EFCA Battle Is Not Over

4/15/2009 By Ogletree Deakins

After much speculation, the Employee Free Choice Act of 2009 (EFCA) was introduced in the 111th Congress on March 10. The bills introduced in both the House of Representatives, **H.R. 1409**, and Senate, **S. 560**, are identical to last year's measure, which passed the House, but stalled in the Senate due to a filibuster on the motion to debate the bill on the Senate floor. This year's bills were introduced with fewer original co-sponsors amid increasing concerns regarding the economic impact of "card check" and compulsory arbitration of first contracts.

In a critical development, however, on March 24, Sen. Arlen Specter, R-Pa., announced that he would oppose EFCA and would vote against cloture to take the bill to the Senate floor. Specter was the only Republican in the last Congress to vote for cloture on EFCA and organized labor was counting on him to be the 60th vote this year. Specter indicated that he would "reconsider" his position on EFCA "when the economy improves." Specter also endorsed a series of labor law "reform" proposals.

Even before this announcement, a number of moderate Senate Democrats who had voted for cloture in the last Congress expressed serious reservations, and in some cases opposition, to the bill in the current Congress.

These recent developments should not be misinterpreted as a sign that the labor law reform agenda is dead in Congress. Several alternatives to EFCA, as well as other labor law reform proposals, may now rise to the forefront. Unions and Senate leaders have publicly announced that the battle is not over.

Mounting Campaign
EFCA's introduction was preceded by a steady stream of pro-EFCA events and publicity since the 111th Congress convened in January. The effort to pass EFCA officially commenced on Feb. 4, when organized labor and its progressive allies conducted the "Million-Member Mobilization" rally on Capitol Hill. Thousands of union members and their allies attended this rally and presented the signatures of 1.5 million working women and men from around the country calling for Congress to pass the legislation.

More recently, President Barack Obama predicted that EFCA would pass Congress in a videotaped speech presented to over 100 top labor officials at the winter meeting of the AFL-CIO's Executive Council.

As the president told the AFL-CIO leaders, "[t]o me, and to my administration, labor unions are a big part of the solution. We need to level the playing field for workers and for unions that represent their interests—because we cannot have a strong middle class without a strong labor movement. … And as we confront this [economic] crisis and work to … pass [EFCA], I want you to know that you will always have a seat at the table."

Same Provisions
Both the House and Senate versions of the new legislation are the same as from last Congress. They provide:

Card check certification. The bills would establish a "card check" procedure for union representation when a majority of the workers sign union authorization cards. Under the legislation, the National Labor Relations Board (NLRB) must certify a union based on valid signed

union authorization cards from 50 percent plus one of the workers in an appropriate bargaining unit, and may not schedule an NLRB-supervised secret ballot election.

Compulsory first contract interest arbitration. The bills would mandate a first contract by requiring that where the parties have failed to reach agreement after 120 days of collective bargaining and mediation, a federally appointed arbitrator will be selected to write the terms and conditions of employment binding on the parties for a period of two years.

Anti-employer penalties. The legislation also imposes three new penalties for employer unfair labor practice conduct during union organizing or while bargaining for an initial contract. Those penalties are:

Liquidated damages equivalent to triple back pay for employees terminated in violation of the National Labor Relations Act.

Fines of $20,000 for each unfair labor practice.

Mandatory injunction proceedings under Section 10(l) of the act for campaign-related unfair labor practices.

Alternative Proposals

As a proposed alternative to EFCA, Rep. Joseph Sestak, D-Pa., has introduced **H.R. 1355**, the National Labor Relations Modernization Act, which drops the "card check" provision from EFCA, "tweaks" the compulsory first contract arbitration provision, adds a requirement for union organizer access to employees at work and maintains the new anti-employer penalty provisions.

Sen. Specter's suggested proposals would provide for "quickie" union representation election deadlines, union access to employees at work, new penalties for unfair labor practices and bad faith bargaining delays, and a series of provisions designed to speed up the NLRB's case handling and decision making processes.

Also, union pressure is now likely to mount for passage of other labor law "reforms," such as the RESPECT Act, which would eliminate the act's statutory exclusion from unionization and collective bargaining for first-line supervisors.

Congressional Action Uncertain

The specific timing for EFCA's consideration by the Senate or House is unclear at this point. Also unclear is whether any of the proposed alternatives to EFCA will gain momentum. Recently, AFL-CIO President John Sweeney was quoted as saying that it may require a union amendment to EFCA to gain the needed Senate votes. Business groups are concerned that a union-drafted alternative could be as bad, or worse, than the original bill while only providing "political cover" for elected officials in the form of superficial changes.

According to Washington, D.C.-based Ogletree Governmental Affairs principal Hal Coxson: "The key vote in the Senate is on cloture, no matter how many cloture votes are taken. Senators must vote against cloture every time on EFCA or any equally bad union alternative bill."

What Business Should Do

Tom Davis, a shareholder in Ogletree Deakins' Nashville office noted: "Progressive employers are simultaneously working to defeat the labor law reform effort and taking steps to prepare for the possibility of new organizing rules which will work in favor of unions. Since labor's main objective is to make it harder for employees to hear from management on the issue of unionization, employers must work to create an environment in which they can quickly get critical information on unions to employees. At the very least, that means training your leadership on how to confidently and effectively communicate about unions. It also means employers should be prepared to communicate with employees about unions (and any new organizing rules) when the time is right."

***Ogletree Deakins** provides counsel to management in every area of labor and employment law.*

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Editor's Note: This article should not be construed as legal advice.

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