



The Labouring Oar



Message from the Chair

By Kathryn M. Knight

It's summertime, and the Labor and Employment Law Section is HOT! That is, the Section is having a busy and exciting summer, and we want to share with you, our Section members and readers, all that we have going on.

I hope you already have made plans to join us in New York for the Annual Meeting on September 13-15, 2018. I'm happy to report that the Section, in collaboration with the Southern District of New York, was selected to present what promises to be a riveting continuing legal education program on a timely topic: "#MeToo: Implementation and Administration of an Effective Anti-Harassment Policy." The program will be presented by a distinguished panel comprised of The Honorable Lisa Margaret Smith, United States Magistrate Judge, Southern District of New York; Mary A. Smith of Jackson & Lewis in White Plains, New York; and Phillip A. Kitzer of Teske Katz Kitzer & Rochel in Minneapolis, Minnesota. The panel will be moderated by Donna Phillips Currault of Gordon, Arata, Montgomery, Barnett, McCollam, Duplantis & Eagan in New Orleans. The panel discussion will explore the #MeToo and #TimesUp movements and the need to avoid and be

cognizant of potential unintended consequences of those movements, including, as one example, fewer mentors for women. In addition, the panel will address practical topics, such as effective anti-discrimination and anti-harassment policies, how to investigate a complaint properly, and what constitutes "prompt remedial action." Finally, the panel will explore settlement agreements and potential tax consequences of confidentiality provisions.

In addition, the Programming and CLE committee will kick off its Traveling CLE program on August 3, 2018 in Puerto Rico. There, Greg Peters, Katherine González, and Phillip Kitzer will address "Hot Topics 2018," including NLRA changes under the Trump Board, sexual orientation discrimination in the workplace, and recent developments affecting labor and employment law in Puerto Rico. Future locations and dates for the Traveling CLE program include El Paso, Texas on November 7, 2018, followed by Portland, Oregon and Rockford, Illinois on dates still to be determined.

The Section is also busy planning its 2019 Biennial Conference, which once again will be held in San Juan, Puerto Rico. Those of you who have been active in Section activities for some time will recall that the conference began in Puerto Rico in 2005 and remained there through the 2011 conference, after which the conference was presented twice in New Orleans and most recently in San Antonio. We're

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Welcome New Members!

The Labor & Employment Section is one of the larger FBA sections, but we are always excited to welcome new members into the fold! Our Section has tremendous diversity, with members from all over the country, from all types of firms or organizations, and representing employees, employers, government agencies, and labor unions. The continuing growth of the Section only better enables the Section to provide a meaningful experience to all of its members, with rewarding opportunities for networking, education, and practice development. Without further ado, the *Labouring Oar* welcomes the Section's newest members:

Erika Birch, *Stindberg & Scholnick LLC*

Steven Brown, *Isler Dare, P.C., Richmond, VA*

Kristen Goodman, *Hall, Arbery, Gilligan, Roberts & Shanlever, Savannah, GA*

Dorothy Green, *Latham, Shuker, Eden & Beaudine LLP, Orlando, FL*

Cristen Hintze, *Littler Mendelson, Los Angeles, CA*

Alen Hsu, *Blank Rome LLP, Fort Lauderdale, FL*

Ryan Jaghab, *Cole, Scott & Kissane, P.A., Orlando, FL*

Phillip Kilgore, *Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Greenville, SC*

Gregory Lacey, *Adtalem Global Education, Inc., Barrington, IL*

Shaylon Lovell, *Littler Mendelson, Phoenix, AZ*

Christopher Lyon, *Simms Showers LLP, Hunt Valley, MD*

Fauzia Makar, *Law Offices of Robert Eckard & Associates, P.A., Palm Harbor, FL*

Kellen Matthews, *Adams and Resse LLP, Baton Rouge, LA*

Megan Moore, *Rusty Hardin & Associates, Houston, TX*

Michael O'Connell, *D.C. Department of Transportation, Washington, D.C.*

Matthew Panach, *Fuller, Tubb, Bickford & Krahl, Oklahoma City, OK*

Thomas Payne, *Schwabe Williamson & Wyatt, Portland, OR*

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Demetrius Pyburn, *Haynsworth Sinkler Boyd, Greenville, SC*

Meg Rein, *MKR Legal, Austin, TX*

Edward Takashima, *Boies Schiller Flexner LLP, Santa Monica, CA*

Lisa Tatum, *LM Tatum PLLC, San Antonio, TX*

Joni Thome, *Baillon Thome Jozwiak & Wante LLP, Minneapolis, MN*

Alexander Wallin, *Castanon Law Group, Anaheim, CA*

Welcome to all of our newest members, and we encourage you to get involved with the Section by attending one of our CLE events or meetings, contributing an article to one of our publications, or joining one of our committees!

