



**TRESPASS TO LAND
(1995 WISCONSIN ACT 451)**

Information Memorandum 96-20

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INTRODUCTION

This Information Memorandum describes 1995 Wisconsin Act 451, relating to trespass to land.

A copy of Act 451 may be obtained in person or by mail from the Documents Room, Lower Level, One East Main Street, Madison, Wisconsin 53702; telephone: (608) 266-2400.

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I. BACKGROUND

After extensive debate, the Legislature passed 1995 Assembly Bill 13. The Bill, as passed by the Legislature, consisted of Assembly Substitute Amendment 2, Assembly Amendment 13 to Assembly Substitute Amendment 2, Assembly Amendment 2 to Assembly Amendment 13 and Senate Amendment 1. The Governor signed the Bill and it was published as 1995 Wisconsin Act 451. The Act took effect on July 11, 1996.

1995 Wisconsin Act 451 (referred to hereafter as “the Act” or “Act 451”) makes various changes in s. 943.13, Stats., a statute titled “Trespass to land.” Section 943.13, Stats., is referred to as the “trespass statute” throughout this Memorandum. A copy of s. 943.13, Stats., as affected by the Act, is included as an Appendix to this Memorandum.

The changes made by the Act are best understood in the context of the trespass statute. Therefore, Part II of this Memorandum contains a brief summary of s. 943.13, Stats., as amended by the Act, and Part III contains a comprehensive description of the trespass statute as amended by the Act. Part IV of this Memorandum contains a brief discussion of the common law of trespass, to clarify the differences between common law and statutory trespass. Finally, Part V of this Memorandum poses a series of commonly asked questions about trespass under s. 943.13, Stats., and provides answers to those questions.

II. KEY PROVISIONS OF THE TRESPASS STATUTE, AS AFFECTED BY 1995 WISCONSIN ACT 451

The trespass statute, as affected by Act 451, has the following key provisions:

- On specific types of land that are defined in the trespass statute (primarily fenced, cultivated or undeveloped land, with certain exceptions), it is trespass to enter or remain on the land without the express or implied consent of the owner or occupant. The owner or occupant is not required to post signs or markers in order to give notice that entry to the land is not permitted.
- A person violates the trespass statute who enters or remains on *any* land after being notified not to do so. The owner or occupant may give notice in person (orally or in writing) or by posting signs or markers as prescribed by the statute.
- The enforcement mechanism for the trespass statute is a trespass citation, which is similar in form and in the related legal procedures to a traffic citation. Most law enforcement officers can issue a trespass citation, although Department of Natural Resources (DNR) wardens are not authorized to do so.
- The penalty for violating the trespass statute is a civil forfeiture (as distinguished from a criminal penalty). The maximum penalty for violating the trespass statute is a forfeiture of \$1,000. A person who receives a trespass citation may choose not to contest the citation in which case the person forfeits the deposit, which is \$203 (\$100 for the penalty and \$103 for associated costs).
- Counties, cities, villages and towns may adopt ordinances similar to and not in conflict with the trespass statute. The local deposit amount is typically \$100, the same as the deposit amount for violation of the statute, although the local government is not required to adopt the state forfeiture or deposit amounts.

III. COMPREHENSIVE DESCRIPTION OF THE TRESPASS STATUTE, AS AFFECTED BY 1995 WISCONSIN ACT 451

The concept of the trespass statute is simple. It is trespass for a person to enter or remain on *any land* if the person receives notice from the owner or occupant not to enter or remain on the land. For *certain types of land* (land that is fenced, cultivated or undeveloped or land that is occupied by an agricultural structure), the owner or occupant is not required to give notice that trespass is prohibited, and it is trespass for a person to enter or remain on the land without the express or implied consent of the owner or occupant. Two types of undeveloped land are subject to the requirement of notice: private inholdings within public land and private land that is adjacent to public land.

This Part of the Memorandum contains a comprehensive description of s. 943.13, Stats., as affected by Act 451. [Bracketed comments indicate whether changes to the described provisions were made by the Act.]

A. ACTIONS THAT CONSTITUTE TRESPASS

1. Any Land; Notice Required

The owner or occupant of any land in this state may give notice not to enter or remain on the land. The methods for giving notice are described below in Section C. If the owner or occupant does not give notice that entering or remaining on the land is prohibited, and the land is not of a type for which express or implied permission is required for entry, it is not trespass under the trespass statute to enter or remain on that land.

