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What's Next For EFCA?

Law360, New York (March 30, 2009) -- The surprise announcement by Senator Arlen Specter, R-Pa., on Wednesday, March 24, 2009, that he would not vote to end an anticipated Senate filibuster of the Employee Free Choice Act of 2009 (H.R. 1409) raises several questions: Is labor law reform dead, delayed, or destined to be different than expected?

History of EFCA

Labor's allies in Congress have introduced the Employee Free Choice Act ("EFCA") in each Congressional session since 2003. The bill would amend the National Labor Relations Act (the "NLRA") to make it easier for unions to organize employees by requiring certification based on signed authorization cards.

The bill would also require that the terms of a first labor contract be settled by an interest arbitrator after 120 days of negotiations between management and a union, and would strengthen penalties for certain unfair labor practices. EFCA passed easily in the House in 2007 but was filibustered in the Senate that year.

Is EFCA Dead?

Sen. Specter co-sponsored the bill in 2003 and was the only Republican to vote to end a filibuster in 2007.

With the Senate Democratic Caucus currently boasting 58 members, and with the prospect of another vote for cloture if Al Franken is deemed the winner of the Minnesota Senate Race, organized labor hoped that Sen. Specter would provide the critical 60th vote needed to end a filibuster and send the bill to bring the proposal to the Senate floor, where it would need just 51 votes to pass.

Sen. Specter's March 24 announcement may not have been a complete rejection of EFCA, however. He reiterated the sentiments he expressed in his 2007 cloture speech that, in his view, labor law is in need of reform.

He claimed to have several grave concerns about EFCA, but said he wanted to end the 2007 filibuster so that a thoughtful debate toward compromise could occur. But he cautioned in his 2007 floor speech that he might support EFCA if alternative measures were not enacted.

The Senator's 2009 announcement seemed to leave that door open to return to that position "when the economy returns to normalcy."

Senate Majority Leader Harry Reid, D-Nev., reacted to Sen. Specter's announcement by suggesting that the Pennsylvanian's vote might not be necessary.

According to the Huffington Post, Sen. Reid said of Sen. Specter's announcement: "He's not the only Republican who has indicated a willingness to consider something being done ... He's not the only suspect."

Sen. Reid's "suspects" may include Sen. Olympia Snow, R-Maine, and Sen. Susan Collins, R-Maine, who, along with Sen. Specter, were the only Senate Republicans to vote in favor of President Obama's stimulus plan earlier this year.

But there are some indications that EFCA may too have problems in the Democratic caucus. Eighteen Democrats — including many prior supporters — declined to co-sponsor the bill when it was introduced in the 111th Congress on March 10, 2009.

And there have been several reports that congressional "Blue Dogs" would be open to compromise legislation. That speculation was heightened when Sen. Evan Bayh, D-Ind., announced on March 19, 2009 that he and 12-15 centrist Democrats had formed a "Practicality Caucus" to moderate some of his party's reform programs.

While EFCA proponents likely realize that all of these events probably doom the bill's passage in its current form this year, they may choose to hold out until next year, when one-third of the Senate faces re-election.

However, one very prominent labor leader has at least suggested some willingness to consider compromise. SEIU President Andy Stern released a statement recently on the union's Web site striking a conciliatory tone:

"It's simple: If you support democracy, you should support the right to debate legislation that could improve the lives of millions of working Americans ... We look forward to working with Sen. Specter and the rest of the Congress to find ways to give workers the free choice to join a union free from intimidation and harassment."

Sen. Specter's Wish List

In 2008, Sen. Specter co-authored a Policy Essay entitled, “Representation Without Intimidation: Securing Workers’ Right To Choose Under The National Labor Relations Act,” in the Harvard Journal of Legislation, which suggested several alternative measures to address what he called an “ineffectual” system with “toothless remedies.”

He referenced that essay during his March 24 announcement and introduced into the Senate record a list of NLRA amendments that he would support.

Faster Elections and Resolution of Challenges

Sen. Specter would preserve the right of all employees to vote in a secret ballot election, but would require that election to be held within 10-35 days after a union files a petition.

Current National Labor Relations Board policy is to conduct an election within 42 days of filing. While the vast majority of elections are held within that time period, unions often point to cases that are delayed.

The Senator would also require that challenges to elections be resolved within 20-30 days of the election.

