

CONFLICTS AND ISSUES IN 2021 ACTS

I. RELOCATION OF ARKANSAS SOVEREIGNTY ACT OF 2021

The Arkansas Sovereignty Act of 2021, Act 1012, was initially placed in Title 1 of the Arkansas Code, General Provisions. This title contains those laws that are generally applicable to the entire Arkansas Code of 1987. There are a few exceptions as there is no other better place to codify those laws than in Title 1.

However, fundamentally, the Arkansas Sovereignty Act of 2021 establishes certain duties and responsibilities and restrictions on public officers and employees. There is a title in the Arkansas Code specifically for the codification of such laws, Title 21 Public Officers and Employees. From the standpoint of the overall organization of the Arkansas Code and to put this particular law in the place in the Code where most users would most likely be searching for it, **we recommend** moving this Act to Title 21.

II. REDEFINED TERM “SERIOUS HARM” UNDER THE HUMAN TRAFFICKING ACT OF 2013, ARK. CODE § 5-18-101 ET SEQ.

Act 1106 amended several provisions of the Arkansas Code to create an affirmative defense for human trafficking victims who have been forced into committing certain criminal offenses and for the sealing of criminal records created as a result of crimes committed while a victim of human trafficking. One of the sections amended the Human Trafficking Act of 2013, Ark. Code § 5-18-101 et seq., by adding two definitions to § 5-18-102; one defining “abuse or threatened abuse of law or legal process” and the other defining “serious harm”.

The problem is that § 5-18-102 presently contains a definition of “serious harm” that is similar to, but not the same as, the newly added definition for the term. A logical way to read the present law together with the new enactment and the new definition for “serious harm” is to treat the new definition as an implied amendment of the present definition. The new definition tracks the definition of the term as used in other states and in the federal Trafficking Victims Protection Act of 2000.

We recommend that the new definition of “serious harm” created by Act 1106 replace the existing definition at § 5-18-102(11). We would have this correction confirmed by the General Assembly by passage of a **technical corrections bill** next regular session.

III. ELECTION LAW CONFLICTS – Date for drawing of ballot order of candidates in school elections

Act 448 amends § 6-14-111(k) to set the date for candidate ballot order selection by lot based on 72 days before the 1st Tuesday following the 1st Monday in November, the 3rd Tuesday in May for elections in odd-numbered years, Tuesday 4 weeks before the 3rd

Tuesday in June in gubernatorial election years, or 89 days before the annual school election if held on the 1st Tuesday after the 1st Monday in March during presidential election years. It is effective July 28, 2021.

Act 610 amends the same subsection by setting the draw by lot for annual school elections in even-numbered years to the ballot draw deadline for primary or general elections, in odd-numbered years when the annual school election is held in May to March 7th, and in odd-numbered years when the annual school election is held in November 72 days before the annual school election. It is effective January 1, 2022.

We recommend codifying both, with the Act 448 version being effective until January 1, 2022, and the Act 610 version becoming effective on January 1, 2022. We will need some **technical correction legislation** to remove the Act 448 version after it is superseded.

IV. ELECTION LAW CONFLICTS -- Amendments to Arkansas Code § 7-4-120 by Acts 756 and 974

Act 756 amended Arkansas Code § 7-4-120. Act 974 amended Arkansas Code § 7-4-120(b) and (e). **We recommend** stitching Arkansas Code § 7-4-120 together as follows:

7-4-120. Complaints of election law violations — Definitions.

Act 756

(a)(1) Except as provided in subdivision (a)(2) of this section, the State Board of Election Commissioners may investigate alleged violations, render findings, institute corrective actions, and impose sanctions according to this subchapter for violations of election and voter registration laws.

(2) The State Board of Election Commissioners shall not investigate alleged violations, render findings, or impose sanctions concerning violations of:

(A) The provisions of § 7-1-103(a)(1)-(4), (6), and (7); or

(B) Campaign finance and disclosure laws for which the Arkansas Ethics Commission has the duty and authority to investigate and sanction under §§ 7-6-217 and 7-6-218.

(b)(1) A complaint shall be filed with the State Board of Election Commissioners in writing ~~within thirty (30) days of~~ no earlier than the date established by law for the delivery or mailing of absentee ballots to a voter and no later than thirty (30) days following the certification of an election by a county board of election commissioners of the following:

(A) An alleged violation of the ~~voter registration laws regarding elections including without limitation:~~ elections including without limitation:

(i) Voter registration;

(ii) Requests for absentee ballots;

(iii) Delivery of absentee ballots;

- (iv) Casting of ballots;
- (v) Ballot tabulation;
- (vi) Certification of election results;
- (vii) Administration of an election;
- (viii) Election processes; or
- (ix) Conduct of an election; or

(B) The election or elections affected or associated with the complaint.

