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## **Congressional Law Reform Bills May Sit Out 2010**

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WASHINGTON - Congress introduced a host of legislation during 2009 with the potential to impact the practice of the law on many fronts - from overhauling the nation's patent laws and lowering the bar for discovery in civil litigation to expanding the federal bench and banning mandatory arbitration clauses. But congressional insiders and observers doubt that many of those proposals will become law during 2010, pointing to a number of potential barriers like the Obama administration's major agenda items that still require attention and political hurdles rising in Congress, which may limit the amount of law legislators will ultimately be able to pass.

The battle to overhaul the nation's health care system consumed huge swaths of legislative bandwidth, especially in the Senate, during the fall and winter. Although the Senate approved its version of the legislation on Christmas Eve, debate will spill over into January, as lawmakers need to reconcile the House and Senate versions into one bill, which then must pass both chambers before it can be signed into law.

Congress will also have to deal with a funding bill for the administration's plans to send 30,000 new troops to Afghanistan, analysts said. Added to that are the big-ticket items that have been cleared by the House and now await Senate action, like cap-and-trade energy legislation and a \$150 billion jobs bill. For attorneys, one huge legislative battle with the power to deeply affect the practice of law is the financial re-regulation package that the House passed in December. It would create a new set of regulations for lawyers to deal with, as well as a stand-alone Consumer Financial Protection Agency with the authority to enforce some of those regulations.

The House version originally had a clause that could have brought some attorneys under the jurisdiction of the new agency for assisting in financial planning, administering trust accounts, and other run-of-the-mill conduct, according to Thomas M. Susman, director of the American Bar Association's government affairs office. That provision was modified to exclude lawyers registered with a state bar in the House version, Susman said, and the ABA is working to obtain a similar exclusion from the Senate version. Organized labor is waiting on the Senate to take up the Employee Free Choice Act, which the House passed in March. The legislation could revitalize traditional labor law practices that have declined over the decades as U.S. unionization rates have steadily fallen, labor lawyers said.

The bill would make it significantly easier for workers to unionize by taking away an employer's ability to force an election and instead allowing unions to be certified through a majority of workers signing a card - which is how the bill got its nickname, "card check." It also has provisions that would stiffen penalties against employers who violate organizing laws and set conditions to force arbitration for initial contracts. The Senate is expected to consider the bill after it completes health care reform and the jobs bill. Loudly opposed by business interests, the bill lacks the 60 votes necessary to break a GOP filibuster, as several lawmakers, including California Democrat Sen. Dianne Feinstein, have publicly withdrawn their support for it as currently written.

This month, House lawmakers unveiled a sweeping immigration reform bill that includes a way to legalize the estimated 12 million undocumented workers in the country. But rather than approve something and

wait for the Senate, the bill's sponsors said they would move on their version after the Senate passes its bill.

Democrat Rep. Luis Gutierrez of Illinois said at a press conference that Senate leadership promised there would be floor time for immigration reform in February or March. At the same press conference, the chair of the Congressional Hispanic Caucus hinted at a political price if the Obama administration does not throw its full weight behind reform efforts.

"I have to remind everyone that when it comes to immigrants who were registered to vote and came out to vote in huge numbers, they had one thing in mind - comprehensive immigration reform," said Rep. Nydia M. Velázquez, D-N.Y.

In order for the timing to work out, the Senate Judiciary Committee will have to hold hearings, debate and amend, and approve the yet-unfinished immigration bill that Sen. Charles E. Schumer, D-N.Y., is working on. That process is expected to consume a lot of time, a committee aide said.

Earlier this year, the Senate Judiciary Committee labored to broker a number of compromises en route to approving a bill in April to overhaul patent laws, something several Congresses before it had tried and failed to do. But since then, neither the House Judiciary Committee nor the full Congress has taken up patent legislation.

Insiders said there is still a lack of consensus on the bill on a number of make-or-break issues to the various industries involved, like calculation of damages for infringement or rules for review of patents after they've been granted. These are the sorts of concerns that have stopped previous efforts at passing patent reform legislation.

"No bill is better than a bad bill," said Brian Pomper, executive director of the Innovation Alliance, a coalition of technology companies, including San Diego-based Qualcomm, Inc.

There are some matters in which Congress must pass legislation. Lawmakers granted themselves a two-month extension on expiring provisions of the Patriot Act and a law controlling the redistribution of broadcast signals to satellite television companies. The new deadline for action is Feb. 28.

Other bills of interest to lawyers include those that would:

Expand the federal judiciary by 63 new permanent and temporary judges across the country, including 12 permanent and three temporary district court judgeships in California, as well as one temporary and four permanent appellate court judgeships for the 9th U.S. Circuit Court of Appeals;

Flip two Supreme Court rulings that raised the standard plaintiffs must meet to enter the discovery phase in litigation: *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*;

Eliminate mandatory, binding, pre-dispute arbitration clauses in contracts;

Reform the state secrets privilege in civil litigation such that the government could exclude certain evidence without dismissing the entire case;

Prohibit the federal government from requesting an organization or its employees to waive the protections of the attorney-client privilege or the work product doctrine;

Allow cameras access to federal court in order to broadcast proceedings;

Establish a qualified right for reporters to protect sources against subpoenas;

Require judges to perform a balancing test before approving protective orders in civil litigation settlements;

Prohibit federal preemption of state consumer-protection laws;

Amend the Internal Revenue Code to allow attorneys to deduct certain expenses and costs in contingency-fee cases up front;

Change sentencing laws to eliminate mandatory sentencing and close the gap between jail terms for crack and powder cocaine;

Grant members of the military the same rights as civilians to appeal their convictions to the Supreme Court.

While the legal community may be anxious to resolve these issues, the Democratic majority in Congress may end up pushing them aside in 2010 in order to focus on the Obama administration's primary goals, analysts said. The midterm elections in November could also make it more difficult for the Democratic majority to pass legislation.

"The election looms large, with Republicans tasting the possibility of taking a substantial number of seats," said the ABA's Susman. "That always makes for more contentiousness ... It's always easier to stop something than to get it through."

The approaching election makes it harder for Democratic leadership to ask vulnerable members to cast the sort of tough votes that could haunt them at the polls, analysts said. And, as is true with all presidents, the longer Obama stays in office, the more his political capital declines.

"With every day that passes, it becomes harder to cajole House and Senate Democrats," said Sarah Binder, an expert on Congress and legislative politics with the Brookings Institution, a non-partisan think-tank.

The election will also mean a shortened legislative calendar. Congress is expected to break in October and it's unclear how much work will go on after the November elections make lame ducks out of some lawmakers.

But Donald Wolfensberger, director of the Woodrow Wilson International Center for Scholars' Congress Project, pointed out that Democrats "can't just shy away from doing anything," because they're behind the curve in terms of legislation passed and are going to need accomplishments to run on. Major legislation has come during election years in the past, such as the Civil Rights Act in 1964 and sweeping welfare reform in 1996, he added.

Analysts also noted that progress on an issue is not an all-or-nothing proposition contingent on legislation becoming law.

Hearings on Capitol Hill this year highlighted ongoing litigation against mandatory pre-dispute arbitration clauses, for example. Several financial institutions, like Bank of America and JPMorgan Chase & Co., dropped those clauses from their contracts this fall.

Lawmakers can also lay the groundwork for future laws, said Michael Macleod-Ball, the acting director of the American Civil Liberties Union's Washington legislative office.

"Even if it doesn't get a bill all the way through," he said, "if the current Congress can heighten attention on certain issues, that might set up passage down the road."