

JOHN R. LEWIS VOTING RIGHTS ACT OF NEW YORK (NYVRA)

An Overview of § 17-206(7): Notification
Requirement and Safe Harbor for Judicial Actions
and § 17-206(10): Preclearance



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A QUICK INTRODUCTION

The New York State John R. Lewis Voting Rights Act (NYVRA) was signed into law in June 2022

The NYVRA creates new “causes of action” designed to protect minority voting rights

§ 17-206(7) sets out prohibited conduct, remedies for violations, and who has standing to sue

PROHIBITIONS ON VOTER DISENFRANCHISEMENT AND DILUTION

- A violation of § 17-206(1), Prohibitions on Voter Disenfranchisement, shall be established upon a showing that:
- Based on the totality of the circumstances, members of a protected class have less opportunity than the rest of the electorate:
- To elect candidates of their choice **OR** to influence election outcomes

PROHIBITIONS ON VOTER DISENFRANCHISEMENT AND DILUTION

- A violation of § 17-206(2), Prohibitions on Voter Dilution, shall be established upon a showing that a locality used an at-large method of election **AND** either:
 - A. Voting patterns of protected class members within the locality are racially polarized; **OR**
 - B. Under totality of the circumstances, the ability of protected class members to elect candidates of their choice or to influence election outcomes is impaired; **OR**

PROHIBITIONS ON VOTER DISENFRANCHISEMENT AND DILUTION

Used a district-based or alternative method of election and that candidates or electoral choices preferred by protected class members would usually be defeated, **AND** either:

- A. Voting patterns of protected class members within the locality are racially polarized; **OR**
- B. Under totality of the circumstances, the ability of protected class members to elect candidates of their choice or to influence election outcomes is impaired

According to 17-206(3), under the totality of the circumstances, the following factors may be considered:

(a) History of discrimination in the locality, geographic region, or state;

(b) How members of a protected class have been elected to office in the locality;

CAUSES FOR ACTION

(c) Use of any voting law or procedure that may enhance the dilutive effects of the current elective scheme;

(d) Denial of access to the ballot for voters or candidates of a protected class;

(e) How protected groups contribute to political campaigns at lower rates;

(f) How members of a protected class vote at lower rates;

CAUSES FOR ACTION

(g) How protected class members are disadvantaged in areas such as criminal justice, education, employment, health, land use, and environmental protection;

(h) How protected class members are disadvantaged in other areas which may hinder their ability to participate in the political process;

CAUSES FOR ACTION

(i) Use of overt or subtle racial appeals in political campaigns;

(j) A significant lack of response by political officials to the needs of a protected class; **AND**

(k) Whether the locality has a compelling justification for the adoption

CAUSES FOR ACTION

STANDING AND REMEDIES

- According to § 17-206(4), Standing, any of the following may file an action against a locality:
 1. Aggrieved person;
 2. Organization whose membership includes aggrieved persons or protected class members;
 3. Organization whose mission is to ensure voting access and such mission would be hindered by a violation; **OR**
 4. An attorney
- This action must be filed in the supreme court of the county where the locality is located

STANDING AND REMEDIES

- According to § 17-206(5), Remedies, upon a finding of a violation, the court shall:
- Implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process

STANDING AND REMEDIES

- The remedies may include but are not limited to:
 1. A district-based method of election;
 2. An alternative method of election;
 3. New or revised districting or redistricting plans
- The court shall consider proposed remedies by any parties and non-interested parties, but shall not provide deference or priority to a proposed remedy offered by the locality
- **THE ATTORNEY GENERAL DOES NOT PLAN TO REVIEW REDISTRICTING MAPS AT THIS TIME**

STANDING AND REMEDIES

- The court shall have the power to require a locality to implement remedies that are inconsistent with any other provision of law
- In instances where such inconsistent provision of law would preclude the court from ordering an otherwise appropriate remedy in such matter

- According to § 17-206(6), a governing body of a locality that **HAS** authority under the NYVRA and all applicable local and state laws to:
- Implement a new method of election that would replace the locality's at-large method of election with a district-based or alternative method of election, **OR**

