Really Sticky Default Rules

Author : Michael Fischl

Date : December 13, 2010

Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 Berkeley J. Emp. & Lab. L. 1 (Winter 2010).

In the law of work, the hierarchy of legal authority – constitutions trump statutes trump common law – is frequently subverted by a common law that doesn't seem to know its place.

Early efforts to supplant common law with statutory regulation frequently foundered when common law rules morphed into constitutional principles and forced contrary legislation to give way – most famously, when the right to fire "at will" achieved constitutional stature in the service of striking down state laws prohibiting the yellow-dog contract. And the constitutionalized common law continues to this day to shape the regulation of work, most recently when the "at-will" rule reared its head to vanquish "class of one" equal protection claims for public employees.

But in the post-New Deal era, the common law has often been able to "jump the queue" on its own, thwarting statutory reform without any need for an assist from the Constitution. As Jim Atleson argued in his 1983 classic *Values and Assumptions in American Labor Law*, what judges treat as just plain "common sense" about the rights and duties of parties within an employment relationship bears an uncanny resemblance to the rules of 19th Century master-servant law. This tenacious grip on the way judges *think about* labor issues goes a long way to account for the myriad settings in which common law principles outwit, outplay, and outlast the explicit provisions of labor legislation – e.g., when the duty of loyalty (nowhere mentioned in the NLRA) is read to trump the express statutory right to strike or when property rights (again without mention in the statute) are invoked to curtail the likewise explicit right to organize.

In *Toward Third-Party Liability for Wage Theft*, Brishen Rogers takes Atleson's insight a step further by tracing the influence of common law thinking not on the rules of governance *within* the employment relationship but instead on the judicial understanding of what constitutes "employment" itself – no small thing, since the statutory protection available to workers depends in virtually every instance on their status as "employees" under the statute in question. Yet in a world of work marked by the dismantling of internal labor markets in favor of outsourcing – where tasks previously undertaken in-house are increasingly assigned to labor contractors (think custodial work) and supply chains (think production work) – efforts to enforce workplace rights may falter when the outsourcer isn't viewed as a statutory "employer" despite the fact that it remains the principal beneficiary of all that contracted-out labor (think the university with clean classrooms and offices, or the publisher selling books printed offsite).

Rogers explores the consequences of this discontinuity between law and worklife under the Fair Labor Standards Act (FLSA), the New Deal statute that prohibits child labor and establishes the right to a minimum wage. Rogers focuses in particular on the problem of enforcing the latter, a notoriously difficult task given the prevalence of thinly capitalized labor contractors in low-wage industries (e.g., agriculture, hospitality, garment work, janitorial and landscaping services, etc.), for many of whom declaring bankruptcy or merely turning out the lights in the face of threatened legal action is just another cost of doing business. In the meantime, the outsourcing firms are seemingly beyond the law's reach, despite the fact that their contracting and purchasing practices are largely responsible for the downward pressure on wages in the first place. It's no wonder, then, that the many studies Rogers canvasses reveal an appallingly high incidence of what a recent GAO report on FLSA enforcement aptly describes as "wage theft."

Yet outsourcing wasn't born yesterday. Drawing on Marc Linder's work, Rogers notes that the New Deal Congress was plenty familiar with the use of "judgment-proof middle men" in the garment and other industries to avoid workplace regulations, prompting it to adopt a capacious definition of covered "employees" by declaring that

"'[e]mploy' includes to suffer or permit to work." This language was broad enough, as authoritatively construed in a famous pre-FLSA child labor case by then-Chief Judge Cardozo, to reach firms outsourcing work to contractors who violate the law when the outsourcers might through "reasonable diligence" have discovered the unlawful practices and made reasonable efforts to curtail them – broad enough, in other words, to reach a firm "shocked, shocked" to learn of minimum wage violations by its contractors even as it banks the booty from low-cost outsourcing.

What eventually followed, though, is the drearily familiar narrative of American courts taking their cues not from the FLSA but instead from – you guessed it – the common law, defining "employee" via various versions of the "control" test used for determining employer tort liability in the late 19th Century. Rogers provides a powerful critique of this development (none dare call it deradicalization) and offers a series of possible fixes, the most promising among them the approach embraced by Cardozo and presumably available to contemporary courts willing to take the "suffer or permit to work" language and its provenance and purposes seriously.

In the process, Rogers displays a sure grasp of the debates surrounding third-party liability in other areas of the law, an impressive facility with economic analysis, and a seasoned lawyer's eye for the challenges of implementation and proof. But the principal reason I like the article (lots) – and, full disclosure here, I've been a fan since I read it in draft a year ago – is the value it adds to Atleson's insight about the common law's resistance to statutory incursion. Building on Noah Zatz's wonderful work on prison labor, Rogers astutely critiques the relentless judicial quest for a transcendent meaning of "employment" that exists outside of and prior to law, despite the fact that the understandings that invariably emerge are very much a product of the law of an earlier era – the "con," perhaps, in the all too frequently forgotten constitutive role of law in American work.

Cite as: Michael Fischl, *Really Sticky Default Rules*, JOTWELL (December 13, 2010) (reviewing Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 Berkeley J. Emp. & Lab. L. 1 (Winter 2010)), http://worklaw.jotwell.com/really-sticky-default-rules/.