

- (ar) No public employer may discharge or otherwise discriminate against any public employee it employs because the public employee filed a request with the department, instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this section, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or exercised any other right related to occupational safety and health which is afforded by this section.
- (b) A public employee who believes that he or she has been discharged or otherwise discriminated against by a public employer in violation of par. (ar) may file a complaint with the division of equal rights alleging discrimination or discharge, within 30 days after the employee received knowledge of the discrimination or discharge.
- (c) Upon receipt of a complaint, the division of equal rights shall, except as provided in s. 230.45 (1m), investigate the complaint and determine whether there is probable cause to believe that a violation of par. (ar) has occurred. If the division of equal rights finds probable cause it shall attempt to resolve the complaint by conference, conciliation or persuasion. If the complaint is not resolved, the division of equal rights shall hold a hearing on the complaint within 60 days after receipt of the complaint unless both parties to the proceeding agree otherwise. Within 30 days after the close of the hearing, the division of equal rights shall issue its decision. If the division of equal rights determines that a violation of par. (ar) has occurred, it shall order appropriate relief for the employee, including restoration of the employee to his or her former position with back pay, and shall order any action necessary to ensure that no further discrimination occurs. If the division of equal rights determines that there has been no violation of par. (ar), it shall issue an order dismissing the complaint.
- (d) Orders of the division of equal rights under this subsection are subject to judicial review under ch. 227.

Cross-reference: See also ch. DWD 223, Wis. adm. code.

- (9) **COORDINATION OF STATE SAFETY AND HEALTH PROGRAMS.** The department shall coordinate state safety and health programs and shall plan and conduct comprehensive safety and health loss prevention programs for state employees and facilities.
- (10) **EXCEPTION FOR CERTAIN POLITICAL SUBDIVISIONS.** The department is not required to expend any resources to enforce this section in political subdivisions having 10 or less employees unless it has received a complaint.

History: 1981 c. 360, 391; 1985 a. 182 s. 57; 1991 a. 39; 1995 a. 27 ss. 3652 to 3659, 9130 (4); 1995 a. 342; 1997 a. 3; 1999 a. 82; 1999 a. 150 s. 672; 2003 a. 33; 2005 a. 74; 2013 a. 20.

Cross-reference: See also chs. SPS 303, 330, and 332, Wis. adm. code.

This section extends the coverage of OSHA to government employees. OSHA was meant to address tangible, measurable workplace hazards. The threat of on-the-job violence to a campus police officer is too abstract to be within the coverage afforded. The denial of a request for a hearing on a complaint seeking to require the provision of firearms to officers was proper. *West v. Department of Commerce*, 230 Wis. 2d 71, 601 N.W.2d 307 (Ct. App. 1999), 98-1693.

101.10 Storage and handling of anhydrous ammonia; theft of anhydrous ammonia and anhydrous ammonia equipment.

- (1) **DEFINITIONS.** In this section:

- (a) "Agricultural activity" means planting, cultivating, propagating, fertilizing, nurturing, producing, harvesting, or manufacturing agricultural, horticultural, viticultural, or dairy products; forest products; livestock; wildlife; poultry; bees; fish; shellfish; or any products of livestock, wildlife, poultry, bees, fish, or shellfish.
- (b) "Anhydrous ammonia equipment" means any equipment that is used in the application of anhydrous ammonia for an agricultural purpose or that is used to store, hold, transport, or transfer anhydrous ammonia.
- (c) "Transfer" means to remove from a container.

- (2) **RULES.** The department shall promulgate rules that prescribe reasonable standards relating to the safe

storage and handling of anhydrous ammonia.

(3) PROHIBITIONS. No person may do any of the following:

- (a)** Store, hold, or transport anhydrous ammonia in a container that does not meet all applicable requirements established by rules of the department promulgated under sub. (2).
- (b)** Transfer or attempt to transfer anhydrous ammonia into a container that does not meet all applicable requirements established by rules of the department promulgated under sub. (2).
- (c)** Transfer or attempt to transfer anhydrous ammonia without the consent of the owner of the anhydrous ammonia.
- (d)** Intentionally cause damage to anhydrous ammonia equipment without the consent of the owner of the anhydrous ammonia equipment.
- (e)** Intentionally take, carry away, use, conceal, or retain possession of anhydrous ammonia belonging to another or anhydrous ammonia equipment belonging to another, without the other's consent and with intent to deprive the owner permanently of possession of the anhydrous ammonia or anhydrous ammonia equipment.
- (f)** Intentionally release or allow the escape of anhydrous ammonia belonging to another into the atmosphere. This paragraph does not apply if the owner has authorized the actor to exercise control over the anhydrous ammonia or has consented to its release.