The owner or occupant may give the notice at any time. The notice may be given either before or after a person enters the land. If the owner or occupant has previously given express consent for a person to enter the property, the owner or occupant may later give notice revoking that consent. The notice may be given to individuals and need not be given uniformly to all persons who may enter the property. The notice may give permission or deny permission for specific kinds of activities or may establish specific conditions on use of the land.

[These provisions are unchanged by the Act.]

2. Specific Types of Land; Notice Not Required; Requirement of Express or Implied Consent

The following types of land are not subject to the requirement of notice. It is trespass for a person to enter or remain on any of these types of land without the express or implied consent of the owner or occupant:

- Enclosed land, i.e., land that is fenced.
- Cultivated land.

- Undeveloped land.
- Land that is occupied by a structure used for agricultural purposes.

Although notice is not required, the owner or occupant of the types of land described above may also give notice not to enter or remain on the land.

Two types of undeveloped land are exempted from the requirement of express or implied consent and are thus subject to the requirement of notice. The following are the types of undeveloped land that do not require express or implied consent to enter or remain on the land:

- “Inholdings,” which are parcels of private land surrounded completely by land owned by the United States, by the State of Wisconsin or by a local governmental unit (i.e., any general or special purpose unit of local government) or any combination of those governmental units.
- Private land that is abutting a parcel of land owned by the United States, the State of Wisconsin or a local governmental unit.

[The Act adds undeveloped land and land that is occupied by a structure used for agricultural purposes to the types of land for which express or implied consent of the owner or occupant is required.]

[Also, the Act expands the requirement of express or implied consent as it applies to enclosed or cultivated land. Under the trespass statute prior to the enactment of Act 451, to enter enclosed or cultivated land *with intent to catch or kill any birds, animals or fish on the land or gather any products of the soil* required the express or implied consent of the owner or occupant. It was not trespass to enter enclosed or cultivated land for another purpose without the express or implied consent of the owner or occupant. The Act eliminates this condition, so that any entry onto any enclosed or cultivated land requires the express or implied consent of the owner or occupant, regardless of the intent of the person entering the property.]

B. “UNDEVELOPED LAND”

The trespass statute uses the terms “enclosed land,” “cultivated land” and “land that is occupied by a structure used for agricultural purposes” without defining those terms. However, “undeveloped land” is defined in the trespass statute to mean land that meets *all* of the following criteria:

- The land is not occupied by a structure or improvement being used or occupied as a dwelling unit.
- The land is not part of the curtilage, or is not lying in the immediate vicinity, of a structure or improvement being used or occupied as a dwelling unit.

- The land is not occupied by a public building.
- The land is not occupied by a placement of employment.

Two of the terms in the definition of “undeveloped land” are subject to further definition in the trespass statute:

- “Dwelling unit” is defined as “a structure or that part of a structure which is used or intended to be used as a home, residence or sleeping place by one person or by 2 or more persons maintaining a common household, to the exclusion of all others.”
- “Place of employment” is defined in the trespass statute by reference to s. 101.01 (2) (f), Stats. [renumbered s. 101.01 (11), Stats., effective July 1, 1996]. That definition is as follows:

“Place of employment” includes every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit, but does not include any place where persons are employed in private domestic service which does not involve the use of mechanical power or in farming. “Farming” includes those activities specified in s. 102.04 (3), and also includes the transportation of farm products, supplies or equipment directly to the farm by the operator of said farm or employes for use thereon, if such activities are directly or indirectly for the purpose of producing commodities for market, or as an accessory to such production. When used with relation to building codes, “place of employment” does not include an adult family home, as defined in s. 50.01 (1), or, except for the purposes of s. 101.11, a previously constructed building used as a community-based residential facility, as defined in s. 50.01 (1g), which serves 20 or fewer unrelated residents.

“Curtilage” is not defined in the trespass statute. This term often appears in criminal cases regarding the legality of searches and seizures under the Fourth Amendment of the U.S. Constitution. “Curtilage” typically means the dwelling unit, the outbuildings that are associated with the dwelling unit, such as the garage and the land immediately surrounding these buildings in which the owner or occupant has an expectation of privacy.

