

Sex Offender Residency Restrictions

League of Wisconsin Municipalities

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I. Wisconsin State Law

a. Sex offender reporting requirements, generally:

i. Whether reporting is required:

1. **Mandatory:** Crimes defined as a “sex offense”

a. “Sex offense means a violation, or the solicitation, conspiracy, or attempt to commit a violation, of s. 940.22 (2), 940.225 (1), (2) or (3), 944.06, 948.02 (1) or (2), 948.025, 948.05, 948.051, 948.055, 948.06, 948.07 (1) to (4), 948.075, 948.08, 948.085, 948.095, 948.11 (2) (a) or (am), 948.12, 948.13, or 948.30, of s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies, or of s. 940.30 or 940.31 if the victim was a minor and the person who committed the violation was not the victim's parent.” (Wis. Stat. § 301.45(1d)(b))

2. **Discretionary:** Offenses include violations in which “a court imposes a sentence or places a person on probation for any violation, or for the solicitation, conspiracy, or attempt to commit any violation, under ch. 940, 944, or 948 or s. 942.08 or 942.09, or ss. 943.01 to 943.15...[.]” (§ 973.048(1m)(a))

a. Subject to certain offenses in which the victim was a minor and the person was not the victim’s parent. (§ 973.048(2m))

3. Reporting: Person must register with Department of Corrections and maintain a current address (§ 301.45)

ii. Length of registration:

1. **Adults:**

a. 15 years for certain offenses (§ 301.45(5)(a))

b. Lifetime for certain offenses (§ 301.45(5)(am))

c. Discretionary for crimes not defined as “sex offenses” : A court may order reporting under § 301.45 “until his or her death” for certain offenses “if the court determines that the underlying conduct was sexually motivated” and reporting requirements “would be in the interest of public protection to have the person report.” (§973.048(1m))

i. Has been interpreted to include any period of time

2. **Juveniles:**

a. Registration is discretionary (§ 938.345(3)(a))

b. May be lifetime (§ 938.345(3)(b))

c. Court may release registration requirement “upon satisfying the conditions of the dispositional order imposed for the offense” (§ 938.345(3)(d))

b. Ch. 980 (sexually violent person)

- i. Initiated by petition from the Department of Justice or District Attorney’s Office to find a person sexually violent (Wis. Stat. § 980.02)
- ii. If determined to be a sexually violent person, the person is committed to the Department of Health Services “for control, care and treatment until such time as the person is no longer a sexually violent person.” (§ 980.06)
- iii. Committed to Sand Ridge Secure Treatment Center (Mauston, WI)
- iv. Person may petition for:
 - 1. Supervised release (§ 980.08)
 - a. Under DHS supervision
 - b. Similar to “house arrest”
 - c. Subject to registration requirements
 - 2. Discharge (§ 980.09)
 - a. Under DOC supervision
 - b. Still subject to registration requirements
- c. Special Bulletin Notice (SBN): DOC or DHS sends law enforcement detailed information on certain offenders prior to their supervised release. (§ 301.46(2m))
 - i. DOC or DHS may provide notice if they deem the offender poses a significant risk to the community
 - ii. DOC or DHS shall provide a notice for:
 - 1. Ch. 980 sexually violent person
 - 2. Person who has been convicted of 2+ sex offenses that require registration

➡ **PRACTICE TIP:** DOC’s online Sex Offender Registry (<http://offender.doc.state.wi.us/public/offenders>) will identify on the sex offender search whether an SBN was issued to local law enforcement for that offender.

II. Residency Restrictions in Wisconsin

- a. State preemption for Ch. 980’s
 - i. Act 156: Effective March 2, 2016
 - 1. Residency restriction ordinances may not impact placement
 - a. § 980.08(4)(cm): “An actual or alleged lack of available housing for the person within a county because of an ordinance or resolution in effect or proposed by the county or by a city, town, or village within the county may not constitute good cause to select another county under this paragraph.”
 - 2. Victim considerations for placement
 - a. § 980.08 (4) (f): DHS shall consider the victim’s location in its report for placement options
 - 3. Codified residency restrictions
 - a. § 980.08(4)(f)(2): Creates a residency restriction for Ch. 980 persons on supervised release:
 - i. 1,500 foot radius around “any school premises, child care facility, public park, place of worship, or youth center”
 - ii. If offense against:
 - 1. “Adult at risk” or “elder adult”: 1,500 foot radius around a nursing home or an assisted living facility

2. Child under 13 (“serious child sex offender”):
May not be placed into a residence adjacent to a property where a child’s primary residence exists.

