

the national lawyers guild

NEWSLETTER of the Labor & Employment Committee

<http://www.nlg-laboremploy-comm.org>



May 2017

WHERE to find us

at the



**AFL-CIO LCC
Denver 2017**

**MONDAY, MAY 15TH
7 am – 8 pm**

**What the Guild Is Up To
In the lounge facing Perks™
Lobby Level**

**TUESDAY, MAY 16TH
6:50 am – 8 pm**

**Turning the Tide in 2018
Mineral Rooms B + C
RSVP ASAP to
fschreiberg@kazanlaw.com.**

Winning back key battlegrounds in 2018

How to rebuild progressive multiracial
majorities in OH, PA and beyond

BY ERIC DILLON, WORKING AMERICA

The 2016 election laid bare the deep discontent with politics that's been brewing in America's working class. That discontent helped undermine the multiracial Obama coalition and paved the way for devastating Democratic losses up and down the ballot. To reverse this dynamic, progressives will have to do more than focus on short-term election efforts. We need to invest in sustained, face-to-face organizing that reaches across racial, geographic and political divides to unite all potential progressive voters. Building the resistance and organizing in communities of color is crucial. And to win in the key battlegrounds that Democrats lost in 2016, we must also win back some of the white working-class voters who swung from Barack Obama to Donald Trump.

Winning in working-class communities will make or break elections in 2018. Some voters are open to progressive ideas and need to hear them articulated. Others need to be convinced the political process is meaningful to them. We need to start investing now in year-round organizing at scale. This is how we can win crucial elections and start bridging the divides in America.

We need to start organizing now in the must-win states of Pennsylvania and Ohio. Both of these swing states have critical Senate and gubernatorial races in 2018. We must do deep organizing there right away and quickly expand to Michigan, Wisconsin and other key battlegrounds. That is how we'll prevent the GOP from gaining a Senate supermajority, make a real run at the U.S. House in 2018, and build strength for state redistricting fights after 2020.

Focus on must-win states

In Ohio this cycle, the governor's seat will be open and Democratic Sen. Sherrod Brown is up for re-election. To win, progressives must address the drop in African-American turnout in 2016, especially in big cities like Cleveland, and win back the support of many white working-class voters who swung from Obama to Trump. Working America has effectively appealed to both constituencies with progressive economic arguments delivered directly to



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Winning *(continued)*



voters.

In Pennsylvania, Gov. Tom Wolf and Sen. Bob Casey, both Democrats, will be on the ballot in 2018. Because of steady organizing in Philadelphia and Pittsburgh since 2014, turnout in the state's communities of color surged in 2016. We must maintain that engagement and reclaim the votes of persuadable white working-class voters in places like Scranton and Erie.



We must win in 2018 to fix GOP gerrymandering after 2020. Across the country, Democrats must make significant progress in gubernatorial and state legislative races in 2018 if they're to have any hope of a fair redistricting process after the 2020 Census. In Ohio, a fair map could net the Democrats four U.S. House seats. In Pennsylvania, it could net as many as five seats.

Contact voters face-to-face

Sustained face-to-face engagement with voters by progressive organizers increases turnout and deepens voters' commitment to progressive causes. Studies show the importance of early and repeated outreach to voters. Working America has conducted more than 50 clinical experiments that reinforce these findings. We also have experience layering digital communications into our direct outreach efforts. The credibility we earn at the door enhances our digital outreach, leading to large impacts, especially for lower-profile candidates and ballot measures where the voter is not inundated with information from other sources. Direct outreach to voters can be done as cost-effectively as TV advertising and with better results.

Foster community organizing

We need to do more than knock on doors. Progressives must work to create community. As effective as canvass contact can be, we believe an important segment of voters wants more. They want a place to go, to talk and to act. Many progressive groups have effective models for community organizing, but very few reach working-class voters in suburbs, exurbs and small towns. Working America does. We also do successful organizing in smaller cities. For example, our community team in Greensboro, N.C., which engages about 100 local activists, has led the way to winning paid family leave and a \$15-an-hour minimum wage for municipal employees.