Addressing claims that employer misconduct sometimes makes a fair election impossible, Sen. Specter would codify and expand existing law, which permits federal courts to impose a bargaining obligation without an election in such cases.

New Unfair Labor Practices and Remedies

Sen. Specter would create new unfair labor practices to make it unlawful for an employer or a union official to visit an employee’s home without prior consent. Current law forbids home visits only by employer representatives.

Under the suggested reforms, an employer would be required to give a union “equal time under identical circumstances” in response to any mandatory “captive audience” employer speech about unionization. Current law permits an employer to enforce its property rights to forbid union organizers from entering its property.

While existing law forbids only employers from giving union-related speeches at mandatory meetings within twenty four hours of an election, Sen. Specter would forbid both employers and unions from engaging in campaign related activities during that period.

Sen. Specter’s wish list mirrors EFCA in some respects, proposing amendments that would allow the NLRB to impose treble back pay and civil penalties for certain unfair labor practices. Under the current law, fines and penalties are available only after civil contempt litigation in the U.S. Courts of Appeal.

First Contract Negotiations

Since 2006, current NLRB General Counsel Ronald Meisburg has instructed field offices to focus on avoiding delays in negotiations of first contracts. Mr. Meisburg's policies call for increased use of injunctions and special remedies in these bargaining cases.

Those special remedies include a prescribed or compressed bargaining schedule, an extension of the period of time that a union is free from decertification attempts by employees, and reimbursement of a union's bargaining costs.

Sen. Specter's wish list would codify many of Mr. Meisburg's policies and would permit either party to invoke contract mediation after 120 days of negotiation, but it would not require EFCA-style interest arbitration.

Modifications of NLRB Processes

Much of labor's criticisms of the current system relates to perceived delays in the NLRB's decision-making.

Sen. Specter proposes that the board establish "a certiorari-type" process where the Board would exercise discretion on reviewing decisions by administrative law judges (unfair labor practice cases) or regional directors (representation cases). Currently, the board has that discretion only with respect to representation issues.

The senator would require a decision within 180 days, and would authorize the award of attorneys' fees against a party who engages in harassment, causes unnecessary delay, or acts in bad faith.

Other EFCA Compromise Proposals

On March 5, 2009, with little fanfare, Rep. Joe Sestak, D-Penn., introduced the National Labor Relations Modernization Act, which omitted EFCA's card-check requirements, but would require an employer to provide equal access to the employees to union organizers once an election is ordered.

Rep. Sestak's bill would require interest arbitration but would extend the time period from the 120 days contemplated by EFCA to 240 days. Finally, Rep. Sestak's bill would add the remedies proposed by EFCA.

Another proposed reform agenda came from an unexpected source. On March 22, 2009, three major retailers — Starbucks, Costco and Whole Foods — announced the formation of a coalition, dubbed the "Committee for Level Playing Field," designed to explore an alternative path to labor law reform.

The group listed several principles that it would support, including many endorsed by Sen. Specter. The retailers insist that the secret ballot guarantee be preserved and oppose interest arbitration. However, they said they would support some form of equal access requirements, expedited elections and stricter penalties.

Another suggestion discussed in some circles relates to the extreme politicization of the National Labor Relations Board, which has contributed to the general lack of confidence ascribed to the Board during the past few years.

The board is normally comprised of five presidential appointees with staggered terms: two Democrats, two Republicans and one additional member of the president's party.

Recently, special interests have leveled intense attacks against the board. This has resulted in Congressional hearings to explore alleged partisan biases of the board and its members, and perceived impact on recent decisions.

In the wake of these hearings, the Democratic-controlled Senate refused to confirm any of President Bush's appointments to fill three vacancies on the board.

As a result, for over a year, the board has been acting with only two members — a situation many challenge as a violation of its statutory mandate.

Some academics and labor practitioners believe that extending the terms of board members would provide a stronger sense of the value of precedent in board decisions, and stabilize labor relations overall.

With the exception of Mr. Stern and the small group of retailers discussed above, most management and labor union groups have publicly resisted calls for middle ground on labor law reform.

Sen. Specter's announcement may change that, though one can reasonably expect strong resistance to the recent proposals for employers to grant property access to organizers and to pay employees for attending union-run meetings.

Nevertheless, with card-check and interest arbitration off the table, the path may be clear for a more thoughtful discussion about the immediate future of labor law.

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