Act 974

(C) A complaint may be referred to the State Board of Election Commissioners by the Joint Performance Review Committee and is not subject to the thirty (30) day filing requirement under subdivision (b)(1) of this section.

Act 756 and Act 974

(b)(2)(A) A complaint shall be signed by the complainant under penalty of perjury.

Act 974

(b)(2)(B) If a complaint is referred to the State Board of Election Commissioners by the Joint Performance Review Committee under subdivision (b)(1)(C) of this section, the Chair of the Joint Performance Review Committee shall be the complainant.

Act 756

(b)(3)(A) A complaint shall clearly:

- (i) Describe the alleged violation, including without limitation the supporting facts for the violation or incident;
- (ii) State when or the approximate date that the alleged violation or incident occurred; and
- (iii) State the location or locations of the alleged violation or incident.

(B)(i) The complaint may specify, suggest, or recommend a desired resolution to the complaint.

(ii) If the complaint is timely filed but does not specify the desired resolution of the complainant:

(a) The State Board of Election Commissioners ~~shall~~ may:

(1) Notify the complainant that a desired resolution is not specified;

(2) Inform the complainant that other formal or informal resolutions may be appropriate; and

(3) Inform the complainant that the State Board of Election Commissioners may initiate a lawful resolution, correction, or remedy as the State Board of Election Commissioners deems appropriate; and

(b) The complainant may file the additional information within ten (10) days from mailing of the notice.

(4)(A) If a complaint does not meet the requirements of this section, the complainant shall be notified that the complaint may be corrected by amendment in writing within ten (10) days and that a failure to make the necessary corrections shall result in the complaint's being dismissed.

(B) If a complaint is dismissed because it does not meet the requirements of this section, the State Board of Election Commissioners shall notify the complainant of the fact of dismissal.

(5) A person shall not file a frivolous complaint.

Act 974

(6) If the complaint is referred to the State Board of Election Commissioners by the Joint Performance Review Committee, the complaint shall include:

(A) A report of the findings of the Joint Performance Review Committee, including any hearing testimony the Joint Performance Review Committee believes relevant; and

(B) The recommendations of the Joint Performance Review Committee that may be submitted to the State Board of Election Commissioners, including without limitation a recommendation:

(i) For a letter of reprimand to an election official;

(ii) For decertification as an election official in the next election cycle, including all associated primary and runoff elections;

(iii) That the State Board of Election Commissioners take over and conduct elections in the county in question if the violation or violations are considered severe by the Joint Performance Review Committee and would threaten a county's ability to conduct an equal, free, and impartial election, or the appearance of an equal, free, and impartial election; or

(iv) That state turnback funds be withheld from a county when the State Board of Election Commissioners conducts an election on behalf of a county and the county refuses to reimburse the State Board of Election Commissioners for expenses incurred.

Act 756

(7)(A) If a complaint is filed as required by this section, the State Board of Election Commissioners shall investigate the alleged violation.

(B) Immediately upon beginning an investigation under this section, the State Board of Election Commissioners shall notify the person or persons under investigation of the fact of the investigation and the nature of the investigation.

(C) If at the conclusion of the investigation, the State Board of Election Commissioners finds that there is probable cause to believe there has been a violation of the voter registration laws or election laws, the State Board of Election Commissioners may set a public hearing.

(c) (1) The State Board of Election Commissioners shall maintain a record of all inquiries, investigations, and proceedings.

(2) Except as provided in subdivisions (c) (3) and (4) of this section, records under this section are exempt from disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq., until:

(A) A hearing by the State Board of Election Commissioners is set;
or

(B) The investigation by the State Board of Election Commissioners is closed by the State Board of Election Commissioners.

(3) The State Board of Election Commissioners ~~may~~ shall disclose, through its members or staff, otherwise confidential information to proper law enforcement officers, agencies, and other entities as is necessary to conduct the investigation under this section.

(4) The records of the investigation upon which the State Board of Election Commissioners has based its findings shall be opened to public inspection thirty (30) days after the final adjudication in which the State Board of Election Commissioners makes a final decision.

(d) (1) If the State Board of Election Commissioners determines that the complaint can be addressed through documentary submissions and without a formal investigation, the State Board of Election Commissioners may address the complaint with documentary submissions.

(2) If the State Board of Election Commissioners determines that an investigation is necessary, the State Board of Election Commissioners shall provide to the person who is the subject of the complaint:

(A) A copy of the complaint if a copy has not previously been provided; and

(B) Instructions for filing a response.

