



# LEGAL UPDATE

City of Madison Police Department

Fall 2011

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## *Concealed Carry*

In late-July Wisconsin Act 35 became law. While Act 35 impacts a number of statutes relating to carrying firearms, the primary effect is to create a mechanism for private citizens to legally carry concealed weapons in Wisconsin. Some of the key components of the law are highlighted here:

### Concealed Carry

The general prohibition on carrying a concealed weapon, in §941.23, remains. However, the new version of the statute contains additional exceptions:

- Anyone holding a Wisconsin CCW License
- Any out-of-state resident holding an out-of-state CCW License
- An individual carrying a concealed weapon in his or her dwelling or place of business, or on land that he or she owns/leases/occupies

So, in most instances it is still a crime for someone without a CCW license to carry a concealed weapon.

### Licenses

The Wisconsin Department of Justice, will handle the application process and issuance of CCW licenses. Generally, a license will be issued to any Wisconsin resident over the age of 21 who is not legally prohibited from possessing a firearm. Some level of training will also be required to obtain a license (DOJ is still finalizing the minimum training requirements). A CCW license is good for five years.

Wisconsin residents wishing to carry concealed weapons must obtain a Wisconsin license, even if they have a license from another state. Licenses can be revoked or suspended by DOJ under certain circumstances.

Someone holding a CCW license is permitted to carry a concealed weapon anywhere in the state unless specifically prohibited. "Weapon" is defined as a handgun, electric weapon, knife or billy club. It does not include long guns, machine guns or short-barreled rifles/shotguns.

### Limitations

A CCW license holder may not carry a concealed weapon in any of the following areas:

- Any portion of a building that is a police station, sheriff's office, state patrol station, or the office of a division of criminal investigation special agent.
- Any portion of a building that is a prison, jail, house of

correction, or secured correctional facility.

- Any secured portion of a mental health institute under §51.05.
- Any portion of a building that is a county, state or federal courthouse.
- Any portion of a building that is a municipal courtroom if court is in session.
- Beyond the security checkpoint in an airport.

Violating these restrictions is a misdemeanor. Note that these restrictions do not apply to a weapon in a vehicle in a parking facility that is a portion of any of the above. Also, judges and district attorneys who hold a CCW license are permitted to carry concealed weapons in courthouse, and judges may permit (in writing) any CCW license holder to be armed in a courthouse.

Other limitations:

*Schools:* A CCW license holder may not carry a concealed weapon on school grounds (though the limitation on being armed within 1000 feet of a school does not apply to a CCW license holder).

*Trespassing:* Act 35 creates a series of trespassing violations under §943.13. These sections allow property owners to either notify an individual in person not to be on their property with a firearm, or to make notification by posting signs. Signage must be posted in a prominent place near all entrances, and must provide an appropriate notice that firearms are prohibited. These trespassing violations generally do not apply to firearms in a vehicle in a parking area.

These firearms restrictions can also be applied to "special events," as defined in the Act. This should enable the prohibition of firearms at events like Halloween's Freakfest.

So, businesses and property owners—for the most part—can restrict people from carrying firearms (concealed or not) onto their property. These trespass offenses are forfeiture violations.

*Employers:* Employers can prohibit their employees from carrying concealed weapons during the course of their employment. However, employers cannot prohibit an employee from carrying a concealed weapon or storing a weapon in their vehicle (even if the vehicle is parked on the employer's property or used by the employee during the course of his/her employment).

*Taverns:* A CCW license holder may carry a concealed weapon in a tavern, but only if they are not consuming

alcohol on the premises. However, a tavern owner can bar all weapons from the property with the appropriate notifications/signage.

*Federal Land/Property:* Federal law applies to U.S. government land, and a Wisconsin CCW license may not permit carrying a firearm (concealed or otherwise) on certain U.S. government land or property.

