



Law and Justice Interim Committee

68th Montana Legislature

SENATE MEMBERS

JOHN ESP
CHRIS FRIEDEL
RYAN LYNCH
KEITH REGIER

HOUSE MEMBERS

JODEE ETCHART
DONAVON HAWK
CALEB HINKLE
AMY REGIER

COMMITTEE STAFF

SARA HESS, Lead Staff
JULIANNE BURKHARDT, Staff Attorney
BETHANY MCDOWELL JAMES, Secretary

September 8, 2023

TO: Law and Justice Interim Committee
FROM: Julianne Burkhardt, Staff Attorney
RE: Current Process for Judicial Appointments

Introduction

Senate Bill 140 was passed during the 2021 legislative session. SB 140 provided a direct appointment process for the governor to appoint district court judges and supreme court justices to fill judicial vacancies. The statutes in Title 3, chapter 1, part 10, that provided for a judicial nomination commission that reviewed and provided a slate of candidates to the governor, were also repealed.

Relevant Statutes and Procedure

The current direct appointment process is set forth in Title 3, chapter 1, part 10. Section 3-1-901, MCA initiates the appointment process:

3-1-901. Judicial vacancy — notice. (1) (a) Upon receiving notice from the chief justice of the supreme court, the governor shall appoint a candidate, as provided in this part, to fill any vacancy on the supreme court or the district court.

(b) The chief justice of the supreme court shall appoint a candidate to fill any term or vacancy for the chief water judge or associate water judge pursuant to 3-7-221.

(2) Within 10 days of the date of receipt by the governor of the notice from the chief justice of the supreme court that a vacancy has occurred or the effective date of a judicial resignation has been announced, the governor shall notify the public, including media outlets with general statewide circulation and other appropriate sources, that a vacancy has been announced, including the deadline within which applications must be received.

History: En. Sec. 1, Ch. 62, L. 2021.

Section 3-1-902, MCA, allows the governor to authorize investigations of potential candidates. Qualified lawyers must be U.S. citizens, reside in Montana for at least 2 years, and be admitted to the practice of law in Montana for at least 2 years prior to appointment. Art. VII, sec. 9, Mont. Const.

3-1-902. Investigation — qualifications for appointment. (1) The governor may authorize investigations concerning the qualifications of eligible persons.

(2) A lawyer in good standing who has the qualifications set forth by law for holding judicial office may be a candidate and may apply to the governor for consideration, or application may be made by any person on the lawyer's behalf.

History: En. Sec. 2, Ch. 62, L. 2021.

Section 3-1-903, MCA provides the application process:

3-1-903. Applications. An eligible person may apply for the vacant judicial position by completing and submitting to the governor an original signed paper application and an electronic copy of the original application by the deadline date. The deadline date must be within 40 days of the governor's receipt of the notice of vacancy provided by the chief justice.

History: En. Sec. 3, Ch. 62, L. 2021.

Section 3-1-904, MCA, requires the governor to allow for a public comment period of at least 30 days and that the maximum time period between notification of vacancy and appointment may not exceed 100 days.

3-1-904. Public comment. (1) The governor shall establish a reasonable period for reviewing applications and interviewing applicants that provides at least 30 days for public comment concerning applicants.

(2) Each applicant who has the qualifications set forth by law for holding judicial office and who receives a letter of support from at least three adult Montana residents by the close of the public comment period provided for in subsection (1) must be considered a nominee for the position.

(3) The total time from receipt of notice of a vacancy until appointment may not exceed 100 days.

(4) The application, public comment, and any related documents are open to the public except when the demands of individual privacy clearly exceed the merits of public disclosure.

History: En. Sec. 4, Ch. 62, L. 2021.

Section 3-1-905, MCA, requires the governor to make an appointment within 30 days of the close of public comment. If the governor does not make a timely appointment, the chief justice is required to make an appointment within 30 days of the expiration of the governor's time frame for appointment.

3-1-905. Appointments. (1) The governor, or the chief justice of the supreme court for the office described in 3-7-221, shall make an appointment within 30 days of the close of the public comment period from the list of applicants.

(2) For purposes of Article VII, section 8, of the Montana constitution, the governor must be construed to receive the names of the nominees at the close of the public comment period provided for in 3-1-904.

(3) If the governor fails to appoint within 30 days of the close of the public comment period provided for in subsection (1), the chief justice shall make the appointment from the same list of applicants within 30 days of the governor's failure to appoint.

History: En. Sec. 5, Ch. 62, L. 2021.

Section 3-1-906, MCA, provides for the senate confirmation process whether the legislature is in session or not.

3-1-906. Senate confirmation — exception — nomination in interim — appointment contingent on vacancy. (1) (a) Except as provided in subsection (2):

(i) each appointment must be confirmed by the senate; and
(ii) an appointment made while the senate is not in session is effective until the end of the next special or regular legislative session.

(b) If the appointment is subject to senate confirmation under subsection (1)(a) and is not confirmed, the office is vacant and another selection of nominees and appointment must be made.

(2) The following appointments are not subject to senate confirmation, and there must be an election for the office at the general election immediately preceding the scheduled expiration of the term or following the appointment, as applicable:

(a) an appointment made while the senate is not in session if the term to which the appointee is appointed expires prior to the next legislative session, regardless of the time of the appointment in relation to the candidate filing deadlines for the office; and

(b) an appointment made while the senate is not in session if a general election will be held prior to the next legislative session and the appointment is made prior to the candidate filing deadline for primary elections under 13-10-201(7), in which case the position is subject to election at the next primary and general elections.

(3) A nomination is not effective unless a vacancy in office occurs.

History: En. Sec. 6, Ch. 62, L. 2021.

After confirmation, under 3-1-907, MCA, the appointee must run for election in the next general election. If they are elected, they serve for the remainder of the unexpired term.

3-1-907. Duration of appointment — election for remainder of term. (1) If an appointment subject to 3-1-905 is confirmed by the senate, the appointee shall serve until the appointee or another person elected at the first general election after confirmation is elected and qualified. The candidate elected at that election holds the office for the remainder of the unexpired term.

(2) If an incumbent judge or justice files for election to the office to which the judge or justice was elected or appointed and no other candidate files for election to that office, the name of the incumbent must nevertheless be placed on the general election ballot to allow voters of the district or state to approve or reject the incumbent. If an incumbent is rejected at an election for approval or rejection, the incumbent shall serve until the day before the first Monday of January following the election, at which time the office is vacant and another appointment must be made.

History: En. Sec. 7, Ch. 62, L. 2021.

Conclusion

Please let me know if I can provide any further information.