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Obama's Big Deal; The 2009 Federal Stimulus; Labor And Employment Law At The Crossroads

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I. Introduction

The collapse of the economy at the end of 2008 is one of the most important issues of our time and has resulted in the passage of historic bailout and stimulus legislation. Newly elected President Obama has recognized that his political future depends upon the economy rebounding.² This Essay focuses on an important aspect of the 2009 economic stimulus, formally known as the American Recovery and Reinvestment Act, which seems to have largely been left out of the political debate, and what effect the stimulus will have on labor and employment law. This Essay asserts that this stimulus is much more than just an economic package. It is a reflection of a fundamental social change that is about to occur in labor and employment law similar to President Roosevelt's New Deal. I refer to this as Obama's Big Deal.

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² David Herszenhorn and Jeff Zeleny, *Senate Begins Intense Negotiations*, N.Y. TIMES, Feb. 11, 2009, available at http://www.nytimes.com/2009/02/11/us/politics/11obama.html?_r=1&sq=herszenhorn%20and%20zeleny&st=cse&scp=1&pagewanted=print.

II. The New Deal

Like President Obama, President Roosevelt took office during a time of great economic turmoil. One of Roosevelt's responses to the Great Depression, which the country was in the middle of when he took office, came to be known as the "New Deal." In 1933, President Franklin D. Roosevelt described what he meant by the "New Deal:"

The word "deal" implied that the government itself was going to use affirmative action to bring about its avowed objectives rather than stand by and hope that general economic laws alone would attain them. The word "New" implied that a new order of things designed to benefit the great mass of our farmers, workers and business men would replace the old order of special privilege in a Nation which was completely and thoroughly disgusted with the existing dispensation.³

The New Deal brought about social change and significantly altered labor and employment law by bringing about a host of legislation such as The Social Security Act, The Fair Labor Standards Act, and most importantly, The National Labor Relations Act ("NLRA").⁴

Indeed, like the 2008 Presidential election, the 1932 election was seen as creating a new public mandate, a "new deal" of immediate action. The New Deal, of course was not limited to labor legislation, but President Roosevelt, like President Obama thus far, operated with Congressional approval.⁵

Similar to the current stimulus plan, one of President Roosevelt's early pieces of legislation, the National Industrial Recovery Act ("NIRA") of 1933, clearly linked law and economics together.⁶ In addition to the statute's intended purpose of stimulating the economy, it was also a piece of labor legislation. Specifically, the NIRA authorized the enactment of "Codes of Fair Competition" which had to be approved by the President. A violation of these Codes was a misdemeanor.⁷

One such Code, which was litigated in the Supreme Court and eventually lead to the Act being declared unconstitutional, regulated the time employees could work to forty hours a week, set a minimum pay rate of fifty cents per hour, prohibited employment of anyone under age sixteen and declared that employees have the right to collectively bargain.⁸

³ FRANKLIN D. ROOSEVELT, 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE YEAR OF CRISIS, 1933, at 5 (1938).

⁴ For an excellent summary of the New Deal and some of the programs that were enacted, many of which still exist today, see, New Deal, http://en.wikipedia.org/wiki/New_Deal (last visited Mar. 19, 2009).

⁵ RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE & PROCEDURE § 4.7 (4th ed. 2009) (discussing FDR's New Deal programs).

⁶ See National Industrial Recovery Act (NIRA) of 1933, ch. 90, 48 Stat. 195 (formerly codified at 15 U.S.C. § 703) *invalidated by* A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935).

⁷ Congress envisioned that the "Codes of Fair Competition" would help get the country out of the Great Depression. TIMOTHY J. HEINSZ, DENNIS R. NOLAN & RICHARD A. BALES, LABOR LAW COLLECTIVE BARGAINING IN A FREE SOCIETY 101-102 (6th ed. 2009); MICHAEL C. HARPER, SAMUEL ESTREICHER & JOAN FLYNN, LABOR LAW CASES, MATERIALS AND PROBLEMS 80-83 (6th ed. 2007).

⁸ In A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 551 (1935), the Court found the NIRA unconstitutional for two main reasons. First, the Act infringed upon the Separation of Powers because Congress delegated too much of its authority to the President to take whatever action he saw fit. The Court also held that the statute did not regulate Interstate Commerce under the Commerce Clause as it had been understood at the time. The 2009 stimulus does not suffer from these same problems. First, the statute does not impose unfettered control in the President.

