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**73 DLR CC-1**

*Congress*

**Big Business, Unions Continue  
To Duke It Out in Congress Over EFCA**

As lawmakers return from recess the week of April 20, the battle in Congress between big business and unions over the proposed Employee Free Choice Act (H.R. 1409, S. 560) continues in its intensity as supporters search for “yea” votes and push to get some version of the bill signed into law while opponents try to dump the bill entirely.

EFCA is the biggest labor-related bill in Congress, but lawmakers are considering other measures in the labor and employment arena, and they expect to act in coming months on legislation addressing pay inequality.

Furthermore, the Obama administration has announced it intends to begin debate on a comprehensive immigration system reform package.

When President Obama took office in January, a sense of momentum followed EFCA, as union groups expressed optimism in light of the supportive president and a Congress that had grown more labor friendly. But, following business groups' hard-charging opposition, EFCA's chances of passage dimmed significantly with the defection of seven Senate Democrats in March and early April, and stakeholders—including Sen. Tom Harkin (D-Iowa)—have been hunting for possible middle ground on the highly divisive topic.

Although it has become quite clear that the bill as written does not have enough support in the Senate to advance, neither side has let up in its campaigns to breathe new life into the bill or finally drive a stake through it.

For the past two weeks while lawmakers were presumably in their home districts and states, the U.S. Chamber of Commerce, in opposition of the bill, plastered TV and print ads around the nation as unions, in support of the bill, held hundreds of grassroots events in large cities and small towns and engaged in their own ad campaigns.

EFCA, introduced in the Senate March 10 (45 DLR AA-1, 3/11/09), would amend the National Labor Relations Act to establish a procedure where the National Labor Relations Board would certify a union as the bargaining representative of employees if a majority of employees of the unit signs valid union authorization cards. The legislation also would allow unions to continue to petition for NLRB-supervised secret ballot

elections, if they choose, once 30 percent of the workers have signed union authorization cards.

### **Bill Criticized As Job Buster**

Opponents of the bill include most pro-business groups and the vast majority, if not all, of the Republican lawmakers. They contend that the bill would lead to coercion of workers by union organizers, who under the bill, would likely know how a worker would cast a vote to decide whether to unionize.

“Testimony shows union officials visit workers' homes with strong-arm tactics and refuse to leave until cards are signed,” said Sen. Arlen Specter (R-Pa.) when he officially announced March 24 that he would not support allowing debate on the bill (55 DLR AA-1, 3/25/09). Specter was an original co-sponsor of the bill in 2005.

The opponents further claim that the bill would lead to more workers joining unions, which would increase costs for employers, who in turn would have to slash jobs.

A key concern, opponents say, is that the bill essentially would eliminate the traditional secret ballot election. As currently written, the bill provides that a union could be recognized based on a majority of signed authorization cards or through a secret ballot election conducted by the NLRB. Both the chamber and the unions agree that most employees likely would choose a card check process.

Another EFCA provision that particularly rattles opponents would allow—but not require—parties that are unable to reach a first contract within 90 days to refer the dispute to the Federal Mediation and Conciliation Service. If the FMCS is unable to bring the parties to agreement within 30 days, the dispute then would be referred to binding arbitration.

In fact, the chamber's latest ad campaign shifts the focus of its opposition away from the card check procedure—formerly its primary target—to the arbitration provisions, which it says would allow “government bureaucrats” to impose contracts that set work rules, pay rates, and other provisions if the employer and union cannot reach a contract agreement in 120 days.

“Such arbitration runs contrary to the basic tenet of the Wagner Act for collective bargaining which makes the employer liable only for a deal he or she agrees to,” Specter said during a March 24 Senate floor speech. “The arbitration provision could be substantially improved by the last best offer procedure, which would limit the arbitrator's discretion and prompt the parties to move to more reasonable positions.”

### **Bill Lauded as Economic Savior**

Supporters of the bill view the legislation as a panacea for a reeling U.S. economy that

would lead to more unionized workers, which would in turn result in better wages for low-income workers. They argue that pay gaps between the very rich and the working class have increased dramatically in the past 20 years while U.S. productivity has sharply risen as well.

Currently, the employer controls the method of how its workers decide whether to be unionized. If a union demands recognition based on a majority of signed union authorization cards, the employer can recognize the union or refuse to do so. The union then can file a petition with the NLRB seeking a secret ballot election. Under the proposed legislation, the union could file the cards with NLRB, which would verify that a majority of employees has signed valid authorization cards and would certify the union without directing an election.

“Strengthening and growing America's middle class depends on the ability of employees to exercise their democratic rights at work,” Harkin said in an April 2 statement. “In these economic times it is more important than ever for workers to have a say about their job security, their wages, their retirement savings, and their health care. The Employee Free Choice Act is simple: it will help our economy work for everyone again by giving workers, not CEOs, the choice of whether and how to join together to bargain for a better life.”

Before Specter's announcement, EFCA supporters routinely said that in order to hit the “magic number” of 60 votes to move the bill, they needed Specter's support and that of Al Franken, whose election as a Democratic senator from Minnesota is still in dispute.

Specter had been considered a possible supporter because he had previously voted in favor of cloture on the bill in 2007. But he did so because, at the time, he said he wanted more study of the issue. This time around, Specter acknowledged March 24 that “the system is broken” and suggested he might be able to support some compromise version of the bill that amends the NLRA to “give labor sufficient bargaining power.” Failing that, he added, he would be willing to reconsider EFCA after the country emerges from the recession.

