



Montana's Repeal of Election Day Registration

Overview

Election Day Registration (EDR) allows eligible voters to register to vote (or update their voter registration information) *and* cast their ballots at the polls on Election Day, as opposed to requiring them to do so by a certain deadline before the election.¹ While EDR sounds like a favorable idea, the many administrative concerns and issues that result from this reform showcase why most states are hesitant to offer EDR.

Montana recently became the first and only state to repeal EDR after implementing it.² As soon as Montana repealed EDR, several lawsuits were filed challenging the repeal as an unconstitutional restriction on the right to vote for Montanans under the state constitution.³ In a lengthy opinion, a state court judge agreed and imposed a preliminary injunction.⁴ This decision has already been appealed.

Montana's repeal of EDR paves the way for other states to do the same with EDR and other election procedures that strain election integrity and hamper efficient election administration.

Election Day Registration in Montana

Montana enacted EDR in 2005.⁵ Montana's system for EDR allowed voters to register or update their voter information and cast their ballots during early voting and on Election Day. A movement to repeal EDR eventually followed, and in 2014 a ballot measure proposing such was defeated by the voters.⁶ EDR ultimately remained in effect until H.B. 176 was passed to repeal EDR by an overwhelming legislative majority in early 2021.⁷

¹ Election Day Registration is more commonly referred to as Same Day Registration (SDR). While SDR can include allowing voters to register to vote (or update their voter registration information) and vote on Election Day, for the purposes of this memo, SDR refers only being able to do so during early voting and not on Election Day.

² House Bill 176, 67th Legislature, 2021 Regular Session (Apr. 19, 2021), *available at*:

<https://leg.mt.gov/bills/2021/billpdf/H.B.0176.pdf>.

³ *Montana Democratic Party v. Jacobsen*, Cause No: 21-451; *Western Native Voice, et al. v. Jacobsen*, Cause No: 21-560; *Montana Youth Action, et al. v. Jacobsen*, Cause No: DV 21-1097.

⁴ *Montana Democratic Party, et al. v. Jacobsen*, Consolidated, Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Preliminary Injunctions, Cause No.: DV 21-0451, Montana Thirteenth Judicial District Court Yellowstone County (Apr. 4, 2022), *available at*: <https://montanafreepress.org/wp-content/uploads/2022/04/Findings-of-Fact-Conclusions-of-Law-and-Order-Granting-Plaintiff-s-Motions-for-Preliminary-Injunctions-1.pdf>.

⁵ Montana Code Annotated 2005, 13-2-304, *available at*: <https://leg.mt.gov/bills/2005/mca/13/2/13-2-304.htm>.

⁶ Legislative Referendum 126 (2014).

⁷ See H.B. 176 Bill Actions (Apr. 19, 2021), *available at*:

[https://laws.leg.mt.gov/legprd/LAW0210W\\$BSIV.ActionQuery?P_BILL_NOI=176&P_BLTP_BILL_TYP_CD=H.B.&Z_ACTION=Find&P_SESS=20211](https://laws.leg.mt.gov/legprd/LAW0210W$BSIV.ActionQuery?P_BILL_NOI=176&P_BLTP_BILL_TYP_CD=H.B.&Z_ACTION=Find&P_SESS=20211).



In passing H.B. 176, the legislature sought to ease the administrative burden on election officials, reduce long lines at polling locations, and strengthen election integrity, all while still allowing voters to register during early voting until noon the day before the election. Legislative and witness testimony explain why the Legislature moved to repeal EDR.

Legislative Testimony

Broadwater County Election Administrator Doug Ellis testified in support of repealing EDR by detailing his own Election Day experiences, painting a picture of long Election Day hours due to the endless work required by simultaneously managing the polling location while continuing to accept new voter registrations.

Mr. Ellis, an election official in rural Montana, explained how many rural election officials hold various other offices in addition to their election duties, such as clerk, recorder, school superintendent., etc. Registration deadlines before Election Day, therefore, allow these election officials to validate and finalize election precinct voter rolls to determine the number of ballots each precinct needs on Election Day. But it is not just rural election officials—registration deadlines allow election officials to adequately staff and equip election sites with the necessary personnel and voting equipment based on the number of registered voters. As Mr. Ellis explained:

Elections is probably by far the most trying position that I have, and a lot of it is because of same-day registration,” Ellis said. “It’s extremely hard to put information of all of the voters into the system, get their ballots counted and keep the numbers correct while you’re still registering people to vote.”⁸

The Montana House State Administration Committee originally tabled the bill, but after Republican Members amended the bill to simply cut off voter registration at noon the day before Election Day, H.B. 176 was successfully passed and signed into law by Governor Greg Gianforte.⁹ Upon signing the bill, Governor Gianforte commented:

Montana has a long history of secure, transparent elections, setting a standard for the nation,” Gianforte said in a statement. “These new laws will help ensure the continued integrity of Montana’s elections for years to come.”¹⁰

⁸ *Same-day voter registration debated*, Montana Free Press (Jan. 21, 2021), available at: <https://montanafreepress.org/2021/01/21/same-day-voter-registration-debated/>.