#### Electric Weapons

Individuals holding a Wisconsin CCW license, or an out-of-state CCW license will now be permitted to possess or go armed with electric weapons. Individuals are also permitted to carry an electric weapon in their dwelling or place of business, or on land that they own/lease/occupy. A non-license holder may transport an electric weapon if it is enclosed within a carrying case.

#### Transporting Firearms

Under the Act, CCW license holders can carry concealed weapons (handguns, electric weapons, knives or billy clubs) in a vehicle. Non-license holders may place, possess, load or transport a handgun in a vehicle without it being unloaded or encased. However, long guns still need to be unloaded and encased while being transported in a vehicle.

#### Former Officers

The Act also changes requirements for retired officers to carry concealed weapons. Retired officers may carry a concealed handgun if they possess a photo ID issued by their former agency. The ID must indicate that the former officer has qualified within the past 12 months and specify the type of weapon that the former officer is authorized to carry.

Former officers must qualify every 12 months, and their ID or certification card only allows them to carry a handgun (specified on the ID). Former officers are eligible to apply for a standard CCW license.

#### Open Carry

Act 35 also impact open carry situations in several ways. First, the Act amends the disorderly conduct statute (§947.01) to read:

Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

So, the disorderly conduct statute (and corresponding city ordinance) clearly may no longer be applied to simply carrying a firearm in public. However, if other factors are present (indicating a criminal or malicious intent) then the statute might apply. This is the only portion of the Act that is already in effect.

The Act prohibits openly carrying firearms in the same places that CCW license holders are prohibited from carrying

concealed weapons:

- Any portion of a building that is a police station, sheriff's office, state patrol station, or the office of a division of criminal investigation special agent.
- Any portion of a building that is a prison, jail, house of correction, or secured correctional facility.
- Any secured portion of a mental health institute under §51.05.
- Any portion of a building that is a county, state or federal courthouse.
- Any portion of a building that is a municipal courtroom if court is in session.
- Beyond the security checkpoint in an airport.

The new trespassing statutes (where a property may be posted as prohibiting firearms) also apply to openly carrying weapons.

#### Other Issues

- Most of the Act (everything other than the new language in the disorderly conduct statute) takes effect on November 1, 2011. That is the first day that people can apply for Wisconsin CCW licenses. So, it is not likely that licenses will actually be issued for 30-45 days after that. However, the portions of the Act that apply to out-of-state license holders will still be effective as of November 1.
- Other existing laws related to firearm use were not affected by Act 35. These include:
  - Carrying a firearm while intoxicated, or with a detectable amount of a controlled substance in his/her blood.
  - Pointing a firearm at another.
  - Being a felon in possession of a firearm.
  - Discharging a firearm into a vehicle or building.
  - Possession of a machine gun, switchblade knife, firearm silencer, or short-barreled shotgun/rifle.
- There are a number of circumstances under which it is unlawful for someone to possess a firearm (a felon, bail conditions, injunctions, etc.). In these instances it is unlawful to possess a firearm, even if the person has a CCW license that has not been formally suspended or revoked.
- CCW license holders do not have any greater authority to use firearms than any other citizen. The same rules of self defense, defense of others and defense of property (§939.48 and §939.49) apply.
- A CCW license holder, or an out-of-state license holder, must carry their license with them anytime they are carrying a concealed weapon (other than within their own dwelling or place of business). They also are required to carry a photo identification card (a Wisconsin DL or ID card, or an out-of-state DL or ID).