Specter's announcement then provided cover for seven Senate Democrats to publicly not fully support the legislation as written (62 DLR A-13, 4/3/09).

### **Compromise on the Way?**

Once they lost the support of Specter and the seven Democrats, lawmakers involved in the deal began considering some form of compromise legislation (63 DLR A-14, 4/6/09).

Those talks are ongoing and no details on what will be changed are available.

“Even many of those who don't support the bill in its current form agree that the current system is broken, so we are still confident that we can ultimately pass legislation,” said

a Harkin aide.

Specter's announcement and the defections have had no bearing on the lobbying activities of the business sector or the unions. Indeed, both sides appear to have ratcheted it up a bit.

For its part, AFL-CIO is standing its ground, with President John J. Sweeney listing on the federation's Web site "three basic, nonnegotiable principles" for labor law reform.

Sweeney said reform must "provide workers a real choice to form unions and bargain for a better life, free from intimidation; stop the endless delays in negotiating a first contract; and create real penalties for violating the law."

In addition, the AFL-CIO, American Rights at Work, and Change to Win unveiled an ad and grassroots campaign March 31, called "Faces of the Employee Free Choice Act," featuring 50-foot tall banners draped on buildings around the nation with pictures of faces of workers promoting EFCA.

Since then, union members have held more than 400 grassroots events in support of the measure around the country, including forums, community town halls, roundtables, letter delivery events, and marches. The AFL-CIO said that union members have sent 27,000 letters to Congress in support of EFCA and made about 100,000 phone calls to Congress.

The unions spent more than \$1 million to air two new TV ads across the nation, and more than 5,000 miles were logged by mobile billboards showing the "faces of EFCA," from its banner campaign.

Meanwhile, the Chamber of Commerce's \$1 million television ad campaign, announced April 13, was launched in Colorado, Louisiana, Nebraska, North Dakota, and Virginia—states with senators who might be swing votes.

### **Paycheck Fairness Act**

The Senate is also likely to consider the Paycheck Fairness Act (S. 182, H.R. 12), which would make compensatory and punitive damages available as remedies in Equal Pay Act cases, authorize class actions governed by the Federal Rules of Civil Procedure, and mandate training and other outreach efforts by the Equal Employment Opportunity Commission and the Labor Department's Office of Federal Contract Compliance Programs on wage discrimination issues.

In a 247-171 vote on Jan. 9, the House approved H.R. 12, which would provide enhanced remedies for those who are found to have been subject to pay discrimination (6 DLR AA-1, 1/12/09). Former Sen. Hillary Clinton (D-N.Y.) introduced companion bill S. 182 on Jan. 9 with 29 co-sponsors.

Bill supporters, mainly Democratic lawmakers and workers' rights advocacy groups argue that the bill is necessary because, on average, women are paid 77 cents for every dollar earned by a man.

Bill opponents, mainly Republican lawmakers and business groups, argue that the bill is unnecessary because there are already "strong protections" against pay discrimination in EPA and Title VII of the 1964 Civil Rights Act. Lawmakers opposed to the bill have referred to it as a "trial lawyer boondoggle."

### **Employer Would Have to Show Necessity**

The bill would require that the employer seeking to justify unequal pay bear the burden of proving that its actions are job-related and consistent with a business necessity.

The legislation also would prohibit employers from retaliating against employees who share salary information with their co-workers.

The bill also would require EEOC and OFCCP to train EEOC employees and affected individuals and entities on matters involving wage discrimination.

It is unclear whether the Senate would take up H.R. 12 or the identical S. 182, but Sen. Barbara Mikulski (D-Md.), who has taken over the lead on the bill from Clinton, said she expects the Senate to debate the legislation over the summer.

Senate Majority Leader Harry Reid's (D-Nev.) placement of the bill on the calendar means the chamber could take up the bill at any time.

Supporters would likely need to get 60 "yea" votes as Senate Republicans are expected to filibuster the bill.

### **Possible Immigration Overhaul**

The White House announced April 9 that President Obama remains committed to starting comprehensive immigration reform soon, but he does not think the process will be completed this year.

White House press secretary Robert Gibbs told reporters that Obama would start a "discussion" of legislation to overhaul the nation's immigration system, including a possible path to amnesty for some 12 million illegal aliens already in the United States.

"Obviously, there are a lot of things on his plate and a lot of pressing issues relating to the economy," Gibbs said. "I don't think he expects that it [comprehensive immigration legislation] will be done this year."

The White House has not yet announced details of the reform proposal.

Sen. Charles Schumer (D-N.Y.) issued a statement April 9 saying he believes comprehensive immigration legislation could be approved this year.

“We must solve the immigration issue and we can, even in these difficult economic times,” Schumer said. “I believe there is a real chance of passing comprehensive reform this year, and the Senate panel on immigration will begin a series of meetings and hearings later this month with an eye towards meeting that goal.”

Meanwhile, the AFL-CIO and Change to Win unveiled a joint plan April 14 to push for comprehensive legislation that would include a path to citizenship for undocumented workers.

The labor federations outlined five major principles that they believe must be included in any comprehensive immigration bill. Those principles include: the establishment of an independent commission to assess and manage the future flow of immigrant workers, based on labor market shortages; legalization of undocumented immigrants that are already in the United States; a secure and effective method of worker authorization; improvement of current guestworker programs that does not include expansion of those programs; and “rational” operational control of the border.

The Federation for American Immigration Reform expressed opposition to granting amnesty to undocumented workers.

In addition, the U.S. Chamber of Commerce questioned the use of a commission to determine future flows and said that there should be no move to abandon current guestworker programs.

By Derrick Cain