

4th of July Fireworks Safety



Fireworks in Wisconsin

I. ONLY ONE CONTROLLING STATUTE - Wis. Stat. § 167.10.

A. *Defines Items Which Are "Fireworks" – Wis. Stat. § 167.10(1).*

"[A]nything manufactured, processed or packaged for exploding, emitting sparks or combustion which does not have another common use, but does not include . . ."

The significant exceptions are at subs. (i) through (n) (see Appendix A).

A sparkler on a wire or wood stick not exceeding 36 inches in length that is designed to produce audible or visible effects or to produce audible and visible effects.

A device designed to spray out paper confetti or streamers and which contains less than one-quarter grain of explosive mixture.

A fuseless device that is designed to produce audible or visible effects or audible and visible effects, and that contains less than one-quarter grain of explosive mixture.

A device that is designed primarily to burn pyrotechnic smoke-producing mixtures, at a controlled rate, and that produces audible or visible effects, or audible and visible effects.

A cylindrical fountain that consists of one or more tubes and that is classified by the federal department of transportation as a Division 1.4 explosive, as defined in 49 C.F.R. § 173.50.

A cone fountain that is classified by the federal department of transportation as a Division 1.4 explosive, as defined in 49 C.F.R. § 173.50.

Some exceptions include references to certain items classified as "Division 1.4 explosive, as defined in 49 CFR 173.50" (NOTE: Not all items that are Division 1.4 explosives are unregulated in Wisconsin. Wisconsin Stat. § 167.10(1)(m) and (n), which reference Division 1.4 explosives, refer only to "a cylindrical fountain" and "a cone fountain".)

Division 1.4 consists of explosives that present a minor explosion hazard. The explosive effects are largely confined to the package and no projection of fragments of appreciable size or range is to be expected. An external fire must not cause virtually instantaneous explosion of almost the entire contents of the package.

49 C.F.R. § 173.50(b)(4) (Appendix B).

Federal law classifies fireworks into 2 general categories, "Display Fireworks" and "Consumer Fireworks." "Display Fireworks" are generally large fireworks and are also classified as a "Division 1.3" explosive. These types of fireworks were formerly known as "Special Fireworks" or "Class B" fireworks. "Consumer Fireworks" were formerly known as "Class C" or "common" fireworks, and are classified as a "Division 1.4" explosive. See: 49 C.F.R. §§ 173.50(b) and 173.53, 27 CFR 55.11 (Appendix B and C).

NOTE: Some commonly sold fireworks are not legal under federal law:

[C]herry bombs, M-80 salutes, silver salutes, and other large firecrackers, aerial bombs and other fireworks designed to produce audible effects, and including kits and components intended to produce such fireworks ... if the audible effect is produced by a charge of more than 2 grains of pyrotechnic composition. 16 C.F.R. § 1500.17(a)(3) (Appendix D).

Firecrackers designed to produce audible effects, if the audible effect is produced by a charge of more than 50 milligrams (.772 grains) of pyrotechnic composition . . . aerial bombs, and devices that may be confused with candy or other foods . . . including kits and components intended to produce such fireworks. 16 C.F.R. §§ 1500.17(a)(8) and 1500.86(a)(2) (Appendix D).

All fireworks devices, other than firecrackers, including kits and components, intended to produce such fireworks, not otherwise banned under the act, that do not comply with the applicable requirements of part 1507 of this chapter. 16 C.F.R. §1507.17(a)(9) (Appendix D). Various other requirements for fireworks can be found at 16 C.F.R. § 1507 (Appendix D).

The sale of such fireworks would violate Wis. Stat. § 167.10, as well as federal law. In addition, such products may constitute improvised explosive devices as defined under Wis. Stat. § 941.31(2)(a). Improvised explosive device is defined as:

[A] destructive explosive device capable of causing bodily harm, great bodily harm, death or property damage; with some type of explosive material and a means of detonating the explosive material, directly, remotely, or with a timer either present or readily capable of being inserted or attached; which may include a pipe or similar casing, with the ends of the pipe or casing capped, plugged or crimped, and a fuse or

similar object sticking out of the pipe or casing; and made by a person not engaged in the legitimate manufacture or legitimate use of explosives, or otherwise authorized by law to do so. "Improvised explosive device" does not include ammunition for any rifle, pistol or shotgun.

