Force, which will canvass the many ways the DOJ is combating the global cyber threat, and will also identify how federal law enforcement can more effectively accomplish its mission in this area. Among other areas, the Attorney General has asked the Task Force to prioritize its study of efforts to interfere with our elections. The Task Force released a report on July 19, 2018. The DOJ also issued a statement indicating the agency plans to alert American companies, private organizations, and individuals that they are being covertly attacked by foreign actors attempting to affect elections or the political process.

In early July 2018, the Director of the National Security Agency (NSA) directed the NSA and the Department of Defense's (DOD) Cyber Command to coordinate actions to counter potential Russian government-sanctioned interference in the 2018 midterm elections. The joint program is also working with the FBI, CIA, and DHS.

In August 2018, DHS, EAC, DOD, National Institute of Standards and Technology, NSA, Office of the Director of National Intelligence, U.S. Cyber Command, DOJ, the FBI, 44 states (including Kansas), the District of Columbia, and numerous counties participated in the Tabletop the Vote 2018, DHS' National Election Cyber Exercise which is a simulation that tested the ability of state and federal officials to work together to stop data breaches, disinformation, and other voting-related security issues.

**EAC current activities.** The EAC adopted the Voluntary Voting Systems Guidelines (VVSG) Version 2.0 in September 2017. The VVSG Version 2.0 states a voting device must produce a VVPAT and the software or hardware cannot produce errors that could lead to undetectable changes in tallies.

**New HAVA funding.** On March 23, 2018, the Consolidated Appropriations Act of 2018 (Act) was signed into law. The Act included $380.0 million in grants, which were made available to states to improve the administration of elections, including to enhance technology and make election security improvements. The majority of the funds will be used to improve election cybersecurity and to purchase new voting equipment.

## Kansas Election Security Activities[19]

In February 2018, the Center for American Progress (CAP) released an analysis of election security in all 50 states. Kansas was ranked F/D, one of five states[20] that received an unsatisfactory ranking. The State received fair marks for voting machine certification requirements, pre-election logic and accuracy testing, and adherence to a number of minimum cybersecurity best practices. Kansas received unsatisfactory marks for the lack of a VVPAT from all voting devices and post-election audits; the State's ballot accounting and reconciliation procedures; and for allowing voters stationed or living overseas to return voted ballots electronically. [Note: At the time of the CAP report's publication, 2018 HB 2539 had not yet been passed.] Kansas received an incomplete mark for minimum cybersecurity for voter registration systems as CAP did not receive information on these topics from state officials.

**Online voter registration system.** Kansas is one of 37 states, and the District of Columbia, that offer online voter registration. The State's online voter registration system is about ten years old. The Kansas Director of Elections (Director) with the Office of the Secretary of State (Office) indicated in July of 2018 there was a firewall in place to protect the voter registration system, which was continuously updated, and that Office staff had been trained on cybersecurity best practices. The Secretary of State previously had stated in 2016 the voter registration system had logging capabilities to track modifications to the database.

**Electronic poll books.** As of April 2016, at least 16 Kansas counties, including Johnson, Sedgwick, Shawnee, and Wyandotte, were using EPBs, though neither state statutes nor rules and regulations provide guidance on their use, security, or maintenance. According to the Director, EPBs in Kansas are not connected to the voter registration system *via* a network. Counties are responsible for providing training on EPBs to election personnel.

**Election personnel.** Kansas poll workers must be residents of the area in which they will serve; normally at least 18 years of age, though they may be as young as 16 years old if they meet certain other requirements; not a candidate in the current election; and a registered voter in the area in which they will work. In Kansas, there are no requirements for poll workers to submit to and pass background checks. KSA 25-2806 requires county election officers to provide instruction concerning elections generally, voting devices, ballots, and duties for poll workers before each election. The curriculum specifics and training duration is left to the discretion of the county election officer.

**Voting devices.** In the 2016 election, data from Verified Voting showed that 70 Kansas counties used paper ballots; 15 used both paper ballot and DREs without VVPAT; 15 used DREs without VVPAT; and 5 used DREs with VVPAT. As of March 2018, about 20 counties had replaced some or all of their voting devices or were in the process of purchasing new voting devices.

Johnson County (County) was one locality to update voting devices. In May 2018, the County contracted with ES&S for the purchase of 2,100 voting devices for $10.5 million. During the August 2018 primary election, there were issues obtaining data from the computer thumb drives where votes are stored. There were also issues with poll-worker preparedness in the event of device malfunction and insufficient paper ballots as a backup.

Statutes concerning electronic voting devices can be found in KSA 25-4401 through KSA 25-4416, also known as the Electronic and Electromechanical Voting Systems Act. KSA 25-4406(k) requires voting devices to be compliant with HAVA voting system standards. Logic and accuracy testing must be conducted on all voting devices five days before an election, per KSA 25-4411. County commissioners and county election officers may select the type of voting device utilized in their voting locations, as long as it has been approved by the Secretary of State.

During the 2018 Legislative Session, the Legislature passed HB 2539, which required any electronic or electromechanical voting system purchased, leased, or rented by a board of county commissioners after the effective date of the bill to provide a paper record of each vote cast at the time the vote is cast. The bill also required voting systems to have the ability to be tested before an election and prior to the canvass date.

**Storage and tallying of votes.** The majority of Kansas counties use some form of paper ballot and use electronic scanners to tally the votes. These paper ballots are stored in locked boxes with authorized access. Counties that use DREs without a VVPAT store votes on removable memory cards.

**Transmitting of vote tallies.** Vote tallies provided *via* memory cards are transported by the county election officer. KAR 7-21-2 states results are only to be sent by fax, phone, handdelivery, or encrypted electronic transfer. According to the Office, officials typically call in or e-mail results, and there is no Internet uploading of results.

**Post-election audits.** During the 2018 Legislative Session, the Legislature passed HB 2539, which required county election officers to conduct a manual audit or tally of each vote cast in 1.0 percent of all precincts, with a minimum of one precinct located within the county. The audit requirements apply to all counties for elections occurring after January 1, 2019. The requirement for audit or tally applies regardless of the method of voting used. The bill specified these contested races will be audited:

- In presidential election years: one federal race, one state legislative race, and one county race;

- In even-numbered, non-presidential election years: one federal race, one statewide race, one state legislative race, and one county race; and
- In odd-numbered election years: two local races, selected randomly after the election.

**Other election security resources.** Kansas also uses participation in interstate information sharing programs and cybersecurity services provided by private entities to safeguard elections.

**Kansas election funding.** Kansas received $26.4 million in total 2002 HAVA funds and has $2.9 million remaining as of early 2018. Under the Consolidated Appropriations Act of 2018, Kansas received about $4.4 million in new HAVA funds, with a state match of $219,180. Kansas submitted a budget in August 2018 with the majority of funds going to local jurisdictions, purchase of new equipment, and training. The Office budget totals $4.5 million for FY 2018 and $4.6 million for FY 2019, all from special revenue funds. The Office budgeted $548,977 for elections and legislative matters for FY 2018 and $551,359 for FY 2019.

1 Those states were Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Minnesota, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Washington, and Wisconsin.
2 Phishing includes forged e-mails, texts, and other messages used to manipulate users into clicking on malicious links or downloading malicious file attachments.
3 Injection flaw is a broad web application attack technique that attempts to send commands to a browser, database, or other system, allowing for a regular user to control behavior.
4 Cross-site scripting vulnerability allows threat actors to insert and execute unauthorized code in web applications
5 Denial-of-service attack prevents legitimate users from accessing information or services.
6 Ransomware is a type of malicious software that infects a computer system and restricts users' access to system resources or data until a ransom is paid to unlock it.
7 Application whitelisting allows only specified programs to run while blocking all others, including malicious software.
8 Input validation is a method of sanitizing untrusted user input provided by users of a web application.
9 Penetration testing is an authorized simulated attack on a computer system, performed to evaluate the security of the system.
10 Secure sockets layer security is the standard security technology for establishing an encrypted link between a web server and a browser. This link ensures that all data passed between the web server and browsers remain private and integral.
11 Virtual private network creates a safe and encrypted connection over a less secure network.
12 Remote-access software allows someone to access a computer or a network from a remote distance.
13 ALBERT is a unique network monitoring solution that provides automated alerts on both traditional and advanced network threats, allowing organizations to respond quickly when their data may be at risk.
14 These states are Alaska, Arizona, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin.
15 Cyber-liability insurance is coverage for financial consequences of electronic security incidents and data breaches.
16 White-hat hacker is a computer security specialist who breaks into protected systems and networks to test their security.
17 Interstate information sharing programs include the Multi-State Information Sharing & Analysis Center and the Election Infrastructure Information Sharing & Analysis Center, which collect, analyze, and disseminate threat information to members and provide tools to mitigate risks and enhance

resiliency.

18 Cybersecurity services provided by private entities include The Athenian Project and Project Shield.

19 *Note:* More detailed information on election security in Kansas can be found in the KLRD memorandum titled "Status of Election Security in Kansas," located at *http://www.kslegresearch.org/KLRD-web/Publications/StateLocalGovt/2018-08-08-ElectionSecurityKansas.pdf*.

20 The other states include Arkansas, Florida, Indiana, and Tennessee.

For more information, please contact:

Katelin Neikirk, Research Analyst
*Katelin.Neikirk@klrd.ks.gov*

Joanna Dolan, Principal Research Analyst
*Joanna.Dolan@klrd.ks.gov*

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

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KLRD




Jessa Farmer
Research Analyst
785-296-3181
Jessa.Farmer@klrd.ks.gov




# State and Local Government

## I-5 Government Transparency

### Transparency Legislation in 2018

This article provides information about legislation related to transparency in elections, campaign finance, and elected officials in Kansas, other states, and in Congress. In 2017 and 2018, legislatures in several states and Congress introduced bills, resolutions, and constitutional amendments that concerned transparency in campaign finance, contribution limits, finance disclosure, lobbying, ethics, or limits on elected officials. (For information on election transparency and post-election audits, please see *I-4 Election Security* in this Briefing Book.)

### Comprehensive Transparency Legislation

#### *Kansas*

The 2018 Kansas Legislature passed SB 394, effective July 1, 2018, which made changes to lobbying activities and requirements in Kansas.

The bill amended the definition of "lobbyist" to include independent contractors compensated by an executive agency for the purpose of evaluation, management, consulting, or acting as a liaison for the executive agency and who engages in lobbying. The bill includes in the definition of "lobbying" promoting or opposing any action or inaction of any executive agency on any executive administrative matter or judicial agency on any judicial administrative matter. Certain activities are exempted from the definition of "lobbying," including communications between and among members of the Legislature or executive or judicial officials or employees and communications regarding a contract, lease, or agreement of $5,000 or less.

The bill also amended the restrictions of gifts and meals provided by a lobbyist. The bill extends to members, member elects, and employees of the judicial branch the limitation that hospitality in the form of recreation having an aggregate value of $40 or more or in the form of food and beverages shall not be given to influence the performance of official duties pertaining to a judicial administrative member. The bill extended to these judicial officials and employees the presumption that hospitality in the form of food and beverages

is not given to influence an official matter. The bill also increased the value of a meal that may be accepted by members of the Executive Branch from $25 to $40 per occurrence.

The bill also requires lobbyists to register and report certain activities. Lobbyists must register and provide the name of each executive and judicial agency and office as well as any agency, division, unit, department, institution, office, commission, board, or bureau they lobby. The lobbyist must also note if they will lobby the Legislative Branch. The bill also extended the requirement that lobbyists must disclose the aggregate value of gifts, entertainment, or hospitality provided when the lobbyist expends $100 or more and the date the gift, entertainment, or hospitality was provided to legislators, members of the Judicial Branch, or legislative or judicial employees. The bill requires the lobbyist to disclose the full name of the legislator, Judicial Branch member, or legislative or judicial employee. This requirement extends to state officers, state officers-elect, state employees, members-elect of the Judicial Branch, and legislators-elect. Previously, lobbyists were only required to disclose when they expended $100 or more for gifts, entertainment, or hospitality in any reporting period.

### *Missouri*

By means of an initiative petition, Missouri voters voted in the November 2018 general election on a ballot initiative that would amend the legislative process and legislator activities; the measure was adopted. Amendment 1, known as "Clean Missouri," would amend the *Missouri Constitution*, as follows:

- Prohibit state legislators and their employees from serving or registering as a paid lobbyist or solicit prospective employees or clients to represent as paid lobbyists for two calendar years after the conclusion of the session the legislator or employee last served;
- Limit the value of gifts, service, or things of value that state legislators and their employees may accept to no more than $5 per occurrence;
- Reduce the amount of contribution that candidates for the state legislature may accept from any person in any one election to:
  - $2,500 for candidates for the state Senate; and
  - $2,000 for candidates for the state House of Representatives;
- Create the nonpartisan position of "Non-Partisan State Demographer" to develop procedures in preparation of the drawing of legislative redistricting maps on the basis of the federal census and present such information to the House Apportionment Commission and the Senatorial Apportionment Commission, and change the criteria for redrawing state legislative districts;
- Require legislative records to be public records and allow public access to these records and require that legislative proceedings (including committee proceedings) to be public meetings subject to recording by citizens, so long as these recordings do not materially disrupt the meetings; and
- Prohibit political fundraising activities and political fundraising events by any state legislators or candidates for state legislature on Missouri state property.

