



Much Ado About Wisconsin's Concealed Carry Law

by Nathaniel A. Hoffman

Commonly referred to as the “Concealed Carry Law,” 2011 Wisconsin Act 35 (the “law”) went into effect on November 1, 2011 and allows the carrying of a concealed weapon by licensed individuals in most public places throughout Wisconsin. In adopting the law, Wisconsin joins 48 other states that currently allow the carrying of a concealed weapon in some way; only the state of Illinois remains a holdout. Concealed carry has many political, legal and practical ramifications, but any analysis of its impact is hindered by the difficulty of obtaining accurate statistical information regarding the effect of concealed carry on the crime rate in states where it has been allowed and the lack of case law discussing the law. In practice, it appears that there have been few abuses of concealed carry in the states which have permitted it, and the number of permit holders involved in gun-related offenses seems to be very limited. Despite the heated rhetoric on the subject and the large number of hunters in Wisconsin (more than 700,000) who may apply for permits to carry concealed weapons, it may be that concealed carry will have little effect on the daily lives of law-abiding citizens in Wisconsin.

Regardless of where one might stand on the right to carry a concealed weapon, the enactment has forced many real estate owners and tenants in Wisconsin to face the decision of allowing or prohibiting the carrying of a concealed weapon on their premises. This article will explore those options and some of the ramifications of the decision in the context of commercial property, *i.e.*, property used for retail, office or industrial purposes, but not residential uses or property that is vacant land.

The law allows individuals to become licensed by the state to carry a concealed weapon in public after undergoing required training. However, permit holders are not permitted to carry concealed weapons in some public places like police stations and law enforcement facilities, prisons and jails, airports (beyond the security checkpoint), courthouses, and

certain municipal buildings. A recent *Business Journal Serving Greater Milwaukee* survey reported that 63% of the respondents thought that their businesses would not allow concealed weapons on their premises, 26% would permit concealed carry and 11% were undecided.

In a commercial business setting, the decision to permit or prohibit concealed carry will require careful consideration of many factors and leads to two realistic and meaningful options: (1) prohibit people from bringing concealed weapons onto the property (by posting signs), or (2) allow people to bring weapons onto the property (and not post signs prohibiting weapons). Property owners and tenants who wish to allow concealed weapons on their premises do not need to take any action. As an incentive for property owners and businesses to allow their tenants, employees and visitors to carry concealed weapons in their premises, the law gives these parties protection from liability. Wis. Stats. 175.60(21)(b) provides that a person or entity “that does not prohibit an individual from carrying a concealed weapon on property that the person owns or occupies is immune from liability arising from its decision.” While this provision will protect the owner or occupant from claims resulting from the discharge of a concealed weapon based on the owner’s or occupant’s decision to allow guns on its premises, it is unlikely that the immunity will provide protection from claims that the owner or occupant was otherwise negligent. For example, if a patron walks into a store with a concealed weapon and slips on a wet floor, falls, and his concealed weapon discharges and wounds another person (or himself), it seems likely that there would be a triable issue as to whether the negligence of the owner of the store was the cause of the injury, and the owner’s immunity from liability

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based on the concealed carry law would provide little or no protection.

Property owners and tenants who decide to prohibit concealed weapons on their premises have many more issues to consider. First, they must post signs stating that weapons are prohibited. The signs must be at least five inches by seven inches in size and prominently displayed at all of the entrances to the premises to which the restriction applies. Different notice criteria apply to signs posted on “land” such as vacant fields, wooded areas and construction sites. Although the law requires no specific language on the sign, the actual language used is important; “weapons,” “firearms” and “handguns” are preferable to “guns.” If the sign only prohibits “concealed weapons,” the visitor may assume that “open carry” is permitted. Consultation with counsel familiar with the signage requirements is recommended with respect to the language of the sign and areas of placement.