Section 7(a) of the NIRA required that the industry codes include provisions for the protection of labor including the right of employees to collectively bargain and engage in concerted activities.⁹ Though the NIRA did provide employees with significant rights, the statute was considered ineffective because it did not have effective remedies. The NIRA was declared unconstitutional in 1935.¹⁰

The 1933 NIRA was the precursor to modern labor legislation reflected in the 1935 NLRA.¹¹ Although the NLRA was designed in part to help eliminate labor disputes, that was more of a “constitutional hook” to uphold its constitutionality. The core purpose of the original NLRA was to address the Great Depression by enhancing the bargaining power, and therefore, the purchasing power of workers.¹² Congress was following Keynesian economic theory by hoping to increase mass worker purchasing power as a way of speeding up the economic recovery.¹³ Indeed, section one of the NLRA clearly links the issue of wages and the depression to the need of employees to have the right to unionize by stating:

The inequality of bargaining power between employees . . . and employers . . . tends to aggravate recurrent business depression, by depressing wage rates and purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining¹⁴

Thus, in their classic work on labor law, Professors Cox, Bok, Gorman and Finkin characterized the NLRA as both an economic measure to improve wages and as a program to

Second, *Schechter's* Commerce Clause jurisprudence has long been abandoned by the Court. See ROTUNDA & NOWAK, *supra* note 5 at § 4.8 (discussing modern Commerce Clause jurisprudence). It is beyond the scope of this work to discuss this issue in further detail.

⁹ For an excellent summary of the NIRA see, WEST'S ENCYCLOPEDIA OF AMERICAN LAW, NATIONAL INDUSTRIAL RECOVERY ACT OF 1933 (1998), available at <http://answers.com/topic/national-industrial-recovery-act-of-1933>.

¹⁰ *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 551; see also 1 THE DEVELOPING LABOR LAW, 26-30 (John E. Higgins, Jr., ed., 5th ed. 2006) (discussing history of the NLRA as well as the NIRA).

¹¹ The NIRA, of course, predates the Fair Labor Standard Act of 1938, 29 U.S.C. Sec. 203 et. seq. which regulates wages and hours as well as child labor.

¹² HEINSZ ET AL, *supra* note 7, at 101; ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW CASES AND MATERIALS 75 (14th ed. 2006) (stating impetus for legislation aiding unionization came from a need to halt the Great Depression).

¹³ COX ET AL, *supra* note 12, at 75. For a summary of Keynesian Economic theory, see Alan S. Binder, *Keynesian Economics*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed. 2007), available at <http://www.econlib.org/library/Enc/KeynesianEconomics.html>

¹⁴ 29 U.S.C. § 151 (2006).

minimize labor disputes.¹⁵ The history of the NLRA demonstrates the historical relationship between the law and economics with respect to labor matters.

III. The 2009 Economic Stimulus

The 789 billion dollar stimulus is one of the largest economic rescue programs since the New Deal and it exceeds the entire cost of the Iraq War which started in 2003.¹⁶ President Roosevelt's New Deal legislation never increased the deficit by more than 1.5% of the gross domestic product. This legislation, which is all a product of deficit spending, represents 2.5% increase in gross domestic product for two years in a row¹⁷ and raises the government debt to 12.104 trillion dollars.¹⁸ Like the New Deal, its purpose is to "create jobs and promote economic recovery."¹⁹

¹⁵ COX ET AL, *supra* note 12, at 77. Indeed, when New York Senator Robert Wagner introduced the NLRA he directly linked it to the economy by stating:

I want to emphasize ever more strongly the constitutional power and the intent of Congress to prevent these unfair labor practices even where they do not lead or threaten to lead to strikes. As economic conditions have changed, courts on the whole have shown an increasing willingness to recognize that unsound business practices are a direct burden upon the regularity and volume of commerce When wages sink to low levels, the decline in purchasing power is felt upon the marts of trade. And since collective bargaining is the most powerful single force in maintaining and advancing wage rates, its repudiation is likely to intensify the maldistribution of buying power, thus reducing standards of living, unbalancing the economic structure, and inducing depression with its devastating effect upon the flow of commerce.