The Clean Missouri ballot initiative was challenged on constitutional grounds. Opponents to the initiative argued Clean Missouri violates the *Missouri Constitution* because it would amend more than one section of the *Missouri Constitution*. Attorneys representing Clean Missouri argued the initiative is constitutional because all provisions touch the Missouri General Assembly.

In September 2018, Cole County Circuit Judge Daniel Green ordered the Missouri Secretary of State to rescind Clean Missouri's certification, removing it from the November 2018 ballot. The Western District of the Missouri Court of Appeals heard an appeal brought by attorneys

representing Clean Missouri on September 20, 2018. The Court of Appeals ruled the Circuit Court erred when it removed Clean Missouri from the ballot. By overturning the Circuit Court's decision, the Court of Appeals put Clean Missouri back on the November 2018 ballot. The Missouri Supreme Court denied an appeal.

## Transparency in Presidential Campaigns

In recent years, California, Delaware, Maryland, and Massachusetts have all introduced legislation relating to transparency in national presidential elections.

California S 149 (2017), Delaware S 28 (2017), Maryland S 256 (2018), Maryland H 662 (2018) and Massachusetts S 365 (2017) would require the disclosure of the federal income tax returns of candidates for President of the United States.

The Massachusetts legislation would require the presidential candidate to disclose federal tax returns for the three most recent available years. Legislation in California, Delaware, and Maryland would require the candidate to disclose federal tax returns for the five most recent available years.

The legislation proposed in Delaware, Maryland, and Massachusetts would also require candidates for Vice President of the United States to disclose federal tax returns for a specified number of most recent available years.

Each bill would prevent the candidate for president's name from appearing on the ballot if the candidate does not submit their federal tax returns in a specified time before the election. California's bill would prevent the candidate's name from appearing on the primary election ballot, and Deleware, Maryland, and Massachusetts's bills would prevent the candidate's name from appearing on the general election ballot.

Of the bills introduced, only Delaware S 28 is still active. The bills in California, Maryland, and Massachusetts all either failed or were vetoed.

## Transparency in Campaign Contributions and Political Advertisements

During the 2018 session, bills were introduced in the states of Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, New York, and Washington; the District of Columbia; and the U.S. Congress relating to campaign finance transparency. Of the 20 bills and resolutions dealing with campaign finance, 8 were enacted or adopted in 2018.

### *District of Columbia*

In 2018, the District of Columbia passed five emergency bills (DC B 155, DC B 486, DC B 487, DC B 862, and DC B 863) and one resolution (DC R 160) temporarily amending campaign finance law. Currently pending DC B 8, known as the "Campaign Finance Transparency and Accountability Amendment Act of 2017," would establish the changes made in the previous bills and resolution to create permanent law.

Among other things, the bill would require political action committees (PACs) to direct their contributions through regulated accounts designated for that purpose, clarify expenditures coordinated with a candidate or campaign are considered contributions to that candidate or campaign, require PACs and independent expenditure committees to certify the donations they have received have not been coordinated with any candidate or campaign, enhance disclosure of independent contributions, and prohibit unlimited contributions to a PAC in a year when the committee is not supporting candidates.

### *Maine*

In 2018, Maine enacted HP 1301, which, among other things, created reporting requirements for certain campaign contributions. The bill requires that contributions aggregating in excess of $100,000 for the purpose of influencing a campaign for a *Maine Constitution* people's veto referendum or a direct initiative must be reported within five days of receipt. Such a report must disclose the name and purpose of the organization making the contribution, the amount and date

of each contribution, the five largest sources of income in the year prior to filing the report, and other information about the organization.

## Transparency in Digital Information and Social Media

Recently, both Congress and individual states have considered legislation regarding the use of digital technology in government. Of the legislation introduced, many bills and resolutions specifically include social media as a digital resource for elections and campaign finance. Introduced legislation also includes online resources as a way to connect lawmakers with the public.

### *U.S. Congress*

During the 115th Congress (2017-2018), S. 1989 was introduced. Known as the "Honest Ads Act," the purpose of the bill is to enhance transparency and accountability for online political advertisements by requiring those who purchase and publish these advertisements to disclose information about the advertisements to the public. The bill's intent is to provide the public with the sources of funding for political advertisements so they can both make informed political choices and hold elected officials accountable. The bill touches on other campaign finance laws, including the prohibition on campaign spending by foreign nationals. The bill would require disclosure of sources of funding of political advertising, including certain Internet or digital communication.

Also during the 115th Congress, H. 4504 was introduced. Known as the "Transparency in Government Act of 2017," the bill, if enacted, would amend several acts relating to transparency, including the Ethics in Government Act and the Lobbying Disclosure Act. The bill would require committees to post online all public hearings, including transcripts and audio and video recordings.

### *Maryland*

In 2018, Maryland enacted HB 981. Known as the "Online Electioneering Transparency and Accountability Act," the bill amends campaign law to include digital information. The bill amends the definition of "campaign material" to include certain material disseminated and certain qualifying paid digital communications. The bill also alters the definition of "public communication" to include certain qualifying paid digital communications, which requires a person making independent expenditures of a certain amount to file an independent expenditure report with the State Board of Elections. The bill requires online platforms to retain a digital copy of each online political advertisement it distributes or transmits and maintain accounting records that include the name and address of each person who purchased an online political advertisement and the cost and method of payment for that online political advertisement.

### *Michigan*

In 2018, Michigan introduced SR 135, a Senate Resolution urging Congress to regulate political advertisements on the Internet to encourage transparency. The resolution seeks to include in the current federal regulation of political advertisements those advertisements promoting political campaigns that are circulated on digital and social media pages.

For more information, please contact:

Jessa Farmer, Research Analyst
Jessa.Farmer@klrd.ks.gov

Joanna Dolan, Principal Research Analyst
Joanna.Dolan@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

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KLRD




Whitney Howard
Principal Research Analyst
785-296-3181
Whitney.Howard@klrd.ks.gov




# State and Local Government

## I-6 Joint Committee on Special Claims Against the State

The Kansas Tort Claims Act, enacted in 1979, allows state agencies to accept a limited amount of liability. The Tort Claims Fund, established in the Office of the Attorney General, offers recourse for other actions brought against the State. The State does assume certain responsibility for its actions under the tort claims statutes; however, there are certain areas under those statutes where the State has no liability.

The fact that state agencies are immune under statute does not mean a citizen cannot be injured by some action of the State. A potential claimant may have no remedy other than filing a claim with the Joint Committee on Special Claims Against the State (Joint Committee).

The purpose of the Joint Committee is to consider and evaluate claims against the State that cannot be lawfully paid by the State or state agency, except by an appropriation act of the Legislature. The claims that come to the Joint Committee involve an issue of equity and do not always involve the issue of negligence on the part of the State or a state employee.

### Joint Committee Membership

The Joint Committee has seven members, consisting of three members of the Senate and four members of the House of Representatives. At least one representative must be a member of the House Committee on Appropriations and at least one senator must be a member of the Senate Committee on Ways and Means.

The chairperson of the Joint Committee alternates between the House and Senate members at the start of each biennium. The members appointed from each chamber must include minority party representation. Any four members of the Joint Committee constitutes a quorum. Action of the Joint Committee may be taken by an affirmative vote of a majority of the members present, if a quorum is present. In 2017, enactment of SB 50 removed the requirement that at least one House of Representatives member and one Senate member must be an attorney licensed to practice law in Kansas (KSA 2018 Supp. 46-912).

## Claims Process

The claimant starts the claims process by completing and submitting a claim form pursuant to KSA 2018 Supp. 46-913. The claim form is available on the Internet through both the Legislature's website and the Kansas Legislative Research Department (KLRD)'s website (*http://www.kslegresearch.org/KLRD-web/Publications/Resources/Documents/ClaimsAgainstState/FillableClaimsForm.pdf*), or it may be requested in hard copy by contacting KLRD.

The claimant indicates on the claim form whether he or she wishes to appear in person for the hearing. In-person hearings for claimants who currently are incarcerated are conducted *via* telephone conference.

Claimants who request to appear in person for their hearing are notified 15 days in advance of the hearing *via* certified mail, as prescribed in KSA 46-914. Additionally, the claim form must be notarized prior to consideration of the claim.

KSA 46-914 also requires notification to the state agency involved within 15 days in advance of the hearing *via* certified mail. State agencies and employees are charged with providing the Joint Committee with information and assistance as the Joint Committee deems necessary.

The rules of evidence do not apply to the Joint Committee. However, the Joint Committee is authorized by KSA 46-917 to adopt procedural guidelines as may be necessary for orderly procedure in the filing, investigation, hearing, and disposition of claims before it. The Joint Committee has adopted 12 guidelines (Joint Committee rules) to assist in the process. These guidelines are available on the Internet through both the Legislature's website and KLRD's website, or can be requested in hard copy by contacting KLRD.

The Joint Committee traditionally holds hearings during the interim. The Joint Committee is mandated by statute (KSA 46-918) to hear all claims filed by November 1st during that interim.

The Joint Committee can meet during the legislative session only if both the President of the Senate and the Speaker of the House of Representatives authorize the meetings, pursuant to KSA 46-918.

## Joint Committee Recommendations

The Joint Committee makes recommendations regarding the resolution of the claims. The Joint Committee is required by KSA 46-915 to notify the claimants of its recommendation regarding the claim within 20 days after the hearing.

The Joint Committee submits its recommendations for payment of claims it has heard in the form of a bill presented to the Legislature at the start of each legislative session.

## Claims Payments

Payment for claims that are appropriated by the Legislature and signed into law by the Governor are paid by the Division of Accounts and Reports.

Prior to receiving payment, claimants are required to sign a release. A claimant's acceptance of any payment is final and conclusive and constitutes a complete release of any claim against the State (KSA 2018 Supp. 46-924).

When an inmate owes an outstanding unpaid amount of restitution ordered by a court, money received by the inmate from a claim settlement is withdrawn from the inmate's trust account as a set-off, pursuant to KSA 2018 Supp. 46-920.

For more information, please contact:

Whitney Howard, Principal Research Analyst
Whitney.Howard@klrd.ks.gov

Natalie Nelson, Principal Research Analyst
Natalie.Nelson@klrd.ks.gov

Isaac Elyacharshuster, Fiscal Analyst
Isaac.Elyacharshuster@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

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KLRD




James Fisher
Research Analyst
785-296-3181
James.Fisher@klrd.ks.gov




# State and Local Government

## I-7 Kansas Open Meetings Act

### Purpose

The Kansas Open Meetings Act (KOMA), KSA 2018 Supp. 75-4317, *et seq.*, recognizes "that a representative government is dependent upon an informed electorate" and declares that the policy of the State of Kansas is one where "meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public." [KSA 2018 Supp. 75-4317.]

The Kansas Supreme Court has recognized KOMA is to be "interpreted liberally and exceptions narrowly construed" to carry out the purpose of the law. [*Mem'l Hosp. Ass'n v. Knutson*, 239 Kan. 663, 669 (Kan. 1986).]

### State and Local Public Bodies Covered by KOMA

- State agencies;
- Political and taxing subdivisions of the state;
- Legislative bodies of the state or its subdivisions;
- Administrative bodies of the state or its subdivisions;
- Boards, commissions, authorities, councils, committees, and subcommittees of the state or its subdivisions, or of legislative or administrative bodies thereof; and
- Other subordinate groups of any of the above entities that receive or expend and are supported in whole or in part by public funds. [KSA 2018 Supp. 75-4318.]

### State Bodies Covered by KOMA

- The Legislature, its legislative committees, and subcommittees unless rules provide otherwise;
- State administrative bodies, boards, and commissions;
- State Board of Regents;
- State Board of Education;
- Kansas Turnpike Authority;
- Supreme Court Nominating Commission (added by 2016 SB 128); and
- Other state bodies.

## Local Governments Covered by KOMA

The following local governments are covered by KOMA:

- Cities;
- Drainage districts;
- Counties;
- Conservation districts;
- School districts;
- Irrigation districts;
- Townships;
- Groundwater management districts;
- Water districts;
- Watershed districts;
- Fire districts;
- Municipal energy agencies;
- Sewer districts;
- District judicial nominating commissions (Added by 2016 SB 128); and
- Other special district governments.