- b. § 980.135: Preempts municipal ordinances as long as individual is:
 - i. Subject to supervised release under Ch. 980,
 - ii. Residing where he or she is ordered *and*
 - iii. In compliance with all court orders issued under Ch. 980

➡ **PRACTICE TIP:** Ordinances should be amended to account for Ch. 980 amendment. Municipality may exclude Ch. 980’s from residency restriction or may create a residency restriction for Ch. 980’s consistent with § 980.135. In order to pursue a nuisance injunction for non-compliance, municipality may need such an ordinance to have standing as a plaintiff. Otherwise, court may deny standing as an interested party in the event DHS, DA’s Office or another party acts (or fails to act) in response to a violation of Act 156 residency restrictions.

- b. Common elements of Wisconsin residency restrictions
 - i. Designated offender:
 1. Offense based: Lists various offenses that qualify
 - a. e.g. “Any of the following offenses set forth within the Wisconsin Statutes, as amended, or the laws of this or any other state or federal government, having like elements necessary for conviction, respectively...”
 2. Offender based: Includes all offenses by certain qualifying offenders
 - a. e.g. “[A]ny person who is required to register under s. 301.45, Wis. Stats., for any offense against a child or any person who is required to register under s. 301.45, Wis. Stats., and who has been designated a Special Bulletin Notification (SBN) sex offender pursuant to s. 301.46(2) and (2m), Wis. Stats.” (Milwaukee Code of Ordinances 106-51-2-b)
 - ii. Radius around prohibited areas:
 1. Typically 500-2,000 feet➡ **PRACTICE TIP:** Ordinance should define points of measurement to avoid challenges for vagueness.
 - a. e.g.: “The distance shall be measured by following a straight line from the outer property line of the residence to the nearest outer property line of a school, licensed day care center, park, recreational trail, playground or any other place designated by the city as a place where children are known to congregate.” (MCO 106-51-3-b)
 - iii. Prohibited areas:
 1. Most common: schools, day cares, parks, recreational trails, and playgrounds
 2. Other: golf courses, elderly homes, movie theaters, libraries, swimming pools, etc.
 - iv. Exceptions:
 1. Grandfather clause

2. “Romeo and Juliet” (i.e. two minors engaged in consensual relations)
 3. Prohibited area that is created after person established residency
 4. Living with certain family members
 - ➡ **PRACTICE TIP:** To avoid family members claiming to live at a residence and then immediately moving out after an inspection, ordinance may want to include a minimum time that family member(s) must have resided at location to establish a valid residence (i.e. 1 year).
 5. Minor or ward under guardianship
 6. Incarcerated
 7. Receiving treatment in approved facility
- v. Domicile clause: Prohibits residency of sex offenders who were not from that municipality at the time of the offense.
1. Common language: “In addition to the restrictions of sub. 3, but subject to sub. 4, no person who has been convicted of a sexually violent offense or a crime against a child shall be permitted to reside in the city, unless such person was domiciled in the city at the time of the offense resulting in the person's most recent conviction for committing the sexually violent offense or crime against a child.” (MCO 105-61-5)
 - ➡ **PRACTICE TIP:** If neighboring municipalities in your county have residency restrictions but your municipality does not, there is a strong likelihood that your municipality could become a “dumping ground” for sex offender placement. As such, domicile clauses are an effective means for a municipality to limit its intake of sex offenders to its own constituents.
- vi. Non-residence restriction
1. Child safety zones: prohibits offenders subject to residency restrictions from *being present* at prohibited areas (i.e. school, park, etc.)
 2. Loitering restrictions for sex offenders: prohibits offenders subject to residency restrictions from *loitering* at prohibited areas (i.e. school, park, etc.)
- vii. Establishing residence: An offender may establish more than one residence based on criteria set forth in ordinance.
1. Allows temporary residences that are not subject to residency restrictions (i.e. <3 days); *or*
 2. Residence is established wherever someone sleeps
 - ➡ **PRACTICE TIP:** The ordinance and/or enforcement should not include certain temporary or involuntary locations, such as hospitalization and incarceration.