(3) The State Board of Election Commissioners may:

(A) Administer oaths for the purpose of taking sworn statements from witnesses in the course of its investigations;

(B) Request the person who is the subject of the complaint to answer allegations in writing, produce relevant evidence, or appear in person before the State Board of Election Commissioners; and

(C) (i) Subpoena any person or the books, records, or other documents relevant to the investigation or inquiry.

(ii) The subpoena may direct any law enforcement officer of the county concerned or the Director of the Division of Arkansas State Police to seize any public record that is withheld.

(4) The State Board of Election Commissioners shall:

(A) Provide the person subpoenaed with reasonable notice of the subpoena and an opportunity to respond; and

(B) Advise the complainant and the person who is the subject of the complaint in writing of the final action of the State Board of Election Commissioners.

(e) If the State Board of Election Commissioners finds a violation of the voter registration laws or election laws under its jurisdiction, the State Board of Election Commissioners may:

- (1) Issue a public letter of caution, warning, ~~or~~ reprimand, or a conditional warning of consequences that shall be imposed if corrective action is not completed;
- (2) Impose a fine of no less than twenty-five dollars (\$25.00) and no more than one thousand dollars (\$1,000) for a negligent, knowing, or intentional violation;
- (3) Report the information obtained in the investigation and the findings and determinations of the State Board of Election Commissioners to the appropriate law enforcement authorities;
- (4) Make expenditures and order ~~Order~~ payment of the costs of the investigation and hearing;

Act 974

- (5) Decertify an election official from appointment as an election official;
- (6) Issue an order that the State Board of Election Commissioners shall take over and conduct elections in the county in question if the violation is considered severe by the State Board of Election Commissioners and would threaten either a county's ability to conduct an equal, free, and impartial election, or the appearance of an equal, free, and impartial election; or

Act 756

(7) Combine any ~~of the~~ two (2) or more of the actions or sanctions authorized under this section.

(f) The State Board of Election Commissioners shall advise the complainant and the person who is the subject of the complaint of the:

- (1) Finding of the State Board of Election Commissioners;
- (2) Final action taken and sanctions issued by the State Board of Election Commissioners against a person associated with the complaint and a response thereto; and

(3) Reasons for the findings, final actions, and sanctions.

(g) The State Board of Election Commissioners shall maintain a record of all inquiries, investigations, and proceedings.

(h) (1) The State Board of Election Commissioners shall adopt rules concerning the imposition of fines under this section.

(2) If a person fails to pay the fines ordered by the State Board of Election Commissioners under this section, the State Board of Election Commissioners may obtain a judgment from a court for the amount of the fine imposed by filing suit in the:

- (A) Pulaski County Circuit Court;
- (B) Circuit court of the county in which the person resides; or
- (C) Small claims division of a district court.

(3) The fee for filing of a suit in a circuit or district court in this state shall be waived for the State Board of Election Commissioners.

(4) All moneys received by the State Board of Election Commissioners in payment of fines shall be deposited into the State Treasury as general revenues.

(i)(1) The State Board of Election Commissioners shall conclude its investigation and take its final action under this section within one hundred eighty (180) days of the filing of a complaint.

(2) The State Board of Election Commissioners shall announce its final action as a final administrative decision.

(3) However, if the State Board of Election Commissioners fails to take its final action within one hundred eighty (180) days, the final administrative action shall be effective within one hundred eighty (180) days of the filing of the complaint.

(4) If the State Board of Election Commissioners holds a hearing under this section, the State Board of Election Commissioners shall conclude all actions under this section within two hundred forty (240) days.

(j) A final action of the State Board of Election Commissioners under this section is an adjudication for purposes of judicial review under § 25-15-212.

(k) As used in this section:

(1) "Election laws" means the United States Constitution, the Arkansas Constitution, and the statutes, final court decisions of general applicability, and rules of the United States and the State of Arkansas concerning elections conducted by county boards of election commissioners and the rules promulgated by the State Board of Election Commissioners under § 7-4-101 concerning elections conducted by county boards of election commissioners;

(2) "Frivolous" means clearly lacking any basis in fact or law; and

(3) "Voter registration laws" means those laws under the United States Constitution, the Arkansas Constitution, Amendment 51, and the statutes, final court decisions, and rules promulgated by the United States and the State of Arkansas concerning voter registration laws pursuant to Arkansas Constitution, Amendment 51.

V. ELECTION LAW CONFLICTS -- Dates for public notice of elections, objections to certain election officials

Act 448 amends § 7-5-202 changing the published notice date from 20 days before the preferential primary and general election, and 10 days prior to the general runoff, school, and special election to 8 days before the beginning of early voting in the preferential primary, general primary, general election, general runoff, school, and special election. It changes the date by which an objection must be made to the board of election commissioners concerning an election official from 10 days to 7 days after the election notice has been posted.