(4) PENALTIES.

- (a)** Any person who violates a rule of the department promulgated under sub. (2) may be required to forfeit not less than \$10 nor more than \$100 for each violation.
- (b)** Except as provided in par. (c), any person who violates sub. (3) is guilty of a Class I felony. Notwithstanding s. 101.02 (12), each act in violation of sub. (3) constitutes a separate offense.
- (c)** Any person who violates sub. (3) (a) or (b) while performing an agricultural activity or while performing an activity related to the construction, repair, alteration, location, installation, inspection, or operation of anhydrous ammonia equipment with the consent of the owner of the anhydrous ammonia equipment may be required to forfeit not less than \$10 nor more than \$100 for each violation.

History: 2001 a. 3, 16, 73, 109; 2005 a. 14.

Cross-reference: See also ch. SPS 343, Wis. adm. code.

101.11 Employer's duty to furnish safe employment and place.

- (1)** Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.
- (2)**
 - (a)** No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.
 - (b)** No employee shall remove, displace, damage, destroy or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, nor interfere in any way with the use thereof by any other person, nor shall any such employee interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment or frequenter of such place of employment, nor fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees or frequenters.
- (3)** This section applies to community-based residential facilities as defined in s. 50.01 (1g).

History: 1971 c. 185; Stats. 1971 s. 101.11; 1975 c. 413; 1987 a. 161 s. 13m.

Cross-reference: See also chs. SPS 361, 362, 363, 364, and 365, Wis. adm. code.

Ordinary negligence can be compared with negligence founded upon the safe place statute. In making the comparison, a violation of the statute is not to be considered necessarily as contributing more than the common-law contributory negligence. *Lovesee v. Allied Development Corp.*, 45 Wis. 2d 340, 173 N.W.2d 196 (1970).

When an apartment complex was managed for a fee by a management company, the company was carrying on a business there. Reduction of rent to one of the tenants for caretaking services constituted employment on the premises. A tenant who fell on the icy parking lot after the caretaker knew of the condition need only prove negligence in maintaining the premises. *Wittka v. Hartnell*, 46 Wis. 2d 374, 175 N.W.2d 248 (1970).

A public sidewalk is not made a place of employment merely because an employer constructed it and kept it free of ice and snow. *Petroski v. Eaton Yale & Towne, Inc.*, 47 Wis. 2d 617, 178 N.W.2d 53 (1970).

The fact that a violation of the safe place statute is found puts the burden on the owner to rebut the presumption of causation but does not establish as a matter of law that the defendant's negligence was greater than the plaintiff's. *Frederick v. Hotel Investments, Inc.*, 48 Wis. 2d 429, 180 N.W.2d 562 (1970).

A store must be held to have had constructive notice of a dangerous condition when it displayed shaving cream in spray cans on a counter and a 70-year old woman fell in cream sprayed on the white floor. *Steinhorst v. H.C. Prange Co.*, 48 Wis. 2d 679, 180 N.W.2d 525 (1970).

The mere existence of a step up into a hospital lavatory was not an unsafe condition. *Prelipp v. Wausau Memorial Hospital*, 50 Wis. 2d 27, 183 N.W.2d 24 (1971).

Failure to light a parking lot can support a safe place action, but the evidence must show how long the light was burned out to constitute constructive notice. *Low v. Siewert*, 54 Wis. 2d 251, 195 N.W.2d 451 (1972).

A parking lot owned by a city that is a continuation of a store parking lot used by the public for attending the city zoo and the store, even though maintained by the private property owner, is not a place of employment. *Gordon v. Schultz Savo Stores, Inc.*, 54 Wis. 2d 692, 196 N.W.2d 633 (1972).

Detailed construction specifications and the presence of engineers to insure compliance does not manifest control over the project so as to make the commission liable. *Berger v. Metropolitan Sewerage Commission of Milwaukee*, 56 Wis. 2d 741, 203 N.W.2d 87 (1973).

