On March 18, the National Labor Relations Board’s general counsel, Richard F. Griffin Jr., issued Memorandum GC 15-04, seeking to clarify what types of employer policies and rules are considered lawful and which are likely to interfere unlawfully with employees’ rights under the National Labor Relations Act. All employers, regardless of whether they have union-represented employees, are urged to compare their workplace policies and rules to the memorandum to determine if any of them might be considered illegal by the current NLRB.

By way of background, Section 7 of the NLRA gives employees the right to organize, to bargain collectively, and “to engage in other concerted activities for the purpose of ... mutual aid and protection.” More simply, employees enjoy the federally protected right to act on behalf of themselves and their co-workers regarding wages, hours and other terms and conditions of employment, whether unionized or not. This includes such activities as complaining about pay, benefits or discipline, and extends to more assertive actions, such as seeking union assistance, walking off the job, picketing or filing a formal petition with the NLRB for a union election.

Section 7 is broadly written and it is an unfair labor practice under the NLRA for an employer to “interfere with, restrain or coerce employees in the exercise of their Section 7 rights.” While an employer policy is unlawful if it explicitly prohibits Section 7 activity, the NLRB also considers a policy unlawful if it could be reasonably interpreted by employees to prohibit the discussion of, or the disclosure of information about, employees’ terms and conditions of employment, or otherwise restrict Section 7 activities.

The first part of the memorandum identifies eight categories of rules and compares examples of lawful and unlawful wording:

- Confidentiality. Policies that prohibit the discussion or disclosure of terms and conditions of employment, including wages, hours or workplace complaints, violate Section 7. Likewise, a confidentiality policy that broadly
encompasses “employee” or “personnel information” is also impermissible. On the other hand, “broad prohibitions on disclosing ‘confidential’ information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment.”

• Employee conduct toward the company and supervisors. Employees have the right “to criticize or protest their employer’s labor policies or treatment of employees,” both privately and publicly. The NLRB will find unlawful rules that “prohibit employees from engaging in ‘disrespectful,’ ‘negative,’ ‘inappropriate’ or ‘rude’ conduct towards the employer or management,” on the theory that such rules can reasonably be read to prohibit protected concerted criticism of the employer. However, an employer may implement rules that prohibit insubordination, and may lawfully require that employees be respectful and professional toward co-workers, clients or competitors.

• Conduct toward fellow employees. Employees have the right “to argue and debate with each other about unions, management and their terms and conditions of employment,” and such speech will not lose protection under the act even if it includes “intemperate, abusive and inaccurate statements.” This principle implicates rules banning “negative” and “defamatory” statements, as well as anti-harassment rules. On the latter subject, the memorandum notes that “although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intertemporal comments regarding Section 7 protected subjects.”

• Employee communication with third parties. Employees have a Section 7 right to communicate with the news media, government agencies and other third parties regarding matters relating to their employment. While “employers may lawfully control who makes official statements for the company,” rules that prohibit employees from speaking to the media or third parties on their own behalf are unlawfully broad.

• Use of company logos, copyrights and trademarks. Rules that broadly prohibit employee use of logos, copyrights and trademarks also risk interfering with Section 7 rights. Employers can lawfully require employees to “respect” copyright and trademark laws, but “employees have a right to use the fair use of the company name and logo on picket signs, leaflets and other protest material.”

• Photography and recording. Employees have a Section 7 right to photograph and make recordings in furtherance of protected concerted activity. Rules banning photography or recordings are unlawfully overbroad where they would reasonably be read to prohibit taking pictures or recordings on non-work time.

• Leaving work. Because employees have the right to strike and participate in walkouts, rules regulating when employees can leave work are unlawful if they can be read to forbid such activities. A rule would be lawful if it “makes no mention of ‘strikes,’ ‘walkouts,’ ‘disruptions’ or the like,” as employees should “reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity.”

• Conflict of interest. Employees have the right to engage in concerted activity to improve terms and conditions of employment, even if this activity is in conflict with the employer’s interests. Consequently, broad prohibitions on activities that are contrary to the employer’s interests are unlawful. However, if a conflict of interest policy clarifies that it is limited only to the legitimate business interests of the employer, it is likely to be upheld.

The second part of the memorandum examines a recent settlement with Wendy’s International LLC regarding its handbook policies. It compares the rules in the Wendy’s handbook that initially were found to be unlawful with Wendy’s modified rules, adopted pursuant to an informal settlement agreement, which the general counsel does not believe violate the act. The Wendy’s experience pointedly illustrates the immediate need for employers to review their rules and policies to determine whether they might be read to restrict Section 7 rights, and, if so, whether appropriate modifications and disclaimers should be added.

In the end, the memorandum, while puzzling at times, is an informative summary of recent NLRB holdings, and provides practitioners with some insight into the current NLRB general counsel’s thinking on these various policy issues.