III. Wisconsin Case Law

- a. *Village of Menomonee Falls v. Ferguson*, 2011 WI App 73: Grandfather clause for Menomonee Falls residency restriction applies to the residence and not the individual. Therefore, an offender is not permanently exempt if person was in compliance at the time of the enactment of the ordinance. If that person moves, that person loses grandfather status and all future locations must be in compliance with ordinance.
 - i. Acknowledges validity of residency restriction ordinances

1. ¶ 16: “However, Wisconsin does not have a sex offender residency restriction statute. Instead, Wisconsin municipalities are allowed and commonly do enact sex offender residency restriction ordinances.”
 - ii. Distinguishes person vs. property
 1. ¶ 17: Grandfather exception in village’s ordinance was to the person and not the residence.
 2. ¶ 23: Interpreting exception to go to the individual would create an “absurd result.”
 - a. i.e. If individual was living at a lawful residence at creation of ordinance, under Ferguson’s theory that individual could move without limitation within municipality.
 - iii. Zoning analogy
 1. ¶ 29: Court drew an analogy with zoning laws as a basis to permit residency restrictions
 - b. *City of South Milwaukee v. Kester*, 2013 WI App 50: A municipality may enforce its residency restriction with a nuisance injunction.
 - i. Violation of a sex offender residency restriction is nuisance *per se*
 1. ¶ 9: “A nuisance *per se* may be established by law, and no actual injurious consequences are required to support a finding of nuisance *per se*.”
 2. ¶ 10: A residency restriction violation is sufficient to demonstrate a nuisance *per se*. No other evidence is necessary to prove a public nuisance and for an injunction to be issued.
 - ii. Due process protected
 1. ¶ 14: No due process violation to enjoin individual for violation of residency restriction ordinance as long as individual has opportunity to present case he or she qualifies for an exception or exemption
 - iii. No preemption
 1. ¶ 17-¶19: Regulation of sex offenders, including where they live, is a matter of both statewide and local concern. Court found South Milwaukee’s residency restriction furthers its goal to reduce the risk of re-offense by child sex offenders. Ordinance does not defeat the purpose or violate the spirit of state law; therefore, is it not preempted by state law.
- ➡ **PRACTICE TIP:** *Kester* provides strong case law for other nuisance actions, including precedence for a nuisance *per se* and nuisance injunctions.

IV. Examples of Milwaukee County Challenges to Residency Restrictions

- a. *State v. Wofford* (95CF950391) (Milwaukee County): Circuit court judge found that the Milwaukee County residency restriction ordinances “acting in concert” are preempted and that “one may eventually have to give way.” Court later enjoined the municipalities from enforcing their ordinances. Court denied municipalities’ motion to reconsider. Decision rendered without Milwaukee County municipalities ever making an appearance or being noticed of preemption decision.
 - i. *Village of Brown Deer, et al v. Circuit Court of Milwaukee County, et al* (2015AP1031-W) (*unpublished*): 18 of 19 Milwaukee County municipalities petitioned court of appeals for a writ of prohibition against *Wofford* court order.

Case mooted out when circuit court judge amended order to remove injunction before decision rendered. Court of appeals subsequently denied *writ*.

- b. *State v. Collins* (99CF001326) (Milwaukee County): DOC sought court ordered exception from Milwaukee ordinance that contained a provision, “In absence of a court order specifically exempting a designated offender from the residency restriction in this subsection, ...”. Milwaukee intervened and objected. Before final disposition of the case, Milwaukee amended its ordinance removing provision. Court denied DOC’s motion.
- c. *In re Interest of D.S.* (2015AP001634) (Milwaukee County): Juvenile adjudicated delinquent and subject to sex offender registration motioned to reopen case based, in part, on impact of Milwaukee’s sex offender residency restriction that was enacted after registration was ordered on juvenile. Milwaukee District Attorney’s Office responded to motion, in part, alleging that Milwaukee’s ordinance does not apply because it is preempted by Wis. Stat. Ch. 938. Milwaukee intervened and court affirmed validity of ordinance and denied motion to reopen. Juvenile appealed and District Attorney’s Office did not raise preemption argument on appeal. Thus, Milwaukee did not have an interest in the appeal. Court of appeals affirmed children’s court decision and supreme court denied *cert*.