Act 1051 amends § 7-5-202 by allowing a county party chair or his or her spouse or the spouse of a poll worker to work an election so long as no objection has been made within 10 days after the posting of the list of election officials. It appears that this Act merely used the 10 days as that was the law previous to Act 448.

We recommend codifying the amendments made by Act 1051, with the exception of incorporating the 7 day limit from Act 448 into the Act 1051 language.

VI. ELECTION LAW CONFLICTS -- Campaign contribution levels

Act 384 amends § 7-6-203(b) (1) to repeal the \$2,700 limit and authorize the Arkansas Ethics Commission to set the maximum campaign contribution level.

Act 385, specifically effective for elections after January 1, 2023, amends § 7-6-203(b)(1) without addressing the amendment made by Act 384, and essentially reinstates the \$2,700 limit but clarifies that it is the total aggregate amount allowed. It then goes on to establish that the total aggregate amount of contribution per election is based on the total contributions made to a candidate by a donor during an election regardless of which office or offices the candidate is seeking. The aggregate amount during an election applies even if a candidate is seeking more than one office during the election or concludes a campaign or withdraws from the election.

We recommend codifying both acts, but essentially undoing the amendment to § 7-6-203(b)(1) by Act 384 effective January 1, 2023, when Act 385 takes effect.

VII. ELECTION LAW CONFLICTS -- Carryover funds in political campaigns

Act 737 repealed the definition of carryover funds in § 7-6-201 et seq., and removed all of the references to the term in § 7-6-201 and 7-6-203, but missed one in § 7-6-230.

Act 272 added a subdivision to the repealed definition in § 7-6-201(3) that **we recommend** treating as effectively repealed by Act 737.

Act 324 added a couple of new subdivisions to § 7-6-203(f) and (g) which referenced carryover funds. **We recommend** treating those references to carryover funds within the new subdivision as effectively repealed by Act 737, but otherwise codifying the new subdivisions.

Act 1029 amended § 7-6-230(a)(1) which has a reference to carryover funds, but did not repeal it. The relevant part states:

(a)(1) A candidate required to file carryover fund reports in electronic form under § 7-6-203 and campaign contribution and expenditure reports in electronic form under § 7-6-207 may file reports in paper form under this section.

To conform the language to the intent of Act 737, which repealed all references to carryover fund reports in § 7-6-203 and the filing requirements, **we recommend** codifying the sentence as follows:

(a)(1) A candidate required to file ~~carryover fund reports in electronic form under § 7-6-203 and~~ campaign contribution and expenditure reports in electronic form under § 7-6-207 may file reports in paper form under this section.

We would have these corrections confirmed by the General Assembly by passage of a **technical corrections bill** next regular session.

VIII. COTTAGE FOOD PRODUCTION OPERATIONS AS AN EXEMPT FOOD SERVICE ESTABLISHMENT

Act 306 amended Arkansas Code § 20-57-201(2)(B)(vi)(a) that established certain exemptions from the term “food service establishment” for the purpose of regulation by the Department of Health to exempt cottage food production operations from state regulation internet sales direct to in-state consumers and direct to out-of-state consumers so long as the out-of-state sales comply with federal food safety laws. Act 306 has an emergency clause making it effective March 9, 2021.

Act 1040 repealed the definition and references to “cottage food production operation” in Arkansas Code § 20-57-201, repealed certain provisions in that section and made certain other amendments to that section, repealed Arkansas Code § 20-57-209, and enacted the “Food Freedom Act”, Arkansas Code § 20-57-501 et seq. which appears to cover cottage food production operations specifically under the term “homemade food or drink product” as defined in Arkansas Code § 20-57-503(3), and regulates those operations under other sections of the Food Freedom Act.

We recommend codifying Act 1040 pursuant to Arkansas Code § 1-2-207(b) as it is the later enactment and treating Act 306 as superseded. Given the emergency clause, Act 306 is effective until July 28, 2021.

IX. TWO ACTS, SAME PURPOSE, TECHNICAL CONFLICT?

Acts 404 and 894 amend Arkansas Code § 23-4-422, and the Formula Rate Review Act, specifically, Arkansas Code §§ 23-4-1205(c), 23-4-1206, 23-4-1207(d), and 23-4-1208. While their titles are identical, there are some conflicts between the two acts that cannot be reconciled textually.

The acts have identical retroactive and applicability clauses. They both have emergency clauses, with Act 404 effective March 22, 2021, and Act 894 effective April 25, 2021.

To the extent that there is any issue regarding the application of the two acts because of the differences between the two acts, Act 404 was effective for 34 days after which Act 894 became effective. **We recommend** codifying Act 894 and treating Act 404 as superseded.