Eric Dillon joined Working America as Development Director in 2016 with 15 years of political fundraising experience at state and national levels. He is most proud of helping Virginia become purple, beginning in 2001 with Mark Warner's gubernatorial campaign and continuing in 2006 and 2012 with Tim Kaine's gubernatorial and senatorial campaigns. He will talk about the in-depth, long-term organizing we need to do nationwide. You can reach him at edillon@workingamerica.org.

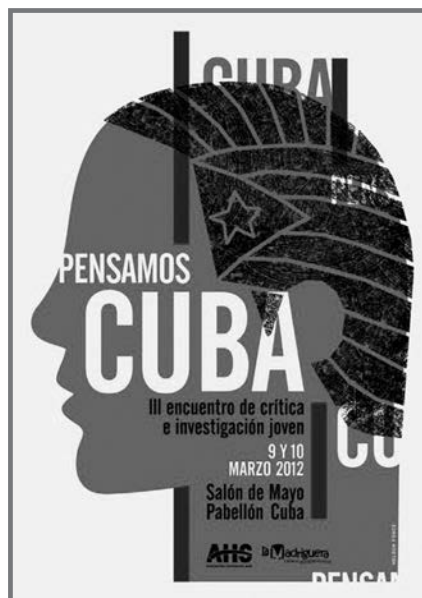
¡CUBA SI!

The Labor & Employment Committee has been sponsoring research delegations to Cuba, including both an international conference and a professional research program, since 2000. Our 2017 delegation included NLG President Natasha Bannon and a diverse array of talented Guild members in terms of race, age, work focus and politics.

The 2017 conference brought together lawyers and labor activists from all corners of the hemisphere and covered a range of topics, including transnational work to defend labor rights, Cuba's efforts to give workers the right to participate in enterprise management and making a place for both self-employed and cooperative workers, and protecting workplace safety and health. Our delegation's report will be coming out shortly.

In addition to participating in the conference, delegation members always make time to tour Cuban workplaces and interview workers, union leaders and labor lawyers. In 2017 we visited a textile/clothing manufacturer and engaged in an exchange with the provincial Union of Jurists in Pinar del Rio, where the delegation was updated concerning the current legal issues facing workers, including family issues and rights of women and children, and recent revisions to the Labor Code, as applicable to contract workers under the Foreign Investments Act.

You can learn more about our 2017 delegation and our plans for 2018 by going to http://www.nlg-laboremploy-comm.org/Intl_Cuba_Research.php. Join us!



Build the resistance AND build a majority

Organizing in the Central Valley and the country's heartland

BY FRAN SCHREIBERG

Thanks to so many of you who gathered in the battleground states to canvass, get out the vote, and take on other tasks with labor and Working America. When Lora Jo Foo and I compared notes we realized that flipping just 24 seats in Congress would recapture the House.

Late last November, we committed to working closer to home to start that process and provide a model that our “friends and family” could duplicate throughout the country. We hope you will join this effort in your own communities!

Working America, the non-profit community affiliate of the AFL-CIO with over three million members nationally, focuses on organizing. Having been on the board of Working America and volunteering for them in several past elections, their model seemed the most effective and securing a Working America canvass in California became our goal.

Working America engages voters with a door-to-door canvass. We LISTEN to what folks have to say. We recruit members and build trust. Our members, who vote about two-thirds of the time for candidates we recommend.

We don't drive folks crazy with emails, but do send periodic messages about important issues. We go back to their doors during the year, and ultimately, at the door and via email and text messaging, we persuade our members to support candidates who we believe support the working class. We can engage in voter registration and GOTV.

Using basic community organizing techniques, we are creating a Working America project in the Central Valley to reach potential voters at their doors with a disciplined canvass involving paid canvassers and volunteers. Working America has not used volunteer canvassers in the past, so that part of this program is somewhat experimental, but the paid canvassers can help supervise the volunteers.