## Public Bodies Excluded from KOMA

Certain state and local bodies or entities are excluded from the requirements of KOMA, including the following:

- The Judicial Branch (except for judicial nominating commissions); and
- State or local bodies when exercising quasi-judicial powers (examples include teacher due process hearings, civil service board hearings for a specific employee, or zoning amendment hearings for a specific property).

## Meetings: What are They?

KOMA covers meetings, defined in KSA 2018 Supp. 75-4317a, as a gathering or assembly with the following characteristics:

- Occurs in person or through the use of a telephone or any other medium for "interactive" communication (See the following "Serial Meetings" section);
- Involves a majority of the membership of an agency or body; and
- Is for the purpose of discussing the business or affairs of the body.

The Kansas Court of Appeals has held that informal discussions before, after, or during recesses of a public meeting are subject to the requirements of the open meetings law. [*Coggins v. Pub. Emp. Relations Bd*, 2 Kan. App. 2d 416 (Kan. Ct. App. 1978).] Calling a gathering a "work session" does not exempt the event from the law if the three requirements of a meeting are met.

Social gatherings are not subject to KOMA as long as there is not a majority of the membership present or there is no discussion of business of the public body between a majority of the membership.

**Serial meetings.** The Attorney General has said serial communications among a majority of a quorum of a public body constitute a meeting if the purpose is to discuss a common topic of business or affairs of that body by the members. Such a meeting may occur through calling trees, e-mail, or the use of an agent (staff member) of the body. [Att'y. Gen. Op. 98-26 and 98-49.] The use of instant messaging also would qualify as a meeting. KSA 2018 Supp. 75-4318(f) now deems interactive communications in a series to be subject to open meetings requirements if the communications:

- Collectively involve a majority of the membership of the body or agency;
- Share a common topic of discussion concerning the business or affairs of the body or agency; and
- Are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency.

## Is Binding Action the Trigger?

In regard to discussing "the business or affairs of the body," binding action or voting is not

necessary. It is the discussion itself that triggers the requirements of KOMA (KSA 2018 Supp. 75-4317a).

## Notice of Meetings, Agendas, Minutes, Conduct of Meeting, and Cameras

**Notice required only when requested.** KOMA does not require notice of meetings to be published. According to KSA 2018 Supp. 75-4318(b), notice must be given to any person or organization requesting it. Notice requests may expire at the end of a fiscal year, but the public body has a duty to notify the person of the pending expiration before terminating notice. The presiding officer has the duty to provide notice, but that duty may be delegated. No time limit is imposed for receipt of notice prior to the meeting.

Notice may be given in writing or orally, but it must be made individually to the person requesting it. Posting or publication in a newspaper is insufficient. A single notice can suffice for regularly scheduled meetings. There is also a duty to notify of any special meetings. No fee for notice may be charged.

Petitions for notice may be submitted by groups of people, but notice need be provided only to one person on the list, that person being designated as required by law. All members of an employee organization or trade association are deemed to have received a notice if one is furnished to the executive officer of the organization.

**Agenda not required.** KSA 2018 Supp. 75-4318(d) states: "Prior to any meeting. . ., any agenda relating to the business to be transacted at such meeting shall be made available to any person requesting the agenda." In *Stevens v. City of Hutchinson*, 11 Kan. App. 2d 290 (Kan. Ct. App. 1986), the court concluded that while the law does not require an agenda be created, if a body chooses to create an agenda, the agenda should include topics planned for discussion.

**Minimal requirements for minutes.** The only KOMA requirement for minutes pertains to closed or executive sessions. KSA 2018 Supp. 75-4319(a) requires that any motion to recess for a closed or executive meeting be recorded in the meeting minutes. (See "Executive Sessions: Procedure and Subjects Allowed" on the following page for additional information on executive sessions.)

**Conduct of meetings.** Any person may attend open meetings, but the law does not require that the public be allowed to speak or have an item placed on the agenda. KOMA does not dictate the location of a meeting, the size of the room used (or even that a room must be used) or other accommodation-type considerations. The court has determined (see *Stevens*) a meeting is "open" if it is accessible to the public.

KSA 2018 Supp. 75-4318(a) prohibits the use of secret ballots for any binding action. The public must be able to ascertain how each member voted.

**Use of cameras.** Subject to reasonable rules, cameras and recording devices must be allowed at open meetings (KSA 2018 Supp. 75-4318(e)).

**Subject Matter Justifying Executive Session**

Pursuant to KSA 2018 Supp. 75-4319, only a limited number of subjects may be discussed in executive session. Some of these are listed below.

**Personnel matters of non-elected personnel.** The purpose of this exception is to protect the privacy interests of individuals. Discussions of consolidation of departments or overall salary structure are not proper topics for executive session. This personnel exemption applies only to employees of the public agency. The Attorney General has opined the personnel exemption does not apply to appointments to boards or committees, or nomination of public officers, nor does it apply to independent contractors. [Att'y. Gen. Op. 2016-03.]

**Consultation with an attorney.** For the body or agency to be deemed privileged in the attorney-client relationship, all elements of privilege must be present:

- The body's attorney must be present;
- The communication must be privileged; and
- No other third parties may be present.

**Additional justification for executive session are as follows:**

- Employer-employee negotiations to discuss conduct or status of negotiations, with or without the authorized representative who actually is doing the bargaining;
- Confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;
- Sensitive financial information contained within personal financial records of a judicial nomination candidate;
- Official background check of a judicial nomination candidate;
- Case reviews conducted by the Governor's Domestic Violence Fatality Review Board;
- Matters affecting an individual student, patient, or resident of a public institution;
- Preliminary discussions relating to acquisition (not sale) of real property;
- Security of a public body or agency, public building or facility, or the information system of a public body or agency, if open discussion would jeopardize security;
- Matters relating to information acquired and records of the Child Death Review Board;
- Matters relating to parimutuel racing;
- Matters relating to the care of children;
- Matters relating to patients and providers;
- Matters relating to maternity centers and child care facilities; and
- Matters relating to the Office of Inspector General.

**Executive Session: Procedure and Subjects Allowed**

Requirements and restrictions on closed or executive sessions are contained in KSA 2018 Supp. 75-4319. Executive sessions are permitted only for the purposes specified. First, the public body must convene an open meeting and then recess into an executive session. Binding action may not be taken in executive session. Reaching a consensus in executive session is not in itself a violation of KOMA. [*O'Hair v. United Sch. Dist. No. 300*, 15 Kan. App. 2d 52 (Kan. Ct. App. 1991).] A "consensus," however, may constitute binding action and violate the law if a body fails to follow up with a formal open vote on a decision that normally would require a vote. The law does not require an executive session; the decision to hold an executive session is discretionary.

Generally, only the members of a public body may attend an executive session. The Attorney General indicates a public body may designate certain persons with essential information to assist in executive session deliberations. Inclusion of general observers means the meeting should be open to all members of the public.

Procedures for going into executive session include the following:

- Formal motion, seconded, and carried;
- Motion must contain a statement providing:
  - A statement describing the subjects to be discussed;
  - Justification for closure; and
  - Time and place open meeting will resume; and
- Executive session motions must be recorded in minutes. The law does not require other information to be recorded. Other minutes for open or executive sessions are discretionary, unless some other law requires them.

## Enforcement of KOMA

The law requires the Attorney General to provide and coordinate KORA and KOMA training throughout the state, including coordination with appropriate organizations. Further, the law gives the Attorney General or county or district attorney various subpoena and examination powers in KORA and KOMA investigations.

Among other enforcement provisions, the legislation allows the Attorney General or a county or district attorney to accept a consent judgment with respect to a KORA or KOMA violation, in lieu of filing an action in district court, and allows the Attorney General to enter into a consent order with a public agency or issue a finding of violation to the public agency upon discovery of a KORA or KOMA violation.

For more information, please contact:

James Fisher, Research Analyst
*James.Fisher@klrd.ks.gov*

Robert Gallimore, Principal Research Analyst
*Robert.Gallimore@klrd.ks.gov*

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

KLRD




James Fisher
Research Analyst
785-296-3181
James.Fisher@klrd.ks.gov




# State and Local Government

## I-8 Kansas Open Records Act

### Purpose

The Kansas Open Records Act (KORA) declares it is the public policy of Kansas that "public records shall be open for inspection by any person unless otherwise provided" (KSA 45-216). The burden of proving an exemption from disclosure is on the agency not disclosing the information (*SRS v. Public Employee Relations Board*, 249 Kan. 163 (1991)).

### Who Is Covered by KORA?

KORA applies only to those entities considered a "public agency" under the law (KSA 2018 Supp. 45-217).

Included in this definition are:

- The state;
- Any political or taxing subdivision of the state or any office, agency, or instrumentality thereof; and
- Any other entity receiving or expending and supported in whole or in part by public funds that are appropriated by the state or its political and taxing subdivisions.

The definition covers all state agencies, cities, counties, townships, school districts, and other special district governments, as well as any agencies or instrumentalities of these entities, and officers of the above public entities in connection with their official duties.

In addition, although not included in KORA itself, KSA 2018 Supp. 45-240 requires nonprofit entities, except health care providers, that receive public funds of at least $350 per year to adhere to certain open records requirements. The 2005 Legislature added this provision to require such nonprofit entities to document the receipt and expenditure of public funds and make this information available to the public. Like public agencies, nonprofit entities may charge a reasonable fee to provide this information.

### Exclusions from Open Records Requirement

Certain entities and individuals are expressly excluded from the definition of "public agency" (KSA 2018 Supp. 45-217(f)(2)):

- Entities included only because they are paid for property, goods, or services with public funds[1]; and
- Any municipal, district, or appellate judge or justice.

## What Is a Public Record?

"Public record" is defined broadly under KORA to mean "any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of any public agency; or . . . any officer or employee of a public agency pursuant to the officer's or employee's official duties and which is related to the functions, activities, programs or operations of any public agency" (KSA 2018 Supp. 45-217(g)(1)). Specifically excluded from the definition of "public record" are:

- Records owned by a private person or entity that are not related to functions, activities, programs, or operations funded by public funds, but "private person" shall not include an officer or employee of a public agency who is acting pursuant to the officer's or employee's official duties;
- Records kept by individual legislators or members of governing bodies of political and taxing subdivisions; or
- Employers' records related to certain individually identifiable employee records (KSA 2018 Supp. 45-217(g)(2) and (3)).

The Attorney General opined in 2015 (Op. Atty. Gen. 2015-010) that under certain specific conditions and the law in effect at the time, an e-mail sent by a state employee from his or her private e-mail account related to work funded by public funds is not within the meaning of "public record." However, in 2016, the definition of and exclusions from "public record" were amended to broaden the definition of "public record" and apply it more specifically to state officers and employees, regardless of location of the record (KSA 2018 Supp. 45-217 (g)(1)). Additionally, audio and video recordings made and retained by law enforcement using a body camera or vehicle camera were added to the definition of a criminal investigation record (open only under specific circumstances) (KSA 2018 Supp. 45-254).

## Right of Public to Inspect and Make or Obtain Copies of Records

All public records are open for inspection unless closed pursuant to specific legal authority (KSA 45-218(a) and (b)). Members of the public have the right to inspect public records during regular office hours and any established additional hours; the agency may require a written request but shall not require a request to be made in a particular form (KSA 2018 Supp. 45-220(a) and (b)). If the agency has business days on which it does not have regular office hours, it must establish reasonable hours when persons may inspect records and may not require a notice of desire to inspect more than 24 hours in advance of the hours established for inspection and obtaining copies; the agency also may not require the notice to be in writing (KSA 2018 Supp. 45-220(d)).

Any person may make abstracts or obtain copies of a public record. If copies cannot be made in the place where the records are kept, the records custodian must allow the use of other copying facilities (KSA 2018 Supp. 45-219(b)). Members of the public cannot remove a record without written permission of the custodian (KSA 45-218(a)).

SB 336 (L. 2018, ch. 87) requires that any document or record that contains any portion of an individual's Social Security number be redacted before it is made available for public inspection or copying. This does not apply to documents recorded in the official records of any county recorder of deeds or in the official records of the courts. An agency also is required to give notice, offer credit monitoring service at no cost, and provide certain information to individuals if the agency becomes aware of the unauthorized disclosure of their personal information.

Computerized information can meet the definition of a public record and must be provided in the form requested if the public agency has the capability of producing it in that form. The agency is not

required to acquire or design a special program to produce information in a desired form, but it has discretion to allow an individual who requests such information to design or provide a computer program to obtain the information in the desired form. (Op. Atty. Gen. 1988-152 [voter registration lists]; Op. Atty. Gen. 1989-106; and Op. Atty. Gen. 1987-137).

However, KORA explicitly states a public agency is not required to allow a person to obtain the electronic copies by attaching a personal device to the agency's computer equipment (KSA 2018 Supp. 45-219(g)).