79 CONG. REC. 7572 (1935) (statement of Sen. Robert Wagner). *See also*, Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling On Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 291-293 (1987) (explaining that one of the primary goals of the NLRA was to "redistribute wealth in order to attack the problem of underconsumption" as opposed to any particularistic policy towards labor relations); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 83 n.35 (1988) (describing how the drafters of the NLRA believed that the economy is best served if workers organize into unions).

¹⁶ Greg Hitt & Jonathan Weisman, *Congress Strikes 789 Billion Stimulus Deal*, WALL ST. J. (Feb. 12, 2009), at A1, available at <http://online.wsj.com/article/SB123436825805373367.html#>

¹⁷ Greg Hitt & Jonathan Weisman, *Recovery Package Gets Congressional Approval*, WALL ST. J. (Feb. 14, 2009), at A2, available at <http://online.wsj.com/article/SB123453885966183349.html>

¹⁸ *Id.*; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1604, 123 Stat. 115, 366 (2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf.

To give some additional perspective on just how large this amount is, that amount is larger than the entire gross national product of all but a handful of countries. John Steele Gordon, *A Short History of the National Debt*, WALL STREET J. (Feb. 18, 2009), at A17, available at <http://online.wsj.com/article/SB123491373049303821.html#printMode>. At the same time, it should be noted that this country has only been debt free once in its history, in 1835. *Id.* Thus, deficit spending is very much part of this nation's history.

¹⁹ § 3(a)(1), 123 Stat. at 115-16.

This daunting piece of legislation²⁰ does not have any provisions which directly address traditional labor law; however it does contain related important employment law provisions. It provides 80 billion dollars for the enforcement of “worker protection laws.”²¹ Unfortunately, it is not clear which “worker protection” laws that money is intended to be allocated to, although later in that same paragraph the statute does refer to certain specified programs within the Department of Labor.²² The Act also expands the amount of unemployment insurance benefits, eligible circumstances and duration of unemployment benefits.²³ Additionally, it provides tax relief for workers,²⁴ includes reemployment assistance for older workers²⁵ and includes robust whistleblower protection designed to ensure that employees can disclose waste, fraud, gross mismanagement or a violation of law related to stimulus funds.²⁶

Moreover, the Act indirectly benefits workers by imposing limitations on executive compensation and golden parachute payments where senior executives get a windfall payment for leaving their company.²⁷ Furthermore, the Act has several immigration provisions which severely limit the ability of employers to hire employees under the H-1B visa program which is the primary method of hiring foreign specialty workers on a temporary basis.²⁸ Thus, the Act encourages the employment of American workers.

The Act also revises the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) by alleviating some of the financial burden on employees who may be out of work and in need of health insurance. The statute provides a 65% subsidy for up to 9 months for the payment of health insurance premiums, where an employee lost his job, which will be financed through a government paid payroll tax subsidy.²⁹

The similarities to the New Deal are obvious in that at its core this stimulus is more than just a spending statute. It is also a piece of social legislation which, among other things, regulates part of the employment relationship. Though it does not regulate traditional labor management relations like the 1935 NLRA, it does provide workers with additional benefits. The similarities to the New

²⁰ The original Bill, H.R. 111-1, spanned more than 1400 pages. See H.R. 1, 111th Cong. (2009). It is also important to note that this stimulus legislation followed a few months after The Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008), where the U.S. Secretary of the Treasury was authorized to purchase up to 700 billion dollars in “troubled assets” from “any financial institution.” § 115(a)(3), 122 Stat. at 3780, § 101(a)(1), 122 Stat. at 3767. At the time, that bailout alone represented a 7% increase in the total debt of the United States. Roger D. Congleton, *On the Political Economy of the Financial Crisis and Bailout of 2008*, 28 (fourth draft, Mar. 12, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341084&download=yes (discussing history of the 2008 Bailout); see also Austin Murphy, *An Analysis of the Financial Crisis of 2008: Causes and Solutions*, 2 (2008), available at <http://ssrn.com/abstract=1295344> (describing financial crisis as of “epic proportions” and the money spent on the 2008 bailout as “astronomical”).

²¹ American Recovery and Reinvestment Act, 123 Stat. at 174.

²² *Id.*

²³ § 2002, 123 Stat. at 437-39.

²⁴ § 1001(a), 123 Stat. at 309.

²⁵ § 1841(a)(1), 123 Stat. at 387-88 .

²⁶ § 1553, 123 Stat. at 297.

²⁷ § 7001, 123 Stat. at 516-20.