Wisconsin Stat. § 941.31(2)(b) makes it a Class E felony (\$10,000 and 5 years prison) to make, buy, sell, transport, possess, use or transfer any improvised explosive device, or to possess materials or components with intent to assemble any improvised explosive device.

B. *Limits Sales – Wis. Stat. § 167.10(2).*

Fireworks may ONLY be sold to persons holding VALID permits, to municipalities, and for other very limited specific purposes.

C. *Possession And Use Of Fireworks - Wis. Stat. § 167.10 (3).*

No possession or use of fireworks without a user's permit from an appropriate official of the municipality in which the possession or use is to occur. Although it is not specifically defined this way in the statute or any cases, it can easily be argued that this must be a VALID permit (more on permits later).

Among other exceptions in Wis. Stat. § 167.10(3)(b), there is now a "travelers' exception" (created in 1996):

Possession of fireworks is allowed "while transporting the fireworks to a city, town or village where the possession of the fireworks is authorized by permit or ordinance."

A person is no longer travelling if "the person remains in that city, town or village for a period of at least 12 hours."

D. *Out-Of-State Sales And In-State Shipping – Wis. Stat. § 167.10(4).*

A "wholesaler or jobber" may sell fireworks "to a person outside of this state or to a person or group granted a permit under sub. (3) (c) 1. to 7" if they ship according to applicable laws, and ship by "common motor carrier, contract motor carrier or private motor carrier".

E. *Local Ordinances – Wis. Stat. § 167.10(5).*

A city, village, town or county may enact an ordinance more strictly limiting items defined as fireworks or prohibiting or regulating the sale, possession or use of fireworks. Wis.

Stat. § 167.10(5)(a) and (b). However, it cannot enact an ordinance which is less restrictive than Wis. Stat. § 167.10.

A county ordinance does not apply and may not be enforced within any city, village or town that has enacted or enacts its own ordinance. Wis. Stat. § 167.10(5)(d).

F. Enforcement – Wis. Stat. § 167.10(8) and (9).

Only a city, village or town may petition a circuit court for an order enjoining violations of sec. 167.10 or local ordinances. In regards to townships, Wis. Stat. § 60.24(3)(v) places this authority in the town board chairperson.

Fireworks may be seized and held as evidence of the violation, but only the fireworks that are the subject of a violation may be destroyed after conviction. Wis. Stat. § 167.10(8)(b).

If fireworks are seized and no conviction results, the fireworks "shall be returned to the owner in the same condition as they were when seized to the extent practicable." Wis. Stat. § 167.10(8)(b).

Most violations (illegal sale or possession with intent to sell, possession or use and storage) are \$1000 forfeitures only. Wis. Stat. § 167.10(9)(b). It is a misdemeanor (9 months and \$10,000 fine) to violate a court order issued to enjoin violations of Wis. Stat. § 167.10(2), (3) and (6) or a local ordinance (regarding sale, use and storage). The only felony offenses involve manufacturing of fireworks. Wis. Stat. § 167.10(9)(g). Parents or guardians can be convicted for consenting to minors' use of fireworks. The penalty is a \$1000 forfeiture. Wis. Stat. § 167.10(9)(c).

However, as noted above, possession of illegally produced fireworks may constitute a violation of federal law as well as a felony violation of Wis. Stat. § 941.31 (improvised explosive device) for the making, buying, selling, transporting, possession, use or transfer of such devices.

G. Storage And Handling

Wisconsin Stat. § 167.10(6) sets forth the requirements for the storage and handling of fireworks. These requirements are as follows:

No wholesaler, dealer or jobber may store or handle fireworks in premises unless the premises are equipped with fire extinguishers approved by the fire official of the municipality where the premises are located."

"No person may smoke where fireworks are stored or handled."

"A person who stores or handles fireworks shall notify the fire official of the municipality in which the fireworks are stored or handled of the location of the fireworks."

"No wholesaler, dealer or jobber may store fireworks within 50 feet of a dwelling."

"No person may store fireworks within 50 feet of a public assemblage or place where gasoline or volatile liquid is dispensed in quantities exceeding one gallon."

NOTE: Prior to 1996 the law provided that no person may store or sell fireworks within 50 feet of "where gasoline is sold." The change from "where sold" to "where dispensed" appears to broaden the scope of the statute. For example, may sales occur from a gas station store or display which is more than 50 feet from the pumps?

