the national lawyers guild
NEWSLETTER of the
Labor & Employment Committee
http://www.nlg-laboremploy-comm.org
April 2015

JOIN US *at the*

LCC

Sunday, April 26th

Post-Party Formation

Join us for the After Party
(after the LCC reception)
at 315 South American Street
Philadelphia
8:00 p.m.

Monday, April 27th

L&EC Lunch Meeting

In the hotel
Room Location TBA
12:30 p.m.

Tuesday, April 28th

NLG L&EC breakfast at the LCC

Fighting Back Against ALEC's Attacks on Workers

Salon 5/6
6:50 a.m. (yes in the morning)

"Death by a Thousand Cuts" and ALEC's Local Strategy for Attacking Unions

BY BRENDAN FISCHER

The American Legislative Exchange Council (ALEC) made headlines earlier this year after Wisconsin Republicans introduced a virtually word-for-word copy of the ALEC "model" Right to Work Act, following on the heels of Michigan and other states that have taken up the ALEC-inspired anti-union measures in recent years.

But ALEC and its allies have also been pushing a new and unprecedented approach to defunding unions on a city-by-city basis through an ALEC offshoot, the American City County Exchange (ACCE). Since ACCE's most recent meeting in December, held within ALEC's conference in Washington D.C., local right to work laws have been enacted in several Kentucky counties, and discussed in other states such as Illinois and Ohio.

The ultimate goal, according to speakers at the ACCE conference, is to defund labor unions, which are one of the few counterweights to corporate political influence. ACCE attendees were told that local right to work is "more time consuming in a lot of ways, but you also get the vast money poured into [local] campaigns that you'd expect in a statewide situation, whether its Wisconsin or Michigan or Ohio or what have you," said Brent Yessin, a notorious union-buster and lawyer who is working with ACCE on the measures.

Right to work laws themselves cut off union funding by allowing workers to avoid paying for the costs of union representation, even as they benefit from union-negotiated wages and benefits. But pursuing right to work on the local level additionally draws unions into dozens or possibly hundreds of costly battles, further depleting labor's resources and, with it, their influence. "There are literally thousands of targets for the initiative," Yessin said at the ACCE meeting, according to an account from Steve Arnold, a progressive legislator from Fitchburg, Wisconsin, who attended the meeting.

"**It is a death by a thousand cuts**," Yessin said.

(*continued on page 2*)

A Thousand Cuts (*continued*)

"Yes, there's going to be a lot of litigation"

One big problem for the local laws is that they are almost certainly illegal under the federal Taft-Hartley Act, which allows a "state or territory," but not cities or counties, to enact right to work measures. This means that cities and counties that enact right to work restrictions will face costly lawsuits.

"Yes there's going to be a lot of litigation," Yessin reportedly said at the ACCE meeting, noting that defending the laws would be coordinated with the Heritage Foundation, which is funded by the Koch Brothers and numerous corporations that fund ALEC.

In recent months, ACCE and the Heritage Foundation have made the dubious claim that the Taft-Hartley Act's reference to "state or territory" encompasses cities and counties, a reading of the statute that federal courts have rejected in the past.

The Kentucky Attorney General has advised counties that local right to work measures are illegal under federal law. Even the National Right to Work Committee, one of the leading proponents of right to work measures, has conceded that local laws are illegal, noting last year that "there is zero reason to believe that any local Right to Work ordinances adopted in Kentucky or any other state will be upheld in court." But some Kentucky counties have forged ahead anyway, knowing they would be sued.

This is somewhat surprising. Traditionally, local elected officials have had little appetite for litigation. They live and work directly in the communities they represent, so are less likely to use their post to advance a national ideological agenda, much less use their neighbors' tax dollars to defend a legal theory cooked up by Washington D.C. special interests.

With ACCE this is beginning to change. In order to encourage local governments to promote measures that will result in lawsuits, a mysteriously-funded nonprofit created by Yessin called "Protect My Paycheck" is offering to pay for the counties' legal defense, but only after the county maxes out its insurance coverage. By playing along with the ACCE local right to work scheme, the counties are likely ensuring that their insurance premiums will increase, which will cost taxpayers in the future.

