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# Wisconsin Legislative Council

## ACT MEMO

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**2023 Wisconsin Act 47**  
[2023 Senate Bill 166]

**Wisconsin Code of Military  
Justice**

Members of the Wisconsin National Guard are subject to the Wisconsin Code of Military Justice (WCMJ), which codifies offenses that may be punished under the code and establishes procedures for enforcing the code. When serving on federal status, National Guard members are subject instead to the federal Uniform Code of Military Justice (UCMJ).

2023 Wisconsin Act 47 makes a number of changes to the WCMJ. In particular, the act: clarifies the jurisdiction of military and civilian courts over offenses under the WCMJ; specifies the limits of punishment for violating the WCMJ's punitive articles; and directs the Adjutant General to prescribe rules of procedure that apply to proceedings under the WCMJ and a policy regarding the treatment of victims of offenses under the WCMJ. The act also modifies and creates various punitive articles in the WCMJ to more closely align the WCMJ with the UCMJ.

### **Jurisdiction of Courts-Martial**

Under the WCMJ, courts-martial have primary jurisdiction of “military offenses,” while civilian criminal courts have primary jurisdiction of “nonmilitary offenses” when an act or omission violates both the WCMJ and civilian criminal law. When a civilian court has primary jurisdiction over an offense, the National Guard may initiate a court-martial proceeding only after the civilian authority has declined to prosecute or dismiss the charge, provided that jeopardy has not attached.<sup>1</sup>

For the purposes of establishing jurisdiction, the WCMJ defines “military offense” by enumerating the specific offenses this definition includes, and defines “nonmilitary offenses” as offenses that are in the state’s civilian penal statute and are not offenses under the WCMJ. Under prior law, however, the definition of “military offense” included several offenses that are offenses under both the WCMJ and civilian criminal law.

The act clarifies that civilian authorities have primary jurisdiction over offenses that are prohibited under both Wisconsin’s Criminal Code and the WCMJ, by removing those offenses from the definition of “military offense” and repealing the definition of “nonmilitary offenses.” Under the act, civilian authorities have primary jurisdiction over the following offenses: rape and sexual assault; stalking; rape and sexual assault of a child; sexual misconduct; larceny and wrongful appropriation; robbery; forgery; maiming; arson; extortion; assault; burglary; housebreaking; and perjury.

### **Limits of Punishment**

Prior law provided that the limits of punishment for violating an offense under the WCMJ are prescribed by the Governor, but may not exceed 10 years of confinement or constitute cruel or unusual punishment. The act adopts the limits of punishment under the UCMJ by incorporation, unless the

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<sup>1</sup> The National Guard may take administrative disciplinary actions against a person for violating an offense over which a civilian court has primary jurisdiction regardless of whether the civilian authority prosecutes the offense.

Governor prescribes other limits. As under prior law, these limits may not exceed 10 years of confinement or constitute cruel or unusual punishment.

## **Rules of Procedure for Courts-Martial**

Prior law authorized the Governor to prescribe pretrial, trial, and post-trial procedures, including modes of proof, for courts-martial cases arising under the WCMJ.

The act modifies this provision to require the Adjutant General to prescribe in writing pretrial, trial, and post-trial procedures for courts-martial cases arising under the WCMJ and to make these procedures publicly available on DMA's website.

## **Policy on Treatment of Victims**

The Wisconsin Constitution and Wisconsin Statutes grant crime victims a variety of rights, including the right to be treated with dignity, respect, courtesy, sensitivity, and fairness. For these purposes, "crime victim" is defined, generally, as a person against whom a crime has been committed. A victim of an offense under the WCMJ may satisfy this definition of crime victim under some, but not all, circumstances.

The act requires the Adjutant General to prescribe in writing, publish on the Department of Military Affairs (DMA)'s website, and implement a policy that ensures that any victim of an offense under the WCMJ is treated with dignity, respect, courtesy, sensitivity, and fairness.

## **Punitive Articles Created or Modified**

Congress amends the UCMJ on a regular basis, but these changes do not affect the WCMJ unless subsequently adopted by the Wisconsin Legislature. The act creates and modifies various punitive articles to more closely align the WCMJ with the UCMJ.