²⁸ § 1611, 123 Stat. at 305.

²⁹ § 3001(a)(1), 123 Stat. at 455-56.

Deal should come as no surprise to most Americans as President Obama was supported by organized labor and repeatedly invoked references to the legacy of the New Deal during his campaign.³⁰

The stimulus, does however, have one glaring omission. There is no restriction on the use of stimulus funds to assist, promote or deter unionization. It is a stunning omission because only federal legislation could impose restrictions on the use of funds since any attempt by a state to legislate would be preempted.³¹

IV. Obama's Big Deal And Future Labor and Employment Legislation

President Obama has indicated that providing workers with collective bargaining rights is good for the economy because it results in increased wages.³² The President's views tend to be confirmed in scholarly economic literature.³³

Even before the stimulus was enacted, the first Bill that President Obama signed concerned increasing the rights of workers. Specifically, the Lilly Ledbetter Fair Pay Act of 2009 amends this nation's principal anti-discrimination laws to broaden the statute of limitations in employment discrimination cases. President Obama even tied that legislation to the economy by stating that this legislation sends "a clear message that making our economy work means making sure it works for everyone."³⁴

³⁰ William P. Jones, *Obama's New Deal*, THE NATION, Dec. 1, 2008, available at <http://thenation.com/doc/20081201/jones/print?rel=nofollow>.

³¹ In June of 2008, the Supreme Court in *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2412 (2008), held that a California law which prohibited employers who received more than \$10,000 in state funding to use those funds "to assist, promote, or deter union organizing," Cal. Govt. Cod. Ann. Sec. 16645.2(a), was preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.*

³² Thomas Fitzgerald, *Obama: Plan Will Save Millions of Jobs*, PHILADELPHIA INQUIRER, Feb. 12, 2009, available at <http://www.philly.com/philly/news/homepage/39482347.html>.

³³ LAWRENCE MISHEL, JARED BERNSTEIN, HEIDI SHIERHOLZ, *Excerpt of Chapters 3 and 8, Unions and The Economy*, THE STATE OF WORKING AMERICA 2008-2009, at 1 (2009), available at <http://www.stateofworkingamerica.org/swa08-union.pdf>; Employee Free Choice Act of 2007, H.R. REP. NO. 110-23, at 13-15 (Feb. 16, 2007) (summarizing evidence, including multiple scholarly economic studies, documenting that increased rates of unionization increases productivity), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr023.110.pdf; Harley Shaiken, *Unions, the Economy and Employee Free Choice*, 181 ECON. POLICY INST. BRIEFING PAPER 9-10 (2007) (noting that when unions decline wages decline); Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 676-677 (1993) (discussing how unions help the economy). See also, Robert B. Reich, *The Union Way Up*, L.A. TIMES, Jan. 26, 2009, available at <http://www.latimes.com/news/printedition/asection/la-oe-reich26-2009jan26,0,3639121.story>.

³⁴ Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 30, 2009, available at <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?hp=&pagewanted=print>. The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, legislatively overturns *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) and allows discrimination claims to be brought within 180 days of receiving a paycheck affected by a discriminatory pay decision no matter how far in the past the act of discrimination occurred. Though *Ledbetter* was a Title VII decision, the statute also amends the Ages Discrimination in Employment Act, the Americans With Disabilities Act and the Rehabilitation Act of 1973.

Indeed, in President Obama's proposed 2010 budget entitled A New Era of Responsibility Renewing America's Promise³⁵ the President proposes to "fundamentally reform the nation's unemployment insurance system," by making it a "safety net and economic stabilizer."³⁶ Unemployment insurance was, of course, originally part of the New Deal era Social Security Act.³⁷ The President also plans to restore labor standards to "labor law enforcement agencies" which "struggled with growing work loads and shrinking staff" under the Bush Administration.³⁸ Most significantly, the President proposes the establishment of an automatic workplace pension system which works along side Social Security by permitting employees to voluntarily save towards their retirement.³⁹ The President's budget also increase taxes on the wealthy which is similar to what President Roosevelt did during the depression.⁴⁰

Thus, the Obama Administration, like the Roosevelt Administration, sees a relationship between the rights of workers, unions and the economy. Therefore, Obama's Big Deal response to the faltering economy is likely to be additional labor and employment legislation which will strengthen the standing of unions as well as the rights of employees. A review of some important legislation that was proposed in the 110th Congress provides a clue to what is likely to be reintroduced into the present 111th Congress and signed into law by the President.