Working America focuses on these issues: Good Jobs + A Fair Economy, Workplace Rights, Education, Health Care, Retirement Security, and Corporate Accountability. The canvass in the Central Valley will begin with these issues and then connect to the specifics of where Republican Congressional representatives stand on them.

Working America is non-partisan (it takes no money from any political party), but it can and does evaluate candidates running on the issues important to the working class and makes recommendations. During elections, Working America's canvass shifts from an issue-based organizing canvass to a persuasion canvass.



By the numbers

Working America produces results. But like the broader progressive movement, Working America had a very difficult election cycle in

2016. While there were some close wins in North Carolina and positive outcomes at the state legislative level in Oregon and Washington, our candidates came up short in most of our races.

Overall, Working America had conversations with voters about candidates in 40 races across 14 offices in ten states. We knocked on 2,123,302 doors and had 722,562 conversations about the election, and another 271,256 conversations about issues prior to the campaign work. In each state, we layered in a digital member communications program that included email, SMS, and digital ads.

While our endorsed candidates were unsuccessful in the majority of our races, initial analysis shows that Working America delivered positive effects on both vote choice and turnout in the states where we worked, despite the deeply polarized electoral environment.

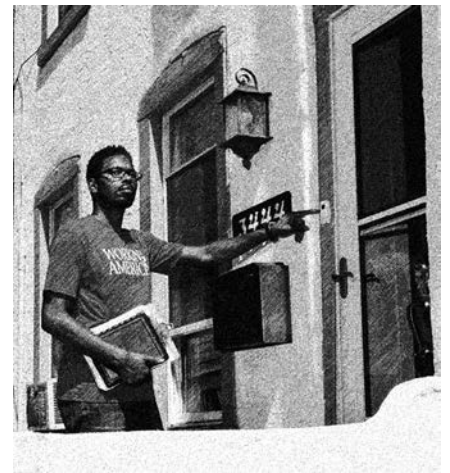
Polling results

Across the five states we polled (Florida, North Carolina, Missouri, Ohio, and Pennsylvania), and across multiple demographics, voters who talked to a Working America canvasser were more likely to support Hillary Clinton than their general public counterparts.

Notably, while national exit polls indicated that Clinton lost Independents by 19 points, those who talked to a Working America canvasser supported Clinton by 17 points—this spread yields a Working America difference of 36 points. We found strong margins among other segments, including Republicans (when Working America chatted with Republicans, more of them supported Clinton—still not a majority, but we persuaded some), African-Americans (12 points better, moving their support for Clinton from 82 to 94 percent), and Latinos (15 points better).

We reach our members not only via e-mail and text (should we get text permission), but also via regular mail, and we have the mailing addresses of all our members so the “votes” referenced here are based on the total number of members that our canvasser can recruit in the course of a year.

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Build the resistance *(continued)*

Remember these are swing voters, many of whom are not registered as Democrats but rather as Independents or who decline to state their party preference.

The November 2018 election in CD 10, for example

In the November 2016 election in CD 10—which includes Modesto, the rest of Stanislaus County and parts of San Joaquin County—Jeff Denham (R) won the district by just 8,200 votes out of about 241,000 votes cast. In the 2014 midterm election, he prevailed by a 15,000 vote margin out of a total 125,000 votes cast. Given that 61,000 Democratic voters participated in 2016 who did not vote in 2014 and that both Secretary Clinton and President Obama carried the district in the last two presidential contests, the district presents a significant opportunity for pickup in 2018. And with 5 paid canvassers in CD 10, we could expect to secure 14,000 to 25,665 additional votes. This range of votes would also be supplemented by the members we obtain through the work of our volunteer canvassers.

Doing it right

We don't believe in parachuting into a community. Lora Jo and I have met with or talked to many of the groups already on the ground in the Central Valley. We want to work closely with those who have established relations in the Valley over decades, and we want to share resources. If useful and requested, we will assist in coordinating among the different groups who are coming into the Valley.