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excited to be returning to beautiful Puerto Rico in 2019 and hope you will plan now to join us. Save the dates: February 21 and 22, 2019.

This is my last message as your Chair, and I would like to thank the Section Officers, Board of Directors, and Committees for all of their hard work. This Section is successful because of so many dedicated and hard-working Officers, Directors, Committee members, and other Section members who volunteer their time and talents for the benefit of others. Through the work of these talented folks, we are able to offer well-written and timely articles for the edification of the readers of our publications and great CLEs addressing cutting-edge topics and recent developments to foster professional growth of our participants (and special

thanks to Brent Kettelkamp, Jack Blum, and Martha Medina, who authored this issue's articles). I hope each of you reading this edition of our Section's newsletter has benefitted in some way from the Section's work this year. If you have, please consider "giving back" by volunteering your time and talents. A new year starts on October 1st, and we would welcome your participation and active involvement in the Section. At the very least, please let us hear from you with your comments and ideas. Contact information for each of the Section's current officers and committee co-chairs is available at the back of this newsletter.

Hope to see you in New York in September. Until then, happy summertime—and stay COOL! ■

A Membership Perk: Monthly Circuit Updates

Don't forget that your membership in the Labor and Employment Section gives you access to the Monthly Circuit Updates! Each month, summaries of all the major labor and employment decisions in each Circuit are provided to all members in an eNewsletter that is also available on the Section's webpage at www.fedbar.org/sections/labor-employment-law-section.aspx. These Updates are an invaluable resource that allows members to stay up-to-date on important developments in each Circuit. Take a deep dive into all the new cases within your Circuit each month, and/or peruse all of the developments around the country to stay abreast of the law for your clients. If you would like to volunteer as a contributor for the Circuit Update, please contact Caitlin Andersen (candersen@seatonlaw.com) or Jack Blum (jblum@paleyrothman.com) for more information.

No Accommodation Required for Employee Unable to Work Overtime

By Brent Kettelkamp

The U.S. Court of Appeals for the Eighth Circuit recently decided that the United Parcel Service (“UPS”) was not required to accommodate an employee requesting to work no more than eight hours a day when working overtime was found to be an essential function of his position.¹

Jerry Faidley began working for UPS in 1987 as a package car driver. Faidley sustained a few work-related injuries over the course of his time with UPS and had his hip replaced in late 2011. Faidley returned to work with no working restrictions in April 2012. Faidley worked his normal shift for a few days but was quite sore. He went back to the doctor and received a permanent restriction limiting him from working more than eight hours a day. Faidley provided UPS with the restriction and requested the accommodation in May 2012. The parties then participated in the first interactive process. UPS determined that Faidley could not be accommodated in his current position, because it was an essential function of his job to work over eight hours a day. UPS did offer Faidley a part-time job, but he declined it for various reasons. Faidley then commenced a lawsuit in early January 2013 asserting state and federal failure to accommodate claims under the Americans with Disabilities Act (“ADA”) and Iowa’s state law counterpart.

Faidley also filed a grievance with the local union objecting to not being able to work. After various revisions to his work restrictions, Faidley requested another interactive accommodation process with UPS in May 2013. Having found no full-time positions, UPS offered Faidley another part-time position. Faidley declined the position and elected to retire in November 2013. Faidley then filed another lawsuit in 2014, alleging Iowa state law disability discrimination and retaliation claims. The two cases were consolidated, and the United States District Court for the Southern District of Iowa granted UPS’s motion for summary judgment concluding that (i) Faidley was not constructively discharged and therefore suffered no adverse employment action; (ii) working more than eight hours a day was an essential function of the package car driver position that could not be accommodated; (iii) Faidley was not qualified for reassignment to another driver position because working over eight hours a day was also an essential function of that role; (iv) because the part-time positions UPS offered Faidley were reasonable accommodations, Faidley was not qualified to remain at UPS after he rejected the same; and (v) a reasonable jury could not have found that UPS acted in bad faith in conducting the interactive accommodation process. Faidley appealed. On appeal, a divided panel reversed in part and remanded. A rehearing en banc followed, and the Eighth Circuit ultimately affirmed the district court’s decision.

