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FIREARMS LAWS IN WISCONSIN

INTRODUCTION

Several recent federal and state court cases have addressed two fundamental issues that have long been controversial both in Wisconsin and around the nation: the possession of firearms and when and how they may be used. On the federal level, the U.S. Supreme Court ruled in 2008 that citizens have a constitutional right to own guns. At the state level, the Wisconsin Supreme Court and a lower court have, in several decisions, helped to define whether, and in what situations, citizens may carry and use concealed weapons within the context of the state constitution's "right to keep and bear arms" amendment. In addition, during the past several sessions the Wisconsin Legislature has considered proposals to authorize citizens to carry concealed firearms.

This brief summarizes the relevant court decisions and legislation. It discusses the constitutional provisions regarding firearms possession and use, laws relating to background checks and waiting periods for gun purchases, the concealed carry prohibition, and other laws relating to firearms in Wisconsin.

CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS

Both the Wisconsin and U.S. Constitutions address a basic right to keep and bear arms, and several recent significant court decisions have touched on aspects of this right.

Wisconsin Constitution. In November 1998, Wisconsin electors approved an amendment to the state constitution guaranteeing a right to keep and bear arms. The amendment, which was approved by a vote of 1,205,873 to 425,052, provides in Article I, Section 25: "The people have the right to keep and bear arms for

security, defense, hunting, recreation or any other lawful purpose." It was left to the legislature and courts to determine what limits may be placed upon this right. Since then, several court cases have served to clarify how the law is applied in practice.

U.S. Constitution. The meaning of the Second Amendment to the United States Constitution has long been subject to debate. It reads: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Some have contended that it liberally grants citizens the right to possess guns, while others have asserted that it should be construed more narrowly as merely protecting a state's right to organize an armed militia. Until 2008, court rulings had not been definitive either way, but had tended to favor the view that states had substantial authority to restrict private gun ownership.

D.C. gun ban unconstitutional. In June 2008, the U.S. Supreme Court struck down the District of Columbia's strict prohibition on the ownership of handguns, which also required that shotguns and rifles be kept unloaded or bound by a trigger lock. In *District of Columbia et al. v. Heller* (478 F. 3d 370), the Court held that the second amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. Left undefined were standards by which gun control laws around the nation will be evaluated in any future cases challenging gun restrictions.

CONCEALED WEAPONS PROHIBITED

In Wisconsin, only police officers are generally allowed to carry concealed firearms in public. The law, in effect since 1872, provides in Section 941.23: "Any person except a peace officer who goes armed with a concealed or dangerous weapon is guilty of a Class A misdemeanor." Wisconsin and Illinois are the only two states that have no process for issuing permits to carry concealed firearms and expressly prohibit concealed carry.

In a 1993 case (*State v. Keith*, 175 Wis. 2d 75), the Wisconsin Court of Appeals defined the three elements of a concealed weapons violation: 1) the dangerous weapon is on the defendant's person or within reach, 2) the defendant is aware of the weapon's presence, and 3) the weapon is hidden. While state law does not specifically prohibit openly carrying loaded or unloaded firearms in public, doing so may subject the person to the risk of being arrested and charged with disorderly conduct [s. 947.01] on the grounds that the display threatens public peace and safety "... under circumstances in which the conduct tends to cause or provoke a disturbance ...".

It is unclear what effect, if any, the 2008 U.S. Supreme Court decision in the *Heller* case may have on the issue in Wisconsin. In *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), the Supreme Court ruled that the second amendment applies only to the federal government, placing no restrictions on state actions. However, several recent cases in Wisconsin have addressed the limits of the concealed carry law.

Wisconsin courts limit concealed weapons ban. The Wisconsin Supreme Court, in three decisions, found that the right granted by Wisconsin's constitutional amendment is not absolute as it pertains to carrying concealed weapons. However, under certain circumstances, such as occupational situations, state interests in restricting concealed firearms may be overridden when a person's safety is at stake. A fourth case, from Milwaukee County Circuit Court, also dealt with this issue.

In *State of Wisconsin v. Philip Cole*, 264 Wis. 2d 520 (2003), police found two concealed handguns in the car in which Cole was riding. He appealed the conviction, arguing a violation of his constitutional right to keep and bear arms. As he failed to identify a specific or imminent threat which would justify having ready access to the hidden guns, the court upheld the verdict, concluding that although the amendment created a fundamental right, that right is still subject to reasonable limits.