A public agency is not required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, or illustrations unless the items were shown or played at a public meeting. Regardless, the agency is not required to provide items copyrighted by someone other than the public agency (KSA 2018 Supp. 45-219(a)).

## Duties of Public Agencies

Under KORA, public agencies are required to:

- Appoint a freedom of information officer to assist the public with open records requests and disputes. That officer is to provide information on the open records law, including a brochure stating the public's basic rights under the law (KSA 45-226 and KSA 45-227);
- Adopt procedures to be followed to request and obtain documents (KSA 2018 Supp. 45-220(a));
- Respond to requests where it is possible to determine the records to which the requester desires access (KSA 2018 Supp. 45-220(b)); and
- Provide, upon request, office hours, name of custodian of record, fees, and procedures for obtaining records (KSA 2018 Supp. 45-220(f)).

## Rights of Public Agencies

The public agency may:

- Require written certification that the requester will not use names or addresses obtained from the records to solicit sales to those persons whose names or addresses are contained in the list (KSA 2018 Supp. 45-220(c));
- Deny access if the request places an unreasonable burden in producing the record or is intended to disrupt essential functions of the agency (KSA 45-218(e)); and
- Require payment of allowed fees in advance. Fees may include costs of any computer services and staff time but may not exceed costs (KSA 45-218(f); KSA 2018 Supp. 45-219(c)). (*Note:* Executive Order 18-05 waives any charge or fee for the copying of documents, up to and including the first 100 pages, for all executive branch departments, agencies, boards, and commissions under the jurisdiction of the Office of the Governor in response to a KORA request made by any resident of Kansas.)

## Prohibited Uses of Lists of Names and Addresses

With some specified exceptions, a list of names and addresses cannot be obtained from public records for the purpose of selling or offering for sale any property or service to the persons listed (KSA 2018 Supp. 45-220(c)(2) and KSA 2018 Supp. 45-230). This provision does not prohibit commercial use generally; it just applies to use of the names to sell or offer to sell property or a service. This provision does not prohibit the agency from using names and addresses in its public records for a purpose related to that agency's services or programs (Op. Atty. Gen. 2006-026).

Any person, including the records custodian, who knowingly violates this provision of the law and gives or receives records for this purpose can be

penalized with a civil fine not to exceed $500 in an action brought by the Attorney General or a county or district attorney (KSA 2018 Supp. 45-230).

## Records That Must Be Closed

Some public records are required to be closed by federal law, state statute, or Supreme Court rule. These types of public records must be closed and are broadly referenced in KSA 2018 Supp. 45-221(a)(1). Approximately 280 different statutes require closure of certain public records. A few examples include:

- Child in need of care records and reports, including certain juvenile intake and assessment reports (KSA 2018 Supp. 38-2209);
- Unexecuted search or arrest warrants (KSA 2018 Supp. 21-5906);
- Grand jury proceedings records (KSA 2018 Supp. 22-3012);
- Health care provider peer review records (KSA 2018 Supp. 65-4915(b)); and
- Certain records associated with the Kansas Department of Health and Environment's investigation of maternal death cases (2018 HB 2600).

## Records That May Be Closed

KSA 2018 Supp. 45-221(a)(1) to (55) lists other types of public records that are not required to be disclosed. The public agency has discretion to decide whether to make these types of records available. However, the burden of showing that a record fits within an exception rests with the party intending to prevent disclosure. The types of records that may be closed include these:

- Records of a public agency with legislative powers, when the records pertain to proposed legislation or amendments. This exemption does not apply when such records are:
  - Publicly cited or identified in an open meeting or in an agenda of an open meeting; or
  - Distributed to a majority of a quorum of any body with the authority to take action or make recommendations to the public agency with regard to the matters to which these records pertain;
- Records of a public legislative agency, when the records pertain to research prepared for one or more members of the agency. Again, this exemption does not apply (*i.e.*, the records would be open) when such records are:
  - Publicly cited or identified in an open meeting or in an agenda of an open meeting; or
  - Distributed to a majority of a quorum of any body that has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain;
- Records that are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure;
- Medical, psychiatric, psychological, and alcohol or drug treatment records that pertain to identifiable individuals;
- Personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment in public agencies;
- Letters of reference or recommendation pertaining to the character or qualification of an identifiable individual and not related to the appointment of persons to fill a vacancy in an elected office;
- Information that would reveal the identity of any undercover agent or any informant reporting a specific violation of law;
- Criminal investigation records;
- Records of emergency or security information or procedures of a public agency; plans, drawings, specifications, or related information for any building or facility used for purposes requiring security measures in or around the building or facility; or for the generation or transmission of power, water, fuels,

or communications, if disclosure would jeopardize security of the public agency, building, or facility;

- Attorney work product;
- Records of public agencies that identify home addresses of certain public officials such as judges, certain officers of the courts, and county and city attorneys; and
- Public records containing information of a personal nature when public disclosure would constitute a clearly unwarranted invasion of personal privacy.

## Limited Disclosure Provisions

Some statutes provide for disclosure of limited information in response to KORA requests, rather than disclosure of the complete record requested. Recently created limited disclosure provisions include those concerning body-worn and vehicle camera recordings and certain records of the Department for Children and Families (DCF) regarding child fatalities.

### *Body-worn and Vehicle Camera Recordings*

Every audio or video recording made and retained by law enforcement using a body camera or vehicle camera must be considered a "criminal investigation record," as defined in KORA, thereby bringing such recordings within the exception to disclosure for criminal investigation records. This provision will expire July 21, 2021, unless reviewed and reenacted prior to that date (KSA 2018 Supp. 45-254).

In addition to any disclosures generally authorized for such recordings as criminal investigation records under KORA, the law allows certain persons to request to listen to an audio recording or to view a video recording. The law enforcement agency must allow access to these certain persons, within 20 days of the request, subject to a reasonable fee. The persons who may make such a request include the subject of the recording; any parent or legal guardian of a person under the age of 18 years who is a subject of the recording; an heir-at-law of a deceased subject of a recording; or an attorney for any of the previous persons listed (KSA 2018 Supp. 45-254(c)).

### *Child Fatality Information*

House Sub. for SB 336 (2018), among other provisions, added a requirement that the Secretary for Children and Families (Secretary), as allowed by applicable law, release within seven days the following information when child abuse or neglect results in a child fatality and a request is made under KORA: age and sex of the child; date of the fatality; a summary of any previous reports of abuse or neglect received by the Secretary involving the child, along with the findings of such reports; and any service recommended by DCF and provided to the child (KSA 2018 Supp. 2212(f)(3)).

The bill added a similar provision requiring the Secretary, as allowed by applicable law, to release the following information within seven days when a child fatality occurs while the child was in the custody of the Secretary and a request is made under KORA: age and sex of the child; date of the fatality; and a summary of the facts surrounding the death of the child (KSA 2018 Supp. 38-2212(f)(4)).

## Sunset of Exceptions

A sunset provision for all exceptions added in 2000 required review of any exception within five years, or the exception would expire. It also required any exceptions continued after legislative review to be reviewed again five years later (KSA 2018 Supp. 45-229).

In 2013, the Legislature modified the review requirement in KSA 2018 Supp. 45-229 so that exceptions will no longer be subject to review and expiration if the Legislature has twice reviewed and continued the exemption or reviews and continues the exemption during the 2013 Session or thereafter (2013 HB 2012; L. 2013, ch. 50).

In 2018, SB 336 (L. 2018 ch. 87) continued eight exemptions present in five statutes. Topics

included certain reports prepared by the State Bank Commissioner, results of drug screening test under the cash assistance program, utility and public service records with customer information, concealed handguns records with identifiable information, cybersecurity attacks, protected health information, and certain security plans. Additionally, the bill removed the exception preventing the disclosure of the name of any voter who has cast a ballot from the time the ballot is cast until the final canvass of the election by the county board of canvassers.

## Enforcement of the Open Records Law

HB 2256 (L. 2015, ch. 68) significantly changed enforcement of both KORA and KOMA. The law requires the Attorney General to provide and coordinate KORA and KOMA training throughout the state, including through coordination with appropriate organizations (KSA 2018 Supp. 75-761). Further, the bill gives the Attorney General or a county or district attorney various subpoena and examination powers in KORA and KOMA investigations (KSA 2018 Supp. 45-228; KSA 2018 Supp. 75-4320b)

Among other enforcement provisions, the bill allows the Attorney General or a county or district attorney to accept a consent judgment with respect to a KORA or KOMA violation, in lieu of filing an action in district court, and allows the Attorney General to enter into a consent order with a public agency or issue a finding of violation to the public agency upon discovery of a KORA or KOMA violation (KSA 2018 Supp. 75-4320d; KSA 2018 Supp. 45-4320f).

## Criminal Penalty for Altering Public Record

Altering, destroying, defacing, removing, or concealing any public record is a class A nonperson misdemeanor (KSA 2018 Supp. 21-5920).

1 See Ted Frederickson, Letting the Sunshine In: An Analysis of the 1984 Kansas Open Records Act, 33 Kan. L. Rev. 216-7. This analysis was utilized as recently as the 2017 Kansas Court of Appeals decision in *State v. Great Plains of Kiowa County, Inc.* (53 Kan. App. 2D 609, 389 P3d 984).

For more information, please contact:

James Fisher, Research Analyst
James.Fisher@klrd.ks.gov

Robert Gallimore, Principal Research Analyst
Robert.Gallimore@klrd.ks.gov

Jill Shelley, Principal Research Analyst
Jill.Shelley@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

KLRD




Reed Holwegner
Principal Research Analyst
785-296-3181
Reed.Holwegner@klrd.ks.gov




# State and Local Government

## I-9 Kansas Public Employees Retirement System's Retirement Plans and History

### KPERS Overview—Brief History of State Retirement and Other Employee Benefit Plans

The Kansas Public Employees Retirement System (known generally as KPERS and referenced in this article as the Retirement System) administers three statewide plans. The largest plan, usually referred to as the regular KPERS plan, or simply as KPERS, has within it three tiers that include state, school, and local groups composed of regular state and local public employees; school district, vocational school, and community college employees; Regents' classified employees and certain Regents unclassified staff with pre-1962 service; and state correctional officers. A second plan is known as the Kansas Police and Firemen's (KP&F) Retirement System for certain designated state and local public safety employees. A third plan is known as the Kansas Retirement System for Judges that includes the state judicial system's judges and justices.

All coverage groups are defined benefit, contributory retirement plans and have as members most public employees in Kansas. Tier 1 of the KPERS plan is closed to new membership and Tier 2 closed to most new membership on December 31, 2014; certain state correctional personnel are eligible for membership. Tier 3 of the KPERS plan became effective for new employees hired after January 1, 2015. The cash balance plan is a defined benefit, contributory plan according to the Internal Revenue Service (IRS).

The primary purpose of the Retirement System is to accumulate sufficient resources to pay benefits. Retirement and death benefits paid by the Retirement System are considered off-budget expenses.

Starting in FY 2000, retirement benefit payments, as proposed by the Governor and approved by the Legislature, were classified as off-budget, non-reportable expenditures. As the retirement benefit payments represent a substantial amount of money distributed annually to retirees and their beneficiaries, the historical growth in payments is tracked for informational purposes. KPERS estimates that $1.817 billion will be paid in annual retirement and death benefits in calendar year 2019 for all three plans.

The Retirement System also administers several other employee benefit and retirement plans: a public employee death and long-term disability benefits plan; an optional term life insurance plan; a voluntary deferred compensation plan; and a legislative session-only employee's retirement plan. The Legislature has assigned other duties to the agency in managing investments of moneys from three state funds: the Kansas Endowment for Youth Fund, the Senior Services Trust Fund, and the Treasurer's Unclaimed Property Fund.

The Retirement System is governed by a nine-member Board of Trustees (Board). Four members are appointed by the Governor and confirmed by the Senate; one member is appointed by the President of the Senate; one is appointed by the Speaker of the House; two are elected by Retirement System members; and one member is the State Treasurer. The Board appoints the Executive Director, who administers the agency operations for the Board.

The Retirement System manages assets in excess of $19.2 billion in actuarial value. Annually, the Retirement System pays out more in benefits than it collects in employer and employee contributions. The gap between current expenditures and current revenues is made up with funding from investments and earnings. The financial health of the Retirement System may be measured by its funded ratio, which is the relationship between the promised benefits and the resources available to pay those promised benefits. In the most recent actuarial valuation on December 31, 2017, the funded ratio for the Retirement System was 68.4 percent, and the unfunded actuarial liability (UAL) was $8.907 billion. This is the amount of financing shortfall when comparing the Retirement System assets with promised retirement benefits.