With respect to the ADA accommodation claim, UPS declined Faidley’s requested accommodation because of its determination that working more than eight hours a day was an essential function of the driving jobs. UPS provided the court with several objective reasons why the overtime requirement was an essential function of the driving positions. For example, if a driver was unable to deliver all of the required packages within eight hours (and was restricted from working overtime), other drivers would have to be sent to finish the deliveries, negatively impacting UPS’s business. Moreover, the requirement to work overtime was listed in UPS’s driver job descriptions and the issue was collectively bargained. As a result, the Eighth Circuit determined that UPS did not violate the ADA or the Iowa state law counterpart by refusing Faidley’s request to not work overtime.

As to Faidley’s allegation that UPS failed to engage in good faith during the interactive process, the Eighth Circuit found Faidley’s arguments unpersuasive. The court found that UPS met two times with Faidley upon request for an interactive process. Full-time jobs for which Faidley was qualified were identified, but he failed to obtain them because others more senior to him had priority. When full-time positions were found to not be available, UPS then offered him part-time positions, which he rejected. Given the extensive efforts, the court held that UPS did not act in bad faith during the interactive process.

The Eighth Circuit also affirmed the district court’s dismissal of the disability discrimination claims as UPS was not required to reallocate essential functions of the positions, and because Faidley did not present evidence showing that he could perform the essential functions of the available jobs he sought.

Takeaway for Employers

It is commonplace for employees to receive medical certificates restricting them from working overtime. If an employee requests an accommodation seeking to work no more than eight hours a day, employers should be very careful about denying such a request unless it is an essential function of the respective position. The decision regarding what constitutes an essential function of a position is a fact-intensive one, and courts within the Eighth Circuit review factors such as “the employer’s judgment, its written job description, the terms of any applicable collective bargaining agreement, and the consequences of not requiring the incumbent to perform the function” in making such a determination.² Along with the overtime requirements set forth in the driver job descriptions and the applicable CBA, UPS was also able to provide the court with several explanations and examples regarding why working overtime as a driver was an essential function. If working overtime is deemed to be an essential function of a job by an employer, the employer should make sure to include the same in the job description (and any other applicable document) and have objective reasons why the overtime requirement is essential for the role.



Brent is an associate attorney at Seaton, Peters & Revnew in Minneapolis, Minnesota, where he represents both large and small businesses in employment litigation, commercial disputes, and labor law matters. He has represented clients in all areas of employment law including, FMLA,

ADA, discrimination/harassment, non-competes, and other various employment-related disputes. Brent also has experience representing clients in commercial disputes including, breach of contract, construction-

related claims, residential mortgage-backed securities, fraud/misrepresentation, real estate, enforcement of loan documents, and insurance coverage matters. He can be reached at bkettelkamp@seatonlaw.com.

Endnotes:

¹*Faidley v. United Parcel Serv. of Am., Inc.*, __ F.3d __, No. 16-1073, 2018 WL 2165842 (8th Cir. May 11, 2018).

²*Scruggs v. Pulaski Cty.*, 817 F.3d 1087, 1092-93 (8th Cir. 2016).

Advanced Labor & Employment Traveling CLE

Hot Topics - 2018

The FBA El Paso Chapter and the FBA's Labor & Employment Section invites you to a 3-hour CLE training. National and local speakers will address advanced labor and employment topics providing critical information to local practitioners faced with employment matters.

