the national lawyers guild
NEWSLETTER of the
Labor & Employment Committee
http://www.nlg-laboremploy-comm.org

September 2014

NLG CONVENTION

Join us in Chicago

Tues, Sept 4 12:45–2:30 pm
L&EC General Meeting
(Members and non-members welcome; bring your lunch)*

Thurs, Sept 4 3:30–5:30 pm
Mini CLE • *Using Human Rights to Defend and Promote Income Security* (See page 4 for details)

Thurs, Sept 4 5:00–6:45 pm
L&EC Committee Reception

Thurs, Sept 4 7:00–8:45 pm
Keynote Address
Karen Lewis*

Fri, Sept 5 10:00–11:15 am
Workshop II • *Organizing in the New Economy/Worker Centers: Laboratories of Worker Democracy**

Fri, Sept 5 12:30–2:00 pm
Lunch program
A Jazz Celebration with Maggie Brown (ticket required)*

Friday, Sept 5 3:00–5:00 pm
PLENARY I
*Award Presentation**

Fri, Sept 5 5:30–7:00 pm
International Committee Reception *& Debra Evenson Award presentation**

Fri, Sept 5 9:00 pm –??
Student sponsored party*

Sat, Sept 6 8:45–10:15 am
Major Panel I *Why Inequality Matters: Wage Disparity and Income Inequality—Welcome to the New Economy**

Sat, Sept 6 8:45–10:15 am
Major Panel I • *Why Inequality Matters: Wage Disparity and Income Inequality—Welcome to the New Economy**

Sat, Sept 6 12:00–12:30 pm
Lunchtime Action • The Bandana Project*

Sat, Sept 6 12:30–2:30 pm
PLENARY II *National Elections, Resolutions, Amendments**

Sat, Sept 6 2:30–3:00 pm
The Bandana Project
(continued)*

Sat, Sept 6 3:00–6:00 pm
Anti-Racism + TUPOCC Programming*

Sun, Sept 7 12:30–1:45 pm
Workshop IV • *Immigration Status for Victims of Workplace Crimes*

Sun, Sept 7 1:50–5:00 pm
Labor History Tour
Co-sponsored by the L&EC,
(See page 3 for details)

*** Check for location**

Bringing Labor Law into the 21st Century:
Dealing with the Realities of the Modern Workplace

BY HENRY WILLIS

Non c'è nella storia, nella vita sociale, niente di fisso, di irrigidito, di definitivo. E non ci sarà mai.

In history, in social life, nothing is fixed, rigid or definitive. And nothing ever will be.

—Antonio Gramsci

How Did We Get Here?

The last forty years have seen the gradual destruction of what some of us thought would last forever: the "normal" employer-employee relationship, in which employees worked for a single entity that provided a workplace, directed their work, and paid them. Employers have discovered that they can use subcontracting, franchising and other means of disguising or avoiding the employer-employee relationship to not only shed much of their responsibility for complying with fundamental labor rights, but to strip workers of the ability to enforce those rights.

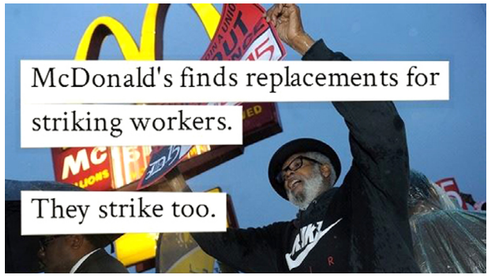
In a sense, this is nothing new. Employers have been using subcontracting as a device to avoid unions and cut employees' wages for at least a century, when garment manufacturers saw that they could drive down wages by dividing up the work that went into making a dress or jacket among many smaller, harder to organize shops. But with the full flowering of globalization, the loss of union strength and the end of whatever once passed

(*continued on page 2*)

Bringing Labor Law into the 21st Century (*continued*)

as a social compact between labor and capital, what was once a tool used by the most anti-union employers has now become a part of the standard management toolkit.

The results have been disastrous for workers. These subcontractors and franchisees, brought in as substitutes for the former employer, are often impermanent, lightly capitalized entities that face intense competitive pressure in bidding for work against other similar, often fungible, companies. And because they are particularly vulnerable to threats of loss of their contract or their franchise, they are quick to carry out the wishes of the entity that hired them. The inevitable results are low wages, poor or no benefits, limited job security, and an unregulated workplace in which workers' rights are rarely, if ever, respected. Employers have been allowed to contract out not only specific work functions, but the obligation to comply with the laws governing the employees who do that work.



Federal labor law has contributed to this race to the bottom by using a narrow definition of who is an "employer" that encourages this process by allowing the principal employer to escape its legal obligations by disavowing "direct" control over their subcontractors' and franchisees' personnel decisions.That is not, in fact, called for by the Act; on the contrary, as we discuss below, the Board applied a broader standard prior to the 1980s. That needs to be changed; the question is how to do it.