“Public building” is not defined in the trespass statute. However, a court is likely to refer to the definition of “public building” in s. 101.01 (1) (g), Stats. [renumbered s. 101.01 (12), Stats., effective July 1, 1996], if questions arise regarding the meaning of this term:

“Public building” means any structure, including exterior parts of such building, such as a porch, exterior platform or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants. When used in relation to building codes, “public building” does not include a previously constructed building used as a community-based residential facility as defined in s. 50.01 (1g) which serves 20 or fewer unrelated residents or an adult family home, as defined in s. 50.01 (1).

It is important to note that the definition of “undeveloped land” does not place any restrictions on where the undeveloped land may be located. Any land that meets all of the criteria listed above qualifies as undeveloped land. It is possible, therefore, that undeveloped land may be located within the boundaries of a city or village and may be surrounded by land that does not qualify as undeveloped land.

[The term “undeveloped land” and the associated definitions were added by the Act.]

C. ACTIONS THAT CONSTITUTE NOTICE

Notice may be given personally by the owner or occupant, that is, directly to the person who proposes to enter or remain on the land. Personal notice may either be oral or in writing.

The owner or occupant may also give notice by “posting” the land. The trespass statute defines two methods of posting that are sufficient to give notice. This does not apparently exclude other methods of posting the land.

The first method of posting the land is to post a sign at least 11 inches square in at least two conspicuous places for each 40 acres to be protected. The sign must carry an “appropriate notice” (a notice that trespassing is prohibited) and the name of the person giving the notice, followed by the word “owner” or “occupant” as appropriate.

The second method of posting land is to display “markings” at least one foot long, that include in contrasting color the phrase “Private Land” and the name of the owner. These markings must be placed in at least two conspicuous places for each 40 acres to be protected.

Any person who places signs or markings on the land of another without obtaining the express consent of the owner or occupant is subject to a forfeiture under the trespass statute.

[The methods of giving notice were not amended by the Act.]

D. EXPRESS OR IMPLIED CONSENT UNDER THE TRESPASS STATUTE

“Express consent” is not defined in the trespass statute. There does not appear to be any need for a definition of this term. However, it should be noted that while express consent that may be given directly to an individual, such as by verbal consent, many other types of conduct of the owner or occupant may constitute express consent. For example, the owner may have sold an easement to a governmental body authorizing public entry on the land or the owner may have consented to public use under a managed forest law contract.

“Implied consent” is defined in the trespass statute to mean “conduct or words or both that imply that an owner or occupant of land has given consent to another person to enter the land.”

However, the trespass statute elaborates on this definition with a directive to assist the court in determining whether a person had implied consent to enter land. The Act directs the court to consider all of the circumstances existing at the time the person entered the land, including all of the following:

- Whether the owner or occupant acquiesced to previous entries by the person or by other persons under similar circumstances.
- The customary use, if any, of the land by other persons.
- Whether the owner or occupant represented to the public that the land may be entered for particular purposes.
- The general arrangement or design of any improvements or structures on the land.

These four considerations are substantially similar to the considerations listed in the Wisconsin Civil Jury Instructions No. 8015. This Jury Instruction relates to the determination of how implied consent of the possessor of property may be determined in a civil trespass action.

[The term “implied consent” was used in the prior statute but the definitions were added by the Act.]

E. ACTIONS THAT ARE EXCLUDED FROM THE TRESPASS STATUTE

The trespass statute explicitly provides that the following activities are not trespass:

- A conference between a representative of the labor union with an employe if the conference is in the living quarters of the employe with the consent of the employe occupants.

- A person entering land, other than the residence or other buildings on the property, as specifically authorized by s. 29.59, Stats., to remove wild animals that are causing a nuisance.
- A hunter entering land that is required to be kept open for hunting as a result of the owner or occupant receiving wildlife damage assistance.

[These provisions were not affected by the Act.]

F. ENFORCEMENT; PENALTIES

The trespass statute is enforced by a citation procedure explicitly provided for this purpose under s. 778.26, Stats. The trespass citation is similar to that issued for traffic violations.