The Legislature in 2015 passed SB 228, authorizing the issuance of $1.0 billion in taxable bonds. In August 2015, the Kansas Development Finance Authority issued the bonds with an effective interest rate of 4.69 percent. The bonds, with interest paid semi-annually over a 30-year period, will be paid off in 2045. The bonds' proceeds became part of the Retirement System's valuation on December 31, 2015, which will be used to determine the participating employer contribution rates for FY 2019 and subsequent fiscal years. Debt service for the bonds is subject to appropriation and not an obligation of KPERS.

### *Brief History of KPERS*

KPERS was created under law passed by the 1961 Legislature, with an effective date of January 1, 1962. Membership in the original KPERS retirement plan (now referred to as KPERS Tier 1) was offered to state and local public employees qualified under the new law and whose participating employers chose to affiliate with KPERS. Another KPERS tier was created in 2007 for state, school, and local public employees becoming members on and after July 1, 2009. KPERS Tier 2 has many characteristics of the original plan, but with certain modifications to ensure that employees and employers will share in the total cost of providing benefits. A third tier was implemented January 1, 2015, for all new employees. The second and third KPERS tiers are described in the last section of this article.

School districts generally were not authorized to affiliate with KPERS until the 1970s, but there were three affiliating in 1963 as the first exceptions to the general rule. Two more school districts affiliated in 1966. Later in 1966, four of the five school districts that had affiliated with KPERS were dissolved by the Legislature as of July 1, 1966. No other school districts became affiliated with KPERS until 1971, when a general law brought the old State School Retirement System (SSRS) and its individual members into KPERS.

The 1970 Legislature authorized affiliation with KPERS on January 1, 1971, for any public school district, area vocational-technical school, community college, and state agency that employed teachers. Other public officials and officers not addressed in the original 1961 legislation had been authorized, beginning in 1963, to participate in KPERS as the result of a series of statutory amendments to KSA 74-4910, *et seq.*, that broadened participation to include groups defined as public rather than exclusively governmental. Amendments to KSA 74-4901 also

broadened the definition of which governmental officials and officers were eligible for KPERS membership.

### *Calculation of Retirement Benefits and Eligibility for KPERS*

KPERS Tier 1 and Tier 2 retirement benefits are calculated by a formula based on years of credited service multiplied by a statutory percentage for the type of service credit multiplied by final average salary.

For credited service, two categories were defined in the 1961 KPERS legislation: participating service, which was equal to 1.0 percent of defined salary for each year, and prior service equal to 0.5 percent of defined salary for each year. In 1965, the Legislature raised the prior service multiplier to 0.75 percent. In 1968, the prior service multiplier was raised to 1.0 percent, and the participating service multiplier was increased to 1.25 percent for all years of service.

In 1970, legislation set the participating service for school employees to be the same as other regular KPERS members, which was 1.25 percent at that time. The prior service multiplier for education employees was set at 1.0 percent for years under the SSRS and 0.75 percent for years of school service not credited under the SSRS. In 1982, legislation increased the participating service credit for state, school, and local KPERS members from 1.25 percent to 1.40 percent of final average salary for all participating service credited after July 1, 1982.

In 1993, legislation raised the multiplier to 1.75 percent for all years participating service for members who retired on or after July 1, 1993.

Three different qualifications for normal retirement were established: age 65, age 62 with 10 years of service, and 85 points (any combination of age plus years of service).

Legislation enacted in 2012, as subsequently clarified during the 2013 Legislative Session, applied a multiplier of 1.85 percent to Tier 2 members retiring under early retirement provisions, as well as to those retiring at the normal retirement dates.

## Contribution Rates for KPERS

KPERS Tiers 1, 2, and 3 are participatory plans in which both the employee and employer make contributions. In 1961, employee contributions were statutorily set at 4.0 percent for the first $10,000 of total annual compensation. The $10,000 cap was eliminated by 1967 legislation. Tier 2 employee contribution rates were set at 6.0 percent by statute beginning July 1, 2009. Tier 1 employee contribution rates increased from 4.0 to 5.0 percent in 2014, and to 6.0 percent on January 1, 2015.

In 1961, initial employer contributions were set at 4.35 percent (3.75 percent for retirement benefits and 0.60 percent for death and disability benefits) of total compensation of employees for the first year, with future employer contribution rates to be set by the Board, assisted by an actuary and following statutory guidelines.

In 1970, the employer contribution rate for public education employers was set at 5.05 percent from January 1, 1971, to June 30, 1972, with subsequent employer contribution rates to be set by the Board. In 1981, the Legislature reset the 40-year amortization period for KPERS until December 31, 2022, and accelerated a reduction in the employer contribution rates in FY 1982 to 4.30 percent for state and local units of government (KPERS non-school) and to 3.30 percent for education units of government (KPERS school).

Actuarially recommended employer contribution amounts for the state and school group are determined by assessing the UAL of both groups and combining the separate amounts to determine one.

During the 1980s, the Legislature capped the actuarial contribution rates for employers on numerous occasions in statutory provisions. In 1988, the Legislature established two employer contribution rates: one for the state and schools and one for the local units of government.

Previously, the state and local employer rate had been combined as the KPERS non-school group.

The amortization period for the combined state and school group was extended from 15 to 24 years, with employer contribution rates set at 3.1 percent for the state and 2.0 percent for the local employers in FY 1990.

In 1993, legislation introduced the statutory budget caps that would limit the amount of annual increase for employer contributions and provided a 25.0 percent increase in retirement benefits for those who retired on and after July 1, 1993, and an average 15.0 percent increase in retirement benefits for those who retired before July 1, 1993.

In order to finance the increased benefits, the Legislature anticipated phasing in higher employer contributions by originally setting a 0.1 percent annual cap on budget increases. The gap between the statutory rates and the actuarial rates that began in the FY 1995 budget year has never been closed.

The Legislature reduced the statutory rate for participating employer contributions for FY 2016 and FY 2017 to 10.91 percent and 10.81 percent, respectively. In FY 2018 and subsequent fiscal years, the contribution rate may increase by no more than 1.20 percent above the previous year's contribution rate. According to the most recent actuarial analysis provided to KPERS, the statutory rate for the state-school group equaled the actuarial contribution rate in FY 2018 at 12.01 percent. In calendar year 2026, the funded ratio is estimated to reach 80.0 percent, which is the minimum ratio for which pension plans are considered by retirement experts to be adequately funded. The "legacy" UAL, which is estimated to be $6.364 billion, is projected to be eliminated in calendar year 2034.

The failure of KPERS participating employers to contribute at the actuarial rate since 1993 has contributed to the long-term funding problem.

The long-term solvency can also be affected by market performance, changes to benefits, and actuarial assumptions, especially the assumed rate of return. Historically, the assumed rate of investment return was 8.0 percent; in 2017, the Board reduced the rate to 7.75 percent, resulting in an increase in the UAL of approximately $500.0 million.

## Retirement Benefits and Adjustments

The original 1961 KPERS legislation provided for the non-alienation of benefits. The KPERS Act stated: "No alteration, amendment, or repeal of this act shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal." This provision is found in KSA 74-4923.

The 1961 legislation exempted the KPERS retirement benefits from all state and local taxation. In other words, no taxes shall be assessed, and no retroactive reduction of promised benefits may be enacted. Any change in benefits must be prospective, unless it involves a benefit increase, which may be retroactive in application, as in the case of increasing the multiplier for all years of service credit.

An automatic cost-of-living adjustment (COLA) was not included in the original 1961 legislation.

Over the years, the Legislature provided additional *ad hoc* post-retirement benefit adjustments for retirees and their beneficiaries.

## KPERS Tier 2 and Tier 3 for Certain New Members

Legislation in 2007 established a Tier 2 for KPERS state, school, and local employees effective July 1, 2009, and made the existing KPERS members a "frozen" group in Tier 1 that no new members could join. The employee contribution rate for the "frozen" KPERS Tier 1 remained 4.0 percent, until 2014 when it increased from 4.0 percent to 5.0 percent, and in 2015 when it increased from 5.0 percent to 6.0 percent. The contribution rate remains at 6.0 percent today.

The Tier 2 for employees hired on or after July 1, 2009, continued the 1.75 percent multiplier; allowed normal retirement at age 65 with 5 years of service, or at age 60 with at least 30 years of service; provided for early retirement at age 55 with at least 10 years of service and an actuarial reduction in benefits; included an automatic, annual 2.0 percent COLA at age 65 and older; and required an employee contribution rate of 6.0 percent.

Legislation in 2012 established a Tier 3 for KPERS state, school, and local employees effective January 1, 2015, and made the existing KPERS members, hired between July 1, 2009, and December 31, 2014, a "frozen" group in Tier 2 that no new members could join, except for certain state correctional personnel. The employee contribution rate for the "frozen" KPERS Tier 2 remained set at 6.0 percent, but the COLA was eliminated and a new, higher multiplier of 1.85 percent was authorized to be applied retroactively for all years of credited service and for future years of service.

Effective January 1, 2015, the KPERS Tier 3 has the following plan design components:

- Normal retirement age—age 65 and 5 years of service, or age 60 and 30 years of service;
- Minimum interest crediting rate during active years—4.0 percent;
- Discretionary Tier 3 dividends—modified formula based on KPERS funded ratio for awarding discretionary credits and capped for early years;
- Employee contribution—6.0 percent;
- Employer service credit—3.0 percent for less than 5 years of service; 4.0 percent for at least 5, but less than 12, years of service; 5.0 percent for at least 12, but less than 24, years of service; and 6.0 percent for 24 or more years of service;
- Vesting—5 years;
- Termination before vesting—interest would be paid for the first 2 years if employee contributions are not withdrawn;
- Termination after vesting—option to leave contributions and draw retirement benefits when eligible, or withdraw employee contributions and interest but forfeit all employer credits and service;
- Death prior to retirement—5-year service requirement and if spouse had been named primary beneficiary, provide retirement benefit for spouse when eligible;
- Tier 3 early retirement—age 55 with 10 years of service;
- Default form of retirement distribution—single life with 10-year certain;
- Annuity conversion factor—2.0 percent less than the actuarial assumed investment rate of return;
- Benefits option—partial lump sum paid in any percentage or dollar amount up to 30.0 percent maximum;
- Post-retirement benefit—COLA may be self-funded for cost-of-living adjustments;
- Electronic and written statements—the Board shall provide information specified. Certain quarterly reporting would be required;
- Powers reserved to adjust plan design—the Legislature may prospectively change interest credits, employer credits, and annuity interest rates. The Board may prospectively change mortality rates;
- Actuarial cost of any legislation—fiscal impact assessment by KPERS actuary required before and after any legislative enactments;
- Divorce after retirement—allows a retirant, if divorced after retirement, and if the retirant had named the retirant's ex-spouse as a joint annuitant, to cancel the joint annuitant's benefit option in accordance with a court order;
- If a member becomes disabled while actively working, the member will be given participating service credit for the entire period of the member's disability.

The member's account will be credited with both the employee contribution and the employer credit until the earliest of (i) death; (ii) attainment of normal retirement age; or (iii) the date the member is no longer entitled to receive disability benefits;

- A benefit of $4,000 is payable upon a retired member's death; and
- Employer credits and the guaranteed interest crediting are to be reported quarterly.

That 2012 legislation also further modified the KPERS Tier 1 plan design components and the participating employer funding requirements for contributions. Several other provisions enhanced supplemental funding for KPERS, first by providing that 80.0 percent from sales of state property would be transferred to the KPERS Trust Fund and, second, by providing for annual transfers of up to 50.0 percent of the balance from the Expanded Lottery Act Revenues Fund to the KPERS Trust Fund after other statutory expenses have been met.

### *Other Recent Revisions*

With regard to substantive policy, the Legislature enacted a new working-after-retirement provision, which took effect on January 1, 2018. For retirees under the age of 62, there is a 180-day waiting period before returning to work. If the retiree is 62 or older, the current 60-day waiting period applies. There must be no prearranged employment agreement between the retiree and the public employer that is affiliated with KPERS. For covered positions, the employer pays the statutory contribution rate on the first $25,000 of compensation and for that portion of compensation greater than $25,000, the contribution rate is equal to 30.0 percent. Covered positions for non-school employees are those that are not seasonal or temporary and whose employment requires at least 1,000 hours of work per year; covered positions for school employees are those that are not seasonal or temporary and whose employment requires at least 630 hours of work per year or at least 3.5 hours a day for at least 180 days. For non-covered positions, the employer makes no contributions. None of the above provisions sunset.

Starting on January 1, 2018, all retirees who had retired prior to that date in state, local, and licensed or unlicensed school positions are not subject to an earnings limitation. Employers will pay the statutory contribution rate on the first $25,000 of compensation and for that portion of compensation greater than $25,000, the contribution rate will be equal to 30.0 percent for retirees employed in covered positions.