Our Central Valley program focuses on CD-10, CD-21 (which David Valadao now represents), and if we raise sufficient money for staff and if we recruit sufficient volunteers able to go to other areas, we would like to focus on CD-25 (held by Steve Knight) and perhaps even CD-49 (where Darrell Issa won re-election in a squeaker in 2016). The majority of voters in these districts (and three others) voted for Clinton, yet elected a Republican to Congress.

Take a look at your own state and just with a back of the envelope look, you can find similar Congressional Districts close to home that are FLIPPABLE.

Next steps—build political infrastructure. In addition to our canvass and assisting in coordinating among groups coming into the Central Valley, we will engage our members with our main partners—the California Labor Federation AFL-CIO and local labor councils, and any number of We will support and develop community actions teams to build a solid political infrastructure and increase civic engagement around issues of local concern via:

- participation in town hall meetings of Congressional representatives and other elected officials,
- participation in other local actions,
- grassroots lobbying at local/state levels,

- phone banking, and
- voter registration and GOTV in 2018 and beyond.



Consider a Naturalization program in the CDs of concern (and elsewhere) with groups and individuals already involved or who wish to be involved in such. This separate program will identify eligible individuals in collaboration with the faith community and existing organizations on the ground in the Central Valley, provide legal assistance in collaboration with various legal services programs and attorney volunteers, address financial and other challenges (such as making sure that citizenship classes are accessible to those who are applying), and educate new citizens around the importance of civic engagement.

Our California project can be replicated in other states where folks are interested in doing something concrete to take back our government. Call Fran or Lora Jo if you want to discuss ideas. And, for those of you at the LCC in Denver, come to our breakfast on Tuesday May 16th to hear more about this project and Working America's national work.

It may be simplistic to say it this way—but all things being equal, if in 2018 we could win 24 Congressional seats, and not lose any existing seats, we would control the House. We can win those seats anywhere. Why not win as many as we can close to home with the help of volunteer activists?

Start now. To flip three (or more) Congressional Districts, we need a grass roots organizing campaign now. Working America knows how to do this and has a track record demonstrating its effectiveness. It is not likely that the Democratic Party or groups calling themselves something “Left” can knock on a door of an Independent voter and not get the door slammed in their face. Working America opens those doors and listens to those voters. Other groups want to work in “flippable” Congressional Districts, but may not have canvass experience, may not have a sophisticated system for tracking voters, may not have built relationships with existing groups, and, most important, may not realize the importance of building a sustainable political infrastructure within the Valley. WE DO.

If you are interested in volunteering or contributing, let us know.

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Frances Schreiber is on the Board of the Working America Education Fund, has practiced as both a labor and criminal defense attorney, and worked for years assisting workers and unions in legislative, regulatory and policy matters concerning occupational safety and health.

The new joint employer rule: How significant?

BY GEORGE GONOS

How can temp agency workers gain union representation? That was the question posed to participants on a panel at the Labor Research & Action Network conference last June called “Temp Lab: Getting Serious About Temp Worker Organizing.”

For me, the starting point was clear.

In its August 2015 decision in *Browning-Ferris Industries (BFI)*, the NLRB had broadened its joint employer test and, for the first time, provided a legal framework for “temps” to join unions and form bargaining units in combination with a company’s direct employees. A month after our panel, in July 2016, the Board’s decision in *Miller and Anderson, Inc.* further strengthened this new position, by eliminating the absurd requirement for employer consent that a previous decision had held necessary. As someone long involved in research and advocacy for temp agency workers, I believed these decisions afforded the labor movement tremendous opportunities that had to be explored and fully utilized.

The new standard set forth in *BFI* enables temp agency workers in many workplaces to establish that user-employers—i.e., the firms they actually work for—co-determine the terms and conditions of their employment, and are therefore joint employers. This designation would legally obligate user firms to recognize and bargain with units that include their temp agency workers, and make them potentially liable for unfair labor practices committed against the temps.