Most notably, the passage of the Employee Free Choice Act ("EFCA")⁴¹ now seems very likely. In 2007, this Bill passed the House and gained majority support in the Senate, but was eventually blocked by a filibuster.⁴² It should also be noted that President Obama, a liberal

³⁵ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, A NEW ERA OF RESPONSIBILITY RENEWING AMERICA'S PROMISE (Feb. 26, 2009) [hereinafter NEW ERA OF RESPONSIBILITY], available at http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf

³⁶ *Id.* at 83.

³⁷ See, Mark A. Rothstein, Charles B. Craver, Elinor P. Schroeder & Elaine W. Shoben, EMPLOYMENT LAW, § 10.6 (3d ed. 2005) (discussing history of Unemployment Compensation and that the statute was originally set forth in the Social Security Act).

³⁸ See NEW ERA OF RESPONSIBILITY, *supra* note 35, at 83, 84.

³⁹ *Id.* at 85.

⁴⁰ David Leonhardt, *A Bold Plan Sweeps Away Reagan Ideas*, N.Y. TIMES, Feb. 27, 2009, at A1, available at http://www.nytimes.com/2009/02/27/business/economy/27policy.html?_r=1.

⁴¹ H.R. 1409, 111th Cong. (1st Sess. 2009); S. 560, 111th Cong. (1st Sess. 2009).

⁴² Steven Greenhouse, *House Passes Bill That Helps Unions Organize*, N.Y. TIMES, Mar. 2, 2007, available at <http://www.nytimes.com/2007/03/02/washington/02union.html?ref=washington>; Steven Greenhouse, *Senate Republicans Block Labor Bill*, N.Y. TIMES, June 26, 2007, available at <http://www.nytimes.com/2007/06/26/washington/26cnd-labor.html?ex=1340510400&en=37d0285c0e3f60d9&ei=5088&partner=rssnyt&emc=rss>. See also Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right To Choose Under The National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311 (2008) (discussing EFCA).

EFCA is organized labor's number one legislative priority, while corporate America is bitterly opposed to this legislation. One management representative even referred to EFCA as "Armageddon." Steven Greenhouse, *After Push for Obama, Unions Seek New Rules*, N.Y. TIMES, Nov. 9, 2009, at A33, available at <http://www.nytimes.com/2008/11/09/us/politics/09labor.html?pagewanted=print>.

It should be noted that a contrary Bill has been introduced by opponents in the 111th Congress known as the Secret Ballot Protection Act, which would amend the NLRA to make it an unfair labor practice for an employer to recognize a union that has not been selected through a secret ballot election. See S. 478, 111th Cong. (1st Sess.

Democrat, supports EFCA and is working with a supportive Democratically controlled Congress.⁴³ Therefore, the impetus for this legislation is political as well as economic.

EFCA has the potential to fundamentally alter the nature of labor law just like the New Deal era NLRA. Under current law, unless employers agree otherwise, unions generally only become certified after a lengthy secret-ballot election. EFCA would permit, but not mandate, unions to be certified if they receive a majority of cards signed by employees stating that want to be represented by a union. Additionally, a dirty little secret in labor law is that while only about 7% of the private sector is organized, even when unions are elected only about 45% of them manage to actually get a first contract.⁴⁴ EFCA addresses this by providing for mandatory interest arbitration of first collective bargaining contract disputes if the parties cannot timely reach agreement. Moreover, under EFCA, where unfair labor practices are committed during the election process and first contract bargaining, an employer would be subject to liquidated damages with respect to any back pay remedy which may be ordered as well as a \$20,000 civil penalty for each violation.

Like the New Deal NLRA, EFCA is much more than a piece of labor legislation. It is a piece of economic legislation designed in part to help the economy. Indeed, the House Report which accompanied the 2007 EFCA Bill, and which was written before the current recession, expressly stated that this Bill sought “to strengthen and expand the American middle class by restoring workers’ freedom to organize and collectively bargain” Additionally, that same report documents how EFCA is designed to further the American Dream of workers to provide for their families, build a nest egg for the future as well as provide for their children’s college education. EFCA is designed to address what the House Report calls a “human rights crisis” which is causing a “middle class squeeze.”⁴⁵