In deciding whether to prohibit concealed carry and post signs on the property, the law provides a distinction between landlords (owners) and tenants (occupants). By providing proper notice, occupants may implement a restriction within their “premises” only while an owner can restrict the space “it owns, occupies or controls.” In the case of a multi-tenant office or retail building, absent some unusual lease provision, the owner of the building has the sole right to prohibit concealed carry in the lobby and other common areas (hallways, elevators, stairwells, parking and landscaped areas), but each individual tenant can choose to prohibit or allow concealed carry in its premises. If the owner of the property prohibits concealed carry in the common areas and a tenant decides not to prohibit its employees or visitors from concealed carry, the owner’s decision controls and the tenant’s employees or visitors will be prohibited from carrying weapons through the common areas. On the other hand, if the property owner does not prohibit concealed carry and the tenant posts signs prohibiting weapons, a prudent landlord may want to consider having the tenant advise the landlord of its decision and expressly acknowledge that it is waiving immunity and agree to indemnify the landlord for any claims arising out of the use of weapons on the tenant’s premises.

In deciding whether to prohibit concealed weapons, a property owner will

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have to analyze many factors including the probable reaction of the public and the effect on its tenants and the employees who work on the property. The opinions of the tenants regarding concealed carry may persuade the property owner toward one decision or the other. Property owners should also contact their management company and security company, if any, as to their capacity and willingness to enforce the policies of the property owner and tenants. In the event an owner or tenant decides to prohibit carrying weapons, then policies should be developed and training provided for employees and property management personnel to enforce the prohibition.

The decision of whether to post notice will often be very case specific, and an owner or tenant will need to consider many factors specific to its business and its clientele. For example, with a few exceptions, the law does not allow owners or occupants to restrict licensees from carrying a concealed weapon in vehicles that are driven or parked in a parking area or in a part of a building or land used as a parking facility. In retail or office settings, business owners need to consider whether the decision to prohibit or permit weapons could potentially alienate or attract a consumer or client base. High profile businesses that post “no weapons” signs may become targets of picketing, boycotts or protests by pro gun groups. Another consideration is the cost of prohibiting

weapons. The actual costs of installing and maintaining signage may be considerable, particularly in certain locations with many points of entry or points of entry which may be difficult to define. Further, there is potential for increased costs required by a management or security company in implementing the decision to post notice.

Despite the apparent initial decision of a majority of businesses in the *Business Journal Serving Greater Milwaukee* poll to prohibit weapons on their premises, only time will tell whether they in fact follow through by posting signs and going through the processes that were touched on briefly in this article. The decision to permit concealed carry is attractive for several reasons: it is easy to implement as no signs need to be made and installed; employees do not have to be trained to respond to a violation; it will not force visitors to remember the issue either positively or negatively; and the owner or occupant will have immunity (as far as it goes). On the other hand, the decision to prohibit weapons is ultimately a decision to protect an owner or tenant’s employees and visitors from the consequences of lethal force and may be viewed as reasonable and practical despite the difficulties that must be overcome to implement the decision.

Obviously, signs prohibiting weapons will not stop criminals, robbers, mass killers or spousal abusers who will ignore the signs. A prohibition may be effective to stop an individual who (1) usually carries a concealed weapon, (2) does not have the weapon available because he has entered premises where they are prohibited, and (3) would have drawn and fired his weapon in the heat of anger or passion. It may also stop injuries from unforeseen events like a slip or fall of a person carrying a concealed weapon which discharges and injures an innocent bystander. Whether these scenarios are sufficient to justify the costs of prohibiting weapons is an individual decision which requires consideration of important policy, legal and implementation concerns.

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focus on:

Construction Litigation



This is the first of a new recurring column. Each issue we will feature a different WHD attorney whose practice supports or relates to the Real Estate Practice Group, and adds value to our real estate clients.

Eric J. Meier is a shareholder and leader of the firm's Construction Litigation & Consultation Team. Eric received his J.D., *cum laude*, from the University of Wisconsin Law School in 2002, where he served as a staff member and Notes and Comments Editor for the *Wisconsin Law Review*, and

his B.B.A. in Finance, Risk Management and Insurance (double major), with distinction, from the University of Wisconsin in 1999. He was named a "Rising Star" on the Wisconsin Super Lawyers list from 2007-2010.

In his practice, Eric pursues construction lien cases; prosecutes or defends construction defect and loss claims; and assists with OSHA-related issues. His experience ranges from working on defending an international design firm against claims in excess of \$100 million arising out of the construction of Miller Park baseball stadium to handling matters before the Metropolitan Builders Association. He has also handled lawsuits in state and federal courts within and outside of Wisconsin, including matters that have been before the Sixth and Seventh Circuit Courts of Appeals and the U.S. Supreme Court.

