



November 14, 2013

Peter Lee
Executive Director
Covered California
560 J Street, Suite 290
Sacramento, CA 95814

Via email

Dear Mr. Lee:

We write to express our concern regarding Covered California's failure to take steps to meet its obligations under the National Voter Registration Act (NVRA), 42 United States Code section 1973gg et seq., and California Elections Code section 2400 et seq. The Secretary of State designated Covered California, providing notice of its NVRA obligations, nearly six months ago. Yet more than six weeks since the launch of open enrollment, Covered California is still not providing voter registration services to applicants nor does it appear to have any plan for doing so. With each passing week, thousands of applicants are deprived of this required opportunity to register to vote as guaranteed by federal and state law.

While we understand Covered California is still working to implement some core functions, it has been nationally lauded for the success of its roll-out and there is clearly no excuse of its dismissal of its NVRA obligations. Although it was the first state-run exchange to be designated, California is now one of only three state-run exchanges with NVRA obligations that have failed to offer any form of voter registration services to applicants.

When the Secretary of State designated the Health Benefit Exchange as a voter registration agency on May 15, 2013, her declaration stated that the designation was effective immediately. Thus, Covered California was required, as soon as it began offering services, to meet its full obligations to provide voter registration services to all applicants as outlined in Section 7 of the NVRA and California Elections Code section 2400 et seq. Yet, on October 24th, David Panush, Director of External Affairs for Covered California, informed the ACLU of California that implementing the NVRA would force Covered California to give up completion of another of its core services. He represented that voter registration would have to wait until all other priorities were completed.

We believe this is a false choice. First, courts have rejected arguments from voter registration agencies that separate and distinct client services are somehow mutually exclusive.¹ Second, although courts understand that NVRA implementation cannot be accomplished overnight,

¹ See *ACORN v. Miller*, 912 F.Supp. 989, 991 (E.D.Mich.1996). ("To allege that these two totally separate functions are somehow mutually exclusive is ridiculous and insulting to potential... registrants.")

Covered California was the first state-run exchange to be designated an NVRA agency and has had six months to implement voter registration as opposed to the 30 to 45 days courts have given agencies to comply.²

The ACLU and its partners relied upon assurances in good faith and offered to work with Covered California on various aspects of NVRA compliance, such as voter preference forms and enrollment counselor training. In September, the ACLU of California was informed by Covered California staff and counsel that, although full NVRA compliance would not be achieved by the October 1st launch, Covered California would be asking every online applicant if he or she would like to register to vote and offering a link to online voter registration. On October 24th, however, Mr. Panush dismissed the possibility of designating an NVRA coordinator to oversee implementation and compliance as required by Elections Code section 2406, subdivision (a)(2). More significantly, since the launch, Covered California informed the ACLU that it *has no timeline* for implementation.

It is estimated that at least one million consumers will apply for healthcare coverage during the open enrollment period. As of now, none of those consumers have or will be offered a meaningful opportunity to register to vote and receive voter registration assistance at the time they enroll for health care. The NVRA gives a private right of action to persons aggrieved by a violation and any of these consumers might elect to bring a lawsuit for Covered California's failure to provide mandated services.³ When an aggrieved party notifies the Secretary of State of a violation of the NVRA, the agency in question has 90 days to correct the violation or face a civil action. The prevailing party in an NVRA suit is entitled to reasonable attorney fees and costs, including litigation expenses.⁴

As we have consistently stated to Covered California staff and in our correspondence to the board, we hope to work cooperatively with Covered California to implement its NVRA obligations. To that end, we have provided the board, staff and the Secretary of State with a step-by-step outline of what Covered California must do to satisfy its responsibilities under the NVRA, as well as sample training materials for enrollment counselors and call center staff. However, to our knowledge, none of these materials have been utilized or incorporated into existing trainings.

We remain willing to assist you. Please inform us no later than November 21, 2013, of the name of your NVRA coordinator and the steps you are taking to achieve NVRA compliance. Though we hope to resolve the problem without litigation, any failure by Covered California to implement voter registration services in accordance with federal and state law by December 16, 2013, may result in legal action. Please do not hesitate to contact us with any questions.

² *Id.*; see also *Wilson v. United States of America*, No. C 95-20042 JW (N.D.Cal. May 4, 1995).

³ 42 U.S.C. §1973gg-9 (b).

⁴ 42 U.S.C. §1973gg-9 (c).

Sincerely,



Lori Shellenberger
Director, California Voting Rights Project
ACLU of California



Dale Ho
Director, Voting Rights Project
American Civil Liberties Union



Lisa Danetz
Senior Counsel
Demos



Sarah Brannon
Director, Public Agency Voter Registration Program
Project Vote

Cc:

The Honorable Edmund G. Brown, Jr., Governor of California

The Honorable Debra Bowen, California Secretary of State

California Health Benefit Exchange Board Members