⁹ *Bill To End Same-Day Voter Registration Nears Governor’s Desk*, Montana Public Radio (Mar. 23, 2021), available at: <https://www.mtpr.org/montana-news/2021-03-23/bill-to-end-same-day-voter-registration-nears-governors-desk>.

¹⁰ *Governor Gianforte Signs Election Security Bills*, Montana Official State Website (Apr. 19, 2021), available at: <https://news.mt.gov/Governors-Office/governor-gianforte-signs-election-security-bills>.



Litigation

Voters under H.B. 176 are now required to register to vote by noon the day before Election Day, rather than being allowed to register on Election Day. Nevertheless, this minimal change resulted in several lawsuits.¹¹ In a statement by Montana Secretary of State Christi Jacobsen:

*The most recent partisan lawsuit filed against the Secretary of State is completely baseless, especially considering when the Constitution was signed, the voter registration deadline was 30 days before an election; but the smoke and mirrors attempt to portray House Bill 176 as some kind of constitutional crime – H.B. 176 is squarely constitutional.*¹²

During the trial, witnesses in support of repealing EDR provided testimony that doing so would reduce long lines at the polls and stop delays in reporting election results. Witnesses also explained how registering individuals to vote on Election Day takes time away from all of the other work, both election-related and non-election-related, especially for election officials in rural communities who wear several hats.¹³

Nevertheless, H.B. 176 was struck down for unconstitutionally burdening the right to vote by limiting a voting option for Native Americans and by making it more difficult for some Montanans to vote.¹⁴ This decision has already been appealed.

Elements and Potential Changes to Montana's New EDR

Montana's standard voter registration deadline remains 30 days before the election, but under H.B. 176, Montana provides for late voter registration up until noon before the day of the election and includes an exception for military and overseas voters to register on Election Day. An expansion of this military and overseas exception to include disabled or elderly voters is one potential way that H.B. 176 could maintain the same level of accommodation that EDR provides, while still benefitting from the repeal of EDR.

Further, Montana still has SDR during early voting, meaning voters are still able to register to vote and cast their ballot at the same time during early voting. However, to vote on Election Day, H.B. 176 requires voters to register one day in advance. Yet, this simple change provides extensive relief for overwhelmed election officials who are now able to focus on administering the election on Election Day without the added administrative burdens that come with EDR.

¹¹ *Montana Democratic Party, et al. v. Jacobsen*, Consolidated, Cause No.: DV 21-0451.

¹² *Fourth lawsuit filed over Election Day registration rollback*, Montana Free Press (Sept. 22, 2021), available at: <https://montanafreepress.org/2021/09/22/montana-unions-challenge-election-law/>.

¹³ *Montana Democratic Party, et al. v. Jacobsen*, Consolidated, Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Preliminary Injunctions at 11 (Apr. 4, 2022).

¹⁴ *Id.* at 36.



History of Election Day Registration in the United States

In the early 19th century, states began requiring voter registration to ensure that only eligible voters could participate in the electoral process. When it was first challenged, voter registration was upheld as a reasonable regulation on the franchise.¹⁵

Historically, states have required voters to register to vote or update their voter information several days, if not weeks, before Election Day. Currently, over 30 states have a voter registration deadline of at least 15 days before an election depending on the method of registration.¹⁶ Until the mid-1970s, this number was even greater; Maine, Minnesota, and Wisconsin became the first states to adopt EDR, in 1973, 1974, and 1975 respectively.¹⁷ Over the next several decades, 15 other states implemented EDR in hopes of increasing voter turnout by allowing voters to both register and vote on Election Day, including Montana in 2005.¹⁸

Advantages and Disadvantages of Election Day Registration

Whether EDR is a benefit or detriment to states and their elections and to voters is a subject of considerable debate, and the question of whether EDR should be expanded or restricted hinges primarily on what works best for individual states and their unique needs. One thing is clear, EDR must not serve as a one-size-fits-all approach to election administration.¹⁹

Potential Advantages

Proponents of EDR argue that EDR increases voter turnout, benefits voters of a particular political party, and provides greater access to the polls for disadvantaged voters.