With regard to fiscal policy, the aforementioned 2012 legislation also modified the rate of increase in the annual caps on participating employer contributions. The 0.6 percent cap would increase to 0.9 percent in FY 2014, 1.0 percent in FY 2015, 1.1 percent in FY 2016, and 1.2 percent in subsequent fiscal years until the UAL of the state and school group reaches an 80.0 percent funded ratio.

Legislation in 2016 provided the Governor with enhanced allotment authority and specifically allowed for the reduction of FY 2016 employer contributions to KPERS. In total, $97.4 million in previously approved FY 2016 employer contributions to the state-school group were delayed.

Legislation in 2017 froze FY 2017 employer contributions at FY 2016 levels, reducing approximately $64.4 million in approved contributions. FY 2018 employer contributions remain at their statutory level and FY 2019 employer contributions were reduced by approximately $194.0 million from their statutory amount. Repayment of the FY 2017 and FY 2019 reductions were approved *via* layered amortization of a level dollar amount for 20 years.

Legislation in 2018 transferred $82.0 million from the State General Fund to the KPERS Trust Fund for FY 2019. In FY 2018, an additional $56.0 million was transferred from the State General Fund to the KPERS Trust Fund, and in FY 2019, up to $56.0 million, dependent on the amount actual State General Fund receipts exceed projected receipts, will be transferred.

For more information, please contact:

Reed Holwegner, Principal Research Analyst
Reed.Holwegner@klrd.ks.gov

Amit Patel, Fiscal Analyst
Amit.Patel@klrd.ks.gov

J. G. Scott, Assistant Director for Fiscal Affairs
JG.Scott@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

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KLRD




Katelin Neikirk
Research Analyst
785-296-3181
Katelin.Neikirk@klrd.ks.gov




# State and Local Government

## I-10 Post-election Audits

According to the National Conference of State Legislatures, 33 states and the District of Columbia currently have some form of a post-election audit in place.

### What is a Post-election Audit?

A post-election audit (audit) verifies the equipment and procedures used to count votes during an election worked properly and the election yielded the correct outcome. Most audits look at a fixed percentage of voting districts or voting machines and compare the paper record to the results produced by the voting system.

In states that conduct post-election audits, most have included audit requirements and processes in statute.

### Post-election Audit vs. Recount

Audits differ from recounts in that they are conducted regardless of the margins of victory, though audits can lead to a recount if errors are detected. A recount is a repeat tabulation of votes cast in an election that is used to determine the correctness of an initial count. Recounts will often take place in the event the initial vote tally during an election is extremely close.

### What is Audited?

Paper records used in an audit may include voter-marked paper ballots, voter-verified paper audit trails produced by direct-recording electronic voting machines (DREs), or paper ballot records produced by ballot-marking devices.

### Types of Post-election Audits

There are three main types of audits implemented by states: traditional audits, risk-limiting audits, and procedural audits. (See the chart at the end of this article for information on the type of audit each state has implemented.)

### *Traditional Post-election Audits*

Thirty states and the District of Columbia conduct traditional audits. This type of audit is usually conducted manually by hand counting a portion of the paper records and comparing them to the electronic results produced by electronic voting machines. Some states, however, have a process where all or part of the audit can be conducted electronically. Some states that implemented traditional audits use a tiered system, which means a different number of ballots are reviewed, depending on the margin of victory.

### *Risk-limiting Audits*

Three states require risk-limiting audits and two states provide counties with the option to utilize risk-limiting audits if they so chose. A risk-limiting audit makes use of statistical principles and methods and is designed to limit the risk of certifying an incorrect election outcome. If the margin is larger, fewer ballots need to be counted. If the race is tighter, more ballots are audited.

### *Procedural Audits*

A procedural audit is a process for ensuring the correct processes and procedures were followed during the course of the election and may be conducted instead of, or in addition to, a post-election audit. Procedural audits vary in their scope and comprehensiveness, but almost always include a ballot accounting and reconciliation process.

## Post-election Audits under Certain Circumstances

Some states do not require a post-election audit to be conducted after every election, but only require them in certain circumstances. For example:

- Idaho conducts a post-election audit only when a recount is required (IC §34-2313); and
- Indiana requires a procedural audit if the total number of votes cast and the total number of voters in a precinct's poll book differ by five or more. A county chairman for a major political party may also request an audit for confirmation of votes cast (IC §3-11-13-37 *et seq.*, §3-12-3.5-8).

## Post-election Audits in Kansas

During the 2018 Legislative Session, the Legislature passed HB 2539, which requires county election officers to conduct a manual audit or tally of each vote cast in 1.0 percent of all precincts, with a minimum of one precinct located within the county. The audit requirements apply to all counties for elections occurring after January 1, 2019. The requirement for audit or tally applies regardless of the method of voting used. The bill specifies these contested races will be audited:

- In presidential election years: one federal race, one state legislative race, and one county race;
- In even-numbered, non-presidential election years: one federal race, one statewide race, one state legislative race, and one county race; and
- In odd-numbered election years: two local races, selected randomly after the election.

## States with No Post-election Audits

Ten states do not conduct any type of audit. These states are: Alabama, Arkansas, Delaware, Georgia, Louisiana, Maine, Mississippi, New Hampshire, Oklahoma, and South Dakota.

**Table of Post-election Audits by State**

*Note:* Table only contains information on states that conduct post-election audits.

| State | Audit Type | Statutes |
|---|---|---|
| Alaska | Traditional | AS § 15.15.420 - § 15.15.450 |
| Arizona | Traditional | ARS § 16-602; State of Arizona Elections Procedures Manual |
| California | Traditional | CEC § 336.5; § 15360 |
| Colorado | Risk-limiting | CRSA § 1-7-515; Colorado Secretary of State Election Rule 25 |
| Connecticut | Traditional | CGSA § 9-320f |
| Florida | Traditional | FSA § 101.591 |
| Hawaii | Traditional | HRS § 16-42, Hawaii Administrative Rules § 3-172-102 |
| Idaho | Other | IC § 34-2313 |
| Illinois | Traditional | 10 ILCS § 5/24A-15; § 5/24C-15 |
| Indiana | Other | IC § 3-12-3.5-8; § 3-11-13-37 *et seq.* |
| Iowa | Traditional | ICA § 50.51 |
| Kansas[a] | Traditional | KSA § 25-3009 |
| Kentucky | Traditional | KRS § 117.305; § 117.383 |
| Maryland | Traditional | MD Code, Election Law § 11-3093; Code of Maryland Regulations § 33.08.05.00 *et seq.* |
| Massachusetts | Traditional | MGLA 54 § 109A |
| Michigan | Procedural | MCLA § 168.31a; Post-election Audit Manual |
| Minnesota | Traditional | MSA § 206.89 |
| Missouri | Traditional | 15 CSR § 30-10.090; § 30-10.110 |
| Montana | Traditional | MCA § 13-17-501 - § 13-17-509 |
| Nebraska[b] | Other | Nebraska Secretary of State's Office |
| Nevada | Traditional | NRS § 293.247; NAC 293.255 |
| New Jersey[c] | Traditional | NJSA § 19:61-9 |
| New Mexico | Traditional, with a tiered system based on the margin of victory | NMSA § 1-14-13.2 *et seq.*; NMAC 1.10.23 |
| New York | Traditional | NY Elect. § 9-211; 9 NYCRR 6210.18 |
| North Carolina | Traditional | NCGSA § 163A-1166 |
| North Dakota | Procedural | NDCC § 16.1-06-15 |
| Ohio | Traditional, with risk-limiting audits recommended | OH ST § 3506.14;<br>Secretary of State Directive 2017-14 |
| Oregon | Traditional, with a tiered system based on the margin of victory | ORS § 254.529 |
| Pennsylvania | Traditional | 25 PS § 3031.17 |
| Rhode Island | Risk-limiting | RI ST § 17-19-37.4 |
| South Carolina | Procedural | South Carolina Election Commission – Description of Election Audits in South Carolina |
| Tennessee | Traditional | TCA § 2-20-103 |
| Texas | Traditional | VTCA § 127.201; Election Advisory No. 2012-03(3d) |
| Utah | Traditional | Election Policy Directive from the Office of the Lieutenant Governor (Sect. 6) |
| Vermont | Traditional | 17 VSA § 2493; § 2582 - § 2588 |
| Virginia | Risk-limiting | VCA § 24.2-671.1 |
| Washington | Traditional, with option of conducting a risk-limiting audit | RCW § 29A.60.170; § 29A.60.185; WAC 434-262-105 |
| West Virginia | Traditional | WVC § 3-4A-28 |
| Wisconsin | Traditional | WSA § 7.08(6); Wisconsin Elections Commission Voting Equipment Audits |
| Wyoming | Procedural | WS 22-11-104; Wyoming Administrative Rules Secretary of State Election Procedures, Chapter 25 |
| District of Columbia | Traditional | DC ST § 1-1001.09a |

[a] *Note:* These provisions apply to Kansas elections held after January 1, 2019.
[b] *Note:* Nebraska does not have a statutory requirement or rules and regulations for post-election audits, but they may be conducted by the Office of the Secretary of State.
[c] *Note:* New Jersey currently does not have machines that produce a paper record and therefore cannot yet conduct an audit.

For more information, please contact:

Katelin Neikirk, Research Analyst
*Katelin.Neikirk@klrd.ks.gov*

Joanna Dolan, Principal Research Analyst
*Joanna.Dolan@klrd.ks.gov*

James Fisher, Research Analyst
*James.Fisher@klrd.ks.gov*

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

KLRD




Erica Haas
Principal Research Analyst
785-296-3181
Erica.Haas@klrd.ks.gov




# State and Local Government

## I-11 Senate Confirmation Process

State law in Kansas requires that certain appointments by the Governor or other state officials be confirmed by the Senate prior to the appointee exercising any power, duty, or function of the office. If a majority of the Senate votes on the question of confirmation of an appointment to an office and the appointment is not confirmed, the office shall become vacant at that time (KSA 75-4315b).

When the Senate is not in session, the Senate Committee on Confirmation Oversight (Committee) reviews appointments and makes recommendations related to the appointments to the full Senate.

The Committee has six members with proportional representation from the two major political parties (KSA 2018 Supp. 46-2601). One of the members of the Committee is the Majority Leader of the Senate, or the Majority Leader's designee, who serves as chairperson. The Minority Leader of the Senate, or the Minority Leader's designee, serves as vice-chairperson.

If a vacancy occurs in an office or in the membership of a board, commission, council, committee, authority, or other governmental body and the appointment to fill the vacancy is subject to confirmation by the Senate, the Committee may authorize, by a majority vote, the person appointed to fill the vacancy to exercise the powers, duties, and functions of the office until the appointment is confirmed by the Senate.

A list of those positions subject to Senate confirmation is included below, along with flow charts outlining the confirmation process for gubernatorial appointees and non-gubernatorial appointees.

### Alphabetical List of Appointments Subject to Senate Confirmation

Adjutant General
Administration, Secretary
Aging and Disability Services, Secretary
Agriculture, Secretary
Alcoholic Beverage Control, Director
Bank Commissioner
Banking Board

Board of Tax Appeals, Members and Chief Hearing Officer
Central Interstate Low-Level Radioactive Waste Commission
Children and Families, Secretary
Civil Service Board
Commerce, Secretary
Corporation Commission
Corrections, Secretary
Court of Appeals, Judge
Credit Union Administrator
Crime Victims Compensation Board
Employment Security, Board of Review
Export Loan Guarantee Committee
Fire Marshal
Gaming Agency, Executive Director
Healing Arts, Executive Director of State Board
Health and Environment, Office of Inspector General
Health and Environment, Secretary
Highway Patrol, Superintendent
Historical Society, Executive Director
Hospital Authority, University of Kansas
Human Rights Commission
Indigents' Defense Services, State Board
Kansas Bureau of Investigation, Director
Kansas City Area Transportation District
Kansas Development Finance Authority, Board of Directors
Kansas National Guard, General Officers
Labor, Secretary
Librarian, State
Long-Term Care Ombudsman
Lottery Commission
Lottery Commission, Executive Director
Mo-Kan Metropolitan Development District and Agency Compact
Pooled Money Investment Board
Property Valuation, Director
Public Employee Relations Board
Public Employees Retirement System Board of Trustees
Racing and Gaming Commission
Racing and Gaming Commission, Executive Director
Regents, State Board
Revenue, Secretary
Securities Commissioner
Transportation, Secretary
Veterans' Affairs Office, Commission on, Director
Water Authority, Chairperson
Water Office, Director
Wildlife, Parks and Tourism, Secretary

| **Senate Confirmation Process: Gubernatorial Appointments** | |
|---|---|
| Step 1 | The Governor appoints an individual to a vacancy requiring Senate confirmation. |
| Step 2 | The Governor's Office collects completed copies of the appointee's nomination form, statement of substantial interest, tax information, and background investigation, including fingerprints. |
| Step 3 | The Governor's Office submits completed copies of the appointee's nomination form, statement of substantial interest, and acknowledgment of release of tax and criminal records information forms to the Kansas Legislative Research Department (KLRD) *via* the chairperson of the Committee. |
| Step 4 | KLRD and Revisor of Statutes staff review the file for completeness. |
| Step 5 | If the file is complete, KLRD staff informs the chairperson of the Committee that the file is available for review. |
| Step 6 | The nominee's appointment is considered by the Committee. |

| Senate Confirmation Process: Non-gubernatorial Appointments | |
|---|---|
| Step 1 | The chairperson of the Committee is notified by the appointing authority that an appointment has been made requiring Senate confirmation. |
| Step 2 | The appointing authority submits completed copies of the appointee's nomination form, statement of substantial interest, tax information release form, and written request for a background investigation to the KLRD *via* the chairperson of the Committee. |
| Step 3 | The Director of Legislative Research submits a written request to the Kansas Bureau of Investigation (KBI) for a background check, including fingerprints. The Director also submits a request to the Department of Revenue to release the appointees tax information. |
| Step 4 | KBI and Department of Revenue officials complete the background and tax investigations. The information is sent to KLRD. |
| Step 5 | The Director of Legislative Research informs the appointing authority and nominee the file is complete and available for review. |
| Step 6 | The appointing authority and nominee may exercise the option to review the information and decide whether to proceed with the nomination. |
| Step 7 | If the appointing authority and nominee decide to proceed with the nomination, the Director of Legislative Research informs the chairperson and vice-chairperson of the Committee the file is available for review. |
| Step 8 | The nominee's appointment is considered by the Committee. |