In *State of Wisconsin v. Munir A. Hamdan*, 264 Wis. 2d 433 (2003), the Wisconsin Supreme Court ruled that Hamdan's constitutional right to bear arms had been violated, overturning his conviction for violating the law. Hamdan, the owner of a family-run grocery store in a high-crime neighborhood in Milwaukee, routinely kept a loaded gun under the counter near the cash register. In addition to numerous violent criminal incidents outside the store, his premises had been the target of four armed robberies in recent years. In one, the assailant's gun misfired when the trigger was pulled, sparing Hamdan's life. In another, he shot and killed a robber in self-defense. In the incident at issue, he was in the process of putting the gun in storage for the night when he was discovered by police to be carrying it in his pants pocket. The court found that the statute could not be constitutionally applied in this situation because Hamdan's personal interest in having a concealed weapon in his store outweighed the state's interest in enforcing the statute:

If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.

The court went on to state that a Wisconsin resident has the right to carry a concealed weapon on his or her property, business, or

home, when: 1) the need to exercise this right is significant, 2) the person has no other reasonable means to keep and handle the weapon, and 3) the person was not motivated by any unlawful purpose in concealing the weapon.

In a third case, the Wisconsin Supreme Court refused to expand the exceptions to carrying concealed weapons to include vehicles, but did allow that there could be circumstances under which it would be permitted. In *State of Wisconsin v. Scott K. Fischer*, 290 Wis. 2d 121, the court, in May 2006, rejected the argument that a bar owner who transported money in his vehicle was in an extension of his business. Writing for the majority, Justice Ann Walsh Bradley wrote that absent a reasonable belief that a person is actually confronted with a reasonable threat of bodily harm or death:

Only in extraordinary circumstances will an individual carrying a concealed weapon in a vehicle be able to demonstrate that his or her interest in the right to keep and bear arms for security substantially outweighs the state's interest in prohibiting that individual from carrying a concealed weapon in his or her motor vehicle.

In 2007, a case in Milwaukee County Circuit Court, *State of Wisconsin v. Andres Vegas* (Case No. 07 CM 687), again tested the concealed carry law with regard to motor vehicles. Vegas, a pizza delivery driver in a dangerous area of Milwaukee, had been a victim of armed robbery numerous times while on the job, and this was the second time he had shot his assailant. He was warned by authorities about the concealed weapons law after the first shooting. Agreeing that Vegas was likely to be attacked again and had no reasonable alternative to protect himself than to carry a loaded concealed weapon, the charge was dismissed by the court and was not appealed by the district attorney.

Legislation to permit concealed carrying of firearms. Writing the opinion on behalf of the majority in *Hamdan*, Justice David Prosser stated: "We urge the legislature to thoughtfully examine Wisconsin Statute Section 941.23 in

the wake of the (Right to Keep and Bear Arms) amendment and to consider the possibility of a permit system for persons who have a good reason to carry a concealed weapon."

Since the 1999-2000 session, nine bills have been considered by the Wisconsin Legislature to allow qualified persons to apply for a license to carry concealed weapons. 2003 Senate Bill 214 passed in both the Senate and Assembly, but was vetoed by Governor Jim Doyle. A similar proposal, 2005 SB-403, again passed in both houses and was vetoed. The Senate voted by the required two-thirds margin to override the veto, but an override in the Assembly failed on January 31, 2006, by a vote of 64 to 34.

Federal law authorizes concealed carry by retired police officers. Federal law (the Law Enforcement Officers Safety Act of 2004) prohibits a state from barring qualified retired law enforcement officers from carrying concealed firearms, provided the weapons have been shipped or transported in interstate or foreign commerce. 2005 Assembly Bill 561 and 2007 AB-877, both of which failed to pass, proposed to codify in the concealed weapons statute the provisions of federal law that make the law inapplicable to qualified active and retired law enforcement officers. A similar provision was included in the vetoed 2005 SB-403.

Former Attorney General Peggy Lautenschlager had asserted in a 2005 opinion that changes must be made in state law before the federal law could be executed in Wisconsin. The main issue is that the federal law specifies that officers, including those who are retired, must have met state firearms training standards within the past year in order to be eligible for a concealed carry permit. Since the state does not currently set training standards for local law enforcement agencies, it is unclear what retired officers must do to qualify.

Due to this and other issues, including potential liability concerns, a number of law enforcement agencies around the state have declined to implement the federal law. However, in a change in policy, current Attorney

General J.B. Van Hollen began to issue concealed carry permits to retired officers in June 2008 in order to bring the state in compliance with the federal law.

WHO MAY NOT POSSESS FIREARMS

In general, the following categories of persons are not allowed to possess firearms: felons, minors, those adjudged mentally ill, and persons under court-ordered abuse or harassment injunctions.