1. “Increased” Voter Turnout

Several arguments maintain that EDR increases voter turnout.²⁰ However, this effect is largely unconfirmed. While there exists some credible evidence to support the argument that EDR

¹⁵ See *Capen v. Foster*, 29 Mass. 485 (1832), available at: <https://cite.case.law/mass/29/485/>.

¹⁶ *Voter Registration Deadlines*, NCSL (Jan. 4, 2022), available at: <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx>.

¹⁷ *Same Day Voter Registration*, NCSL (Sep. 20, 2021), available at: <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

¹⁸ Virginia will join this group in 2022, and Alaska, not included in the group above, only allows EDR only for voters to vote for president and vice president. *See id.*

¹⁹ *See House Resolution 1*, Lawyers Democracy Fund (Feb. 2019), available at: <https://lawyersdemocracyfund.org/other-issues/hr-1/>.

²⁰ According to Evan Solomon of The Franchise Project, “The first [benefit of same-day registration] is an undisputed increase in voter turnout for states that offer it versus states that don’t. The former averaged a voter turnout over 10 percentage points higher than the latter in the 2012 election. In the same year, four of the top five



increases voter turnout, the National Conference of State Legislatures (NCSL) makes clear that many of the states that have implemented EDR are states that already had historically higher voter participation, making the effect of EDR difficult to calculate.²¹ Furthermore, the increase in voter turnout is likely due to voters casting their ballots during the early voting period under SDR systems, not just EDR. NCSL reports that multiple studies believe SDR, including EDR, provides a 3-7% percent increase in voter turnout.²²

Thus, while there is some evidence demonstrating that EDR increases voter turnout, the degree of its impact is limited, especially when separated from SDR. Furthermore, while proponents argue EDR is the catalyst for this increase, they fail to consider increased voter turnout due to other reasons, such as voter education, support behind a particular candidate, single-issue voting, etc.

2. Advantages for Voters of a Particular Party or Population

While some may argue a particular party benefits from EDR more than the other, no correlation between EDR and partisan outcomes has been identified.²³ The same is true concerning whether EDR benefits certain populations.²⁴ As noted by Craig Brians and Bernard Grofman research in “Election Day Registration’s Effect on U.S. Voter Turnout”:

Even the most dramatic easing of voter registration costs has a modest effect on the total number of voters and little impact on the long-standing skew toward greater representation of those having higher status in the voting electorate of the United States...With the middle class accruing the greatest turnout benefits from EDR, coupled with this group’s large size, there is little reason to expect a disproportional electoral gain for either political party or any particular policy agenda.²⁵

Therefore, it is largely speculative whether EDR benefits one political party more than the other. The argument that repealing EDR is a partisan strategy lacks legitimacy for that very reason.

3. Accommodating Voter Needs

EDR may provide a more accommodating voting process for the elderly, disabled, and students, among others. By allowing for individuals to register and cast their ballot at the same time on

states for voter turnout were those that offered same-day registration.” See *Arguments for and against same-day voter registration*, Ballotpedia (June 30, 2019), available at:

https://ballotpedia.org/Arguments_for_and_against_same-day_voter_registration#Support_arguments_in_detail.

²¹ *Same Day Registration*, NCSL (Sep. 20, 2021).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Election Day Registration’s Effect on U.S. Voter Turnout*, Brians and Grofman (March, 2001), available at: <http://www.socsci.uci.edu/~bgrofman/18%20Brians-Grofman-Election%20day%20registration%27s%20effect.pdf>.



Election Day, these individuals, who often have a harder time appearing in person to register and vote, may do both at once rather than making two trips.

While this is a compelling argument in support of EDR, it has fatal flaws. This argument firstly fails to consider the numerous ways states already accommodate disabled, elderly, and other disadvantaged voters—*e.g.* excuse and no-excuse absentee voting, online voter registration, etc.—that impose far milder administrative burdens on election officials than EDR does. Most importantly, however, this argument neglects the reality that these voters are still more than able to register and vote on the same day during early voting in states like Montana that offer SDR.

Potential Disadvantages

While there may exist some positive aspects of EDR, it is vital to recognize how EDR can threaten the integrity and security of elections and place a significant administrative burden on election officials.

1. Undermining Election Integrity

Opponents of EDR argue that it undermines the integrity and security of elections by making electoral fraud easier to commit. EDR inevitably fails to provide election officials with adequate time to verify the accuracy of the provided voter registration information before the voter casts his or her ballot.²⁶ Advanced deadlines, on the other hand, allow election officials to thoroughly vet the potential voter's information and send a non-forwardable mailing to verify the voter's residence before finalizing and approving the registration application. Because this process is not possible with EDR due to the short timeline, the prospective voter is often required to present proof of residency at the time of registration or soon after registering on Election Day. This, of course, creates additional problems for election security.

