

1338A CARRYING A HANDGUN ON PREMISES WHERE ALCOHOL BEVERAGES ARE CONSUMED — EXCEPTIONS UNDER § 941.237(3)(a) – (j)¹

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.²

Carrying a Handgun on Premises Where Alcohol Beverages are consumed Under Wis. Stat. § 941.237(2)

The defendant's possession of a handgun on a premises licensed for the sale and consumption of alcohol beverages is an issue in this case. The law allows an individual to intentionally go armed with a handgun on a premises licensed for the sale and consumption of alcohol beverages³ if [CHOOSE ONE OF THE FOLLOWING]⁴

[the individual is a peace officer.]⁵

[the individual is a correctional officer while going armed in the line of duty.]⁶

[the individual is a member of the U.S. armed forces or national guard while going armed in the line of duty.]

[the individual is a private security person meeting all of the following criteria:

1. The private security person is covered by a license or permit issued under s. 440.26.
2. The private security person is going armed in the line of duty.
3. The private security person is acting with the consent of the person specified in par. (d).]⁷

[the individual is a qualified out-of-state law enforcement officer, as defined in s.

941.23(1)(g), to whom s. 941.23(2)(b)1. to 3. applies.]⁸

[the individual is a former officer, as defined in s. 941.23(1)(c), to whom s. 941.23(2)(c)1. to 7. applies.]⁹

[(1) the individual is a (licensee, as defined in s. 175.60(1)(d)¹⁰) (out-of-state licensee, as defined in s. 175.60(1)(g)¹¹) and, (2) is not consuming alcohol on the premises.]

[the individual is the licensee, owner, or manager of the premises, or any employee or agent authorized to possess a handgun by the licensee, owner, or manager of the premises.]

[the individual is in possession of a handgun that is unloaded and encased in a vehicle in any parking lot area.]

[the individual is in possession or use of a handgun at a public or private gun or sportsmen's range or club.]

[the individual is in possession or use of a handgun on the premises if authorized for a specific event of limited duration by the owner or manager of the premises who is issued the Class "B" or "Class B" license or permit under ch. 125 for the premises.]

[the individual is in possession of any handgun that is used for decoration if the handgun is encased, inoperable or secured in a locked condition.]

[the individual is in possession of a handgun in any portion of a hotel other than the portion of the hotel that is a tavern.]

[the individual is in possession of a handgun in any portion of a combination tavern

and store devoted to other business if the store is owned or operated by a firearms dealer, the other business includes the sale of handguns and the handgun is possessed in a place other than a tavern.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the exception of (insert the applicable statutory exception) did not apply to the defendant.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of carrying a handgun on premises where alcohol beverages are consumed have been proved and that the exception of (insert the applicable statutory exception) did not apply to the defendant, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1338A was approved by the Committee in October 2023.

This instruction is drafted for the exceptions set forth in § 941.237(3)(a) – (j).

2011 Wisconsin Act 35 [effective date: November 1, 2011] created a process to obtain a license to carry a concealed weapon. A person who is licensed or who is an out-of-state licensee is exempted from the crime that prohibits carrying a handgun where alcohol beverages are sold and consumed if the person is not consuming alcohol on the premises.

2011 Wisconsin Act 35 repealed subsection (4) of section 941.237. This subsection stated that “[T]he state does not have to negate any exception under sub. (3). Any party that claims that an exception under

sub. (3) is applicable has the burden of proving the exception by a preponderance of the evidence.”

The Committee believes that prior to the enactment of 2011 Wisconsin Act 35, the burden of disproving an exception under sub. (3) never shifted to the state, regardless of whether the defendant successfully demonstrated the exception by a preponderance of the evidence. However, the repeal of sub. (4) without any replacement language resulted in two significant changes.

First, the removal of sub. (4) relieved the defendant from the burden of proving the exception by a preponderance of the evidence. The Committee believes it is now sufficient for the defendant to simply point to or produce “some evidence” in support of an exception under sub. (3) in order to fulfill their required burden.

Evidence satisfies the “some evidence” quantum of evidence even if it is “weak, insufficient, inconsistent, or of doubtful credibility” or “slight.” State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). Though the burden of producing “some evidence” of a defense is commonly referred to as the defendant’s burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution; facts elicited from prosecution witnesses by defense cross-examination or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996).

Secondly, in the event that the defendant meets the “some evidence” standard, the Committee believes that the burden shifts to the State to disprove the exception beyond a reasonable doubt.

1. Subsections 941.237(3)(a)–(j) set forth a list of statutory exceptions. The jury instructions typically treat these exceptions like an affirmative defense. That is, the state need not anticipate them in the charging document, and they are not issues in the case until supported by “some evidence.” If so supported, the state must prove the inapplicability of the exception beyond a reasonable doubt. See, e.g., Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). See also Wis JI-Criminal 700, Sec. II, 3.