PROCEDURES FOR IMPLEMENTING NEW OR REVISED REDISTRICTING PLANS

- Has the authority to enact and implement a new districting or redistricting plan,
- **SHALL** undertake each of the steps in § 17-206, if proposed after receiving a NYVRA notification letter, **OR**
- After the filing of a claim pursuant to this title or the federal NYVRA

PROCEDURES FOR IMPLEMENTING NEW OR REVISED REDISTRICTING PLANS

CHALLENGING LOCAL GOVERNMENT LEGISLATIVE BODIES

- Before commencing a judicial action against a “political subdivision,” or locality, the prospective plaintiff must send a written notice by certified U.S. postal mail
- The written notice must be sent to the clerk of the locality (e.g., the county clerk)
- If the locality does not have a clerk, a written notice must be sent to the governing body for that locality (county, city, town, etc.)

CHALLENGING LOCAL GOVERNMENT LEGISLATIVE BODIES

- The written notice must explain why the political subdivision may be in violation of a current New York State election law
- Once received, the written notice is called a “NYVRA notification letter.” This letter commences the violation process
- A copy of the notification letter must also be sent to the Commissioner of Education for localities governed by education law

CHALLENGING LOCAL GOVERNMENT LEGISLATIVE BODIES

- Prospective plaintiffs cannot commence a judicial action against a locality for **50 days** after sending a NYVRA notification letter to the locality
- This delay offers time for the locality to address and remedy the claim before a judicial action

- If a political subdivision is aware of a violation prior to a notification letter, or if the locality receives a notification letter, the locality may pass a “**NYVRA resolution**”
- If the NYVRA resolution occurs because of a notification letter, the resolution must be passed **within 50 days** of when the notification letter was mailed

LOCAL GOVERNMENT ACTION

The resolution must affirm:

1. The locality's intention to enact and implement a remedy regarding the potential violation;
2. Specific measures that will be taken to facilitate the enactment and implementation of this remedy; **AND**
3. A timeline or schedule for the remedy's enactment and implementation

LOCAL GOVERNMENT
ACTION

- When a NYVRA resolution is passed, the locality will have **90 days** from its passage to enact and implement the remedies
- During **the 90 days**, the prospective plaintiff cannot commence a judicial action against a locality for the violation being addressed by the resolution
- For actions against a school district, the Commissioner of Education may use its authority under § 305 of education law to order the enactment of a resolution

LOCAL GOVERNMENT ACTION

LOCAL APPROVAL AND ACTION BY ATTORNEY GENERAL

- Several measures are required if the locality's governing body does not have authority under § 17-206 or applicable state or local laws to enact a remedy included in a NYVRA resolution
- Measures are the same for localities who have the authority but fail to implement a remedy within 90 days of a resolution's passage
- The same measures apply to covered entities, as defined in § 17-210

LOCAL APPROVAL AND ACTION BY ATTORNEY GENERAL

- As an initial action, the governing body may approve a proposed remedy that complies with the current election law
- This remedy is then submitted to the N.Y. Attorney General's Civil Rights Bureau. This submission is called a “**NYVRA proposal**”

LOCAL APPROVAL AND ACTION BY ATTORNEY GENERAL

- Before a NYVRA proposal is passed, the locality must hold at least one public hearing
- The public must be invited to provide feedback about the proposal
- Before the public hearing(s), the locality should conduct public outreach to encourage attendance and participation

LOCAL APPROVAL AND ACTION BY ATTORNEY GENERAL

- Within 45 days after the NYVRA proposal is submitted, the Civil Rights Bureau must grant or deny approval
- The Civil Rights Bureau may only grant approval to a NYVRA proposal if the bureau concludes affirmatively on 5 factors

LOCAL APPROVAL AND ACTION BY ATTORNEY GENERAL

These 5 factors include:

1. The locality may be in violation of the law;
2. The proposal would remedy any potential violation;
3. The proposal is unlikely to violate federal laws or the U.S. Constitution;
4. The proposal would not harm the abilities of protected class members to participate in the political process; **AND**
5. The implementation of the proposal is viable.