Felons. Both Wisconsin and federal law prohibit felons from possessing firearms, but federal law allows individual states to determine what constitutes a restoration of civil rights for the purpose of gun ownership. Wisconsin generally requires that a felon receive a gubernatorial pardon before being permitted to possess a firearm. [s. 941.29 (5) (b)] When a court imposes a sentence for a felony conviction, it must inform the defendant about firearm restrictions. [ss. 48.341, 973.176]

Minors. Generally, both federal and state law prohibit persons under the age of 18 from possessing a firearm [s. 948.60], but Wisconsin makes exceptions for long guns used for hunting or those used during adult-supervised activities such as target shooting. Children adjudicated delinquent may not possess a gun and a school district must suspend a pupil found in possession of a firearm either on school property or while under the supervision of a school authority. [s. 120.13 (1) (bm)]

Mentally Ill. Persons charged with a felony but found not guilty or not responsible for the crime due to mental illness may not possess firearms. This ban extends to a person who has been involuntarily committed for treatment of mental illness, drug dependency, or developmental disability if the court deems the person to be a threat to self or others. For those involuntarily committed, the court must order the person's firearms seized or stored until the person is judged to no longer suffer from the mental illness and is no longer likely to be a danger to the public. [s. 941.29 (1) (d)]

Persons under abuse or harassment injunctions. Wisconsin law bars possession of a firearm in cases in which a person is under a court-ordered injunction or restraining order for domestic abuse, child abuse, or harassment. They are required to surrender their guns to the county sheriff or a court-approved third party. [ss. 813.12 (4m), 813.122 (5m), 813.125 (4m)] Federal law also prohibits a person under a restraining order due to domestic violence from possessing a firearm.

BUYING GUNS: BACKGROUND CHECKS AND WAITING PERIODS

Federal and state law require an instant background check for all firearm purchases made through federally licensed dealers. Wisconsin law mandates an additional 48-hour waiting period before a handgun sale may be completed and the customer takes delivery. Person-to-person sales, such as at gun shows or over the Internet, do not require a federal license and are exempt from the requirements for background checks and waiting periods.

Background checks for all firearm sales. The federal "Brady Handgun Violence Prevention Act of 1993" (P.L. 103-59) has, since November 1998, required all federally licensed firearms dealers to perform background checks on purchases of all firearms, both handguns and long guns. Prior to a sale, the purchase of a long gun (rifle or shotgun) must be approved by the National Instant Criminal Background Check System (NICS), which is operated by the Federal Bureau of Investigation. (As discussed below, checks relating to handgun sales are conducted by the Wisconsin Department of Justice.) Most sales are authorized within minutes. Dealers who fail to comply may be fined and can lose their license.

48-Hour waiting period for handgun sales. In addition to the federally mandated instant criminal history background checks for all firearms sales, Wisconsin enforces a 48-hour waiting period for handgun purchases. During the waiting period, a "firearms restrictions record search" is conducted on the prospective

buyer by the Handgun Hotline operated by the Wisconsin Department of Justice (DOJ). This process includes a criminal history record search, as well as checking if a person is ineligible due to a mental illness determination or a court-ordered injunction. If the search indicates a felony charge without a recorded disposition, the waiting period may be extended up to three additional working days. The dealer may not transfer the handgun to the buyer until 48 hours have passed since an approval confirmation has been received from DOJ. Purchasers must provide identification and truthful information on their application. Violation of the law by any party carries a penalty of a fine of not less than \$500 nor more than \$10,000 and may be imprisoned for not more than nine months. [s. 175.35]

OTHER FIREARMS REGULATIONS

Definitions. “Firearm” is defined in the Wisconsin Statutes as meaning: “. . . a weapon that acts by force of gunpowder.” [s. 167.31 (1) (c)] Firearms are also included in the definition of “dangerous weapon,” which also includes other devices capable of producing death or great bodily harm. [s. 939.22 (10)]

State preemption of local ordinances. 1995 Wisconsin Act 72 prohibited local ordinances that exceed state regulation of the sale, use, possession, carrying, transportation, licensing, registration, or taxation of firearms. Permitted are ordinances that are no more stringent than state law. Act 72 invalidated local controls that had been enacted in numerous municipalities around the state, including: Eau Claire, Green Bay, La Crosse, Madison, Milwaukee, Racine, Sheboygan, Stevens Point, Superior, and Wausau. [s. 66.092]

Prohibited firearms. The possession, sale, use, or transport of a machine gun or other fully automatic firearm, or short-barreled (“sawed off”) shotgun or rifle is generally prohibited. A person also may not take a firearm that is not designed to shoot more than one shot by a single pull of the trigger and modify

it to operate as an automatic weapon. [ss. 941.26, 941.27, 941.28] Firearm silencers are illegal. [s. 941.298] Facsimile and imitation firearms are prohibited. [s. 941.2965, 941.297] “Assault” weapons, armor-piercing ammunition, and certain plastic firearms are banned by federal law.

