



# Wisconsin Elections Commission

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**DATE:** October 20, 2020

**TO:** All Wisconsin Election Officials

**FROM:** Meagan Wolfe  
Administrator

**SUBJECT:** Summary of Wisconsin Weapons/Physical Security Laws and Applicability to Polling Places

## Overview

The Wisconsin Elections Commission (“WEC”) and its municipal, state, and federal partners have received an influx of questions in advance of the November 3, 2020, General Election relating to firearms in the polling place and other physical security issues. This communication will provide guidance on this complicated subject, specifically addressing the most relevant areas of the law and several common questions. In short, Wisconsin law does not expressly prevent the carry of weaponry in polling places unless certain factors are met, and any prohibition on the possession of weapons is a decision that needs to be made at the municipal level. Additionally, chief elections inspectors retain fairly broad statutory protections in their ability to monitor and respond to incidents which disrupt elections processes.

In large part, Wisconsin’s only universal prohibition of weapons in a certain class of facilities relates to K-12 schools. Wisconsin expanded on various federal laws by specifically extending K-12 weapon prohibitions to include lawfully licensed parties in/on school grounds as well (*e.g.* those with a concealed carry license). Wis. Stat. § 948.605(2). There are several other classes of buildings in which the carry of firearms is prohibited, but these are unlikely to be polling places (*e.g.* correctional institutions, secured mental health facilities, airport facilities beyond security checkpoints, courthouses, and law enforcement stations). Wis. Stat. § 175.60(16). Election officials will want to consult their municipal attorney or corporation counsel if a K-12 school or other restricted facility serves as a polling place in your district, or other similar questions about weapons or facilities arise. This memo will also detail the applicability of laws related to other weapons and facilities, as well as personal restrictions that may be applied to specific individuals.

## Firearms

### *Concealed Carry*

- Prohibited in K-12 schools
- May be prohibited by property owners
- Facilities must post signage
- Consult an attorney

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Any person who carries a concealed or dangerous weapon is guilty of a Class A misdemeanor unless they are law enforcement, former law enforcement, a concealed carry licensee, or an out-of-state licensee. Wis. Stat. §§ 175.60, 941.23(2). Several other restrictions may impact an election official's decision to restrict firearms in an otherwise unrestricted polling place. For instance, it is unlawful to carry a firearm while intoxicated or using controlled substances, point a firearm at another person, intentionally discharge a firearm into a vehicle/building, discharge a firearm from a vehicle, or endanger the safety of another person by the negligent operation or handling of a dangerous weapon. Wis. Stat. § 941.20. It is also unlawful, under Wis. Stat. §§ 941.29, 948.60, for a person who is a felon, minor—under 21 years old for concealed carry, mentally ill, or under an abuse/harassment injunction to possess a firearm.

Wisconsin's criminal trespass statutes act as a guidepost for firearm prohibition questions when a universal ban is not otherwise imposed on the specific voter or facility. The law generally allows a property's owner (including tenants/lessees) to set restrictions on that property. These prohibitions include openly carried or concealed firearms. Wis. Stat. §§ 943.13, 943.14.

The law relating to the concealed carry of a firearm on private property is further distinguished by residences (single-family and multifamily), nonresidential buildings, special events, state/local governments units, universities/colleges, and vacant land. Polling places are almost exclusively confined to nonresidential and government buildings, but it can also be argued that an election may represent a special event.

The prohibition of firearms in a nonresidential building (*e.g.* community centers, business, churches, etc.) requires the posting of a sign in prominent places near all entrances where an entrant can be reasonably expected to see the posting. The restriction cannot be applied to a designated parking area/facility if the firearm remains in the vehicle. As such, it is reasonable to ask a voter in the parking lot, or generally on the building's grounds, to return their firearm to a vehicle or move to nearby public property, provided a firearm prohibition exists at the site. Government facilities are also required to post signage near all entrances where an entrant can be reasonably expected to see the posting, in any part of the building that is owned, occupied, or controlled by the governmental unit. Again, a firearm prohibition cannot apply to parking areas/facilities, provided the firearm remains in the vehicle driven to or parked in the lot. Wis. Stat. § 943.13.

Local government units may also restrict the right to carry concealed weapons in polling places, even if the election site or voter is not otherwise restricted as provided above, by relying on the special event provisions of the Trespass to Land statutes. Wis. Stat. § 943.13(1m)(c)3. A special event is an event open to the public for a duration of not more than three weeks. The event must also have designated entrances to and from the event that are locked when the event is closed, or be an event that requires admission. Wis. Stat. § 943.13(1e)(h). Organizers of special events, in this case the local governing body, may prohibit access to persons with concealed weapons.