- If the Civil Rights Bureau grants approval to the proposal, it must immediately be enacted and implemented by the local government
- This must be completed regardless of any provision of state or local law
- If the Civil Rights Bureau denies approval, the NYVRA proposal cannot be enacted or implemented

LOCAL GOVERNMENT ACTION

- The Civil Rights Bureau must provide an explanation for the denial of proposals
- Using its discretion, the bureau may recommend alternative remedies that would be granted approval
- If the bureau does not respond, the NYVRA proposal cannot be enacted or implemented

LOCAL GOVERNMENT ACTION

- A locality that has approved a resolution may enter into an agreement with a prospective plaintiff
- If an agreement is reached, the prospective plaintiff cannot commence an action against the locality for an additional 90 days

LOCAL GOVERNMENT ACTION

An agreement must include a requirement that the locality must:

1. Enact or implement a remedy that complies with the law; **OR**
2. Pass a NYVRA proposal and submit it to the Civil Rights Bureau

LOCAL GOVERNMENT ACTION

EXCEPTION TO FINAL ENACTMENT PROVISION

- If the locality is a “covered entity” under § 17-210(3) and receives approval from the Civil Rights Bureau, the locality is not required to obtain preclearance

Prospective plaintiffs may request reimbursement for any work completed to support the notification letter's claim if:

1. The process is correctly commenced by the prospective plaintiff, **AND**
2. A locality implements a remedy **OR** the Civil Rights Bureau approves the locality's NYVRA proposal

PROCESSES FOR REIMBURSEMENT

- The prospective plaintiff must request reimbursement within 30 days of the enactment or implementation of the remedy
- Or within 30 days of the proposal's approval by the Civil Rights Bureau

PROCESSES FOR REIMBURSEMENT

- The prospective plaintiff must make this request in writing and demonstrate the cost with financial documentation
- Locality can request additional documentation if the provided materials do not substantiate the total claimed costs
- A locality must reimburse a prospective plaintiff for the reasonable costs claimed after the costs are substantiated

PROCESSES FOR REIMBURSEMENT

- A locality may alternatively reimburse a prospective plaintiff in any other amount that is agreed upon between the parties
- Except in actions brought by the N.Y. A.G., the cumulative amount of reimbursement to prospective plaintiff(s) cannot exceed \$45,000
- This number is reviewed and adjusted annually based on the Consumer Price Index for All Urban Consumers (U.S. Dept. of Labor)

PROCESSES FOR REIMBURSEMENT

- If a prospective plaintiff and a locality cannot reach an agreement, either party may file for a declaratory judgment action
- In this circumstance, the parties will obtain a clarification of rights in the Supreme Court of the county where the violation took place

PROCESSES FOR REIMBURSEMENT

DIFFERENT PROTOCOL WHEN CLOSE TO ELECTIONS

- If a locality is scheduled to conduct any election within 120 days, **OR**
- If the first day for circulating designation petitions has started for a locality's next regular election to select governing board members (or is scheduled to begin within 30 days):
- A plaintiff alleging any violation under the NYVRA may commence a judicial action against a locality under § 17-206(7)

DIFFERENT PROTOCOL WHEN CLOSE TO ELECTIONS

- The relief sought by a plaintiff must include preliminary relief for that upcoming election
- Plaintiff must also submit a NYVRA notification letter to the locality prior to or concurrent with commencing a judicial action

DIFFERENT PROTOCOL WHEN CLOSE TO ELECTIONS

- When a judicial action commenced by a plaintiff is withdrawn or dismissed for mootness because the locality implemented a remedy
- Or because the Civil Rights Bureau granted approval of a proposal pursuant to the notification letter
- A plaintiff can only demand reimbursement

DIFFERENT PROTOCOL WHEN CLOSE TO ELECTIONS

- Members of different protected classes may file a joint action under this title
- Must demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate
- If demonstrated, coalition claims are permitted

PRECLEARANCE: A BRIEF INTRODUCTION

Preclearance is a method used by states and the federal VRA to prevent discrimination *before* it happens

Preclearance pursuant to the NYVRA begins on September 22, 2024

§ 17-210 sets forth the process of how preclearance may be sought and obtained

WHAT IS PRECLEARANCE?

- Preclearance requires local governments with a recent history of suppressing voting rights or other kinds of discrimination to:
 - Get approval from the New York Attorney General or a designated court before changing voting rules or procedures
 - Localities that require approval are known as “covered entities” and the requested changes are “covered policies”
- Voting changes can only be precleared if the local government or entity shows that the change(s) will not harm voters of color

A covered entity shall include:

- a. Any political subdivision which, within the past 25 years, has been subject to a court order or “government enforcement action” based upon:
 - Any violation of this title;
 - The Voting Rights Act of 1965;
 - The 15th Amendment; **OR**
 - A voting-related violation of the 14th Amendment;

WHAT IS A
COVERED ENTITY?