Transportation of firearms. In general, possessing or transporting a firearm in a motor vehicle, motorboat, all-terrain vehicle, or aircraft is prohibited unless the gun is unloaded and in a carrying case. [ss. 167.31 (2) and (3), 23.33 (3) (e)] An unlawfully transported firearm is a public nuisance. [s. 29.927 (6g)]

Transfers to children. Except for long guns used for hunting, target practice, or instruction under adult supervision, a dangerous weapon may not be provided to a child. The penalty is increased if the child hurts someone by discharging the gun. [s. 948.60]

Child-safe storage. An adult is liable if a child publicly possesses or uses a loaded firearm that was improperly secured. Among the exemptions are if the firearm was stored in a reasonably secure container or location or secured with a trigger lock. [s. 948.55] Retailers must provide written warnings about the safe storage law. [s. 175.37]

Locations firearms are prohibited. Firearms may generally not be carried in the following places: public (government) buildings [s. 941.235]; taverns, bars, or other places where alcohol beverages are sold or consumed [s. 941.237]; school zones, which are generally within 1,000 feet of school buildings or grounds [s. 948.605]; state parks and fish hatcheries [s. 948.605]; and wildlife refuges [s. 29.091].

Endangering safety by improper use of firearms. Among the illegal uses of firearms:

- Homicide by negligent handling of a firearm [s. 940.08]
- Causing injury by negligent handling of a dangerous weapon [s. 940.24]

- Endangering safety by negligent operation or handling of a firearm [s. 941.20 (1) (a)]
- Intentionally pointing a firearm at or toward another person [s. 941.20 (1) (c)]
- Intentionally pointing a firearm at or towards a law enforcement officer, a fire fighter, an emergency medical technician, a first responder, or an ambulance driver acting in an official capacity [s. 941.20 (1m) (b)]
- Shooting into a building or vehicle if a human may be present [s. 941.20 (2) (a)]
- Using a firearm while intoxicated or while having a restricted controlled substance in blood [s. 941.20 (1) (b) and (bm)]
- Discharging firearm near residence (within 100 yards), without permission of the dwelling's occupant, if on land owned by another [s. 941.20 (1) (d)]
- Shooting from a vehicle: in general, a person may not load or discharge a firearm in or from a vehicle. Excepted are those with disabled hunting permits. [s. 167.31 (2) (c)]
- "Drive-by shooting:" intentionally discharging a firearm from a vehicle while on a highway or a public vehicle parking lot either at or toward another person or at or toward any building or other vehicle [s. 941.20 (3)]
- Shooting from or across a highway or within 50 feet of the center of a roadway. Excepted are those with disabled hunting permits. [s. 167.31 (2) (d)]
- Use of firearms near a public park [s. 167.30]
- Shooting at a railroad train [s. 943.07 (2)]
- Discharging firearm in the direction of transmission facilities [s. 167.31 (3m)]

Penalty enhancers. In several situations, the potential penalty may be increased if a crime is committed while using a firearm, including armed robbery, burglary, and vehicle "carjacking." [ss. 939.63, 943.32 (2), 943.10 (2), 943.23 (1g)]

Providing firearm to prisoner. It is illegal to provide a firearm, whether loaded or

unloaded, or a facsimile firearm, to an inmate of a correctional facility such as a prison or jail, or to introduce a firearm or facsimile into an institution where prisoners are detained. [s. 946.44 (1m)]

Hunting regulations. Anyone born after January 1, 1973, who wishes to obtain a hunting license must successfully complete a hunter education program which includes instruction in safety principles for handling hunting firearms. [ss. 29.591, 29.593] There are restrictions on the use of firearms while hunting for children under the age of 16. [s. 29.304] Hunting is not allowed within 1,700 feet of a hospital or school. [s. 29.301] A person who has caused or been involved in an accidental discharge of a firearm in which any person is injured must generally report it to the Department of Natural Resources within 10 days. [s. 29.345] It is illegal to shoot, kill, or wound with a firearm any animal that is tied, staked out, caged, or otherwise intentionally confined in an artificial enclosure, regardless of the size. [s. 951.09]

FOR MORE INFORMATION

The Wisconsin Statutes cited may be viewed at: <http://www.legis.state.wi.us/>, select "SEARCHABLE INFOBASE." The penalties schedules are in Sections 939.50, 939.51, and 939.52.

Information about the Wisconsin Department of Justice's Handgun Hotline can be accessed at: <http://www.doj.state.wi.us/dles/cib/handgunhotline.asp>.

This brief updates Wisconsin Brief 00-11, and two other publications related to the issues discussed within: 1) Wisconsin Brief 04-1, "The Right to Bear Arms," and 2) Wisconsin Brief 06-6, "Concealed Weapons Laws in the States." LRB publications are available at: <http://www.legis.state.wi.us/lrb/pubs/index.htm>