In addition, while a city, village or town does not need a permit to use fireworks, "municipal fire and law enforcement officials shall be notified of the proposed use of fireworks at least 2 days in advance." Wis. Stat. § 167.10(3)(b)1.

Lastly, the Department of Commerce, as well as fire department chiefs, have the statutory authority "at all reasonable hours (to) enter into and upon all buildings, premises and public thoroughfares excepting only the interior of private dwellings, for the purpose of ascertaining and causing to be corrected any condition liable to cause fire, or any violation of any law or order relating to the fire hazard or to the prevention of fire." Wis. Stat. § 101.14(1)(b) and (2)(a). *Also see* Wis. Stat. § 101.14(1)(a).

II. COMMON QUESTIONS, OR 'PERMITS, PERMITS, PERMITS...'

A. *Who Can Issue Fireworks Permits? – Wis. Stat. § 167.10(3)(a).*

Only the mayor of the city, president of the village or chairperson of the town in which the possession or use is to occur, or an official or employee of that municipality designated by the mayor, president or chairperson.

This duty may not be delegated to others, such as a private business owner (but note the occasional situation where a municipal official is also a business owner).

B. *Who Can Permits Be Issued To? – Wis. Stat. § 167.10(3)(c).*

Permits may only be issued to:

1. A public authority;
2. A fair association;
3. An amusement park;
4. A park board;
5. A civic organization;
6. A group of resident or nonresident individuals;
7. An agricultural producer for the protection of crops from predatory birds or animals.

In addition, subsection (h) specifies that a permit may not be issued to a minor.

C. What Must A Permit Contain? – Wis. Stat. § 167.10(3)(f).

In order to be valid, a permit must contain the name and address of the permit holder, the date on and after which fireworks may be purchased, the kind and quantity of fireworks which may be purchased, the date and location of permitted use, and other special conditions prescribed by ordinance.

D. Are There Any Other Types Of Permits Which Might Do The Trick?

18 U.S.C. §§ 841-848 regulate the interstate importing, manufacturing, distributing and storing of explosive materials. 18 U.S.C. § 843 provides for a license issued by the U.S. Department of Transportation to engage in these activities. Some of the larger "legitimate" fireworks merchants might have one of these federal licenses. Such a license eliminates their need to have a local possession license. *City of Wisconsin Dells v. Dells Fireworks*, 197 Wis.2d 1, 19, 539 N.W.2d 916 (Ct. App. 1995) (Appendix E). However, the federal license only allows the holder to possess and use fireworks, or sell to other federal licensees. It does not allow a federal license holder to sell to persons who do not have a local permit. *City of Wisconsin Dells v. Dells Fireworks*, 197 Wis.2d at 19.

A local ordinance could require a federal license holder to also obtain a local permit.

E. What Does A Permit Under State Law Allow?

A permit can allow its holder to:

Purchase fireworks:

- anywhere in the state
- type and quantity must be specified in the permit
- on or after the date for purchase specified in the permit

Transport those fireworks to a location specified in permit:

- Remaining in a "non-permitted" city, town or village more than 12 hours means you are no longer "transporting."

- If a person is not on a reasonably direct route between the location of purchase and the location of the permit, it can probably also be argued that they are not really transporting to the permitted location.

Use of Fireworks:

- Date and location must be specified in permit.

F. *What About This Stand That Is "Selling" Permits?*

It doesn't work.

Upon closer examination, fireworks stands on Wisconsin have not generally been selling the actual permits themselves. Several "organizations" (see Wis. Stat. § 167.10(3)(c)6.) may have obtained permits from authorized entities, and then the fireworks dealers have purported to sell "memberships" into the organization holding the fireworks permit to individuals wishing to purchase fireworks. Their argument has been that this allows the member to take advantage of the group's permit for their own individual use.

DOJ objected this practice for many years. In a letter dated June 9, 1987, Assistant Attorney General Daniel A. Milan expressed doubts about the validity of one organization's permit scheme. He argued that the intent of Wis. Stat. § 167.10 was to permit the use of fireworks by groups of people at a specific place and time if authorized by the local municipality. Commenting on one organization's practices, he stated that "this is a scheme to facilitate the sale of fireworks rather than to promote Club functions."