A covered entity shall include:

- b. Any political subdivision which, within the past 25 years, has become subject to at least 3 court orders or “government enforcement actions” because of:
- A violation of any state or federal civil rights law; **OR**
 - The 14th Amendment concerning discrimination against members of a protected class;

WHAT IS A
COVERED ENTITY?

A covered entity shall include:

- c. Any county in which the arrest rate of a protected class exceeds the proportion that the protected class constitutes of the county's citizen voting age population by at least 20% at any point in the last 10 years
 - This data must be provided by the N.Y. Division of Criminal Justice Services

This subsection only applies **IF** ...

WHAT IS A
COVERED ENTITY?

This subsection only applies **IF** ...

- Members of a protected class consist of more than 10,000 voting age-citizens **OR** more than 10% of the county's citizen voting-age population

WHAT IS A
COVERED ENTITY?

Lastly, a covered entity shall include:

- d. Any locality where the dissimilarity index, based on data provided by the Census, was more than 50 for any protected class within the last 10 years **AND**:
- The protected class consisted of more than 25,000 citizens of voting age; **OR**
 - Whose members comprise at least 10% of the citizen voting-age population

WHAT IS A
COVERED ENTITY?

- If a “covered entity” is a locality where a board of elections (BOE) has been established, then the BOE is also considered as a covered entity
- If any locality with an established BOE has a covered entity fully within its borders, then the locality and BOE are regarded as a covered entity too

WHAT IS A COVERED ENTITY?

WHAT IS A COVERED POLICY?

- Preclearance applies to any “covered policy” that is enacted or implemented by a covered entity
- A covered policy includes any new or modified voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation or policy concerning any of these topics:
 - a. Method of election;
 - b. Form of government;
 - c. Annexation of a political subdivision;

WHAT IS A COVERED POLICY?

Additionally, a covered policy includes:

- d. Incorporation of a political subdivision;
- e. Consolidation or division of political subdivisions;
- f. Removal of voters from enrollment lists or other “list maintenance activities”;
- g. Hours, location, or number of any early voting or election day poll sites; **AND**

WHAT IS A COVERED POLICY?

- h. Dates of elections and the election calendar, except regarding special elections;
- i. Registration of voters;
- j. Assignment of election districts to early voting or election day poll sites;
- k. Assistance offered to members of a language-minority group; **AND**

WHAT IS A COVERED POLICY?

Lastly, a covered policy may include:

- I. Any additional topics designated by the Civil Rights Bureau (CRB) pursuant to a rule promulgated under the state administrative procedure act
 - But only upon a determination that the law or other policy may have the effect of denying or abridging the right to vote on account of race, color, or language-minority group

A covered entity may obtain preclearance for a covered policy from the Civil Rights Bureau pursuant to the following process:

- a. The covered entity shall submit the covered policy in writing to the CRB
 - If the covered entity is a county or city BOE, it must provide a copy of the covered policy to the state BOE at the same time

PRECLEARANCE BY THE ATTORNEY GENERAL

- b. The CRB shall publish the submission on its website as soon as practicable, but no later than 10 days after the covered policy is submitted

- c. After a submission is published, there shall be an opportunity for the public to comment on the submission to the CRB
 - The CRB shall provide an opportunity for the public to sign up for alerts or notifications regarding submission(s)

PRECLEARANCE
BY THE
ATTORNEY GENERAL

- d. After a covered policy has been submitted, the CRB will review the policy and any public comment about the policy

The CRB will then provide a report and determination as to whether preclearance should be granted or denied to the policy

PRECLEARANCE BY THE ATTORNEY GENERAL

- The CRB shall not make this determination until after the period for public comment has closed
- All CRB reports and determinations regarding preclearance shall be posted publicly on its website

PRECLEARANCE BY THE ATTORNEY GENERAL

- The CRB may request additional information from a covered entity at any time during its review to aid in developing its report and recommendation
- Failure to comply with reasonable requests for more information may be grounds for the denial of preclearance