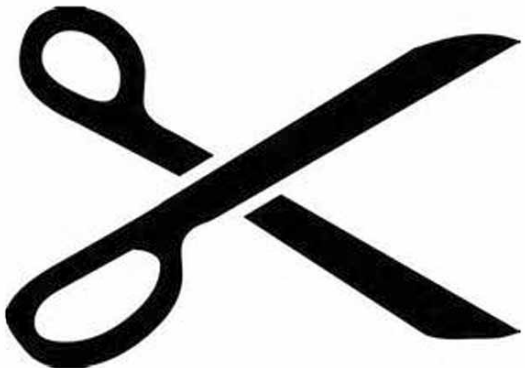
First Private Sector Unions, Then the Public Sector

ACCE, Yessin, and the Heritage Foundation are targeting Republican-controlled states that don't have a statewide right to work law, according to Arnold's account of the meeting. Twenty-four states have already enacted statewide right to work laws.

"We are looking for states where we can pass it locally and not worry that the legislature or governor or both will then repeal" the law, Yessin said. "We . . . have met with officials in a number of counties, a number of states, state jurisdictions, county jurisdictions in Washington, Montana, Wisconsin, Ohio, Pennsylvania, Kentucky and others," he said.

Yessin instructed legislators at the ACCE meeting to first go after private sector workers, rather than more sympathetic public sector workers. "If you tackle it together, you're going to have the teachers, the fireman, the policeman, and SEIU bus drivers and dump-truck drivers and, they're going to be the ones in your fiscal court, or your county commission or whatever, and they're going to be the ones chanting and picketing and raising cain," he said. "Later, public sector employees."

Brendan Fischer is the General Counsel for the Center for Media and Democracy. He will be speaking about ALEC's work in Kentucky and more at the Committee's breakfast meeting at the LCC Conference; see page 1 for details. An earlier version of this article appeared at the Center's PRWatch: http://www.prwatch.org/news/2015/02/12746/death-thousand-cuts-and-alec-attacking-unions



Two and a Half Cheers for Bankruptcy:

Detroit City Retirees Avoid the Worst While Lenders Get a Buzz Cut

by Ursula Levelt

When the possibility of a City bankruptcy petition confronted the City of Detroit's retirees, they were justifiably scared and angry, as reports circulated that they might lose as much of 80 percent of their benefits. With the average City retiree pension being $1,594 per month, that would mean a cut of $1,275, leaving them with a pension of $319 a month. They were not the only ones: the City's elected officials, City workers, and community activists all saw a bankruptcy petition as yet another neoliberal tool to force austerity down the throats of regular people. This explains why Michigan Republican Governor Rick Snyder forced appointment of an Emergency Manager, even after the voters of Michigan had repealed an earlier statute giving him that authority, in order to proceed to bankruptcy.[1]

It did not work out that way: when the bankruptcy case finalized last November, the biggest losers turned out to be the "venture" financial creditors who engaged in what was called an "innovative" loan transaction in 2005 to give the City a temporary fix for the funding shortfall it faced. How did this happen?

After Emergency Manager Kevyn Orr filed the bankruptcy petition, three classes of creditors emerged: secured, unsecured, and "secured or unsecured." This latter class consisted of municipal bond holders whose bonds were secured by the general taxing power of the City. The municipal bond industry wants to believe that these claims are secured, but the law is unsettled in this regard. In the end, these bond holders tend to get paid because cities want to avoid jinxing their ability to issue bonds in the future. In a novel move, Orr decided to classify these claims as unsecured; litigation followed.

Among the secured creditors were UBS and Merrill Lynch, who had claims resulting from an interest swap agreement associated with the 2005 venture deal. The unsecured creditors included Syncora and Financial Guaranty Insurance Company, which had underwritten the 2005 venture deal, the police and general City pension funds, and City employees and retirees with health benefits claims. The retirees challenged any cut in their benefits, based on the Michigan Constitution's protections for civil service pensions. Syncora and FGIC made a strong case that the art collection of the Detroit Institute of Arts (DIA) had to be included as assets of the City. Litigation galore!

As expected, Orr tried to resolve the claims of the secured creditors first, in particular those of UBS/Merrill Lynch, to avoid the hefty penalties built into their agreements. His first offer was to pay $230 million on a $346 million claim. In a surprise move, the judge overseeing the bankruptcy, Steven Rhodes, disapproved this settlement, forcing Orr to sue the venture creditors over the questionable legality of the 2005 deal. (This was not in Orr's DNA: he was a former partner in Jones Day, which had been the architect of similarly "innovative" deals with cities and counties.) The UBS/Merrill Lynch claim eventually settled for $85 million, or 25 cents on the dollar.