V. Notable Non-Wisconsin Law

- a. **California:** In March 2015, the Supreme Court of California found the blanket enforcement of sex offender residency restrictions in San Diego County was unconstitutional. *In re Taylor*, 60 Cal. 4th 1019, 343 P.3d 867 (2015).
 - i. Ordinance rendered 97% of housing inaccessible to offenders. (*Id.* at 1039-40)
 - ii. Court found restriction increased homelessness and hindered access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative services while making it more difficult for law enforcement to monitor, supervise and rehabilitate offenders in the interest of public safety. (*Id.* at 1023)
- b. **Kansas:** Prohibits residency restrictions for sex offenders. (K.S.A. 22-4913)
- c. **Michigan:** In March 2015, a U.S. District Court struck down portions of Michigan’s Sex Offenders Registration Act (SORA) in an action brought by the ACLU. The court struck down as constitutionally vague the 1,000 foot geographic exclusion zone (based on how it should be measured), prohibition on loitering, certain reporting requirements and the term “immediately” in the reporting requirements. *Doe v. Snyder*, 101 F. Supp. 3d 672 (E.D. Mich. 2015), *appeal dismissed* (June 5, 2015).

VI. Factors to Consider when Implementing or Amending Sex Offender Residency Restrictions

- a. *Ex post facto* and double jeopardy:
 - i. **General:** *Kester* court distinguishes whether ordinance is nonpunitive, civil regulatory scheme or a punitive law. Latter could invoke *ex post facto* and double jeopardy challenges. Court considered legislative intent, exceptions to ordinance and availability of housing options. See 2013 WI App 50, ¶¶ 23-31.
 - ➡ **PRACTICE TIP:** Legislative intent should not reference punishing criminal behavior.
 - ii. **Banishment:** *Kester* court finds the ordinance is not banishment because of available housing options. 2013 WI App 50, ¶ 27.
 - ➡ **PRACTICE TIP:** When adding restrictions that limit available housing, consider adding exceptions or other amendments that maintain an adequate amount of housing options to avoid banishment challenges.

- iii. **Rational relationship:** *Kester* court found all child sex offenders are dangerous; thus, a municipality need not cater its restriction to each individual offender. Municipality does not have to enact the *best* measure to satisfy its goals, just a reasonable one. 2013 WI App 50, ¶ 27.
 - ➡ **PRACTICE TIP:** Prohibited areas should relate to victim. For example, restrictions for offenders with an adult victim might not have a rational relationship to a restriction around schools or other areas where children are known to congregate. As a result, there may need to be separate restrictions depending on the victim (e.g., schools for offenses involving a child, retirement homes for offenses involving elderly). In addition, legislators should create a thorough record for legislative intent and findings based on academically sound research.
- b. Judicial and quasi-judicial exceptions: Creates a forum for a judicial or quasi-judicial body to grant an exception to residency restrictions on a case-by-case basis.
 - i. Allows sex offender to seek a court ordered exception
 - ➡ **PRACTICE TIP:** To guide court, the ordinance should include standards for the court to grant an exception.
 - ii. Quasi-judicial body created to determine exceptions (e.g. Sheboygan and Green Bay)
 - ➡ **PRACTICE TIP:** Should not be a rubber stamp to deny exceptions and should include qualified members with professional experience in determining merits of case. Should also consider risk of revictimizing victims of offense.
- c. Impact on homelessness:
 - i. Studies have indicated homelessness increases rate of recidivism
 - ii. If available housing options are limited to the extent a municipality cannot reasonably accommodate housing at least the sex offenders that are its own constituents, there is an increased risk of a finding of “banishment”
 - ➡ **PRACTICE TIP:** Municipalities should provide, or make available upon request, a publicly accessible map of prohibited areas and/or a list of available residences subject to codified exceptions.
- d. Resources available:
 - i. Consider available police resources to enforce ordinance with amount of total sex offenders
 - ii. Considerable available legal resources to initiate a nuisance injunction for repeat offenders who violate the ordinance
 - ➡ **PRACTICE TIP:** Develop and maintain a working relationship with outside stakeholders, including DHS, DOC and DA’s Office, when creating, enforcing and amending ordinance.