In a safe place action the employee's contributory negligence is less when his or her act or omission has been committed in the performance of job duties. *McCrosen v. Nekoosa-Edwards Paper Co.*, 59 Wis. 2d 245, 208 N.W.2d 148 (1973).

A pier at a beach open to the public for a fee constitutes a place of employment. Any distinction between licensees and invitees is irrelevant, and the statute imposes a higher duty as to safety than the common law. *Gould v. Allstar Insurance Co.*, 59 Wis. 2d 355, 208 N.W.2d 388 (1973).

A private road on the ground of a private racetrack that connected the track and a parking lot was subject to this section as to frequenters. *Gross v. Denow*, 61 Wis. 2d 40, 212 N.W.2d 2 (1973).

A one-eighth-inch variance in elevation between the sides of a ramp joint was too slight, as a matter of law, to constitute a violation of the safe place statute. *Balas v. St. Sebastian's Congregation*, 66 Wis. 2d 421, 225 N.W.2d 428 (1975).

An employer may be held liable under the safe place statute not only for failing to construct or maintain safety structures such as fences, but also for knowingly permitting employees or frequenters to venture into a dangerous area. *Kaiser v. Cook*, 67 Wis. 2d 460, 227 N.W.2d 50 (1975).

The safe place statute applies only to unsafe physical conditions, not to activities conducted on a premises. *Korenak v. Curative Workshop Adult Rehabilitation Center*, 71 Wis. 2d 77, 237 N.W.2d 43 (1976).

The duty to furnish a safe place of employment to employees does not impose a duty on a contractor for subcontractor's employees. A contractor can owe a duty to a frequenter, but only when a hazardous condition is under the supervision or control of the contractor. *Barth v. Downey Co., Inc.*, 71 Wis. 2d 775, 239 N.W.2d 92 (1976).

Retention of control and supervision is required for recovery against a general contractor by a subcontractor's employee. *Lemacher v. Circle Construction Co., Inc.*, 72 Wis. 2d 245, 240 N.W.2d 179 (1976).

The length of time a safe place defect must exist, in order to impose constructive notice of it on an owner, varies according to the nature of the business, the nature of the defect, and the public policy involved. *May v. Skelley Oil Co.*, 83 Wis. 2d 30, 264 N.W.2d 574 (1978).

In safe place cases, comparative negligence instructions need not direct the jury to consider the defendant's higher duty of care. *Brons v. Bischoff*, 89 Wis. 2d 80, 277 N.W.2d 854 (1979).

Indemnity in a safe place action creates an effect identical to that of contribution. *Barrons v. J.H. Findorff & Sons, Inc.*, 89 Wis. 2d 444, 278 N.W.2d 827 (1979).

A non-negligent indemnitor was liable to an indemnitee whose breach of a safe place duty was solely responsible for damages under the circumstances of the case. *Dykstra v. Arthur G. McKee & Co.*, 92 Wis. 2d 17, 284 N.W.2d 692 (Ct. App. 1979).

Affirmed. 100 Wis. 2d 120, 301 N.W.2d 201 (1981).

Architects have liability under the safe place statute only if they have a right of supervision and control, which must be determined from the agreement between the owner and the architect. If the duty exists, it is nondelagable. *Hortman v. Becker Construction Co., Inc.*, 92 Wis. 2d 210, 284 N.W.2d 621 (1979).

Evidence of a prior accident was admissible to prove notice of an unsafe condition. *Callan v. Peters Construction Co.*, 94 Wis. 2d 225, 288 N.W.2d 146 (Ct. App. 1979).

"Safe employment" and "safe place of employment" are distinguished. There is a duty to provide safe employment to employees that does not extend to frequenters, while the duty to provide a safe place of employment does extend to frequenters. *Leitner v. Milwaukee County*, 94 Wis. 2d 186, 287 N.W.2d 803 (1980).

That a lease allocates safe place duties between an owner and an employer/tenant does not nullify mutually shared statutory duties. *Hannebaum v. Dirienzo & Bomier*, 162 Wis. 2d 488, 469 N.W.2d 900 (Ct. App. 1991).