2009); *See also* H.R. 1176, 111th Cong. (1st Sess.2009). That Bill has 101 co-sponsors in the House and 16 co-sponsors in the Senate. *Id.*

⁴³ Kris Maher, *President Tells Unions Organizing Act Will Pass*, WALL STREET J., March 4, 2009, available at <http://online.wsj.com/article/SB123611995496723249.html#articleTabs%3Darticle>. Indeed, on February 9, 2009, Rep. Miller, Chairman of the House of Representatives Education and Labor Committee presented an oversight and investigation plan for his Committee’s work in the 111th Congress. That report specifically provides that protecting the rights of workers to organize effectively and strengthening the middle class are goals of the Committee. STAFF OF H. COMM. ON EDUC. AND LABOR, 111TH CONG., REPORT ON OVERSIGHT AND INVESTIGATION PLAN 3-4 (Comm. Print 2009), available at http://edlabor.house.gov/documents/111/pdf/markup/FC/HR911-Oversight/Ed%20Labor_Oversight_Plan-111th%20Congress.pdf. Therefore, it is apparent that EFCA has the support of the President and this important House Committee.

⁴⁴ 7.6% of the private sector workforce is unionized. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY 1 (Jan. 2009), available at <http://www.bls.gov/news.release/union2.nr0.htm>; *See*, Employee Free Choice Act of 2007, H.R. REP. NO. 110-23, at 23-25 (Feb. 16, 2007), available at, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr023.110.pdf

⁴⁵ Employee Free Choice Act of 2007, H.R. REP. NO. 110-23, at 3-7 (Feb. 16, 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr023.110.pdf. Indeed, a group of prominent economists took out a full page advertisement in the February 25, 2009 Washington Post explaining that passage of the EFCA is critical to rebuilding our economy. Economic Policy Institute, *Passage of the Employee Free Choice Act is critical to rebuilding our economy and strengthening our democracy*, available at http://epi.3cdn.net/1eb9aba51935a5b82b_13m6iixpt.pdf. However, EFCA is controversial in that not all economists agree that it will result in significant positive changes to the economy. Kris Maher, *Economist Debate Pro-Labor Measure*, WALL STREET J., Mar. 2, 2009, available at <http://online.wsj.com/article/SB123595413617305463.html#printMode>.

EFCA is also similar to the NLRA in that the legislation is largely one sided and needed to bring about economic and social change. The NLRA was criticized on that basis before it was amended in 1947. *See Higgins, Jr., supra* note 10, at 30. However, those amendments, which came to be known as the Taft-Hartley Amendments, were

The significance of EFCA cannot be understated. Not only would it represent a significant change in fundamental labor law, it also would represent an important political achievement because there has been a “longstanding political impasse,” at least since 1959, with respect to modernizing American labor law.⁴⁶ Of course, the enactment of EFCA is by no means a guarantee that unionization or wage rates will increase, but it is certainly a start.⁴⁷

Obama’s Big Deal is likely to result in additional labor laws as well because what is good for workers is good for the economy. One example is the Re-empowerment of Skilled and Professional Employees and Construction Tradeworkers Act (“RESPECT Act”). This Bill narrows the definition of a supervisor, making it much more difficult for employers to claim that certain individuals are supervisors, and therefore, not covered under the NLRA. If enacted, this Bill will therefore result in more employees, particularly professional employees, being eligible to unionize.⁴⁸

There is a whole host of other legislation which may be enacted that are designed to strengthen employee rights and hence their wages such as The Equal Remedies Act⁴⁹ which would remove the \$300,000 cap on compensatory damages in employment discrimination cases, the Employment Non-Discrimination Act (“ENDA”)⁵⁰ which makes it illegal to discriminate, for the first time under federal law, on the basis of sexual orientation. Additionally, the Fair Pay Act of

largely due to a growing number of strikes and industrial unrest which occurred after World War II. *Id.* at 36-37; HARPER ET AL, *supra* note 7, at 88-89 (discussing history of Taft-Hartley Act, 61 Stat. 136 (codified at 29 U.S.C. Sec. 141-197)).

⁴⁶ Specter, *supra* note 42, at 315. The NLRA was actually last amended in 1974. Those amendments, however, were fairly narrow in that they primarily dealt with bringing the health care industry under the jurisdiction of the NLRA. Higgins, *supra* note 10, at 69-70 (discussing 1974 Amendments to NLRA).

