



This Employer Webinar Series
program is presented by
Spencer Fane Britt & Browne LLP
in conjunction with
United Benefit Advisors

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**Preparing for the
Employee Free Choice Act**

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Organized Labor's Need for Change

▶ **Union Membership Rates**

- 1950's – 35%
- 1983 – 20.1% or 17.7 Million
- 2006 – 12% or 15.4 Million
- 2008 – 12.4% or 16.1 Million

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Current Workforce Penetration

- ▶ Government – 36.8%
- ▶ Private Sector – 7.6%
 - Utilities – 22.2%
 - Telecom – 19.3%
 - Construction – 15.6%

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Organized Labor's New Strategies

- ▶ Change To Win Coalition
- ▶ Employee Free Choice Act
- ▶ Alternatives to EFCA
- ▶ RESPECT Act
- ▶ National Labor Relations Board
- ▶ DOL/FLSA Audits & Enforcement

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Change to Win Coalition

- ▶ SEIU, UNITE, HERE, Carpenters, Laborers, Teamsters, UFCW
- ▶ Strategy Objectives
 - More organizing
 - Less political involvement
 - Fewer, larger unions
- ▶ Potential reunification with AFL-CIO

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Effect of Unionization on a Business

- ▶ Employers cannot change terms or conditions of employment without bargaining.
 - Includes wages, benefits, work rules, any “condition of employment.”
- ▶ Unions tout 30% higher wages.
 - Increased cost of doing business.
 - Generally lower net value for business.

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The Employee Free Choice Act

- ▶ In 2008 the EFCA passed the House by a substantial majority (234 co-sponsors).
- ▶ In 2008 there were almost 50 Senate co-sponsors.
- ▶ http://www.aflcio.org/joinaunion/voicework/efca/cosponsors_110.cfm
- ▶ 2008 EFCA died in the Senate.

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The Employee Free Choice Act

- ▶ President Obama has called this Bill his “Number one priority as President.”
 - “Department of Labor, not Department of Management.”
 - “Time for unions to play some offense.”

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The Employee Free Choice Act

- ▶ Mixed Signals
 - President Obama has indicated need to focus on economy first
 - Senator Specter's changing positions
 - Lukewarm support from Southern Democrats

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The Employee Free Choice Act

- ▶ Card Check.
- ▶ Time Limits on Bargaining.
- ▶ Mediation.
- ▶ Binding Interest Arbitration.
- ▶ Unfair Labor Practice Fines and Treble Damages.

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“Streamlining Union Certification”

- ▶ Current Law
 - Unions show interest through card signing, then obtain voluntary recognition or secret ballot election.
 - Employers have limited free speech rights during the campaign period (generally four to six weeks).

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“Streamlining Union Certification”

- ▶ **Current Law**
 - Elections
 - Secret Ballot
 - NLRB Supervised
 - Union and Company Observers
 - Ballot Challenge Process
 - Public Counting of Ballots
 - Objections and ULPs
 - Appeals

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EFCA Card Check

- ▶ Board certifies union as “exclusive bargaining agent” based solely on card check.
 - For employees → “free choice” or “no choice”?
 - For employers → no opportunity to express their views?

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EFCA Card Check

- ▶ **Open Questions**
 - Scope of Unit Issues
 - Supervisory Issues
 - Validity of Union Cards
 - How Long?
 - Pre-EFCA Cards Valid post-EFCA?
 - Coercive or Misleading Tactics?

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“Facilitating Initial Collective Bargaining Agreements”

- ▶ **Current Law**
 - Duty to bargain in good faith, to agreement or impasse.
 - No obligation to make any particular concession.
 - Union’s strength is in its ability to withhold labor or apply external pressure (i.e. strike or picketing).

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EFCA Bargaining

- ▶ Duty to begin bargaining within ten days after demand.
- ▶ Bargaining lasts for up to for ninety days.
- ▶ Mediation for thirty days.
- ▶ Binding interest arbitration to establish a two-year contract, even over the employer’s objection.

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Newly Unionized Employers in the Post-EFCA World

- ▶ Contract bargaining → technical minefield
 - We “can’t afford” versus “it’s not competitive”
 - Permissive versus mandatory subjects
 - Even experienced business negotiators should not attempt without assistance.
- ▶ Build a record for interest arbitration.

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Arbitration Issues

- ▶ Preserve legal challenges.
- ▶ Know your arbitrator(s).
 - Selection/striking process.
 - Nearly unlimited power. Employers must be persuasive to the individual.
- ▶ Know the Union's likely arguments in advance, and be prepared to counter.

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“Strengthening Enforcement”

- ▶ Current Law
 - 8(a)(1) prohibits “interference” with employee rights.
 - Remedy is posting and injunctive relief.
 - Examples: interrogation, surveillance.
 - 8(a)(3) prohibits discrimination.
 - Remedy is posting, plus back pay and reinstatement if necessary to “make whole.”
 - Examples: discharge, layoff, denial of promotion.
 - Bargaining orders for severe misconduct during pre-election period.

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EFCA Fines and Damages

- ▶ During organizing drive and first contract bargaining:
 - 8(a)(1) violations → threats, as well as any other willful or substantial repeat violation results in a \$20,000 civil penalty per violation, plus notice posting.
 - 8(a)(3) violations → treble damages, reinstatement, and notice posting.

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The Employee Free Choice Act

- ▶ Card Check
- ▶ Time Limits on Bargaining
- ▶ Mediation
- ▶ Binding Interest Arbitration
- ▶ Unfair Labor Practice Fines and Treble Damages

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Alternatives to the EFCA

- ▶ Organized Labor Considering Delay to 2010, or Taking Something Less
- ▶ Possible Alternative
 - “Quickie” Elections
 - Interest Arbitration as a remedy for “bad faith” bargaining
 - Enhanced damages as under EFCA
 - Property access rights – “Equal Time”

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Other Union Strategies

- ▶ RESPECT Act
- ▶ National Labor Relations Board
- ▶ DOL/FLSA Audits & Enforcement

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How Should Employers Prepare?

- ▶ Political Action
 - Lobbyists
 - Trade Associations & Employer Groups
 - Contacts with Senators, Representatives and the President
 - Focus on Negative Economic Impact
 - Focus on Secret Ballot
 - Focus on Mandatory Arbitration

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How Should Employers Prepare?

- ▶ Supervisory Education
- ▶ Employee Education
- ▶ Policies and Procedures
- ▶ Union Vulnerability Audit
- ▶ Rapid Response Team

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How Should Employers Prepare?

- ▶ Early Supervisor and Employee Education Programs
 - Speak now or lose your opportunity.
 - Supervisors need to understand the risks, and have the tools to identify and lawfully resist organizing efforts.
 - Employees need to know both sides of the story, and that they have the right to say “no.”

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How Should Employers Prepare?

- ▶ Policies and Procedures
 - Union-Free Philosophy
 - Don't Sign a Union Card
 - No Solicitation-No Distribution Policy
 - No Loitering Policy
 - Job Posting Policy
 - Internet Access & Computer Use Policy
 - Grievance Procedure
 - Guidance on Weingarten Rights

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How Should Employers Prepare?

- ▶ General Policies and Training
 - Respect for Employees
 - Handbooks / Written Policies
 - Announced Rules and Standards
 - Consistent Application and Discipline
 - Well Trained Supervision
 - Well Trained Employees
 - Competitive Wages and Benefits

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How Should Employers Prepare?

- ▶ Union Vulnerability Audit

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How Should Employers Prepare?

▶ Rapid Response Team

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How Should Employers Prepare?

Questions?

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Thank You!

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Thank you for your participation.