The safe place duty to keep a swimming pool in a condition to protect customers from injury was overcome when a person unreasonably dove into a pool of unknown depth. *Wisnicky v. Fox Hills Inn*, 163 Wis. 2d 1023, 473 N.W.2d 523 (Ct. App. 1991).

A county house of correction is subject to the safe place statute. *Henderson v. Milwaukee County*, 198 Wis. 2d 748, 543 N.W.2d 544 (Ct. App. 1995).

An alarm system does not relate to the structure of a building and therefore does not relate to a safe place of employment. It is a safety device that is the responsibility of the employer and not the building owner. *Naaj v. Aetna Insurance Co.*, 218 Wis. 2d 121, 579 N.W.2d 815 (Ct. App. 1998), 96-3640.

The obligation of a lessor of a building is limited to structural or physical defects. A temporary condition maintained by the lessee does not impose safe place liability on the lessor. *Powell v. Milwaukee Area Technical College District Board*, 225 Wis. 2d 794, 594 N.W.2d 403 (Ct. App. 1999), 97-3040.

A defect is "structural" if it resulted from materials used in its construction or from improper layout or construction. Conditions "associated with the structure" are those that involve the structure being out of repair or not being maintained in a safe manner. An owner sustains safe place liability for a structural defect regardless of knowledge of the defect, but with conditions related to the structure, no liability attaches without actual or constructive notice. *Barry v. Employers Mutual Casualty Co.*, 2001 WI 101, 245 Wis. 2d 560, 630 N.W.2d 517, 98-2557. See also *Nooyen v. Wisconsin Electric Power Co.*, 2020 WI App 9, 390 Wis. 2d 687, 939 N.W.2d 621, 19-0289.

The duties imposed on employers and property owners under this section are nondelegable. *Barry v. Employers Mutual Casualty Co.*, 2001 WI 101, 245 Wis. 2d 560, 630 N.W.2d 517, 98-2557.

This section does not apply to unsafe conditions caused by an injured party's own negligence or recklessness. If a structure's alleged disrepair requires reckless or negligent conduct by the plaintiff for the plaintiff to injure herself or himself, the initial disrepair may not be construed as having caused the injury. *Hofflander v. St. Catherine's Hospital*, 2003 WI 77, 262 Wis. 2d 539, 664 N.W.2d 545, 00-2467.

Land that is merely appurtenant to a place where business is carried on is not a place of employment under s. 101.01 (11). An owner must have ownership, custody, or control of the place of employment and the premises appurtenant thereto. An owner of appurtenant land who does not also have ownership, custody, or control of the place cannot be liable for injuries sustained at the place. *Binsfeld v. Conrad*, 2004 WI App 77, 272 Wis. 2d 341, 679 N.W.2d 341, 03-1077.

If constructive notice is relied on, generally, evidence of the length of time that the unsafe condition existed is required to establish it. Constructive notice, without a showing of temporal evidence of the unsafe condition, may be imputed in a narrow class of cases where the method of merchandizing articles for sale to the public in the area where the harm occurred should have made that harm reasonably foreseeable at that location. *Megal v. Green Bay Area Visitor & Convention Bureau, Inc.*, 2004 WI 98, 274 Wis. 2d 162, 682 N.W.2d 857, 02-2932.

Ten [now seven] years after a structure is substantially completed, s. 893.89 bars safe place claims under this section resulting from injuries caused by structural defects, as opposed to safe place claims resulting from injuries caused by unsafe conditions associated with the structure. *Mair v. Trollhaugen Ski Resort*, 2006 WI 61, 291 Wis. 2d 132, 715 N.W.2d 598, 04-1252.

The owner of a public building is liable for: 1) structural defects; and 2) unsafe conditions associated with the structure of the building. A structural defect is a hazardous condition inherent in the structure by reason of its design or construction. An unsafe condition arises from the failure to keep an originally safe structure in proper repair or properly maintained. A property owner is liable for injuries caused by a structural defect regardless of whether it had notice of the defect, but only liable for an unsafe condition when it had actual or constructive notice of the condition. *Rosario v. Acuity*, 2007 WI App 194, 304 Wis. 2d 713, 738 N.W.2d 608, 06-2421.