Prior to *BFI*, agency temps could not join a union with directly-hired employees because, as constructed by the Board, the temps were the sole employees of the temporary agencies that “assigned” them to work for their business clients and issued their pay checks. On that supposition, the direct-hires and temps had two different employers, and bargaining units that sought to combine them—even where both groups were engaged in the same or similar work, all under the user firm’s direction—were therefore deemed multi-employer units requiring the consent of both purportedly independent employers [see *Oakwood Care Center and N & W Agency, Inc. (2004)*]. If temps engaged in any concerted activity, the user firm could without legal consequence discharge them simply by requesting replacements from the agency, or by re-contracting with a different staffing agency, as the firm was not bound by the Act with respect to these “non-employees.” All this made the unionization of temps virtually impossible. In this way, the bargaining rights of temp agency workers had been effectively nullified, in the Board’s estimation, for 30 years.

The major commercial temp agencies originally won acceptance as statutory “employers” of temp workers through

a blitz of state legislatures during the 1960s. This satisfied their business clients’ desire *not* to be so designated, thus enabling their access to “temporary” labor without serious legal obligations or constraints. The temp industry has lobbied incessantly to maintain its employer status ever since, in every regulatory arena of importance to the business, including retirement pensions, taxation, unemployment insurance, workers’ compensation and (most recently) with respect to the Affordable Care Act.

As any clear-eyed examination of “temp” work makes obvious, however, the temp agencies’ claim of sole employer status does not comport with the facts of the standard temporary employment relationship, in which substantial control over the labor process is maintained by the user firm, on whose premises, and with whose machinery and tools, temps always work. Yet, based on this legal pretense, and with the support of government institutions, the use of temp agency workers as “non-employees” has over several decades become a routine part of U.S. labor relations throughout the economy.

Indeed, the Board’s new joint employer rule is so potentially explosive precisely because the staffing model to which it is applicable is now so widespread. With the help of the global temp industry, large employers in every economic sector have implemented “contingent worker programs” that split their workforce into “core” and “contingent” segments—the latter consisting of temps and other “contract” workers—to reduce labor costs, and avoid the legal obligations and constraints that come with employer status. A layer of “permatemps” comprising a varying proportion of the workforce is now normal in blue-collar workplaces (manufacturing, food processing, warehousing, auto assembly and parts, hospitality, recycling, etc.), but also common in the professions (banking, law, lab science, accounting) and the skilled trades. (At the BFI recycling facility, all 240 low-wage sorters and screeners were hired through a temp agency, while the 60 truck drivers and forklift operators were direct employees). Temps are paid substantially lower wages than direct employees, have no benefits or holidays, or any definable path for conversion to “permanent” employee status, and, at least until now, effectively no collective bargaining rights.

What has all along been grossly underappreciated is how much the presence of temps, in thousands of workplaces, has further tipped the balance of power in management’s favor, and how much this split workforce arrangement has hurt *all* workers, not just the “temps.” The “threat effect”

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“His entire adult lifespan is exactly eight hours. He won’t be around long enough to need benefits.”

Joint employer rule *(continued)*

produced by importing even a small percentage of temp agency workers into the workforce has served effectively to discourage and often defeat union efforts, and to severely dampen wage demands.

Accordingly, my plan for organizing is designed to overcome this pernicious “divide and conquer” strategy. It begins, in any particular arena, with a strategic collaboration between an established labor union and a worker center. While unions possess the accumulated know-how in union formation and collective bargaining under the NLRB, worker centers are usually more deeply embedded in the communities and worker populations (often immigrant groups) from which temps and other contingent workers are recruited. Thus, the Board’s new policy, in addition to affording temp workers a realistic route to unionization, should also be viewed as an opportunity to patch up the two alienated halves of the U.S. labor movement, even as we (re)unite groups of workers and segments of the workforce that have been artificially separated by the temp arrangement and other labeling devices. Potentially, it heralds a return to what unionists used to call “wall-to-wall organizing.”