These decisions are outside of the purview of WEC and must be made by the local officials, whether relating to permanent decisions for properties under the officials' control, or through the designation of a temporary prohibition for the election only. It is recommended that any such decision be made in advance of the election, adequately posted, and passed through an approved resolution/ordinance. This area of the law is also nuanced and highly charged. It is in the interest of local officials to discuss this with their municipal attorneys or corporation counsel.

### *Open Carry*

- Open carry is generally legal if the person is not otherwise prohibited from possessing a firearm
- Prohibited in K-12 schools
- May be prohibited by property owners
- Facilities should post signage to ensure compliance
- Consult an attorney

The open carry of firearms is legal for any person at least eighteen years of age, when that person is not otherwise prohibited from possessing a firearm or using it in violation of the law (*e.g.* intoxication, reckless misuse of the weapon, felons, minors, the mentally ill, those under an abuse/harassment injunction from possessing a firearm, etc.). Additionally, the same absolute building prohibitions apply to the open carry of a firearm as they do to concealed carry (*e.g.* correctional institutions, secured mental health facilities, airport facilities beyond security checkpoints, courthouses, and law enforcement stations). Another unique consideration is that state preemption statutes were enacted for both the concealed and open carry of firearms.

Wisconsin's preemption law was implemented without exceptions for the presence of firearms in public places. Some states have outright bans on firearms in polling places, while others have preemption statutes that do allow municipal governing bodies to regulate firearms in a more restrictive manner than state law does. Wisconsin's statutes provides that, "no political subdivision may enact or enforce an ordinance or adopt a resolution that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration, or taxation of any knife or any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute." Wis. Stat. § 66.0409(2). As such, local laws cannot undermine or be more restrictive than state firearms laws. Some municipal governments have already enacted broader restrictions on weapons, but it is unlikely that these would remain enforceable unless the law is the same, or similar to, state law. Wis. Stat. § 66.0409(4)(b).

The open carry of firearms is not as obviously restricted as concealed carry (*i.e.* many concealed carry regulations and requirements were specifically spelled out in statute and are quite clear). Local elections officials are not without options, though. Officials can lawfully place limits on the open carry of firearms in the polling place should they deem it necessary, despite the fact that the processes for doing so are not as plainly delineated.

The law states that, "Any person who goes armed with a firearm in any building owned or leased by the state or any political subdivision of the state is guilty of a Class A misdemeanor." Wis. Stat. § 941.235(1). This again excludes current/former law enforcement officers and qualified licensees (*e.g.* those with a concealed carry license), but does apply broadly to those voters considering the open carry of a firearm in a government owned or leased building. This statute formally puts individuals on notice that the open carry of firearms in government buildings is prohibited, but it is still recommended that a sign be properly posted at all entrances, clearly putting entrants on notice. The signs can indicate that both the concealed and open carry of firearms is restricted, or it can simply indicate that there is a complete ban on firearms. Open carry is further complicated by the fact that many polling places are not in government buildings, and some polling places are not formally leased by the respective government entity. In other instances, a local governing unit may have opted not to prohibit the carrying of a firearm on government premises despite the statute (*i.e.* a less restrictive law). This is where the lack of proscribed processes and restrictions on open carry can be troublesome.

That said, local elections officials would be able to work with the property's owner to temporarily or permanently designate the site as a firearm-free zone (*e.g.* if the building is leased or privately owned). Officials could also temporarily prohibit firearms in a government building that has been designated as open to firearms.

Generally, the open or concealed carry of a firearm does not constitute disorderly conduct. A person may not be charged with an ordinance-based or criminal offense of disorderly conduct for going armed with a concealed or openly carried firearm unless the facts and circumstances indicate a malicious or criminal intent. Wis. Stat. §§ 947.01(2), 66.0409(6).

### *Polling Place Disruption*

- Chief Inspectors have broad powers if they believe an individual is creating a disruption
- Individuals should be given the opportunity to remedy the disruptive behavior
- Inspectors should exercise their good judgement to avoid creating a greater disruption

Election inspectors also have certain authority to maintain order and enforce obedience to their lawful orders during the election and canvass processes. Specifically, "If any person refuses to obey the lawful commands of an inspector, or is disorderly in the presence or hearing of the inspectors, interrupts or disturbs the proceedings, they may order any law enforcement officer to remove the person from the voting area or to take the person into custody." Wis. Stat. § 7.37(2). Thus, an election inspector could command a person to exit the polling place immediately, or contact law enforcement for the purposes of an arrest, if the individual is preventing the official from maintaining order, regardless of prohibitions on open/concealed carry. It would be advisable to give that person the opportunity to remedy the behavior before they are ever removed. Removal would deny the disruptive voter their right to vote, but a situational analysis would need to be performed by the chief inspector in each instance.