Because polling locations are rarely connected electronically to update voter registration information in real-time, there exists the potential for voters to register and vote at several different polling locations on Election Day. While this fraud would be discovered after the election, the multiple ballots cast would nevertheless be counted since election officials are unable to separate ballots once they are cast.

Ultimately, EDR presents important election integrity concerns that are not easily addressed to prevent bad actors from taking advantage of the system. To ignore the existence of these election vulnerabilities is to undermine the legitimacy and integrity of the vote, and states need to weigh these risks and implement intentional reforms to avoid them as Montana did.

²⁶ *The Facts About H.R.1 – the For the People Act of 2019*, The Heritage Foundation (Feb. 1, 2019), available at: <https://www.heritage.org/election-integrity/report/the-facts-about-hr-1-the-the-people-act-2019>.



2. Administrative Burden

Opponents of EDR also point to the intense administrative burden it places on election officials during the busiest time of their year. Rather than being able to focus on running an election, which includes efficiently operating the voting location, directing staff, certifying votes, troubleshooting potential issues, and relaying timely results, EDR requires election officials to also worry about registering voters. For obvious reasons, this puts an unnecessary strain on election officials and creates opportunities for bad actors to take advantage.

Additionally, election officials in EDR states are largely unable to anticipate the number of ballots, equipment, and staff that will be needed on Election Day since any number of voters could appear on Election Day to register and vote.²⁷ This can lead to significant Election Day issues—such as long lines, running out of ballots, etc.—which jeopardizes the franchise for all voters.

Lastly, it has become a more recent challenge for election officials to issue timely election results once the polls close. EDR, by requiring election officials to process Election Day registrations instead of allowing them to focus on providing timely results, only compounds this problem and sows distrust in elections as results are delayed.

Although EDR may improve voter turnout to a small degree and provide additional means by which to accommodate elderly and disabled voters, EDR exposes the electoral process to unnecessary vulnerabilities and burdens, making it easier to commit voter fraud while undermining efficient and secure elections. These risks are often unnecessary, especially considering the other election reforms can expand access without undermining efficient and secure elections, such as secure online voter registration with proper safeguards. States must carefully consider these pros and cons before implementing, or in the case of Montana, repealing, EDR.

Montana as a Model for Other States

As other states look to repeal burdensome election procedures that cause more harm than good, Montana's repeal of EDR can serve as a helpful blueprint.

Minor Changes that Make a Meaningful Difference

States should look for minor changes that make meaningful differences to the ease and security of election administration. Montana made minimal changes that, while small, provided extensive relief for election officials and further safeguard the election process without disenfranchising voters. In passing H.B. 176, Montana moved the registration deadline up only one day. But this one day makes a world of difference for election officials in Montana who can now focus on properly staffing and equipping polling locations, running efficient and secure elections, and delivering timely results.

²⁷ *Id.*



Maintain Voter Access

States should look to make these meaningful changes without dramatically affecting voter access to the polls. True, H.B. 176 means that voters must now abide by a slightly different registration deadline, but this does not mean that voter access has been limited. Montana is still among the minority of states that even allow voters to register and vote on the same day during early voting.²⁸ Even without EDR, voters in SDR states like Montana do not have to take multiple trips to the polls to register and vote since they can do both on the same day during early voting. Therefore, disabled, elderly, and disadvantaged voters still have extensive access to the polls through Montana's early voting system. Montana's changes minimally affect voter access while making the voting process far less cumbersome on Election Day.

Tangible Benefits

Election changes that have tangible benefits are far more likely to withstand challenges; therefore, states should make changes that have clear advantages over the prior procedure that was in place. H.B. 176 means that election officials can now properly focus on administering an election rather than being overwhelmed by EDR. Furthermore, H.B. 176 means that polling locations can be adequately staffed and equipped. This will result in long lines being reduced and officials being able to efficiently conduct an election. Not only that, but election officials will also be able to run more secure and accurate elections because their focus will be solely on administering a free and fair election.

Conclusion

While EDR has certain benefits, these benefits come at a disproportionate cost. With severe administrative burdens and risks to election security, EDR is an election procedure that generates more issues than solutions. Montana understood this and repealed EDR to ease the severe burdens it had placed on election officials and election integrity. Rather than being a partisan tool, H.B. 176 provides a road map for how states can go about amending or repealing unsuccessful and burdensome election reforms.

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²⁸ Montana and North Carolina remain the only states that allow same-day registration only during the early voting period. *See Same Day Registration*, NCSL (Sep. 20, 2021).