Safe is a relative term that does not mean completely free of any hazards. What constitutes a safe place depends on the facts and conditions present and the use to which the place is likely to be put. That a place could be made more safe does not mean that an owner has breached the duty of care established by sub. (1). When the agency having power to adopt orders to secure the safety of employees and frequenters of public buildings has issued a safety order concerning a particular situation, it establishes what is safe, and a jury or court cannot establish any other standard. *Szalacinski v. Campbell*, 2008 WI App 150, 314 Wis. 2d 286, 760 N.W.2d 420, 07-0667.

The trial court erred in finding no unsafe condition under the safe place statute when it applied a height requirement to a sidewalk crack. There is no mathematical deviation rule that is a standard for a safe sidewalk. The ultimate question is not what is a defect, or how many inches high was the obstruction or deep the depression, but solely whether under all circumstances affecting the sidewalk it was in a reasonably safe condition for public travel by persons exercising ordinary care for their own safety. *Gulbrandsen v. H&D, Inc.*, 2009 WI App 138, 321 Wis. 2d 410, 773 N.W.2d 506, 08-2990.

The safe place statute includes a duty on employers to inspect premises to ensure that they are safe. Failure to comply renders the employer liable for the violation of the safe place statute. The duty to maintain does not arise until constructive knowledge of the defect exists, but if an adequate inspection would have revealed the defect and that inspection was not performed, the jury may infer constructive notice of the defect. The safe place statute applies the duty to maintain to both owners and employers alike. *Gennrich v. Zurich American Insurance Co.*, 2010 WI App 117, 329 Wis. 2d 91, 789 N.W.2d 106, 09-2111.

A “structural defect” for which an owner sustains safe place liability for the defect regardless of knowledge of the defect arises from design or construction flaws when a building element is put in place, whether as an original part of a structure or as a replacement. This contrasts with features of a structure that were installed safely and then developed into a hazard. *Wagner v. Cincinnati Casualty Co.*, 2011 WI App 85, 334 Wis. 2d 516, 800 N.W.2d 27, 10-1195.

The presence of asbestos in the air during and following routine repairs to defendant's buildings constituted an unsafe condition associated with the premises. *Viola v. Wisconsin Electric Power Co.*, 2014 WI App 5, 352 Wis. 2d 541, 842 N.W.2d 515, 13-0022.

The safe place statute is a negligence statute that imposes a heightened duty on owners of public buildings to construct, repair, and maintain their buildings safely. The statute does not address negligent acts; instead, it addresses unsafe property conditions. *Soletski v. Krueger International, Inc.*, 2019 WI App 7, 385 Wis. 2d 787, 924 N.W.2d 207, 17-2063.

The safe place statute does not extend to vehicles. *Hopkins v. Ros Stores, Inc.*, 750 F. Supp. 379 (1990).

Under the safe place statute, an owner is only absolved of its statutory duty if it relinquishes complete control of the premises to a contractor, and the premises are in a safe condition at that time. The owner must have control over the place such that it can carry out its duty to furnish a safe place of employment, but the control and custody of the premises need not be exclusive, nor is it necessary to have control for all purposes. *Anderson v. P&G Paper Products Co.*, 924 F. Supp. 2d 996 (2013).

101.111 Excavations; protection of adjoining property and buildings.

- (1) DEFINITION.** In this section “excavator” means any owner of an interest in land making or causing to be made an excavation.
- (2) CAVE-IN PREVENTION.** Any excavator shall protect the excavation site in such a manner so as to prevent the soil of adjoining property from caving in or settling.
- (3) LIABILITY FOR UNDERPINNING AND FOUNDATION EXTENSIONS.**
 - (a)** If the excavation is made to a depth of 12 feet or less below grade, the excavator may not be held liable for the expense of any necessary underpinning or extension of the foundations of buildings on adjoining properties.
 - (b)** If the excavation is made to a depth in excess of 12 feet below grade, the excavator shall be liable for the expense of any necessary underpinning or extension of the foundations of any adjoining buildings below the depth of 12 feet below grade. The owners of adjoining buildings shall be liable for the expense of any necessary underpinning or extension of the foundations of their buildings to the depth of 12 feet below grade.
- (4) NOTICE.** Unless waived by adjoining owners, at least 30 days prior to commencing the excavation the excavator shall notify, in writing, all owners of adjoining buildings of his or her intention to excavate. The notice shall state that adjoining buildings may require permanent protection. The owners of adjoining property shall have access to the excavation site for the purpose of protecting their buildings.