In the meantime, the judge also ruled against the retirees' constitutional claim and forced them to the table to negotiate a settlement. This negotiation took shape under the umbrella of a public discussion over a choice between people and art, a reference to the DIA art collection. If it came to that, the art would lose. In this climate, the mediator appointed by the bankruptcy court, Gerald Rosen, managed to convince a number of foundations to pony up $350 million to support a "grand bargain." The money would be used to shore up retirees' pensions in exchange for a promise to protect the DIA collection from the bankruptcy proceeding.

Orr also achieved a settlement with the bondholders with ambiguous status. The group with the strongest legal claim settled for 74 cents on the dollar, the group with a weaker claim for 46 cents on the dollar.

The last creditors standing were Syncora and FGIC with $400 million and $1.1 billion claims respectively. On the brink of trial, they saw the writing on the wall and settled their claims for a mere 13 cents on the dollars and some options to develop City property.

So how did the retirees come out? Rather than looking at the pension funds and the dispute over the size of the actual liability the funds had, let's look at individual retirees. The health benefits claims were settled by moving the retirees to the Affordable Care exchange with some protections, such as a City stipend towards the cost of premiums. This represents a cut in benefits; while the actual loss varies from one person to the next, it comes to an average loss of roughly $250 per month.

(*continued on page 4*)

Two and a Half Cheers (*continued*)

As usual, police and fire retirees came out best: their pensions were not reduced, but they lost half of their annual cost of living adjustments. With an average pension of $2,550 per month, the additional cost for health benefits comes to a reduction of about 10 percent. (These pensions are higher because police and fire retirees do not qualify for social security pensions.)

The other retirees experienced a 4.5 percent reduction in their pension benefits, complete loss of the cost of living adjustment, and the increased health benefit cost, adding another 16 percent reduction. An Income Stability Fund was created to prevent any retiree's income from falling under 130 percent of the federal poverty line.

The above numbers are somewhat speculative, but there is no doubt that the retirees' recovery in the bankruptcy was higher than the 20 cents on the dollar that many retirees expected and feared, not to mention the 13 cents on the dollar that the venture creditors ended up with.

This tells us that bankruptcy may not always be a tool for neoliberal austerity. In fact, in recent municipal bankruptcies in California the courts have blocked further austerity measures and found a duty for cities to provide a certain level of services, regardless of their obligations to creditors.[2]

This is how Judge Rhodes put it. He qualified Detroit as a "municipal service enterprise" with a "mission to provide municipal services to its residents and visitors to promote their health, welfare, and safety." As employees are the backbone in this effort, the City has a strong interest "in preserving its relationships with its employees and in enhancing their motivation."[3] Unexpected good news for embattled city workers and retirees from a Republican-appointed judge!

Other cities in financial distress may want to take another look at bankruptcy as an option. Maybe it can be turned into a tool against the neoliberal tendency to always favor financial interests over the interests of the people. But could we please have a democratically elected mayor file the next petition?

NOTES

1 The history of the passage of the Emergency Manager Act is long and undemocratic. For more detail on the struggle against the Emergency Manager Act, see the website of the NLG Sugar Law Center, http://www.sugarlaw.org and previous articles in this newsletter.

2 See Anderson, Michelle Wilde. 2014. "The New Minimal Cities." Yale Law Journal 23:1118-1227, p. 1192, reviewing the bankruptcies of Vallejo, Stockton, and San Bernardino.

3. In re *City of Detroit*, No. 13-53846, Oral Opinion on the Record, November 7, 2014, *available at* http://mieb.uscourts.gov/.

Ursula Levelt is Managing Director of the TWU Local 100 Legal Department.

Cuba In Transition

by Matthew Rinaldi

"Today, the United States of America is changing its relationship with the people of Cuba."

Barack Obama, speaking these words on December 17, 2014, initiated a three phase process. He traded three Cuban intelligence agents held in U.S. prisons for two U.S. agents held in Cuba, announced the beginning of diplomatic relations between the two countrieshand a set of measures aimed at normalizing relations, including the relaxation of travel restrictions, and proclaimed the goal of ending the current U.S. blockade, calling it ineffective in achieving regime change in Cuba.

In March of 2015, a delegation from the NLG Labor and Employment Committee traveled to Cuba to evaluate the impact of these announcements. We found a country celebrating the return of their agents, cautiously optimistic about the prospects of diplomatic relations with the United States and steadily working on changes in Cuban society that have been underway for over a decade.