For more information, please contact:

Erica Haas, Principal Research Analyst
Erica.Haas@klrd.ks.gov

Robert Gallimore, Principal Research Analyst
Robert.Gallimore@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

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KLRD




Steven Wu
Fiscal Analyst
785-296-3181
Steven.Wu@klrd.ks.gov




# State and Local Government

## I-12 State Employee Issues

### Classified and Unclassified Employees

The state workforce is composed of classified and unclassified employees. Classified employees comprise nearly two-thirds of the state workforce, while unclassified employees comprise the remaining one-third. HB 2391 (2015) revised the Kansas Civil Service Act to direct all persons in newly hired positions, including any rehired employee and any current employee who voluntarily transfers, or is voluntarily promoted or demoted, into an unclassified position. If federal law requires a state agency to maintain personnel standards on a merit basis and that agency has converted classified positions to unclassified positions, the state agency must adopt a binding statement of agency policy to meet the federal requirements.

Classified employees are selected through a competitive process, while unclassified positions can be filled through direct appointment, with or without competition. While unclassified employees are essentially "at will" employees who serve at the discretion of their appointing authority, classified employees are covered by the "merit" or "civil service" system, which provides additional employment safeguards. These safeguards are as follows:

- All actions, including recruitment, hiring, classification, compensation, training, retention, promotion, discipline, and dismissal of state employees, shall be:
  - Based on merit principles and equal opportunity; and
  - Made without regard to race, national origin or ancestry, religion, political affiliation, or other nonmerit factors and shall not be based on sex, age, or disability except where those factors constitute a *bona fide* occupational qualification or where a disability prevents an individual from performing the essential functions of a position; and
- Employees are to be retained based on their ability to manage the duties of their position.

### Characteristics of State Employees

In FY 2017, a profile of classified state employees reflected the following:

| The "average" classified employee: | The "average" unclassified employee: |
|---|---|
| Is 46 years of age | Is 45 years of age |
| Has 14 years of service; and | Has 10 years of service; and |
| Earns $37,643 per year | Earns $48,391 per year |

Source: SHARP (June 2017)—Includes classified and unclassified, benefit-eligible employees, including full- and part-time employees. Excludes Regents universities, legislators, student employees, classified temporary, and unclassified non-benefit-eligible temporary employees.

## State Employee Benefits

Among the benefits available to most state employees are medical, dental, and vision plans; long-term disability insurance; deferred compensation; and a cafeteria benefits plan, which allows employees to pay dependent care expenses and non-reimbursable health care expenses with pre-tax dollars. In addition, state employees accrue vacation and sick leave. The vacation leave accrual rate increases after 5, 10, and 15 years. In general, the State also provides 9 to 10 days of holiday leave for state employees.

### *Retirement Plans*

Most state employees participate in the Kansas Public Employees Retirement System (KPERS). Employees contribute 6.0 percent bi-weekly based on salary. The state contribution is set by law each year. In addition to the regular KPERS program, there are plans for certain law enforcement groups, correctional officers, judges and justices, and certain Regents unclassified employees. Contributions from both the employee and the State differ from plan to plan. (See *I-9 Kansas Public Employees Retirement System's Retirement Plans and History* in this Briefing Book for more information.)

## Compensation of State Employees

Kansas statutes direct the Director of Personnel Services, after consultation with the Director of the Budget and the Secretary of Administration, to prepare a pay plan for classified employees, which "shall contain a schedule of salary and wage ranges and steps." The statutes also provide that this pay plan can be modified by provisions in an appropriation bill or other act. When the Governor recommends step movement on the classified pay plan, a general salary increase, or both, funding equivalent to the percentage increase for classified employees generally is included in agency budgets to be distributed to unclassified employees on a merit basis.

The previous Kansas Civil Service Basic Pay Plan consisted of 34 pay grades, each with 13 steps. The difference between each step was approximately 2.5 percent, and the difference between each salary grade was approximately 5.0 percent. Employees typically are hired into a job at the minimum of the salary grade. Until recently, assuming satisfactory work performance, classified employees would receive an annual 2.5 percent step increase, along with any other general adjustment in salary approved by the Legislature. No classified step movement was recommended or approved from FY 2001 to FY 2006. In FY 2007, the Legislature approved a 2.5 percent step movement, effective September 10, 2006. There has been no further step movement since FY 2009.

## New Classified Employee Pay Plans

The 2008 Legislature established five new pay plans for executive branch classified state employees and authorized multi-year salary increases for classified employees, beginning in FY 2009, who are identified in positions that are below market in salary.

The legislation authorized a four-year appropriation totaling $68.0 million from all funds, including $34.0 million from the State General Fund (SGF), for below-market pay adjustments (excluding the FY 2009 appropriation of $16.0

million). Due to budgetary considerations, the appropriation for FY 2012 was eliminated, bringing the total appropriation to $58.7 million. The State Finance Council approved an appropriation of $11.4 million, including $8.1 million from the SGF for FY 2013.

Finally, the legislation codified a compensation philosophy for state employees. The philosophy was crafted by the State Employee Pay Philosophy Task Force and endorsed by the State Employee Compensation Oversight Commission during the 2007 Interim. The pay philosophy includes:

- The goal of attracting and retaining quality employees with competitive compensation based on relevant labor markets;
- A base of principles of fairness and equity to be administered with sound fiscal discipline; and
- An understanding that longevity bonus payments shall not be considered as part of the base pay for classified employees.

The following table reflects classified step movement and base salary increases since FY 1997.

| Fiscal Year | Salary Adjustment |
|---|---|
| 1997 | Step Movement: 2.5 percent<br>Base Adjustment: None |
| 1998 | Step Movement: 2.5 percent<br>Base Adjustment: 1.0 percent |
| 1999 | Step Movement: 2.5 percent<br>Base Adjustment: 1.5 percent |
| 2000 | Step Movement: 2.5 percent<br>Base Adjustment: 1.0 percent |
| 2001 | Step Movement: 2.5 percent<br>Base Adjustment: None |
| 2002 | Step Movement: None<br>Base Adjustment: 3.0 percent, with 1.5 percent effective for full year and 1.5 percent effective for half a year |
| 2003 | Step Movement: None<br>Base Adjustment: None |
| 2004 | Step Movement: None<br>Base Adjustment: 1.5 percent effective for last 23 pay periods |
| 2005 | Step Movement: None<br>Base Adjustment: 3.0 percent |
| 2006 | Step Movement: None<br>Base Adjustment: 2.5 percent, with 1.25 percent effective for full year and 1.25 percent effective for half a year |
| 2007 | Step Movement: 2.5 percent, effective September 10, 2006<br>Base Adjustment: 1.5 percent |
| 2008 | Step Movement: None<br>Base Adjustment: 2.0 percent |

| Fiscal Year | Salary Adjustment |
|---|---|
| 2009 | Step Movement: None<br>Base Adjustment: 2.5 percent; Below Market Salary Adjustments |
| 2010 | Step Movement: None<br>Base Adjustment: None; Below Market Salary Adjustments |
| 2011 | Step Movement: None<br>Base Adjustment: None; Below Market Salary Adjustments |
| 2012 | Step Movement: None<br>Base Adjustment: None |
| 2013 | Step Movement: None<br>Base Adjustment: None |
| 2014 | Step Movement: None<br>Base Adjustment: None<br>Employee Bonus: $250 Bonus |
| 2015 | Step Movement: None<br>Base Adjustment: None |
| 2016 | Step Movement: None<br>Base Adjustment: None |
| 2017 | Step Movement: None<br>Base Adjustment: None |
| 2018 | Step Movement: None<br>Base Adjustment: 2.5 percent < 5 years; 5.0 percent > 5 years with no adjustment; 2.5 percent Judicial |
| 2019 | Step Movement: None<br>Base Adjustment: 5.0 percent if not included in 2017 Legislative Pay Plan; 2.5 percent if included at 2.5 percent in 2017 Legislative Pay Plan; 5.0 percent uniformed corrections officers; 5.0 percent nonjudicial; 2.0 percent Judicial |

**FY 2019.** The FY 2019 approved budget includes 40,103.2 full-time equivalent (FTE) positions and represents an increase of 35.4 positions, or 0.1 percent, above the FY 2018 approved number.

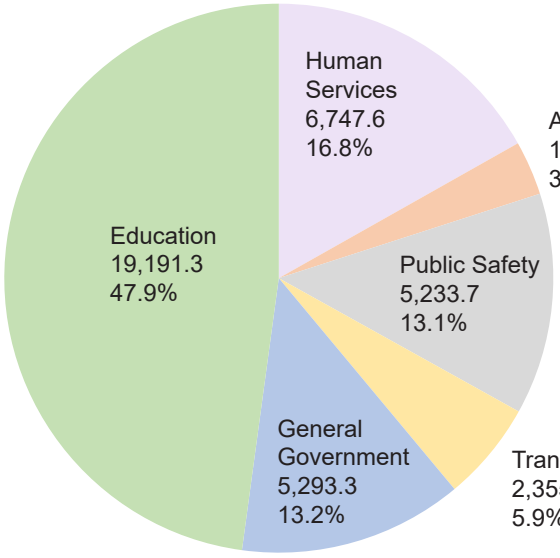
The increase is largely attributable to adding 20.0 FTE positions in the Department for Children and Families to increase child welfare field staff, such as social workers; adding 55.0 FTE positions at Larned State Hospital for expansion of Sexual Predator Treatment Program Reintegration facilities; and adding 13.0 FTE positions in the Kansas Bureau of Investigation for Special Agent positions in the Field Investigations Division and the Special Operations Division, including three agents for the Child Victim Unit.

FTE positions are permanent positions, either full time or part time, but mathematically equated to full time. For example, two half-time positions equal one full-time position.

Non-FTE unclassified permanent positions are essentially unclassified temporary positions that are considered “permanent” because they are authorized to participate in the state retirement system.

The following chart reflects approved FY 2019 FTE positions by function of government:

**FY 2019 FTE Positions by Function of Government**




**TOTAL: 40,103.2**

*Note:* Numbers may not add due to rounding.

**Largest employers.** The following table lists the ten largest state employers and their number of FTE positions.

| Agency | FTE Positions |
|---|---|
| University of Kansas | 5,346.9 |
| Kansas State University | 3,864.5 |
| University of Kansas Medical Center | 2,986.5 |
| Children and Families, Department for | 2,482.9 |
| Transportation, Department of | 2,355.3 |
| Wichita State University | 2,087.4 |
| Judicial Branch | 1,868.0 |
| KSU-ESARP | 1,106.2 |
| Revenue, Department of | 1,019.1 |
| Larned State Hospital | 998.5 |

* Source: 2018 IBARS Approved

For more information, please contact:

Steven Wu, Fiscal Analyst
Steven.Wu@klrd.ks.gov

Dylan Dear, Managing Fiscal Analyst
Dylan.Dear@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

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KLRD




Joanna Dolan
Principal Research Analist
785-296-3181
Joanna.Dolan@klrd.ks.gov




# State and Local Government

## I-13 Voter Registration and Identification

### Voter Registration Requirements

#### *National Voter Registration Requirements*

Federal and state elections in the United States are generally run by the states themselves, according to Article I and Article II of the *U.S. Constitution*. Nevertheless, there are some federal requirements that impact voter registration in the states.