There is also substantial support for the need to revise American labor law, because under the current frame work, union elections are “often conducted in an environment of employer intimidation and coercion” under a statute with toothless remedies which is plagued by constant delays. Specter, *supra* note 42, at 312. Thus, there is a labor relations need for EFCA to be enacted as well.

⁴⁷ Professor William B. Gould, IV, who served as Chairperson of the NLRB during the Clinton Administration, has recently observed that hard-fought gains of organized labor, particularly in the automobile industry, have resulted in widespread hostility towards organized labor. William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*. 43 U. OF SAN FRAN. L. REV. 291, 292 (2008).

⁴⁸ Re-empowerment of Skilled and Professional Employees and Construction Tradeworkers Act, S. 969, 110th Cong. (1st Sess. 2007), H.R. 1644, 110th Cong. (1st Sess. 2007).

In response to *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the NLRB issued three decisions, *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), which expanded the definition of who a supervisor is under the NLRA. Supervisors are not protected by the NLRA and therefore, absent extremely unusual circumstances, they cannot unionize. These cases held that an individual is a supervisor if he “assigns” overall duties to others, or is held accountable for merely directing subordinates. These decisions make it very difficult for employees and professional employees in particular, who are protected under the NLRA, to unionize. Mitchell H. Rubinstein, *Attorney Labor Unions*, NYS Bar J. 23, at 26 (Jan. 2007) (discussing the above cases and noting the difficulties professional employees, such as attorneys, have in forming unions).

The RESPECT Act would legislatively overrule this line of cases by not including, within the definition of a supervisor, employees who only “assign” or “direct” others and requires that supervisors spend a majority of their workday actually supervising employees.

⁴⁹ S. 2554, 110th Cong. (2nd Sess. 2008); H.R. 5129, 110th Cong. (2nd Sess. 2008).

⁵⁰ H.R. 3685, 110th Cong. (1st Sess. 2007).

2007,⁵¹ would require a comparable worth job pay standard by requiring that employers pay jobs of equivalent worth the same amount. Moreover, The Patriot Employer Act,⁵² would provide a tax credit to qualifying “patriot employers” who adopt a position of neutrality in union organizing drives, maintain headquarters in the U.S., pay at least 60% employee health care premiums, and provide a specified living wage and retirement benefits to employees.

As a Senator, President Obama also sponsored the Healthy Families Act,⁵³ which would require paid leave to full time employees and pro rata paid sick leave to part-timers and the Working Families Flexibility Act,⁵⁴ which requires that employers and employees undertake a detailed interactive process to find a flexible work arrangement when necessary.

A common theme that runs across all of this proposed legislation is that workers are being provided with more rights and benefits which will make it easier for them to obtain employment, keep their jobs and organize into unions if those so desire. Indeed, the relationship between law and economics cannot be missed.

V. Conclusion

No one can know for certain whether the stimulus, a controversial piece of legislation,⁵⁵ which has divided Congress along party lines, will work. Nevertheless, President Obama has indicated that he would support additional stimulus legislation if necessary.⁵⁶ We already know that the Obama Administration plans to shore up the financial system and address the housing

⁵¹ H.R. 2019, 110th Cong. (1st Sess. 2007); S. 1087, 110th Cong. (1st Sess. 2007).

⁵² S. 1945, 110th Cong. (1st Sess. 2007).

⁵³ H.R. 1542, 110th Cong. (1st Sess. 2007); S.910, 110th Cong. (1st Sess. 2007).

⁵⁴ H.R. 4301, 110th Cong. (1st Sess. 2007); S.2419, 110th Cong. (1st Sess. 2007).

⁵⁵ Some critics view the stimulus package as driving the American economy towards the European model of socialism. See Jon Meacham & Evan Thomas, *We Are All Socialists Now*, NEWSWEEK, Feb. 16, 2009, available at <http://www.newsweek.com/id/183663>. Other critics argue that the stimulus is filled with special interest programs known as “pork.” See Matthew Bandyk, *Finding the Pork in the Obama Stimulus Bill*, U.S. NEWS & WORLD REPORT, Feb. 19, 2009, available at <http://www.usnews.com/articles/business/economy/2009/02/19/finding-the-pork-in-the-obama-stimulus-bill.html>.

⁵⁶ Laura Meckler, *Obama Signs Stimulus Into Law*, WALL ST. J., Feb. 18, 2009, available at <http://online.wsj.com/article/SB123487951033799545.html#printMode>.