- A CCW license holder, or an out-of-state license holder, who is carrying a concealed weapon is required to display his/her license and photo ID to a law enforcement officer upon request. The officer must be acting in his/her official capacity and with lawful authority. The penalty for not carrying or displaying the CCW license is a \$25 forfeiture.
- DOJ will be creating a database of CCW license holders. However, the law only permits police to access the database to confirm that a license produced by an individual at the request of an officer is valid, or to confirm whether a person who is carrying a concealed weapon and claims to have a CCW license (but does not have it with them) actually has a license. The database can also be used to investigate whether a person made false statements during the license application process. Law enforcement cannot access the database for any other purpose. The database is also largely exempted from access under the public records law.
- Some of the prohibited activities under Act 35 (failure to carry the CCW license, trespassing, etc.) are forfeiture violations rather than crimes. The City has enacted ordinances that correspond to these statutes.
- The City will prohibit firearms in all City buildings, and will post appropriate signage to comply with the statute. The City will also produce signs that can be provided to property owners, similar to the MPD “No Trespassing” signs.
- While there are clear limitations on the reasons law enforcement can access the database of CCW license holders, it appears that the database will be accessible 24/7 through the TIME system.

## *Citizen Encounters*

The objectives of the Madison Police Department when responding to reports of an armed person(s) are to ensure the safety of the community and officers while respecting citizens’ constitutional and statutory rights. MPD fall inservice has included a section on concealed carry and how to engage in citizen encounters (contacts, stops, arrests) in light of this change to Wisconsin Law. An overview of some relevant issues:

### Consensual Contacts

Officers are always free to engage in consensual contacts with citizens. No level of reasonable suspicion or probable cause is required to do so. No force, real or implied, may be used during a consensual contact...the citizen must feel “free to decline the officers’ requests or otherwise terminate the encounter.” Any inherently coercive behavior on the part of the police, that would “communicate to a reasonable person that he is not at liberty to ignore the police presence and go about his business,” will transform the contact into a stop,

requiring suspicion of criminal activity.

Consensual contacts with potentially armed subjects can arise in two primary ways: open carry situations where no reasonable suspicion exists; or other consensual contacts done for investigative purposes. During a consensual encounter, officers may ask for identification and may ask if the subject is armed or carrying a concealed weapon. The subject is under no obligation to answer questions, provide identification or even remain with the officer. If the subject is lawfully armed (an open carry situation, for example) the officer may ask to separate the weapon from the subject, but the subject is generally under no obligation to comply.

An encounter that begins as a consensual encounter may transition into a stop or arrest if reasonable suspicion or probable cause is developed.

### Stops

A stop is a brief, investigative detention requiring reasonable suspicion—based on specific and articulable facts—that an individual is committing, has committed or is about to commit a crime. While Act 35 might seem to significantly impact officers’ actions during investigative stops, the impact actually appears quite minor.

When dealing with the traditional investigative stop (traffic or otherwise), Act 35 does not change much. If an officer possesses reasonable suspicion that a subject they have lawfully stopped is armed, a frisk is permissible. If a weapon is discovered during a frisk, the officer may secure it. Once the weapon has been secured, then the officer can investigate whether the subject is a CCW license holder. If the subject does possess a CCW license and no arrest is made for the original offense, then the weapon should be returned to them at the completion of the stop. Weapons should be returned in a manner that does not expose officers to any risk of attack.

CCW license holders who are carrying a concealed weapon are not required to inform law enforcement that they are armed during police encounters. However, if asked by a law enforcement officer whether they are armed a CCW license must display his/her license and a photo ID. So, in many circumstances it may be wise for officers to ask suspects who have been detained if they are armed.

If a detained suspect indicates that they are a CCW license holder who is carrying a concealed weapon (either by volunteering the information or in response to an officer’s question), generally the officer should temporarily separate the weapon from the suspect while the validity of the CCW license is verified. The officer should remove the weapon him/herself (do not direct the subject to handle the weapon) and secure it during the stop while the license is verified. In some situations, it might be safer to allow the subject to retain the weapon, and provide verbal directions to control their hands, movement, etc. Which option is selected should depend on the circumstances (nature of the offense leading to

the stop, cooperativeness of suspect, environment, etc.), but either is generally reasonable.

If the CCW license is verified and the stop does not result in an arrest, then the weapon should be safely returned to the subject at the completion of the stop.