## **Prohibited Activities With a Military Recruit or Trainee by a Person in a Position of Trust**

The act creates a punitive article that prohibits an officer, noncommissioned officer, or petty officer who is in a training leadership position from engaging in a prohibited sexual activity with a specially protected junior member of the armed forces. It also prohibits a military recruiter from engaging in prohibited sexual activity with an applicant for military service or a specially protected junior member of the state military forces who is enlisted under a delayed entry program. This article parallels Article 93a of the UCMJ, which was adopted in the National Defense Authorization Act (NDAA) for fiscal year 2016.

Under the act, prohibited sexual activity means any sexual act or sexual contact or any attempt or solicitation to commit a sexual act or sexual contact. A specially protected junior member of the armed forces is a member of the state military forces who is one of the following: (1) assigned to or awaiting assignment to basic training or other initial active duty for training; (2) a cadet, midshipman, an officer candidate, or student in any other officer qualification program; or (3) in any program that, by regulation of the Secretary of the Army or Air Force, is identified as a training program for initial career qualification. Consent is not a defense for any conduct at issue.

## **Retaliation**

The act creates a punitive article that prohibits wrongfully taking or threatening to take an adverse personnel action against any person or wrongfully withholding or threatening to withhold a favorable personnel action with respect to any person, if done with intent to do any of the following: (1) retaliate against any person for reporting or planning to report a criminal or military offense; (2) retaliate

against any person for making or planning to make a protected communication; or (3) discourage any person from reporting a criminal or military offense or making a protected communication.

Under the act, a communication qualifies as a protected communication under two circumstances. The first is if it is a lawful communication to a member of Congress, member of the Wisconsin Legislature, the Governor, or an inspector general. The second is if it satisfies both of the following conditions: (1) the communication is to a member of the U.S. Department of Defense, a member of the National Guard Bureau, a law enforcement officer, a state agency, a legislative service agency, a person in the chain of command, or a court-martial proceeding; and (2) in the communication, a member of the state military forces complains of, or discloses evidence that, the person reasonably believes constitutes evidence of a violation of a law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

This provision is modeled on Article 132 of the UCMJ, which was adopted in the fiscal year 2016 NDAA.

### **Sexual Assault and Abusive Sexual Contact**

The act generally aligns the elements of sexual assault and abusive sexual contact under the WCMJ with the elements of these offenses under the UCMJ by making two changes. First, the act modifies the WCMJ to provide that, as under the UCMJ, a person who commits a sexual act or sexual contact upon another person without that person's consent is guilty of sexual assault or abusive sexual contact, respectively. Second, the act amends another provision of the article pertaining to sexual assault and abusive sexual contact that enumerates various other types of conduct that may constitute sexual assault or abusive sexual contact to generally align this provision with the UCMJ.

### **Sexual Harassment**

The act creates a punitive article in the WCMJ that prohibits sexual harassment and parallels an amendment made to Article 134 of the UCMJ in the fiscal year 2022 NDAA. Specifically, any person who either knowingly makes an unwelcome sexual advance, demand, or request for a sexual favor or knowingly engages in other unwelcome conduct of a sexual nature is guilty of sexual harassment, if the conduct meets two conditions.

First, the sexual advance, demand, request, or conduct of a sexual nature must do either of the following:

- Under the circumstances, cause a reasonable person to believe, and actually cause at least one person to believe, that submission to or rejection would be made, either explicitly or implicitly, a term or condition of that person's job, pay, career, benefits, or entitlements or would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements.
- Be so severe, repetitive, or pervasive that a reasonable person would perceive, and at least one person actually perceived, an intimidating, hostile, or offensive working environment.

Second, the sexual advance, demand, request, or conduct of a sexual nature must be to the prejudice of good order and discipline in the state military forces or of a nature to bring discredit upon the state military forces, or both.

### **Conduct Unbecoming an Officer**

Article 133 of the WCMJ prohibits any commissioned officer, cadet, candidate, or midshipman from engaging in conduct unbecoming of an officer and a gentleman. The act removes the language referring

to “and a gentleman” to eliminate gender-specific language and parallel a similar modification to the UCMJ.

**Effective date:** December 8, 2024

For a full history of the act, visit the Legislature’s [bill history page](#).

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