What If I Told You That Employer Power Is a Legal Construct

Author : Matt Bodie

Date : November 26, 2021

Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 **Berkley J. Emp. & Lab. L. __** (forthcoming), available at SSRN.

What is an "employer," and what can it do? And what role does law play in answering those questions? In this understated yet radical new piece—*Abolish the Employer Prerogative, Unleash Work Law*—Gali Racabi analyzes the law's basic concepts for governing the workplace. Digging deep into the substratum of the law's framework, he excavates the idea of the "employer prerogative": namely, that the employer's designated representatives have "the legal authority to make unilateral decisions in the workplace." (P. 4.) Racabi's simple proposal is to end this prerogative and consider alternative ways of allocating workplace power. His concept is both simple and staggering: a complete reorganization of the governance of firms within our economy.

Abolishing the Employer's Prerogative is centered on a notion that is so much a part of our common cultural and economic understandings that it may even take a moment to realize what it is. Our economy delegates control over economic activity and decision-making to individual firms. Firms are a little hard to define, as they are economic (and not scientific) phenomena, but essentially they are the businesses that we work for, buy from, and contract with when engaging in our economic lives. We rely on firms to organize our behavior such that we can carry on extensive, long-lasting economic engagements within the rubric of a firm, rather than simply a market. The theory of the firm has proven a useful yet frustrating subfield of economics, as economic methodologies have not always proven suitable for the subtle, complex intricacies of interpersonal cooperation and competition that are contained within the firm.

Our legal system has assigned the task of sorting out the very real issues of power and control over the firm to the laws that govern business entities. Out of the variety of potential types of such entities—common law partnerships, limited liability companies, cooperatives—by far the most popular are corporations. Corporations are governed by state law—with Delaware winning the race to the top or the bottom, depending on your perspective—and share a common set of governance mechanisms such as the board of directors, the exclusive shareholder franchise, and fiduciary duties. These governance mechanisms control all other aspects of the firm, including decisions with respect to employees. Those decisions are limited by regulations, including the many mandatory and default rules within employment, but the firm holds the primary discretion.

Racabi points out, however, that it doesn't have to be this way. He explains how the law assumes that employers—which are almost always business entities under law—have the authority to decide how to run their businesses, absent some other legal constraint. Describing it as a "vast ocean of prerogative" (P. 7), Racabi methodically details the particular aspects of this discretion and the ways in which it is indulged, rather than cabined. The common law assumes employer power, most notably in the super-sticky employment at-will doctrine. Efforts to inject worker participation into the mix—most notably the Wagner Act—have been minimized and eroded by the prerogative's exalted status. In a clever and important move, Racabi does not focus simply on at-will, which has received waves and waves of academic treatment. Instead, he points out how at-will undercuts contractual efforts to circumscribe the

employer prerogative in other areas by allowing employers to rip up existing agreements at any time, rendering them close to meaningless. All roads lead back to the foundational principle that an "employer"—almost never an actual person, but instead a fictional entity—has the authority to run "its" business the way "it" wants.

Why does this system persist? Racabi focuses on two mechanisms that reinforce the prerogative: a "whack-a-mole" effect and a "cage/jeopardy" effect. Because those who run the business entity control the entity's decision-making in other areas, they can dodge efforts to regulate the employment relationship by restructuring that relationship. And employers can also threaten to punish workers and the community by withdrawing or withholding the benefits generated by the firm's business. Racabi illustrates these mechanisms with the example of Uber, which both endeavored to structure its relationship with workers to avoid employment responsibilities, and then used its economic power to threaten a withdrawal from California to get the state to change its laws.

So what are the alternatives? It seems mad-eyed to contemplate a world in which business entities do not control their own businesses. But again with calm and measured analysis, Racabi uncorks some wild possibilities: an employee prerogative, where decisions are made by "employee governance bodies" (Pp. 53-54); the social prerogative, in which representatives from the community, the workforce, and management have joint power; a no-default rule, where parties would interact as if in an arm's-length market; a separation of powers model, where factions are balanced against each other using various internal institutions; and an ad hoc approach that would unbundle the collection of prerogatives over different areas and allocate different rules in each. In order to manage these reallocations of power, Racabi suggests a national agency to regulate systems within firms, or a legal right for firms to waive the default rule but only under conditions of collective bargaining.

Abolish the Employer Prerogative is quite a ride. Throughout we have Racabi's even, contemplative tone as we swoop and whoosh through a complete reimagining of the basics of our economic system. As he correctly points out, his proposal may be anti-free-enterprise, at least as free enterprise has been practiced in this country, but it is definitely not a rejection of the market economy. He acknowledges that there may be a loss in economic efficiency, but he also points out that there is the potential for tremendous upside. And for those who might expect a cats-and-dogs-living-together level of chaos, he understands but does not seem too concerned. He knows there is much more to do—much more to consider, contemplate, and envision—before we get there.

Part of me wonders why Racabi didn't talk about all the other things that would seem to be an essential part of this discussion he undertakes: the exclusion of workers from corporate governance; the potential of employee ownership and worker cooperatives; workplace practices such as quality work circles and holacracy that foster employee participation;; the allocation of rights in trademark, trade secrets, and other IP to the business entity; the role of antitrust in regulating coordination rights; the teaching that various theories of the firm might have to impart on his endeavor. In particular, it would be useful to hear more about the efforts of labor law to overcome the employer prerogative, and why those efforts have failed to this point. While he does touch on some of these briefly, of course all of these things are largely outside the scope of his article as constructed. They are not outside the scope of this dialogue, mind you, but they are outside of the article's thesis: the law gives the employer the power to control its business and its workplace, but—emphatically—the law does not *have* to be this way.

In the article's concluding paragraph, Racabi makes clear that he is not offering a detailed policy prescription; rather, his hope is "to provoke work law scholars, students, and activists into engaging in systemic, political, and imaginative thinking about the relationship between law and workplace power." (P. 67.) I really enjoyed Racabi's thoughtful and provocative piece, and I hope others take him up on his invitation to reimagine the way we organize the law of business and of the workplace.

Cite as: Matt Bodie, *What If I Told You That Employer Power Is a Legal Construct*, JOTWELL (November 26, 2021) (reviewing Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 **Berkley J. Emp. & Lab. L.** __ (forthcoming), available at SSRN), https://worklaw.jotwell.com/what-if-i-told-you-that-employer-power-is-a-legal-construct/.