Again, criminal trespass, disorderly conduct, or other statutory/ordinance-based violations (*e.g.* voter intimidation, etc.) do not occur simply because an individual possesses a firearm or other weapon in a Wisconsin polling place. The person would likely need to brandish the weapon or act in a way that constitutes such a violation. This would ultimately become a fact-specific analysis and judgment that needs to be carried out by law enforcement and the judicial system. This does not mean that elections officials are unable to use their own judgment to assess the situation and act accordingly, although caution should be exercised.

Wisconsin Statute § 12.13(3)(x) also provides that no person may, "Refuse to obey a lawful order of an inspector made for the purpose of enforcing the election laws; engage in disorderly behavior at or near a polling place; or interrupt or disturb the voting or canvassing proceedings. This and other laws prevent fraud and intimidation that could apply if a person were brandishing a weapon to influence voters or otherwise disrupt processes.

Chief inspectors or municipal clerks may also prohibit election observers from carrying a weapon if doing so disrupts the operation of the polling place, clerk's office, or alternate absentee ballot site. The chief inspector or municipal clerk can take this a step further and order the removal of any observer if that individual commits an overt act that disrupts the operation of the polling place or clerk's office. Wis. Stat. § 7.41(3).

## **Other Weapons**

- Knives and other edged weapons are prohibited at K-12 schools
- Carrying a knife is generally lawful if the individual is not otherwise prohibited from carrying a weapon
- As with firearms, Chief Inspectors may assess if the conduct is disruptive

Wisconsin recently removed restrictions on the carry of all knives, including switchblades or automatic knives (*i.e.* the law now also allows the open and concealed carry of knives). 2015 Assembly Bill 142. Switchblades had previously been criminalized under the now-repealed Wis. Stat. § 941.24. The state's concealed carry law specifically excludes knives from the definition of "dangerous weapon" as it relates to the additional requirements for concealing a weapon. Wis. Stat. § 941.23(1)(ap). That said, those prohibited from carrying a concealed firearm may also be prohibited from carrying a concealed knife. Wis. Stat. § 941.231. The statute prohibiting dangerous weapons other than firearms on school property has defined "dangerous weapon" in the broadest terms of Wisconsin law, which includes knives and other items, so knives would be prohibited on K-12 school property. Wis. Stat. § 948.61. In addition, the preemption laws discussed above have been expanded to include knives as well as firearms, so some local ordinances cannot exceed state law, and some ordinances may have been thus nullified (*e.g.* laws restricting blade length).

As discussed with firearms, disorderly conduct or other legal violations do not occur simply because a person is armed with a knife or other weapon. The facts and circumstances must indicate a malicious or criminal intent. Wis. Stat. §§ 947.01(2), 66.0409(6). Beyond the considerations evaluated here, the law can be varied from weapon to weapon, and circumstance to circumstance. (*e.g.* "dangerous weapon" is defined to include firearms, electric weapons, metallic knuckles, and many other specific items for the purposes of weapons prohibitions for individuals under eighteen years of age, other statutes may define "dangerous weapons" differently based on the purpose of the law, etc.).

This memorandum has provided guidance on the primary types of weapons and situations that may be encountered, but the main focus of the chief inspector should be whether or not a disruption or other unlawful behavior is occurring (*i.e.* as it relates to chief inspector's statutory obligations to lawfully, safely, and without disruption manage the polling place). Again, the chief inspector retains the right to ask the person to refrain from the disruptive behavior, remove an individual from the premises if a lawful order is not obeyed or the disruption continues, or contact law enforcement to determine if a criminal law is being violated. Regardless of the legality of the specific weapon, a person does not have the right to use it in a manner that violates the provisions of state elections or criminal laws, or to infringe upon the rights of other voters in an unreasonable or illegal manner.

## **Law Enforcement**

- Law enforcement is generally permitted at polling places
- Municipal clerks should coordinate with law enforcement before election day

Wisconsin law does not expressly prohibit local law enforcement from having a presence in the polls. In fact, some WEC guidance specially allows for it (*e.g.* a police officer is often used as the "end of line officer" after the polls close).

Chief inspectors and election official will want to consider the potential impact of such a presence carefully, though, and maintain an open line of communication with local law enforcement. Uniformed and non-uniformed officers in some wards have been known to occasionally check in at the polls to ensure the chief inspector has not seen anything concerning or does not otherwise require assistance. Officers are often present to cast their own vote as well. This relationship certainly plays an important part in the operation of a safe election process, but it also requires the chief inspector to walk a fine line in creating a polling place environment that does not disenfranchise or otherwise concern certain voters (*e.g.* some lawful voters are simply made uncomfortable by the presence of an armed official in the polling place).