Indeed, as this Essay goes to print, there has already been some talk in Congress about the need for additional stimulus legislation in order to help spur job growth. Greg Hitt, *Lawmakers Weigh Need for Second Stimulus To Spur Job Growth*, WALL ST. J., March 11, 2009, available at <http://online.wsj.com/article/SB123672017289487805.html#printMode>.

foreclosure crisis.⁵⁷ Additionally, as this Essay goes to print, the Administration is also working on a bailout of the American auto industry.⁵⁸

Many economists believe that the stimulus package is strong medicine, but not a cure in and of itself.⁵⁹ In the coming months there may be additional changes that affect the world of work – particularly in the automobile industry – that we cannot anticipate. Therefore, like President Roosevelt’s New Deal, Obama’s Big Deal may result in additional labor, social and economic legislation and take several years to achieve its objective to bring the economy back to health.

On the other hand, President Obama views the stimulus package as a temporary measure. Indeed, he was quoted as stating that the country cannot sustain growth without getting the deficit under control.⁶⁰ He also indicated that, at the least, he plans to cut the annual deficit in half by the end of his term.⁶¹ In fact, at the end of February 2009, he held a White House summit which brought together dozens of advisers and adversaries to discuss how to curb the burgeoning budget. What is most significant about this summit is that President Obama included unions.⁶² This demonstrates that the President sees unions as part of his Big Deal and as part of the solution to the financial crisis. Indeed, this makes it more likely that additional pro-labor legislation will be enacted.

The end result of the 2009 economic stimulus, on which this Essay focuses, is that it is more than just a piece of economic legislation. It is also a piece of social legislation which is likely to be just the tip of the iceberg with respect to labor and employment law. It is likely to result in increased unionization rates and increased worker rights. When the stimulus and related economic bailouts end, the underlying labor and social legislation that they generated will remain in place and likely have profound effects on the future of labor and employment law. Thus, labor and employment law is at the crossroads of change as a result of Obama’s Big Deal.

⁵⁷ Katherine Skiba, *As Obama Signs \$787 Billion Stimulus, the Question Is, Will it Work?*, U.S. NEWS & WORLD REPORT, Feb. 17, 2009, available at <http://www.usnews.com/articles/news/stimulus/2009/02/17/as-obama-signs-787-billion-stimulus-the-question-is-will-it-work.html> (describing stimulus package as “just one leg of a three-legged stool” with the other two legs involving the financial and housing industries).

The Obama Administration proposes to address the foreclosure crisis by giving bankruptcy judges the authority to modify the terms of home mortgages. See Marcia Coyle, *Debating Judges’ Role in Foreclosure Remedy*, NAT’L L.J., Feb. 23, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428469718>.

⁵⁸ David E. Sanger, *Obama Takes On Auto Crisis Without a ‘Czar’*, N.Y. TIMES, Feb. 18, 2009, at B1, available at <http://www.nytimes.com/2009/02/18/business/18czar.html?fta=y> (discussing automobile industry bailout and stating that President Obama “finds himself in the position of managing an industry”).

⁵⁹ Skiba, *supra* note 57. Indeed, some view the economic crisis as a world-wide problem which needs a global solution. Great Britain’s Prime Minister, Gordon Brown, is proposing a “global New Deal.” See John F. Burns, *In Turbulent Time For Britain’s Premier, A Hope To Bolster U.S. Ties*, N.Y. TIMES, March 3, 2009, at A11, available at <http://www.nytimes.com/2009/03/03/world/europe/03britain.html?scp=1&sq=global%20new%20deal&st=cse>. It is unclear what role the U.S. would play in this program and whether Prime Minister Brown’s program would involve changes to foreign or domestic labor and employment laws.

⁶⁰ Jackie Calmes, *Obama Has Plan to Slash Deficit, Despite Stimulus Bill*, N.Y. TIMES, Feb. 22, 2009, at A1, available at <http://www.nytimes.com/2009/02/22/us/politics/22budget.html?8br>.

⁶¹ *Id.*

⁶² Philip Elliott, *Obama to Convene Fiscal Summit at White House*, ASSOCIATED PRESS, Feb. 23, 2009, available at http://www.google.com/hostednews/ap/article/ALeqM5hEx3tiPjHZQLVqjNmHR_oP6FZMuwD96H66D80.