PRECLEARANCE BY THE ATTORNEY GENERAL

- e. In any preclearance determination, the CRB must identify in writing whether it is approving or rejecting the covered policy
- However, the CRB may designate preclearance as “preliminary” with its discretion, in which case the CRB may deny preclearance within 60 days of submission

PRECLEARANCE BY THE ATTORNEY GENERAL

The CRB may only grant preclearance if it determines the covered policy will **NOT**:

- Diminish the ability of protected class members to participate in the political process; **OR**
- Diminish the ability to elect their preferred candidates to office

If the CRB grants preclearance, the entity may enact or implement the policy immediately

PRECLEARANCE BY THE ATTORNEY GENERAL

- If the CRB denies preclearance, the CRB must “interpose” objections explaining its basis
 - The covered policy shall not be enacted or implemented
- If the CRB fails to respond within the required timeframe, the policy is deemed as precleared
 - The entity may enact or implement the submitted policy

PRECLEARANCE BY THE ATTORNEY GENERAL

REQUIRED TIME PERIODS AND APPEALS

For public comment, reviews, and determinations made by the CRB regarding preclearance submission, the time periods shall be as follows:

- The period for public comment shall be 5 business days for any covered policy concerning the designation or selection of poll sites (or the assignment of election districts to poll sites) for election day and early voting.

REQUIRED TIME PERIODS AND APPEALS

- The CRB shall review the policy, including any public comment, and decide to grant or deny the covered policy within 15 days following its submission.
- Upon a showing of good cause, the CRB may receive an extension of up to 20 days to decide.

REQUIRED TIME PERIODS AND APPEALS

- For any other covered policy, the period for public comment shall be 10 business days
- The CRB shall review the covered policy, including any public comment, within 55 days of its submission
- The CRB may invoke up to 2 extensions of 90 days each

REQUIRED TIME PERIODS AND APPEALS

The CRB is authorized to promulgate rules for an expedited, emergency preclearance process in the event:

- A covered policy occurring during or immediately before an election because of any “disaster” described in § 3-108; **OR**
- Other exigent circumstances

Any preclearance granted in this scenario shall be considered “preliminary” and preclearance may be denied within 60 days following receipt of the policy

REQUIRED TIME PERIODS AND APPEALS

- Appeal of any denial by the CRB may be heard in the supreme court for New York or Albany County in a proceeding commenced against the CRB.
- Actions brought pursuant to this section shall be subject to expedited pretrial and trial proceedings **AND** receive an automatic calendar preference on appeal

A covered entity may obtain preclearance for a covered policy from a court pursuant to the following process:

- a. The covered entity shall submit the covered policy in writing to the designated court in the judicial department within which the entity is located:
 - i. 1st Judicial Dept.: New York Cty.
 - ii. 2nd Judicial Dept.: Westchester Cty.
 - iii. 3rd Judicial Dept.: Albany Cty.
 - iv. 4th Judicial Dept.: Erie Cty.

PRECLEARANCE BY THE COURT

- If the covered entity is a county or city BOE, it must provide a copy of the covered policy to the state BOE
- The covered entity shall also provide a copy of the policy to the CRB at the same time
 - Failure to provide a copy to the CRB will result in an automatic denial of preclearance

PRECLEARANCE BY THE COURT

- The court shall grant or deny preclearance within 60 days following submission of the covered policy
- The court shall grant preclearance only if it determines that covered policy will **NOT**:
 - Diminish the ability of protected class members to participate in the political process; **OR**
 - Diminish the ability to elect their preferred candidates to office

PRECLEARANCE BY THE COURT

- If the court grants preclearance, the covered entity may enact or implement the policy immediately
- If the court denies preclearance or fails to respond within 60 days, the covered policy shall not be enacted or implemented

PRECLEARANCE BY THE COURT

FAILURE TO
SEEK OR OBTAIN
PRECLEARANCE

If any covered entity enacts or implements a covered policy without seeking preclearance **OR** enacts or implements a covered policy despite denial of preclearance...

- Either the CRB or any other party with standing shall bring an action to enjoin the covered policy **AND** to seek sanctions against the locality and local officials in violation

**NEW YORK
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For more information, please contact:

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