The maximum penalty for violation of the trespass statute is a civil forfeiture of \$1,000. This is a civil, rather than criminal, penalty and incarceration is not a penalty for violation of the statute.

The Judicial Conference has established a bond amount of \$100 for a trespass citation. The additional costs imposed by statute raises the total bond amount to \$203. A person who receives a trespass citation may deposit the \$203 with the clerk of court and stipulate no contest to the citation and no further enforcement action will be taken. A person receiving a citation may also plead not guilty and challenge the citation. If a person receives a citation and does not make a deposit or plead not guilty, the court may issue a summons or an arrest warrant.

[These provisions were not affected by the Act.]

G. NONSTATUTORY PROVISIONS

The trespass statute as amended by the Act is made applicable to offenses that occur on or after the effective date of the Act. The effective date of the Act is July 11, 1996, which was the day after the Act was published in the official state newspaper, following the signing of the Bill by the Governor. Any offenses that occur prior to the effective date of the Act are subject to s. 943.13, Stats., as it existed prior to the effective date of the Act.

IV. COMMON LAW TRESPASS

The common law of trespass is not directly related to the statute prohibiting trespass to land. There is overlap between the kinds of conduct addressed by each of these two bodies of law. However, the purpose of these two bodies of law is substantially different. The common law of trespass provides a private remedy, usually consisting of damages and an injunction, for the interference with the property of another. The trespass statute uses the authority of the state to both prohibit and punish wrongful entry onto the property of another. The common law of trespass is discussed briefly in this Part of the Memorandum to avoid any potential confusion between the trespass statute and common law trespass.

The trespass statute is enacted by the Legislature. By contrast, the common law of trespass has judicial origins. The “common law” consists of those principles of law that originated in the English courts and that continue in force in this country, as modified by federal and state courts and the Legislature. Trespass is one of the many branches of common law.

Under the common law, trespass in a general sense means any unauthorized entry upon the land of another. To the extent that the property is damaged or the owner or occupant is injured by the unauthorized entry, the owner or occupant may bring a lawsuit and obtain recovery against the trespasser. In a trespass action, there is no need to prove intent or negligence. If the owner or occupant proves that the trespass occurred, the owner or occupant may obtain a judgment for any damages that occurred and an injunction against further trespass.

A property owner may sue a person for conduct that is trespass under the common law, although the person’s actions would not be a violation of the trespass statute.

V. COMMONLY ASKED QUESTIONS ABOUT THE TRESPASS STATUTE

The following is a series of specific questions that were raised during debate and discussions surrounding 1995 Assembly Bill 13. The answers to the questions relate to the trespass statute as affected by Act 451.

How does the trespass statute affect a door-to-door solicitor?

The trespass statute does not prevent door-to-door solicitors from making calls. Solicitors generally make calls at homes and businesses, which would not fit into the classifications of enclosed, cultivated or undeveloped land, for which the express or implied consent of the owner or occupant is required for entry. Therefore, a solicitor may approach the home or business, and must leave the property only if the owner or occupant gives notice not to remain on the property.

How does the trespass statute affect a person who enters property to request permission to hunt on the land?

If a hunter asks permission at the house, the answer to this question is the same as the answer above regarding solicitors: a home and the property immediately surrounding it is not enclosed, cultivated or undeveloped land, so the express or implied consent of the owner or occupant is not required for entry to that land.

In some cases a hunter may enter fields or undeveloped land to find an owner or occupant who is working there in order to obtain permission to hunt. The trespass statute requires a person to have the express or implied consent of the owner or occupant to enter or remain on the property if the land is cultivated or undeveloped. The trespass statute provides that the “customary use of land” is one way for a person to obtain implied consent, which would include the custom of obtaining permission of the owner or occupant to hunt on the property.

Can express or implied consent be revoked?

Express or implied consent to enter or remain on land can be revoked at any time. If the owner or occupant gives a person notice not to enter or remain on the property, that person must leave promptly.

What is the status of people who lose their way, make an error in map-reading or otherwise trespass on land by mistake?

The trespass statute does not include intent as an element of the offense. In other words, the statute does not distinguish between persons who intentionally enter or remain on property knowing that consent of the owner or occupant is lacking and persons who are present on property by mistake. However, although intent is not an element of a violation of the trespass statute, the intent of the individual may be relevant to the law enforcement officer’s exercise of discretion in determining whether or not to issue a citation.