The spy trade generated international headlines. Ramon Labanino, Antonio Guerrero and Gerardo Hernandez were the last imprisoned members of the Cuban Five, Cuban agents who were jailed for over 15 years—not for spying on the United States, but for infiltrating terrorist groups in Florida that had launched deadly attacks on Cuba. They were traded for Alan Gross, an employee of U.S. AID sent to Cuba on increasingly dangerous missions until he was caught, and Rolando Sarroff Trujillo, a double agent who had assisted in the capture of the Cuban Five and was imprisoned by the Cuban government.

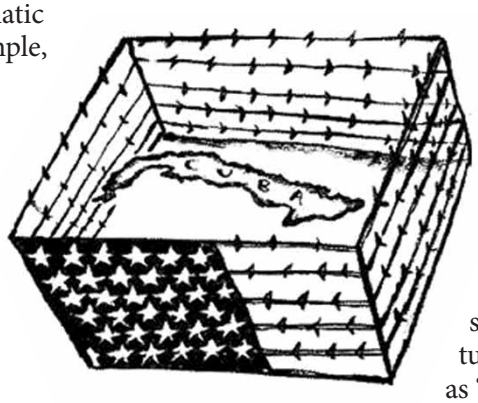
In his speech, Obama did not reveal Sarroff's name, but referred to him as "one of the most important intelligence agents we have ever had in Cuba."

Three spies were not included in the trade. Ana Belen Montes, who worked for the CIA, came to see U.S. policy toward Cuba as immoral and began passing information to Havana. She remains in solitary confinement in Carswell Federal Prison in Texas. Walter Kendall Myers was an employee of the U.S. State Department who, with his spouse Gwendolyn, took the same actions as Ana Belen Montes. Both remain in prison. All three deserve their freedom.

The promise of full diplomatic relations has not yet been fulfilled. Three rounds of talks have been have been followed by the historic meeting of Obama and Raul Castro in Panama City. Momentum to normalize relations is growing. The naming of an ambassador, however, requires the approval of Congress and the leaders of the Republican Party have vowed to block any appointment.

In addition, Cuba remains on the list of State Sponsors of Terrorism, which imposes financial and political sanctions on Cuba. After the meeting in Panama, Obama recommended that Cuba be removed from the list, an act which becomes final if 45 days pass without Congressional intervention. Voices are being raised, particularly in New Jersey, for the return of Assata Shakur, perhaps for the purpose of politically attacking Obama as well as to hamper attempts at normalizing relations.

The talks must also address whether the parties will follow the Vienna Convention regarding diplomatic relations. Will the U.S. embassy, for example, support and finance groups to impact Cuban internal politics??



It is in the area of "regime change through ending the embargo" that the most confusion exists. The blockade, in place since the 1960s, became codified by Congressional legislation. The Torricelli Act of 1992 prohibited any foreign-based subsidiary of a U.S. company from doing business in Cuba. The Helms-Burton act of 1996, signed by Bill Clinton, provides, among other restrictions, that any non-U.S. company that deals economically with Cuba can be subjected to U.S. sanctions and its leadership barred from entering the United States.

The blockade has certainly damaged Cuba economically. Yet it has remained committed to socialism while introducing tourism to gain hard currency and allowing foreign capital to invest in Cuba under state-monitored controls. These changes, which began in the 1990s after the collapse of the Soviet Union, have the stated purpose of making socialism in Cuba sustainable. U.S. capital has seen money being made by foreign investors while it is locked out of the Cuban economy by the U.S. government.

The economic changes being put into effect, especially the new emphasis on cooperatives, collectives and self-employment, are meant to preserve the core social system. There remains a full commitment to free education, free public health care and protection for people who are unable to work, among other achievements of the revolution.

Raul Castro stated in December of 2010, criticizing Cuba's former attempt to copy Stalinist policies, "We are fully aware of the mistakes we have committed and the necessary updating of our socialist economic model, adapted to Cuba's conditions and not to the capitalist and neocolonial past. We do not intend to copy from anyone. That brought about enough problems for us because, in addition, we copied badly. We shall not ignore the experiences of others," referring to Russia, China and eastern Europe, "and we shall learn from them."

The NLG delegation took note of steps which have been taken to learn from the past. The homophobia which was rampant in the early years of the revolution has been bitterly fought by the Cuban Institute for Sexual Education, which has led high profile and successful efforts to recognize the rights and liberties of the LGBT community. Exit visas for Cubans have been eliminated, making travel easier. Cuba's "human capital" increasingly earns hard currency overseas. Cuban baseball stars like Yulieski Gourriel, Alfredo Despaigne and Frederich Cepeda now play in Japan, where they are not required by Japan to renounce their Cuban citizenship, a rule still imposed only on Cubans by the United States and Major League Baseball.