§ 941.237(3) provides that subsection (2) does not apply to any of the following:

- (a) A peace officer.
- (b) A correctional officer while going armed in the line of duty.
- (c) A member of the U.S. armed forces or national guard while going armed in the line of duty.
- (cm) A private security person meeting all of the following criteria:
 - 1. The private security person is covered by a license or permit issued under s. 440.26.
 - 2. The private security person is going armed in the line of duty.
 - 3. The private security person is acting with the consent of the person specified in par. (d).
- (cr) A qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g), to whom s. 941.23(2)(b)1. to 3. applies.
- (ct) A former officer, as defined in s. 941.23(1)(c), to whom s. 941.23(2)(c)1. to 7. applies.
- (cx) A licensee, as defined in s. 175.60(1)(d), or an out-of-state licensee, as defined in s. 175.60(1)(g), if the licensee or out-of-state licensee is not consuming alcohol on the premises.
- (d) The licensee, owner, or manager of the premises, or any employee or agent authorized to possess a handgun by the licensee, owner, or manager of the premises.

- (e) The possession of a handgun that is unloaded and encased in a vehicle in any parking lot area.
- (f) The possession or use of a handgun at a public or private gun or sportsmen's range or club.
- (g) The possession or use of a handgun on the premises if authorized for a specific event of limited duration by the owner or manager of the premises who is issued the Class "B" or "Class B" license or permit under ch. 125 for the premises.
- (h) The possession of any handgun that is used for decoration if the handgun is encased, inoperable or secured in a locked condition.
- (i) The possession of a handgun in any portion of a hotel other than the portion of the hotel that is a tavern.
- (j) [in] The possession of a handgun in any portion of a combination tavern and store devoted to other business if the store is owned or operated by a firearms dealer, the other business includes the sale of handguns and the handgun is possessed in a place other than a tavern.

2. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

3. "Alcohol beverages" is defined as follows in §125.02(1)

"Alcohol beverages" means fermented malt beverages and intoxicating liquor.

4. The applicable statutory exception should be selected. The alternatives are those provided in sub. (3)(a) – (j) of § 941.237.

5. "Peace officer" is defined as follows in § 939.22(22):

"Peace officer" means any person vested by law with a duty to maintain public order, whether that duty extends to all crimes or is limited to specific crimes.

6. "Correctional officer" is defined as follows in § 941.237(1)(b):

"Correctional officer" means any person employed by the state or any political subdivision as a guard or officer whose principal duties are the supervision and discipline of inmates.

7. "Private security person" is defined as follows in §440.26 (1m):

"Private security person" means any private police, guard, or any person who stands watch for security purposes.

8. "Qualified out-of-state law enforcement officer" is defined as follows in § 941.23:

"Qualified out-of-state law enforcement officer" means a law enforcement officer to whom all of the following apply:

- 1. The person is employed by a state or local government agency in another state.

2. The agency has authorized the person to carry a firearm.
3. The person is not the subject of any disciplinary action by the agency that could result in the suspension or loss of the person's law enforcement authority.
4. The person meets all standards established by the agency to qualify the person on a regular basis to use a firearm.
5. The person is not prohibited under federal law from possessing a firearm.

"Law enforcement officer" is defined as a person who is employed by a law enforcement agency for the purpose of engaging in, or supervising others engaging in, the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law and who has statutory powers of arrest. See § 175.49(1)(g).

"Law enforcement agency" means an agency that consists of one or more persons employed by the federal government, including any agency described under 18 USC 926C (e) (2); a state, or a political subdivision of a state; the U.S. armed forces; or the national guard, that has as its purposes the prevention and detection of crime and the enforcement of laws or ordinances, and that is authorized to make arrests for crimes. See § 175.49(1)(f).

9. "Former law enforcement officer" is defined as follows in § 175.49(1)(d):

"Former law enforcement officer" means a person who separated from service as a law enforcement officer at a state or local law enforcement agency in Wisconsin.

"Law enforcement officer" is defined as a person who is employed by a law enforcement agency for the purpose of engaging in, or supervising others engaging in, the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law and who has statutory powers of arrest. See § 175.49(1)(g).

"Law enforcement agency" means an agency that consists of one or more persons employed by the federal government, including any agency described under 18 USC 926C (e) (2); a state, or a political subdivision of a state; the U.S. armed forces; or the national guard, that has as its purposes the prevention and detection of crime and the enforcement of laws or ordinances, and that is authorized to make arrests for crimes. See § 175.49(1)(f).

10. "Licensee" is defined as follows in § 175.60(1)(d):

"Licensee" means an individual holding a valid license to carry a concealed weapon issued under this section.

11. "Out-of-state licensee" is defined as follows in § 175.60(1)(g):

"Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license.