How Do We Get Out of Here?

"Precarious" and "contingent" workers in the temporary labor sector, the restaurant industry, warehouses, and the domestic worker field have organized to push back against this system; we will be discussing these efforts in detail in "Organizing In The New Economy/Worker Centers: Laboratories of Worker Democracy" on Friday the 5th at 10:00 am. These organizing efforts are the necessary precondition to any change.

At the same time we need to challenge the legal underpinnings of this system—and, in particular, the peculiarly narrow reading of "joint employer" liability that the National Labor Relations Board adopted during the Reagan Administration—that has allowed employers to retain effective control over a business, yet still avoid responsibility for the actions of their subcontractors and franchisees. This standard is contrary to the basic purposes of the Act, which was passed in order to raise workers' wages and purchasing power by giving them the power to bargain collectively, not individually. The NLRB's *Airborne Express* standard does just the opposite: instead of fostering collective bargaining, it encourages employers to divide workers into atomized units that separate the subcontractor's employees from all of the others in the workplace, while allowing those workers to bargain only with their nominal employer, rather than with the business owners that actually have the power to raise wages and change conditions.

The current NLRB has, in fact, opened the door to change in this area by signaling its willingness to revisit the standard in several cases in which it invited amicus briefs this summer. The NLRB's General Counsel has done the same by making it clear that his office is prepared to go after McDonald's as a joint employer with its franchisees in the cases growing out of the wave of fast food workers' walkouts. Labor and its allies have taken two complementary approaches in response.

Some have argued that all the Board needs to do is to return to the standard that the Second Circuit articulated in the *Browning-Ferris Industries* case, which would allow a finding of joint employer status based on indirect as well as direct control over the essential terms and conditions of employment of the subcontractor's or franchisee's workers. This will indeed rein in the worst abuses: while employers in industries ranging from health care to fast food have embraced subcontracting and franchising enthusiastically, those same employers typically insist on detailed specifications governing how their subcontractors or franchisees perform the work they have been given that effectively strip subcontractors and franchisees of any meaningful opportunity to determine the terms and conditions of their workers' employment, except at the margins. McDonald's should be worried if the Board broadens its standard to consider evidence of indirect control: its franchise agreements require franchisees' employees to follow McDonald's extensive, detailed standards that specify, among other things, the exact words the employee is to use when greeting a customer and how to fold the bag into which food items are placed.

Others, including the Labor and Employment Committee, have argued in the alternative for a capital-based standard that broadens the focus to cover not just the extent of direct or indirect control which the principal entity exerts over the essential terms and conditions of employment of the subcontractor's or franchisee's workers, but the financial power that the principal entity has over the nominally independent business with which it is contracting. Here again, McDonald's is a good example, since it uses fixed term agreements with franchisees that commit them to buy goods from the vendors it specifies, to adopt its menu price points and menu offerings, and to rent their stores from it, all enforced with the threat of non-renewal of the franchise agreement, that leave these franchisers with no operational freedom of any sort. Bargaining with that captive franchisee would be like interviewing a ventriloquist's dummy: the words might come out of its mouth, but it is someone else doing the talking. Real bargaining requires bringing McDonald's to the table.

This capital-based approach is not at odds with the pure and simple *Browning-Ferris* approach; after all, in the case of McDonald's, to return to our example, all of these means of financial control go hand in hand with equally constrictive tools of operational control, including the sort of computer monitoring of employees' job performance that effectively puts McDonald's in every store for every hour of the day. But there is nonetheless an important philosophical difference between the two. The traditional *Browning-Ferris* analysis focuses on the "right to control," a standard that courts developed in order to distinguish between employees and independent contractors. That is certainly relevant in those cases in which businesses such as FedEx have tried to shed their obligations as an employer by misclassifying their employees. That, in turn, makes application of the "right to control" standard attractive to courts that look for uniform and predictable standards—even while employers work overtime to subvert them.

But the "right to control" test can lead to anomalous results: the Board has, during the years when it tied itself in knots over whether it could force both employers and subcontractors to bargain as a single unit, used the equivalent of a Venn diagram to divide up those issues that the union could bargain over with the contractor, or the principal, or both. This leads us to the same deadend, in which the Board allows the employer to divide workers into small, weakened units and to play Mutt and Jeff whenever it suits it.

The capital-based approach instead takes a unitary approach: the entity with financial control has the duty to bargain over every mandatory subject, not just those it chooses to retain control over. This serves the goals that the Congress that passed the Wagner Act was trying to achieve, namely raising workers' wages and their purchasing power –the very interests that subcontracting, franchising, privatization and all the other forms of outsourcing attack.