The NLG delegation met with lawyers from around the world, and there was a critical examination of the new role of self-employment in the Cuban economy. While the goal is to avoid a new concentration of wealth, many speakers addressed the possibility that the ongoing reforms will create a new class of small employers whose class interests may turn against socialism. Workers designated as "self-employed" may hire other workers for wages, thus creating new legal issues in a non-state sector of Cuban production and distribution. This risk is seen as emerging within Cuba, not from foreign capital.

These changes have been developing for over twenty years. One response to self-employment in Cuba has been the slow introduction of a tax system. In the book *Cuba: Socialist Economic Reform and Modernization* by Evelio Vilarino, published in 1998, he argues:

> *There is no doubt that the introduction of nonstate production forms with high relative incomes imposes the need to establish mechanisms for income redistribution in which a tax policy cannot be absent.*

This is a startling idea for those more familiar with the early years of the Revolution.

Unexpected issues now exist. An increasingly prosperous Cuban diaspora sends remittances to relatives on the Island, leading to a racial disparity that mirrors the demographic of the exile community. And the dual currency system, introduced alongside tourism, has created income inequality by rewarding those who receive "tourist money" (convertible pesos) as tips or as cash payments rather than earning the national currency (moneda nacional). The dual currency system is set to be eliminated, but Cuba is moving very cautiously in implementing this decision.

We are witnessing an attempt to build a socialist model that is both sustainable and prosperous. As Marce Cameron writes in the *Green Left Monthly* of February, 2015, "'I want to see Cuba before everything changes' is how many reacted to Barack Obama's surprise 12/17/14 announcement. Seeing Cuba for oneself can only be encouraged, but those who

(*continued, bottom of page 6*)

RESOLUTION CALLING FOR AN END TO THE U.S. EMBARGO OF CUBA

WHEREAS, for over ten years the National Lawyers Guild Labor & Employment Committee and the Canadian Association of Labor Lawyers have collaborated on various projects, including work on labor rights in Cuba, and

WHEREAS, our organizations stand in solidarity with the Cuban trade union movement and with the Cuban people in their struggle to preserve and advance their labor, human, and democratic rights; and

WHEREAS, as members of our respective organizations we recognize that the policy of the United States and other nations toward Cuba only makes sense if it recognizes Cuba's sovereignty and independence, respects Cuba's trade union movement and its work to empower Cuban workers, contributes to genuine improvement of labor and human rights, and truly serves the humanitarian and democratic interests of Cuban workers and of the Cuban people; and

WHEREAS, there is a broad consensus among the global and Cuban trade union movements that the U.S. economic embargo has failed in its stated policy goals of promoting democracy by ending socialism in Cuba, while adversely affecting ordinary Cuban citizens; and

WHEREAS, the current aspects of the U.S. embargo on Cuba that restrict individual and group travel of American citizens, including U.S. trade unionists, are counterproductive to advancing worker and human rights on the island; and

WHEREAS, we are encouraged by the recent pronouncements of President Obama and President Raul Castro in regard to diplomatic relations and trade between the United States and Cuba.

THEREFORE BE IT RESOLVED, that we urge the U.S. Congress to repeal the Helms-Burton and Torricelli Acts; and

BE IT FURTHER RESOLVED, that we urge the U.S. government to end individual and group travel restrictions to Cuba involving U.S. citizens and take all other measures within the authority of the Executive Branch to end the embargo and normalize relations between our countries, including but not limited to removing Cub from the ist of State Sponsors of Terrorism.

BE IT FURTHER RESOLVED, that we will, to the extent we are members of trade unions in our respective countries and represent unions in our legal work, when appropriate, make every effort to work with the International Trade Union Confederation, the Trade Union Confederation of the Americas, the Word Federation of Labor and the global labor movement, in solidarity with the Cuban labor movement, to further the cause of worker and human rights in Cuba.

MADE THIS 7TH DAY OF MARCH, 2015, IN HAVANA CUBA.

NLG Labor & Employment Committee

Canadian Association of Labor Lawyers

Cuba In Transition

(*continued from page 5)*

fear that it will soon be transformed by American tourists, U.S. corporations and commercialism need not rush to book flights." The idea that a change in U.S. policy alone will unleash corporate and cultural recolonization is based, ironically, on the idea that the blockade itself is holding back a flood of U.S. capital.