By returning to a test that recognizes indices of *indirect* and *reserved* control, the Board has given temp workers and their unions the means to gather what is usually ample existing evidence of user firms’ substantial role in determining the terms and conditions of work, sufficient in most cases to prove joint employment. Abundant evidence of user-firm control can be found in the secret contracts that temps work under, which they may now obtain in proving joint employment for the purpose of unit formation. BFI’s contract with its temp agency, for example, gave BFI the right to control the speed of the conveyor belts, the number of temp workers staffing the lines, and the right to discharge any agency worker. Like many standard temp agency contracts, it also imposed limits on the length of a temp’s assignment, and capped the top wage that the agency could pay the temps.

It should also be noted how the Board’s new policy changes temp workers’ legal relation to their real employers, and expands their tactical options. As joint employers, user firms can no longer commit ULPs against temps with impunity, and temps or unions can use the ULP process to counter the dismissal of pro-union temps, a major impediment to organizing in the past. The joint-employer status of user firms also allows temps and their labor organizations to picket and carry out other direct actions against those firms.

Ultimately, how significant is the Board’s new joint employer policy for the labor movement? We must acknowledge that a key catalyst of union decline has been the steady increase in the use of “contingent workers”—i.e., workers that employers claim are not their legal employees, and who are therefore left in a nether world, effectively stripped of their union rights in relation to the large corporations for which they produce value—a trend that (some important victories

notwithstanding) labor unions have not had the means to arrest. If so, the new joint employer rule—better reflecting today’s reality of triangular employment relationships and extended subcontracting chains—may represent the tool we’ve been lacking to swing open the door of the trade unions to these legions of workers, too long left abandoned. A rejuvenated labor movement may not be too far-fetched.

At the LRAN conference, it was encouraging to witness a growing enthusiasm for union-worker center alliances, as the LIFT fund grants to support these partnerships exemplify. Early successes have been in the news, and more are to come. The narrow joint-employer doctrine that has allowed large employers to utilize “temp” and “contract” labor without accountability has recently been crumbling, not just at the NLRB, but in other venues as well (e.g., California’s AB 1897 makes client firms liable, along with their temp agencies, for wage theft and other violations). The NLRB is widely expected to extend the new joint employer test to the millions of franchised workers, like those in fast foods. With these developments, we have a new labor landscape in urgent need of mapping.

George Gonos is professor emeritus at SUNY-Potsdam, and now a visiting instructor at FIU’s Center for Labor Research and Studies. Currently, he appears in the documentary, “A Day’s Work,” on the tragic rates of workplace injury and death for temp workers.

SEEKING AUTHORS FOR THE NLG GUIDE TO LABOR LAW

We are looking for people to update two chapters in our West publication *Employee and Union Member Guide to Labor Law: A Manual for Attorneys Representing the Labor Movement* (see www.nlg-laboremploy-comm.org/Our_Publications.php):



Chapter 1, “Organizing the Unorganized” (252 pages, last updated June 2015)

Chapter 11, “The Duty of Fair Representation” (82 pages, last updated June 2015)

Updates are due annually, in January or July. Authors must have expertise in the subject matter and excellent research and writing skills.

Authors receive a complimentary copy of the treatise and complimentary updates to the treatise for as long as they keep the chapter up to date.

If interested, contact Elise Gautier, at elise.gautier@comcast.net, and send her your CV or a link to your website.