Which leads us to a third, complementary approach to undoing the damage that decades of relentless cutting of employees' wages and destruction of job security has wrought: statutes preserving the rights of workers who are affected by outsourcing to a measure of job security. Any number of jurisdictions have passed worker retention ordinances protecting employees of government contractors; those statutes have survived employers' preemption arguments and other challenges. Several jurisdictions, including Providence and Los Angeles, have extended similar protections to purely private sector employees, such as hotel and grocery workers. While federal legislation of this sort is a long way off, there is always room for local initiatives.

But to return to the point we made at the outset, all of the legislation and legal victories in the world are no substitute for the organizing work that "precarious" workers must do themselves. We can assist, but they must lead.

CHICAGO LABOR HISTORY TOUR

Chicago holds a special place in U.S. labor history. It was the home of the Eight Hour Day movement in the 1880s, the focal point of the Pullman Strike of 1894, the birthplace of the IWW in 1905, the nerve center for the 1919 organizing campaign in the steel industry and the efforts to organize the packinghouse industry and Sleeping Car Porters from the 1920s onward, and the scene of workers' successful occupation of Republic Windows in 2008. And that is only a partial list: Chicago has also seen some of the most violent responses by the State to labor's efforts to organize, from the Haymarket Massacre of 1886 to the Memorial Day Massacre of 1937.

The Labor & Employment Committee is sponsoring a tour of Chicago on Sunday, September 7th, following the Convention, that will visit some of the sites where history was made. While we cannot hope to cover all that history in a single day we can promise that you will come away from Chicago with a deeper understanding of how much was required to win the rights we fought for.

The tour is three hours, from 2:00 to 5:00, and costs $25.00, which includes a donation to the Illinois Labor History Society. Meet us in the convention hotel lobby at 1:50 pm.

Please reserve in advance by emailing nlglabor@gmail.com with the following information: (1) Subject Line: Labor History Tour reservation, (2) your name, (3) the number of spots you are reserving, and (4) your e-mail address. Space is limited and on a first come, first serve basis, so SIGN UP NOW!

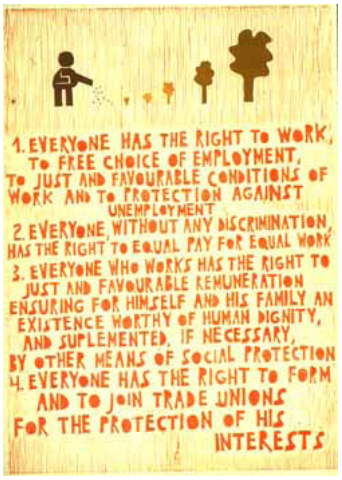
USING HUMAN RIGHTS TO DEFEND WORKERS' STANDARD OF LIVING

Join us this Thursday, September 4 at 3:30

at Chicago-Kent College of Law for a mini-CLE offering a stimulating discussion of the human rights strategies, including litigation and legislation, that have succeeded in protecting income security in an era of precarious work in the United States, Canada and Latin America. We will hear from

- Enrique Larios, a labor attorney in Mexico City, a professor of law at UNAM, a visiting professor in Peru, Argentina, and Uruguay, and Vice-President of the Asociación Latinoamericana de Abogados Laborales/ Latin American Labor Lawyers Association (ALAL), who will address the prevalence of precarious work, with particular emphasis on conditions in Mexico.
- Jeanne Mirer, one of the foremost advocates worldwide of enforcing international law protections for workers and President of the International Association of Democratic Lawyers, who will focus on international standards addressing precarious work.
- Linelle Mogado, a labor and human rights attorney at the Professional Institute of the Public Service in Canada and a member of the Canadian Association of Labor Lawyers/Association canadienne des advocats du movement syndical (CALL/ACAMS) and previously Director of Centro Legal de la Raza in Oakland, who will discuss the strategies that have worked to fight the worst forms of precarious work and income inequality in Canada.

The session will be moderated by Prexy Nesbitt, an educator, writer, and organizer who previously worked on Mayor Harold Washington's staff and was a former Special Representative of the Government of Mozambique in the U.S., Canada and Europe.



We look forward to a wide-ranging and practical discussion of what needs to be done and what strategies have worked in fighting the global attack on workers' rights and standard of living.

Students and faculty from Chicago-Kent College of the Law will be admitted without charge; students from other schools will be charged $15.00. Guild attorneys will pay $30.00 and non-Guild attorneys $40.00. Sponsored by the Guild's International Labor Justice Working Group, International Committee, Labor & Employment Committee. You can preregister at http://knowyourhumanrights.org/2014/07/25/register-now-international-labor-justice-cle-september-4-2014/, which also provides a map of the neighborhood.

This Mini-CLE will be held at Chicago-Kent College of Law, 565 W. Adams Street, Chicago, IL.

---

nlg

Labor & Employment Committee

c/o Kazan McClain Lyons Greenwood & Harley

Jack London Market

55 Harrison Street #400

Oakland, CA 94607