More recently, a court has finally decided this issue, holding that "[u]nder § 167.10(3)(c)6, STATS., the permit is issued to a group, not to the individuals that make up the group. Therefore, it is the group, W[isconsin] F[ireworks] A[ssociation], which holds the permit, not the members of the WFA." *Dells Fireworks*, 197 Wis. 2d at 20. Since the permits made clear that the individuals had no ability to exercise any control over the organization itself, they were not acting on behalf of the organization. The court went on to say that:

Except for an agricultural producer, user permits may not be issued to individuals. These requirements give the issuing municipality the ability to carefully control the use and possession of fireworks within its boundaries. If any individual who pays two dollars can obtain a permit without the municipality even knowing about it, there is little point to any of these sale and use requirements. It is clear from the WFA membership form and the undisputed circumstances of the membership purchases, that WFA is not exercising any control over the purchase or use of fireworks by its members.

Dells Fireworks, 197 Wis. 2d at 21.

G. *Can They Sell To People From Other States Who Are In Wisconsin?*

A wholesaler or "jobber" can sell fireworks "to a person outside of this state." Wis. Stat. § 167.10(4). However, that language doesn't provide a right to sell to other states' residents while they are in this state. *State v. Victory Fireworks*, 230 Wis. 2d 721, 602 N.W.2d 128 (Ct. App. 1999), *petition for review denied*, 4/26/2000 (Appendix F). Also see *Cornellier Fireworks Co. v. St. Croix County*, 119 Wis. 2d 44, 349 N.W.2d 721 (Ct. App. 1984) (Appendix G).

In *State v. Victory Fireworks*, the state charged the defendant with multiple violations of Wis. Stat. 167.10 alleging unlawful sales to out of state residents. The defendant had the purchasers sign a document entitled "Out of State Fireworks Purchase Contract and Straight Bill of Lading" which claimed that title to the fireworks would only pass when the fireworks entered another state. The purchasers were then allowed to buy restricted fireworks. The fireworks were packaged in a sealed box or bag with a label which reflected, among other things, that it was illegal to open and use the fireworks in Wisconsin. The trial court dismissed the charges on the ground that Wis. Stat. § 167.10(4) allowed sales to non-residents.

The Court of Appeals rejected this argument based the plain language of the statute. The court held that Wis. Stat. § 167.10(4) only allows sales to purchasers who are actually outside of Wisconsin and not merely to non-residents. *State v. Victory Fireworks*, 230 Wis. 2d at 725.

When the seller ships the fireworks they must be packaged and shipped in accordance with applicable state and federal law by, "common motor carrier, contract motor carrier or private motor carrier" (as defined at Wis. Stat. § 194.01 (1), (2) and (11)). This means the fireworks cannot be put into private automobiles for "shipment" out of state. In *State v. Victory Fireworks*, the Court of Appeals stated that it did not have to reach the question of whether the out of state purchaser's vehicles fit the definition of an appropriate carrier as that issue did not effect whether the sale itself was unlawful. *State v. Victory Fireworks*, 230 Wis. 2d at 726.

III. OTHER STATUTES

Consideration should also be given to the effect other statutes may have on fireworks enforcement. For example, all persons or businesses who are doing business in Wisconsin must charge and collect state sales taxes. In order to do so they must first obtain a sales tax permit. Wis. Stat. § 77.52(7) and (8). A special permit is available for businesses who are temporarily selling in Wisconsin. Wis. Stat. § 77.52(19). These statutory requirements raise several issues.

First, Wis. Stat. § 77.61(11) provides:

Any city, village or town clerk or other official whose duty it is to issue licenses or permits to engage in a business involving the sale at retail of tangible personal property subject to tax under this subchapter, or the furnishing of services so subject to tax, shall, before issuing such license or permit, require proof that the person to whom such license or permit is to be issued is the holder of a seller's permit as required by this subchapter or has been informed by an employe of the department that the department will issue a seller's permit to that person.

Therefore, this statute allows governmental officials to deny the issuance of any license to a business which does not have the necessary sales tax permit.

Second, Wis. Stat. § 77.52(12) provides that anyone who operates a business without a permanent or temporary sales tax permit, including each officer of a corporation, partnership, limited liability company member or any other person authorized to act on behalf of a seller "is guilty of a misdemeanor." Other crimes for failing to file sales tax returns, evading taxes or stealing sales taxes are set forth in Wis. Stat. §§ 77.60 and 77.61