



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2015 Senate Bill 410

Senate Amendment 2

Memo published: January 11, 2016

Contact: David Moore, Staff Attorney (266-1946)

CURRENT LAW

Wisconsin's criminal invasion of privacy statute provides that no person may install a surveillance device in a private place, or use a surveillance device that has been installed in a private place, to observe a nude or partially nude person without that person's consent. This statute defines "surveillance device" to mean "any device, instrument, apparatus, implement or contrivance used, designed to be used or primarily intended to be used to observe the activities of a person."

Wisconsin law also criminalizes various conduct related to capturing representations depicting nudity. As relevant here, it is a Class I felony to capture a representation that depicts nudity without the knowledge and consent of the person depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy. It is also a Class I felony to make, exhibit, or distribute a reproduction of such a representation.

Additionally, it is a Class A misdemeanor to post, publish, or cause to be posted or published, a "private representation" if the actor knows that the person depicted does not consent to the posting or publication of the private representation. "Private representation" is defined, very generally, to mean a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that the person depicted intends to be viewed only by the person who captured the representation or by the person to whom the person depicted directly gave the representation.

2015 SENATE BILL 410

Senate Bill 410 makes the following changes to the criminal invasion of privacy statute:

- It modifies the definition of “surveillance device” to clarify that a surveillance device need only be capable of observing the activities of a person and need not be primarily designed for that purpose.
- It provides that in addition to installing or using an installed surveillance device, no person may use a surveillance device—whether installed or not—to observe in a private place a nude or partially nude person without the consent of the person observed.

Senate Bill 410 also makes a number of changes to the crime of capturing, reproducing, exhibiting, or distributing a nude representation. The bill provides that it is a Class I felony to capture, reproduce, exhibit, or distribute an “intimate representation” without the consent of the person depicted under circumstances in which he or she has a reasonable expectation of privacy if the person knows or has reason to know that the person who is depicted does not consent to the capture of the intimate representation. The bill defines “intimate representation” to mean any of the following:

- A representation of a nude or partially nude person.
- A representation of clothed, covered, or partially clothed or covered genitalia or buttock that is not otherwise visible to the public.
- A representation of a person urinating, defecating, or using a feminine hygiene product.
- A representation of a person engaged in sexual intercourse or sexual contact.

The bill also creates a definition of consent, specifies that a person under the age of 18 is incapable of giving consent, and specifies that certain persons—such as a person suffering from a mental illness or defect that impairs capacity to appraise personal conduct or a person who is unconscious—are presumed to be incapable of consent. This presumption may be rebutted.

SENATE AMENDMENT 2

Under current law, the provisions related to the misdemeanor crime of posting or publishing a private representation do not apply to a person who posts or publishes a private representation that is newsworthy or of public importance. Senate Amendment 2 applies this exception to the felony crime of capturing, reproducing, exhibiting, or distributing an intimate representation.

Senate Amendment 2 also specifies that neither the provisions related to the felony crime of capturing, reproducing, exhibiting, or distributing an intimate representation nor the provisions related to the misdemeanor crime of posting or publishing a private representation apply to a provider of an interactive computer service, as defined by federal law, or to an

information service or telecommunications service, as defined by federal law, if the representation was provided to the service by a third party.

BILL HISTORY

Senate Amendment 2 to Senate Bill 410 was offered by Senator Vukmir on December 16, 2015. On January 7, 2016, the Senate Committee on Judiciary and Public Safety voted unanimously to recommend adoption of Senate Amendment 2 and passage of Senate Bill 410, as amended.

DM:ksm