Organizing to defend immigrant workers in LA County

BY ARIELLA MORRISON

Immigration and Customs Enforcement (ICE) officers were waiting outside the restaurant where Mario Ramirez* works, a day after he went the Long Beach courthouse to pay a fine. When Mr. Ramirez, who has no prior deportations and whose children are U.S. citizens, was arrested by these ICE agents, urgent legal assistance and advocacy was needed. Every other Friday morning in Los Angeles, activists, organizers, immigrant rights attorneys, and clergy, amongst others, gather at a community immigrant rights organization's headquarters to strategize around how to respond to increased ICE activity in LA County. This Network, comprised of legal, communications, political, organizing, and coordinating committees, is working to ensure that Los Angeles County's response to mass enforcement actions is effective, coordinated, and timely. After Mr. Ramirez was detained, volunteers acted quickly to ensure that an attorney visited him as soon as possible in detention, that the Mexican Consulate was alerted, and that the local Congressman's office was involved.

Our Network is training community, faith, immigrant rights, and labor organizers at Know Your Rights Raids Readiness Trainings as part of a robust raids response, which includes investigation, advocacy, and litigation. We are mobilizing attorneys to stand side-by-side with our immigrant communities, using our legal and organizing expertise as strong, unified, legal safeguards against immigration policies of the current Administration.

Every individual facing deportation deserves representation. Without knowing *exactly how* potential mass deportations will play out under the Administration's immigration policies, this Network is organizing a systemic comprehensive emergency response as well as setting the stage for full-scope pro bono and low bono representation. Research shows that lawyers greatly increase an individual's chances of winning their immigration cases and detained immigrants with counsel are ten times more likely to succeed in their cases than those without a lawyer. In response to this reality, we are equipping law students, non-immigration attorneys, and skilled immigration attorneys to defend workers and other low-income individuals at every step of removal proceedings.

Get involved today by contacting your local NLG National Immigration Project chapter or immigrant

rights organizations to find out about rapid response organizing in your community and educate yourself and others using the following resources:

- <https://www.nilc.org/issues/workersrights/>
- <https://www.immigrantdefenseproject.org/category/resources-for-communities/>
- https://nationalimmigrationproject.org/PDFs/community/2011_Jan_deport-101.pdf
- <http://canttrumpcalifornia.com/resources/>
- <http://www.nnirr.org/drupal/>

By training and engaging pro bono attorneys, we can help prevent immigrant workers and their loved ones from ever being caught up in the deportation machine, we can defend those caught up in the deportation machine, and we can engage both attorneys and advocates as soon as an ICE action or detention occurs. Pro bono attorneys have the opportunity to play a critical role in ensuring access to justice and due process in immigration proceedings through local, statewide, and national emergency response networks around the country.

* Name changed to protect the family's privacy.

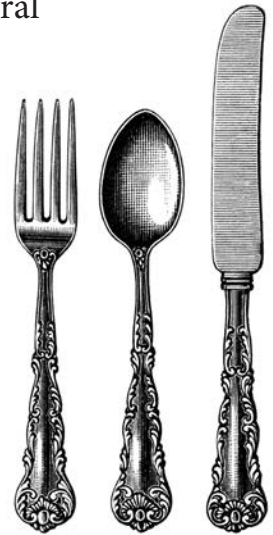
Ariella Morrison is a Senior Staff Attorney with OneJustice and the volunteer attorney coordinator for the Los Angeles Raids Rapid Response Network. OneJustice's mission is to bring life changing legal help to those in need by transforming the civil legal aid system.



Join us for breakfast!

The Labor & Employment Committee is hosting a breakfast at the Denver LCC Conference on what we need to do—and are already doing—to win the 2008 midterms. Join us on Tuesday, May 16th at 6:50 am at Mineral Rooms B + C for a discussion about the issues that Eric Dillon and Fran Schreiber cover in their articles in this issue. Please RSVP ASAP to fschreiber@kazanlaw.com.

We are also meeting Monday, May 15th at 7 am, before the first day's regular schedule begins, to talk about the other work that the Guild is doing nationally and locally to defend immigrants' rights, protect organized and unorganized workers' Section 7 rights, fight wage theft and strengthen our solidarity with workers engaged in the same fights around the globe. Pick up your coffee at the 24-hour coffee shop Perks™ in the Lobby and join us across from there in the lounge area for our meeting.



Labor & Employment Committee

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