An interesting question raised by Act 35 is a situation where officers reasonably suspect that a person is carrying a concealed weapon (based on observations, citizen reports, etc.) but do not have indication that the person is involved in other criminal activity. Court decisions from other jurisdictions (with concealed carry license/permit processes) have held fairly consistently that officers do have the authority to detain subjects under these circumstances to verify whether they have a valid CCW permit and are lawfully carrying the weapon. Consider what our response to a report of someone carrying a concealed weapon prior to Act 35 would have been; while the person could have been lawfully authorized to carry a concealed weapon (off-duty or retired law enforcement), officers would still respond to investigate and determine whether they were carrying a weapon (and, if so, whether they were lawfully authorized to do so). Act 35 doesn't change this.

Officers responding to investigate subjects carrying concealed weapons should respond and verify that the person is lawfully carrying the weapon (law enforcement, valid CCW license holder, someone in their dwelling or business, etc.). Officers should also determine if the property where the subject is located is posted (to prohibit weapons). Absent any additional suspicious behavior, it is generally appropriate to do this in a low-key manner (while taking appropriate steps to maintain officer and public safety). In some instances a more intrusive tactical approach—controlling and frisking the suspect—may be appropriate. If the person is determined to be a valid CCW license holder, then the weapon should be safely returned at the completion of the stop.

If a subject carrying a concealed weapon does not have their license with them, but officers verify their identity and that they do have a valid CCW license, they should generally be cited (for failing to carry the license) and the weapon should be returned (if there is a lawful way for the subject to transport it). If the subject presents their license and photo ID within 48 hours of the incident then the citation must be withdrawn.

If a subject carrying a concealed weapon claims to have a CCW license, but either their identity or licensee status cannot be confirmed, then an arrest/charge for carrying a concealed weapon is generally appropriate. The weapon should be seized as evidence.

Also remember that Act 35 impacts response to open carry situations. The Act outlines a number of places where open carry is expressly not permitted (courthouses, police facilities, etc.), and also allows property owners to prohibit

weapons on their property through direct notice or signage. Response to open carry situations in these contexts may create reasonable suspicion justifying an investigative stop and further investigation.

However, in other contexts, open carry is less likely to create reasonable suspicion justifying a stop. The amendment to the disorderly conduct statute included in Act 35 limits the applicability of 947.01 to open carry situations; only if “other facts and circumstances indicate a criminal or malicious intent on the part of the person” might open carry be considered a violation (even if others are disturbed).

As with any citizen encounter, it is important to debrief the subject at the end of the incident and explain the reasons for your actions.

Act 35 is new, and leaves a number of questions unanswered. It isn't possible to predict how Wisconsin courts will rule on cases related to Act 35, or whether the Legislature will enact any modifications to the law.

#### Other Issues

As indicated, Act 35 does not require CCW license holders who are armed to notify law enforcement of that fact during an encounter. They do, however, need to produce their license and photo ID if requested. DOJ has put forth some initial recommendations for CCW license holders to follow if contacted by law enforcement while carrying a concealed weapon:

1. Immediately tell the officer that you're carrying a concealed weapon and where it's located.
2. Keep your hands where the officer can see them.
3. Cooperate fully with the officer.
4. Don't make any quick movements, especially toward the weapon.
5. If you're in a vehicle:
  - Roll down your window and place your hands in plain view on the steering wheel
  - If it is at night, turn on the vehicle's dome light.
  - Calmly tell the officer you have a CCW license and that you have a weapon with you. Ask the officer if they have particular instructions concerning the weapon.
  - Do not touch or attempt to touch the weapon unless specifically told to do so by the officer.
  - Do not leave your vehicle unless specifically told to do so by the officer.

In certain circumstances, a law enforcement officer may ask to take temporary possession of the weapon or may seize the weapon during interaction with the individual to ensure the safety of the officer and others or to secure the weapon as evidence. The officer will return the weapon at the end of the stop unless the individual is placed under arrest for a violation of the law that allows the weapon to be seized.

These are only recommendations, and it is unclear if DOJ will incorporate them further into the licensing or training process.