The cover story of *Time* magazine dated 4/6/15 is "Cuba: What will change when the Americans arrive." Along with a predictable slant against Cuban socialism, the article ponders the appearance of Taco Bell and McDonalds and states, "It would take an act of Congress to bring in the American fast-food chains."

In reality, it would require an act of the Cuban National Assembly. We asked Cuban officials whether there was any chance casinos would reappear in Havana. The answer was a resounding "No." The Revolution which tossed American corporations and Mafia casinos from the Island is not about to hand over its hard-won sovereignty.

Matthew Rinaldi is the Secretary of the Guild's Bay Area Chapter and practices civil and military law. This article first ran in a slightly different form on the Bay Area Chapter's website.

KICKING THEM WHEN THEY'RE DOWN:
Corporate America and Its Allies Make Life Even Harder for the Unemployed

by Tony Paris

As attacks on organized labor continue and the "employment at-will" doctrine wreaks havoc on America's working class, corporations have broadened their attacks on workers to include new challenges to the unemployment benefits of those who have been laid off or otherwise lost their jobs through no fault of their own. It is now commonplace for these employers to use multi-million dollar human resource "payroll management" agencies such as TALX or Paychex to handle these challenges within state agencies and to use high-level attorneys to attack workers in administrative hearings and appeals. The result is that benefits that are an essential safety net for working people are now in jeopardy as they face unnecessary delays, judicial hearings, and legislative attacks.

We are also seeing a push to cut off or limit benefits coming from legislatures, particularly those controlled by Republican majorities. Over the past two years, the Sugar Law Center has represented dozens of food service workers at colleges throughout the state of Michigan who face denial of "underemployment" benefits they normally collect during reduced summer schedules when there are fewer enrolled students.

This is primarily the result of a Michigan law passed in late 2011 that extends the "school denial period," normally only applicable to grade school teachers who are off for summer vacation, to any employee who works for a company that contracts with any educational institution. This law has unfairly included year-round employees in food service, maintenance, and landscaping. These employees often work for companies that have received contracts with schools following the privatization of previously public sector union jobs. Workers are still required to work throughout the summer, but are only assigned hours based on demand, and thus they depend on partial unemployment benefits to make ends meet until they are full-time again the next semester. Sugar Law Center has prevailed in roughly fifty administrative hearings and judicial appeals on the issue and is working with UNITE HERE Local 24 to organize and collectively bargain around the issue.

Sugar Law is also involved in a constitutional challenge to the criminalization of unemployment insurance filings in Michigan. This often occurs when minor discrepancies arise between employee and employer answers to ambiguously worded fact-finding questions on certain forms. The state now commonly charges that the employee committed "fraud" or "misrepresentation" when such discrepancies arise. Under current state law, such a charge carries a restitution penalty of *triple* the amount of collected benefits.

Many of these cases now also result in criminal charges without any prior civil administrative hearing or determination. However, when it turns out that it was the employer who was not truthful in its submission, no such determination/charge/penalty is issued.

Because these cases often involve relatively small amounts of potential recovery, it is difficult for workers to retain a private attorney who can dedicate the time and expertise to properly litigate each stage of an appeal. As part of our "Job Loss Fairness" campaign, the Sugar Law Center takes these cases, since we are often the last resort for these claimants to turn to. Labor and employment lawyers in other states will need to develop similar programs with legal aid and workers rights organizations in other states where we already have seen similar abuses or expect these attacks to intensify.

Tony Paris is Lead Attorney of the Sugar Law Center for Economic and Social Justice

JOIN US!

The Labor & Employment Committee is working on a project to provide training to workers centers, the legal aid offices and other advocacy groups that assist them, and employment lawyers who work with low-wage workers about the Section 7 rights that unorganized workers enjoy. We have developed training materials and launched a pilot project in Los Angeles to make sure we are meeting the needs of those groups and their constituents.

This is one of the issues that we will be covering at our membership meeting at the LCC on Monday April 27th. We invite you to join us then to join the conversation about how we can best apply our knowledge and experience to the issues that unorganized workers and their advocates face.

And for those of you who cannot join us at the LCC in Philadelphia we would like to hear your thoughts on what needs to be done and who can do it. Please contact our Los Angeles Workers Rights Committee at hmw@ssdslaw.com to join the discussion.

Labor & Employment Committee

c/o Kazan McClain Lyons Greenwood & Harley
Jack London Market
55 Harrison Street #400
Oakland, CA 94607