

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

M E M O R A N D U M

EXECUTIVE SUMMARY

Protest and Picketing and First Amendment Considerations

Dear Law Enforcement Officials,

This Executive Summary and Memorandum have been prepared in anticipation that 2025 will be a year that sees an increased amount of protest and picketing behavior by Michigan residents. This is to serve as legal guidance on the issues that typically arise when constitutionally protected activity and criminal behavior arise in close proximity. We hope these documents will help you and your staffs to be thoughtful about some of the more common issues that you may encounter.

The questions this memorandum attempt to address include the First Amendment right to protest and picket, the ways in which protesting and picketing can be constitutionally regulated, and factors that might be helpful in deciding if and how to regulate these activities. This memo will provide examples of where and how this activity has been regulated by statutes and interpreted by our state and federal courts. First Amendment questions are fact-intensive, and this memo cannot address every scenario that might arise. The goal of the memo is to offer useful guidance to law enforcement officers in enforcing those laws.

Protesting and picketing are generally protected speech under the First Amendment. Nevertheless, such speech may be constitutionally regulated in order to protect the rights of other individuals and the public at large, including by utilizing local criminal ordinances that address noise, traffic safety, trespassing, disorderly conduct, resisting and obstructing, and destruction of property. But these ordinances should be applied reasonably and judiciously. Laws and ordinances that are prior restraints on speech deserve particularly close scrutiny and must, among other things, contain sufficient standards for a decisionmaker to issue or deny a permit for speech activities.

Criminal Offenses commonly seen in protest/picketing

Disturbing the Peace is a misdemeanor under Michigan Compiled Laws § 750.170. It is something less than a threat of violence but is sufficiently disturbing to peace and quiet or normal operations. This may also include noise violations or other nuisances governed by local ordinances.

Disorderly Conduct is a misdemeanor under Michigan Compiled Laws § 750.167. It includes public intoxication that disturbs or endangers the public, indecent or obscene conduct, and jostling or roughly crowding people in a public place. More specific local ordinances may also apply.

Unlawful Assembly is a 5-year felony under Michigan Compiled Laws §§ 752.543, 752.544. It prohibits 4 or more people from gathering for the purpose of rioting or for staying once a riotous intent develops. Loitering is not enough. Depending on the time of day and whether minors are involved, local curfews may apply.

Blocking Traffic is a civil infraction under Michigan Compiled Laws § 257.676b but is a misdemeanor under § 750.421b if the blockage affects farm or commercial goods. Local ordinances often provide more specific traffic rules.

Trespassing or Destroying Property is also unlawful. Michigan Compiled Laws § 750.552 makes it a 30-day misdemeanor to trespass. State law also prohibits malicious destruction of or injury to various types of property, ranging from misdemeanors to felonies depending on the extent of the damage. *See generally* Mich. Comp. Laws § 750.377a *et seq.* Local ordinances also govern trespassing and littering, as well as operational hours for certain locations, such as public parks.

Threatening or Committing Violence ranges in severity of the offense and penalties and are primarily governed by state law rather than local ordinances. It is a 93-day misdemeanor to assault or batter someone. Mich. Comp. Laws § 750.81. It becomes a 4-year felony if a weapon is used. Mich. Comp. Laws § 750.82. It is also a 10-year felony to riot or incite a riot. Mich. Comp. Laws §§ 752.541, 752.542, 752.544. It is a 90-day misdemeanor to brandish a firearm. Mich. Comp. Laws § 750.234e.

Resisting or Obstructing Law Enforcement is governed by state law under Michigan Compiled Laws § 750.81d, which makes it a 2-year felony to assault, batter, wound, resist, obstruct, oppose, or endanger an official performing his or her duties such as a police officer, firefighter, or paramedic. The penalties increase if and to what extent the official is injured.

Conspiracy is prohibited under Michigan Compiled Laws § 750.157a and is punished equally with the crime conspired, such as rioting, unlawful assembly, acts of violence, etc. The agreement to act illegally is an independent crime.

Please know that the Department of Attorney General stands ready to answer your legal questions as they pertain to protest and picketing activity. We know that the laws are nuanced, and that education is usually the first line of action in working

with the public. Please do not hesitate to reach out to the Department of Attorney General to discuss these issues as they arise in your community. But please understand that requests for criminal charges should be directed to your local prosecutor's office.

Common locations where protest and picketing is observed

Protesting and picketing that occurs too close to an election site may infringe on citizens' rights to freely cast their ballot. The U.S. Supreme Court has upheld a State's 100-foot non-electioneering zone, and consistent with that, Michigan law prohibits electioneering within 100 feet of a polling location. *See* Mich. Comp. Laws § 168.744.

Protesting and picketing at a residence —namely picketing focusing on one particular home (sometimes referred to as focused picketing)— may infringe on private residents' rights and conflict with local ordinances or state statutes. Any laws that prohibit or limit residential picketing must be analyzed individually to ensure that the First Amendment rights of protestors or picketers are preserved. Michigan has a statute that prohibits residential picketing, Mich. Comp. Laws § 423.9f(4), but it is most likely limited to the labor context, and if challenged, may be found to be facially unconstitutional because it is content-based and arguably does not meet the test for strict scrutiny.

School property is not off-limits for expressive activity by students, teachers, or members of the public. Nevertheless, **protesting and picketing at educational institutions** may be constitutionally regulated where they infringe on the rights of others, such as by materially disrupting classwork or creating substantial disorder. College campuses consist of various types of fora, and each area must be analyzed to determine the type of forum and the test applicable to that type of forum.

Protesting and picketing activities at medical facilities are evaluated based on concerns for patient health and well-being, including noise, interference with access to a facility, or a person's right to be left alone.

Protesting and picketing that impact a funeral may infringe on the rights of others if they physically or aurally disrupt funerals or create traffic disruption or noise pollution. Speech that has little expressive value, such as fighting words, incitement, or threats, may also be regulated. But laws must be crafted to overcome vagueness or overbreadth challenges. Laws banning *peaceful* protests based on the privacy of grieving families will be closely scrutinized and are not likely to survive constitutional scrutiny. Buffer zones will be evaluated based on their size in relation to the governmental interest; the larger the buffer zone, the more likely it is to be found unconstitutional.

Protesting at courthouses, jails, prisons, and police stations may be restricted, as these locations are typically considered nonpublic fora, especially the interiors of the facilities. The outside area surrounding the facilities, such as sidewalks, may be considered public fora to the extent that they resemble and function as traditional public fora. And even if they are deemed public, protesting cannot interfere with or block work conducted at the facility or unduly harass or endanger the workers.

Protesting and picketing at the State Capitol may be restricted as long as the restrictions are reasonable and content-neutral and leave open ample alternative channels of communication. The Capitol is a public forum, so regulations must be content-neutral and serve a significant governmental interest. Caselaw has upheld the application of the Capitol Committee's procedures in certain circumstances.