Eric is a member of Mayfair Rotary Club of Wauwatosa, Wis., a Volunteer for Arthritis Foundation of Wisconsin, and has run the Chicago Marathon three times. He can be reached at (414) 978-5413 or emeier@whdlaw.com.



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Uncertainty Persists as Deadline for Large Pier Registration Looms

by Kathryn M. West

Currently, waterfront property owners with "large" piers have until April 1, 2012 to register their pier with the Wisconsin Department of Natural Resources (DNR) in order to be grandfathered under existing DNR pier guidelines. The forms necessary to register can be downloaded at <http://dnr.wi.gov/waterways/recreation/piers.html>. In



addition, under current law, owners of piers installed for the first time after February 2004 must meet the size limits outlined in the DNR's regulations or seek an individual permit with a state review.

All this may change, however, if legislation making its way through the Wisconsin Legislature becomes law. The provisions of the bill change the grandfathering exemption so that any pier or wharf that was placed on the bed of a navigable water before the effective date of the bill will be exempt from the permit requirement if the pier or wharf does not interfere with the riparian rights of other riparian owners. The bill completely eliminates the requirement that the pier or wharf be registered to be eligible for the grandfathering exemption.

The provisions of the bill also change the size and configuration requirements for loading platforms on piers. Under the bill, a loading platform meets the exemption requirements, regardless of its configuration, as long as the surface area of the platform does not exceed 200 square feet. The bill also provides that a riparian owner may secure a specified number of personal watercraft to a pier without affecting the riparian owner's eligibility for the exemption.

For more information, or for assistance in determining whether you must register your pier, please contact Kathryn West at (414) 978-5442 or kwest@whdlaw.com, or another member of the Real Estate Practice Group.

What's Yours is Mine, What's Mine is Mine

How to protect yourself when you assign or assume a lease



by Brad Dallet

Whether you are the buyer or the seller, the day you sign the purchase contract, it all seems so simple. At closing, the seller will assign all of its rights under the shopping center leases to the buyer, and the buyer will assume all of the obligations and rights of the landlord. While the seller is only too happy to relieve itself of all of the responsibilities of being a landlord, is the seller giving up too much in the assignment? And while the buyer is looking forward to having all of the rights as landlord under these leases, was the buyer careful to make sure that post closing the seller is really out of the picture?

The "assignment and assumption" of the leases could be a bigger issue than it first appears. What if the shopping center's biggest tenant was six months behind in rent, but that was not disclosed or discussed before the purchase contract was signed? Who has the right to collect the past due rent after the closing? The buyer, since it is the new landlord and has assumed the lease? The seller, because that money was owed to it?

In a very basic assignment and assumption agreement, the seller assigns all of its rights, title and interest in the lease to the buyer. Arguably, the seller would then have assigned its right to go after the delinquent tenant, and thus given up on the lost rent. Most well-drafted purchase agreements state that if the new landlord was able to collect some or all of that past due rent, it would be obligated to turn the money over to the seller, but only after first applying the money to the current rent due. But with a seriously delinquent tenant, what are the odds the new landlord will be able to collect that money?

While a savvy seller may try to include in the purchase contract, or in the assignment and assumption agreement, that post closing, the seller can pursue the deadbeat tenant, an equally savvy buyer will object. After all, as the new owner of the center, the buyer does not want the old landlord taking this tenant to court and impairing its ability to pay rent. If the old landlord's suit forces the tenant to go out of business, then the buyer would be the proud owner of a shopping center with a large vacancy. Not exactly the deal it bargained for when it signed the contract.

Most of the time, a seller is aware of its delinquencies and factors that into the purchase price of the center. However, in the case where an owner was not aware of the delinquency (perhaps due to the failure of a property manager to so advise), the surprised seller may find itself at odds with the buyer at the 11th hour of the deal!

The lesson for both buyers and sellers is know your delinquencies before signing the contract, and factor that into the purchase price. Once that is known, be clear in the purchase contract and the assignment and assumption agreement as to who has what rights. While most landlords will simply wash their hands of the past due accounts, others may want one more chance—even if just a limited right to pursue back rent (e.g., for 90 days, but with no right to terminate the lease or evict the tenant). The bottom line: Know your rights with respect to past due rent and understand how they impact the economic analysis of your purchase.

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