The Voting Rights Act of 1965 allows all U.S. citizens to vote at any election in any state, so long as they are otherwise qualified by law to vote in that election (42 USC §1971).

The National Voter Registration Act of 1993 (NVRA), also known as the "Motor Voter" law, expanded the locations where a person may register to vote by requiring states to allow driver's license applications to also serve as an application for voter registration. The NVRA requires a voter registration application made as part of a driver's license application to include a statement containing each eligibility requirement (including citizenship) for that state (42 USC § 1993gg-3).

Finally, the Help America Vote Act (HAVA) (Public Law 107-252, Section 303) requires applicants to provide one of the following when registering to vote:

- The applicant's driver's license number, if the person possesses a current and valid driver's license;
- The last four digits of the applicant's Social Security number, if the person does not possess a driver's license; or
- The applicant's state assigned identification number for voter registration purposes, for those applicants with neither a driver's license nor a Social Security number.

#### *State Voter Registration Requirements*

Every state except North Dakota requires voter registration.

Generally, state voter registration laws require applicants to:

- Be 18 years old on or before the next election;

- Be a resident of the state where they are registering;
- Not be in jail and not have been convicted of a felony (or have had civil rights restored);
- Be mentally competent/not declared incapacitated; and
- Not be registered to vote in another state.

### *Same-day Voter Registration*

Most states also have registration deadlines applicants must comply with to qualify to vote in an upcoming election. As of March 2018, 18 states and the District of Columbia (D.C.) have laws that allow same-day voter registration. Sixteen of these states allow same-day registration on Election Day. Two states (Maryland and North Carolina) allow same-day registration only during the early voting period. See Chart 1 for more information on registration deadlines.

### *Online Voter Registration*

As of September 2018, 37 states and D.C. have laws allowing for online voter registration. Arizona was the first state to use online voter registration in 2002. Oklahoma is the most recent state to adopt the practice, passing authorizing legislation in 2018. The states that have not provided for the use of online voter registration are Arkansas, Maine, Michigan, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota (no registration required), South Dakota, Texas, Wisconsin, and Wyoming.

### *Preregistration*

The minimum age to vote in all federal and state elections is 18 years old. However, many states allow persons who are not yet 18 years old to register to vote before they turn 18 so they will be added to the voter roles and able to vote as soon as they reach the required age. This practice is commonly referred to as preregistration and is administered by states in a variety of ways.

Twenty-seven states allow an individual to register to vote if they will turn 18 on or before the next election, usually referring to the next general election. Thirteen states and D.C. begin preregistration at 16 years of age, and 4 states allow such registrations beginning at 17 years of age. Five other states have their own unique age requirements: Alaska 90–days before 18th birthday; Georgia, Iowa, and Missouri 17 years, 6 months old; Texas 17 years, 10 months old.

North Dakota does not require voters to register, but specifies that qualified electors must be 18 years of age.

### *Automatic Voter Registration*

The NRVA of 1993 required states to allow individuals to register to vote when applying for or renewing their driver's licenses. Some states have taken this requirement a step further and adopted automatic voter registration (AVR). AVR is a process by which individuals are automatically registered to vote and must opt-out if they do not wish to be on the voter rolls. As of August 2018, 13 states and D.C. have implemented AVR.

## Voter Identification Requirements

As of March 2018, 34 states have enacted laws requiring or requesting voters to provide some form of identification (ID) before voting. However, there are many variations as to which forms of ID are accepted, whether the ID is required to include a photo, and what happens if a voter does not provide the required or requested ID upon arriving at the polling place. See Chart 2 for more information on individual state's requirements for Voter ID.

### ***Kansas Law***

Prior to the 2011 Legislative Session, Kansas law required persons voting for the first time in a county to provide ID unless they had done so when they registered. At that time, acceptable ID forms included a current, valid Kansas driver's license or nondriver's ID card, utility bill, bank statement, paycheck, government check, or other

government document containing the voter's current name and address as indicated on the registration book. A voter's driver's license copy or number, nondriver's ID card copy or number, or the last four digits of the voter's Social Security number were acceptable when the voter was applying for an advance ballot to be transmitted by mail.

In 2011, the law changed significantly through the passage of HB 2067. Effective January 1, 2012, all those voting in person were required to provide photo ID at every election (with the exception of certain voters, such as active duty military personnel, absent from the country on Election Day), and all voters submitting advance ballots by mail were required to include the ID number on, or a copy of, a specified form of photo ID for every election. Free nondriver's ID cards and free Kansas birth certificates were available to anyone 17 or older for the purposes of meeting the new photo voter ID requirements. Each applicant for a free ID had to sign an affidavit stating he or she plans to vote and possesses no other acceptable ID form. The individual also had to provide evidence of being registered to vote. Relatively minor amendments were also made in 2012 SB 129, including adding an ID card issued by a Native American tribe to the list of photo ID documents acceptable for proving a voter's identity when voting in person.

A U.S. District Court judge issued an order striking down Kansas' Voter ID law as it applies to registration for federal elections on June 18, 2018. [*Fish v. Kobach*, 309 F. Supp.3d 1048 (D. Kan, 2018).]

**Chart 1**

| State | Voter Registration Deadline |
|---|---|
| **AL** | Postmarked/Delivered 15 days prior to election |
| **AK** | 30 days before election |
| **AZ** | 29 days before election |
| **AR** | 30 days before election |
| **CA** | Same Day Voter Registration |
| **CO** | Same Day Voter Registration |
| **CT** | Same Day Voter Registration |
| **DE** | 4th Saturday before general/primary election; 10 days before special elections |
| **DC** | Same Day Voter Registration |
| **FL** | 29 days before election |
| **State** | **Voter Registration Deadline** |
| **GA** | 5th Monday before elections, special elections have different rule |
| **HI** | Same Day Voter Registration |
| **ID** | Same Day Voter Registration |
| **IL** | Same Day Voter Registration |
| **KY** | 29 days before election |
| **LA** | 30 days before election |
| **IN** | 29 days before election |
| **IA** | Same Day Voter Registration |
| **KS** | 21 days before election |
| **ME** | Same Day Voter Registration |
| **MD*** | Same Day Voter Registration |
| **MA** | 20 days before election |
| **MI** | 30 days before election |
| **MN** | Same Day Voter Registration |
| **MS** | 30 days before election |
| **MO** | 28 days before election |
| **MT** | 30 days before election |
| **NE** | 3rd Friday before election or delivered by 6:00 p.m. 2nd Friday before election |
| **NV** | 5th Saturday before primary or general, in person (County Clerk/Registrar of Voters) until 9:00 p.m. Tuesday before election |
| **NH** | Same Day Voter Registration |
| **NJ** | 21 days before election |
| **NM** | 28 days before election |
| **NY** | 25 days before election |
| **NC*** | Same Day Voter Registration |
| **ND** | No Voter Registration Requirement |
| **OH** | 30 days before election |
| **OK** | 25 days before election |
| **OR** | 21 days before election |
| **PA** | 30 days before election |
| **RI** | 30 days before election |
| **SC** | 30 days before election |
| **SD** | 15 days before election |
| **TN** | 30 days before election |
| **TX** | 30 days before election |
| **UT** | Same Day Voter Registration |
| **VT** | Same Day Voter Registration |
| **VA** | 22 days before election |
| **WA** | Same Day Voter Registration |
| **WV** | 21 days before election |
| **WI** | Same Day Voter Registration |
| **WY** | Same Day Voter Registration |
| *Allows same day registration only during early voting period | |

| Chart 2 | | | |
|---|---|---|---|
| **State** | **ID Requirement** | **Photo** | **Notes** |
| **AL** | ID requested | Photo required | If no ID, 2 election workers can sign an affidavit attesting to voter's identity. Otherwise, the voter votes a provisional ballot and must provide ID within 4 days |
| **AK** | ID requested | No photo required | Election official can waive ID requirement if they know the voter |
| **AZ** | ID required | No photo required | If no ID, vote provisional ballot and must present ID within 5 days |
| **AR** | ID requested | Photo required | If no ID, vote provisional ballot with sworn statement that voter is registered, counted if voter returns with valid ID or Board of Elections Commissioners does not determine the ballot is invalid |
| **CA** | No ID required | | |
| **CO** | ID requested | No photo required | Colorado uses mail elections, ID only impacts those persons who chose to vote in person |
| **CT** | No ID required | | |
| **DE** | ID requested | No photo required | If no ID, voter signs affidavit attesting to their identity |
| **FL** | ID requested | Photo required | If ID not presented, voter votes provisional ballot and officials compare signature to one on record |
| **GA** | ID required | Photo required | If no ID, voter votes provisional ballot and must return to show ID within 3 days |
| **HI** | ID requested | No photo required | If no ID, date of birth and address used to corroborate identity |
| **ID** | ID requested | Photo required | If no ID, voter signs affidavit with name and address |
| **IL** | No ID required | | |
| **KY** | ID requested | No photo required | If no ID, voter signs oath attesting to qualifications |
| **LA** | ID requested | Photo required | If no ID, voter signs affidavit and provides date of birth and other information |
| **IN** | ID required | Photo required | If no ID, voter votes provisional ballot and must return to show ID within 6 days or sign affidavit swearing indigence or religious objection |
| **IA** | ID requested | No photo required | If no ID, voter signs oath verifying identity and is allowed to vote regular ballot |
| **KS** | No ID required | Voter ID law struck down in 2018 | |
| **ME** | No ID required | | |
| **MD** | No ID required | | |
| **MA** | No ID required | | |
| **MI** | ID requested | No photo required | If no ID, voter signs affidavit and is allowed to vote regular ballot |
| **MN** | No ID required | Voter ID turned down by voters in 2012 | |
| **MS** | ID required | Photo required | If no ID, voter votes on provisional ballot and must return within 5 days to show ID or sign affidavit attesting to religious objection to being graphed |
| **MO** | ID requested | No photo required | If no ID, voter can cast regular ballot if 2 election officials attest they know voter |
| **MT** | ID requested | No photo required | If no ID, voter votes on provisional ballot and signature on ballot envelope is matched to one on file |
| **NE** | No ID required | | |
| **NV** | No ID required | | |
| **NH** | ID requested | No photo required | If no ID, voter signs challenged voter affidavit and votes regular ballot. After election mailing is sent to voter, voter must sign and return or be investigated for voter fraud |
| **NJ** | No ID required | | |
| **NM** | No ID required | | |

| Chart 2 | | | |
|---|---|---|---|
| **State** | **ID Requirement** | **Photo** | **Notes** |
| **NY** | No ID required | | |
| **NC** | No ID required | 2013 Voter ID law struck down | |
| **ND** | ID required | No photo required | If no ID, voter casts ballot that is set aside in sealed envelope. Voter must provide ID within 6 days for ballot to be counted |
| **OH** | ID required | No photo required | If no ID, voter votes on provisional ballot and must return to show ID within 10 days |
| **OK** | ID requested | No photo required | If no ID, voter votes provisionally and election officials verify information provided. Voter registration card accepted as ID |
| **OR** | No ID required | | |
| **PA** | No ID required | 2012 Voter ID law struck down | |
| **RI** | ID requested | Photo required | If no ID, voter votes provisionally and election officials check the signature against any on file |
| **SC** | ID requested | Photo not required | If no ID can be shown, voter registration card. Voter who does not show ID votes provisionally and must return to show ID after election |
| **SD** | ID requested | Photo required | If no ID requested, voter provides name and address and signs an affidavit |
| **TN** | ID required | Photo required | If no ID, voter votes provisionally and must return within 2 days to show ID or sign affidavit attesting indigence or religious objection |
| **TX** | ID requested | Photo required | If no ID and cannot obtain one, voters can present a supporting form of ID and execute a Reasonable Impediment Declaration |
| **UT** | ID requested | No photo required | If no ID, county clerk can verify through other means |
| **VT** | No ID required | | |
| **VA** | ID required | Photo required | If no ID, voter votes provisionally and must return within 3 days to show ID |
| **WA** | ID requested | No photo required | Washington holds mail elections, so ID requirement affects few voters |
| **WV** | ID requested | No photo required | If no ID, voter votes provisionally and must return to show election inspectors ID by the time the polls close or show ID to municipal clerk no later than 4:00 p.m. on Friday following election |
| **WI** | ID required | Photo required | |
| **WY** | No ID required | | |

For more information, please contact:

Joanna Dolan, Principal Research Analyst
Joanna.Dolan@klrd.ks.gov

Katelin Neikirk, Research Analyst
Katelin.Neikirk@klrd.ks.gov

Kansas Legislative Research Department
300 SW 10th Ave., Room 68-West, Statehouse
Topeka, KS 66612
Phone: (785) 296-3181

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