What is the status of trespassing children?

The trespass statute does not distinguish between the actions of children and adults. A child is subject to the statute in the same manner as an adult.

However, there are likely to be differences between the treatment of children and adults in the exercise of law enforcement discretion and in the disposition of a case. Law enforcement officers are likely to exercise discretion in handling cases involving children, particularly those who are too young to appreciate the consequences of their actions. A law enforcement officer may deal informally with children, rather than issue a citation. If a citation is issued, the juvenile court will have jurisdiction of a child under 17 years of age under the Juvenile Justice Code.

How does the trespass statute relate to land entered in the managed forest act?

The Managed Forest Act [ss. 77.80 to 77.91, Stats.] allows the owners of private forest lands to enter a long-term contract with the state for management of the land as forest, in return for a reduction in property taxes during the life of the contract. One of the conditions of the managed forest contract is that the owner must permit public access to the land for hunting, fishing, hiking, sight-seeing and cross-country skiing. Certain exceptions are provided for areas within 300 feet of any building or within 300 feet of a commercial logging operation and for a maximum of 80 acres designated by the owner and any municipality. Also, the owner may prohibit the use of motor vehicles or snowmobiles on any open managed forest land.

The Managed Forest Act authorizes an owner to post signs specifying the designation of or restrictions applicable to any area of the managed forest land. However, those areas of a parcel of land entered under the managed forest law that are open to the public are not required to have signs indicating that the land is open.

Thus, land that is open to the public under the Managed Forest Act may be indistinguishable from forested land (whether fenced or not) that is not entered under the Managed Forest Act. It will be the responsibility of the person who wishes to enter managed forest land that is open to the public to determine the location of such land.

How does the trespass statute relate to “shortcuts” taken across the property of another?

The trespass statute does not authorize “shortcuts” across the property of another. Entry onto the property of another for purposes of travel to a point beyond is analyzed in the same manner as any other entry on the property. It should be noted that a frequent trespass across the property of another may, after a 20-year period, ripen into an easement known as an “easement by prescription.” However, such easements are rare due to the variety of specific conditions which must be met in order for the easement to accrue.

May a hunter enter land to retrieve game?

A hunter may have permission to hunt on land, but game that is killed or crippled by the hunter may fall on or escape to nearby land. DNR rules, in s. NR 10.07 (1) (f), Wis. Adm. Code, require a hunter to “make every reasonable effort to retrieve all wild animals killed or crippled.” However, the Attorney General has opined that this rule does not require the hunter to violate the trespass statute [64 OAG 204]. If the hunter cannot enter the land without trespassing, the hunter may not retrieve the game.

What are the differences between urban and rural settings under the statute?

The statute does not make explicit distinctions between urban and rural property, and therefore applies equally to both.

However, the history of the trespass statute clearly shows that the statute was initially applicable only in rural settings. The references to “enclosed,” “cultivated” and “undeveloped” land continue to suggest rural land, although these terms could all be applied to certain urban land as well. Any questions about the applicability of the trespass statute in urban areas must be resolved by law enforcement discretion or, if a trespass citation is challenged, by judicial interpretation.

It is likely that the “customary use of land,” one of the criteria used to determine if there is implied consent to enter the land, differs in urban and rural areas. Even if the higher standard (express or implied consent of the owner or occupant required) applies in urban areas, the customs in urban areas may result in implied consent being found in more situations than in rural areas.

What is the effect of a “no trespassing” sign posted on enclosed, cultivated or undeveloped land?

The trespass statute does not require enclosed, cultivated or undeveloped land to be posted. However, nothing in the statute prohibits an owner or occupant from posting “no trespassing” signs on the land. The owner or occupant may wish to call attention to the fact that the land is closed, notwithstanding the fact that posting is not required. There is no disadvantage to the owner in posting “no trespassing” signs.

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Section 943.13, Stats., as Affected by 1995 Wisconsin Act 451

943.13 Trespass to land. (1e) In this section:

(a) “Dwelling unit” means a structure or that part of a structure which is used or intended to be used as a home, residence or sleeping place by one person or by 2 or more persons maintaining a common household, to the exclusion of all others.