Careful planning by election officials can minimize any voter concerns, ensure all laws are followed, and maintain order. Pre-planning with law enforcement can be critical to the effective operations of polls (*e.g.* examining the threat landscape, drafting an incident action plan, getting direct lines to communicate if needed, assigning resources to the polls if needed, etc.). Some chief inspectors have even asked for plain-clothes officers to be assigned to their polling place, or they have positioned an officer at the ready in a nearby space.

Chief inspectors also have the right to change these plans if it is believed that a law enforcement presence is disrupting the polling place or otherwise impacting the voting experience. Again, the chief inspector retains statutory rights to ask individuals to leave if it presents a disruption to the polling place.

### **Military**

- National Guard members serving voluntarily or under state authority are permitted
- Armed and uniformed federal military forces are generally prohibited from polling places

Recent events such as the COVID-19 pandemic have resulted in a “military presence” in the polling places, most notably through the lawful order that National Guard troops provide individual augmentation working at short-staffed locations. There is no prohibition on non-uniformed military servicemembers voluntarily serving as an election official.

An armed and uniformed military presence at the polling place is more directly forbidden unless that presence is necessary to repel armed enemies. 18 U.S.C. § 592. (*see also* 18 U.S.C. §§ 593, 595) Recent national discussions have centered on the use of law enforcement and military to ensure polling place activities are not otherwise compromised (*e.g.* prevention of election fraud), but without evidence of widespread fraud or armed enemies, there should be no such presence. Chief inspectors are responsible for ethical/lawful poll operations and would have the authority to question such a presence without a valid reason for the placement.

There are additional protections in the law, such as *posse comitatus*, that also generally prohibit this type of activity by federal military forces. 18 U.S.C. § 1385. This provision details criminal penalties for anyone that willfully uses any part of federal military or law enforcement forces to execute the law in cases or circumstances that were not expressly authorized by Congress or the Constitution.

### **Militias**

- Unauthorized private militias are prohibited by Wisconsin law
- Chief Inspectors may assess if conduct is disruptive

A militia is defined under federal law as a group of able-bodied residents within certain age limits who may be called forth by the government to defend the United States or a specific state (*e.g.* Organized Militias: National Guard, Naval Militia; Unorganized Militia: Other members of the militia). 10 U.S.C. § 246. Groups of armed individuals that engage in paramilitary activity or law enforcement functions without being called forth by a state or federal government, and without reporting to any government authority, are thus considered to be unauthorized private militias. The Second Amendment of the United States Constitution does not protect private militias or prevent the prohibition of private paramilitary organizations. All fifty states prohibit private, unauthorized militia activity. *Fact Sheet: Unlawful Militias in Wisconsin*, Institute for Constitutional Advocacy and Protection, Georgetown Law.

The Wisconsin Constitution forbids private military units from operating outside state authority, providing that, “The military shall be in strict subordination to the civil power.” Wis. Const. art. I, § 20. Wisconsin Statutes also provide that it is a felony for a person to act in an official capacity or perform an official function, when that party knowingly is not a public officer or employee that should be performing such functions, or is otherwise not qualified to act in that capacity. Wis. Stat. § 946.69. There are also laws prohibiting a person from making false statements about current/past military service. Wis. Stat. § 946.78. This may not be relevant, as many militia members represent themselves as their own military organization, rather than that of the government, but it still constitutes a violation if someone is falsely representing themselves as a member of the military to disrupt polling place activities.

Wisconsin law does not proscribe how many individuals are required for an unorganized or illegal militia. That said, even a small group meeting the definitions of a militia can be removed or reported to law enforcement if they are engaged in activity that violates any of the laws or protections described in this memorandum (*e.g.* voter intimidation, an attempt to control or influence election activities, illegal possession of firearms, etc.).

Much of this analysis will become a situational assessment by the chief inspector of the applicable polling place (*e.g.* are the individuals armed, carrying signs/flags/uniforms/hate symbols, is electioneering occurring, are voters leaving at the sight of these individuals, are the individuals talking to voters, etc.). That analysis will help to determine whether the group is simply exercising their own rights, or unlawfully infringing on the rights of others. There are also proactive measures that a chief inspector can take to prepare in advance of the elections (*e.g.* advance planning with law enforcement, direct lines of communication to law enforcement for election day, draft an incident action plan, speak to local threat landscape experts, research hate group and other risk-based databases, etc.).