(az) “Implied consent” means conduct or words or both that imply that an owner or occupant of land has given consent to another person to enter the land.

(b) “Inholding” means a parcel of land that is private property and that is surrounded completely by land owned by the United States, by this state or by a local governmental unit or any combination of the United States, this state and a local governmental unit.

(c) “Local governmental unit” means a political subdivision of this state, a special purpose district in this state, an instrumentality or corporation of the political subdivision or special purpose district or a combination or subunit of any of the foregoing.

(d) “Place of employment” has the meaning given in s. 101.01 (11).

(e) “Private property” means real property that is not owned by the United States, this state or a local governmental unit.

(f) “Undeveloped land” means land that meets all of the following criteria:

1. The land is not occupied by a structure or improvement being used or occupied as a dwelling unit.

2. The land is not part of the curtilage, or is not lying in the immediate vicinity, of a structure or improvement being used or occupied as a dwelling unit.

3. The land is not occupied by a public building.

4. The land is not occupied by a place of employment.

(1m) Whoever does any of the following is subject to a Class B forfeiture:

(a) Enters any enclosed, cultivated or undeveloped land of another, other than undeveloped land specified in par. (e) or (f), without the express or implied consent of the owner or occupant.

(am) Enters any land of another that is occupied by a structure used for agricultural purposes without the express or implied consent of the owner or occupant.

(b) Enters or remains on any land of another after having been notified by the owner or occupant not to enter or remain on the premises.

(e) Enters or remains on undeveloped land that is an inholding of another after having been notified by the owner or occupant not to enter or remain on the land.

(f) Enters undeveloped private land from an abutting parcel of land that is owned by the United States, this state or a local governmental unit, or remains on such land, after having been notified by the owner or occupant not to enter or remain on the land.

(1s) In determining whether a person has implied consent to enter the land of another a trier of fact shall consider all of the circumstances existing at the time the person entered the land, including all of the following:

(a) Whether the owner or occupant acquiesced to previous entries by the person or by other persons under similar circumstances.

(b) The customary use, if any, of the land by other persons.

(c) Whether the owner or occupant represented to the public that the land may be entered for particular purposes.

(d) The general arrangement or design of any improvements or structures on the land.

(2) A person has received notice from the owner or occupant within the meaning of sub. (1m) (b), (e) or (f) if he or she has been notified personally, either orally or in writing, or if the land is posted. Land is considered to be posted under this subsection under either of the following procedures:

(a) If a sign at least 11 inches square is placed in at least 2 conspicuous places for every 40 acres to be protected. The sign must carry an appropriate notice and the name of the person giving the notice followed by the word "owner" if the person giving the notice is the holder of legal title to the land and by the word "occupant" if the person giving the notice is not the holder of legal title but is a lawful occupant of the land. Proof that appropriate signs as provided in this paragraph were erected or in existence upon the premises to be protected prior to the event complained of shall be prima facie proof that the premises to be protected were posted as provided in this paragraph.

(b) If markings at least one foot long, including in a contrasting color the phrase "private land" and the name of the owner, are made in at least 2 conspicuous places for every 40 acres to be protected.

(3) Whoever erects on the land of another signs which are the same as or similar to those described in sub. (2) without obtaining the express consent of the lawful occupant of or holder of legal title to such land is subject to a Class C forfeiture.

(3m) An owner or occupant may give express consent to enter or remain on the land for a specified purpose or subject to specified conditions and it is a violation of sub. (1m) (a) or (am) for a person who received that consent to enter or remain on the land for another purpose or contrary to the specified conditions.

(4) Nothing in this section shall prohibit a representative of a labor union from conferring with any employe provided such conference is conducted in the living quarters of the employe and with the consent of the employe occupants.

(4m) This section does not apply to any of the following:

(a) A person entering the land, other than the residence or other buildings or the curtilage of the residence or other buildings, of another for the purpose of removing a wild animal as authorized under s. 29.59 (2), (3) or (4).

(b) A hunter entering land that is required to be open for hunting under s. 29.59 (4m) or 29.598 (7m).

(5) Any authorized occupant of employer–provided housing shall have the right to decide who may enter, confer and visit with the occupant in the housing area the occupant occupies.