*** 3 hours of CLE Credit will be requested ***

Speakers

- **Gregory Peters** – Shareholder at Seaton, Peters & Revnew, P.A., in Minneapolis, MN - *NLRA Changes Under the Trump Board*
- **Phillip Kitzer** – Member at Teske Katz Kitzer & Rochel, PLLP, in Minneapolis, MN - *What's Happening with Sexual Orientation Discrimination in the Workplace?*
- **Diana Macias Valdez** – The Law Office of Diana Macias Valdez, PLLC, in El Paso, Texas - *Developments Affecting Labor & Employment Law in Texas*

Event Details

Date: November 7, 2018

Time: 9:00 am - 12:00 pm

Place: Albert Armendariz, Sr., U.S. Courthouse,
Jury Assembly Room, 525 Magoffin, El Paso, Texas

Cost:

Members - Free

Nonmembers - \$45

For any questions, please contact Priscilla Castillo at priscilla@mosslegalsolutions.com or 915-703-7309.

A Tipping Point for Tips? Changes to the Tipped Minimum Wage at the State and Federal Levels

By Jack Blum and Martha Medina

While the federal minimum wage under the Fair Labor Standards Act (FLSA) has been stagnant at \$7.25 per hour since 2009, the level of the minimum wage has increasingly come into focus as activists and others campaign against income inequality. Many have coalesced around the “Fight for 15” campaign seeking to double the applicable minimum wage to \$15.00 per hour. With Congress intractably divided, much attention has focused on the states, as 29 states now require employers to pay a minimum wage higher than that mandated by FLSA.¹

Many proponents of increasing the minimum wage have now turned their attention to the tipped minimum wage, which permits employers to pay certain employees a lower direct cash payment and make up the difference between the direct cash payments and the minimum wage with tips the employee receives from customers. Under the FLSA, tipped employees are workers that regularly receive more than \$30 in tips per month. Currently, employers must pay tipped employees a minimum cash wage of \$2.13 per hour and may claim a maximum credit of \$5.12 per hour towards the FLSA’s \$7.25 minimum wage from employee tips. Before employers can claim a tip credit, the FLSA requires them to inform their tipped employees of the following five factors: (1) the amount of the direct cash wage the employer is paying the tipped employee; (2) the additional amount claimed by the employer as a tip credit; (3) that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee; (4) that all tips received by the tipped employee are to be retained by the employee except for pursuant to a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (5) that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.²

In June 2018, District of Columbia voters voted in favor of Initiative 77, a ballot referendum measure that discontinued the separate tipped minimum wage and requires employers to pay all employees the full minimum wage (set to rise to \$15.00 per hour) as a direct cash payment by 2025. When the initiative is fully phased in, D.C. will join six (6) other states (Alaska, California, Montana, Nevada, Oregon, and Washington) that do not permit employers to use a tip credit to satisfy the minimum wage obligation.³ In some instances, local jurisdictions like cities and counties have instituted their own measures to eliminate the tipped minimum wage, notwithstanding its legality in the remainder of the state. Finally, Minnesota, New York, and Hawaii, require employers to pay employees a direct cash payment in excess of the FLSA minimum wage, even if the tip credit has not been eliminated.⁴

Proponents of eliminating the tipped minimum wage claim that the change would not affect the tips made by

employees and would help to increase tipped employees’ income. Proponents also claim that the tipped minimum wage fosters income inequality as tipped employees in higher-end establishments receive generous tips while tipped employees in lower-end establishments are forced to scrape by and may in fact receive less than the minimum wage if they are pressured to over-report the amount of tips they receive. Opponents, on the other hand, contend that the change will confuse customers and curtail the practice of tipping, which could actually reduce the total compensation received by some tipped employees, and also harm businesses by leading to an increase in prices as the employer would be required to pay the entire minimum wage as a direct payment. In 2016, Maine voters passed a similar measure which would have eliminated the tipped minimum wage. However, due to the opposition of many tipped employees claiming that many customers had already stopped tipping despite the law not being in effect, legislators reversed the measure before it went into effect. Ultimately, both sides of the argument point to studies and evidence purportedly supporting their positions, and it is unclear how tipped employees will actually be affected by the change in how the minimum wage is paid.

Amidst this action at the state level, the Department of Labor (DOL) in December 2017, proposed to amend its FLSA tip regulations. These regulations had previously been amended by DOL in 2011 to provide that “[t]ips are the property of the employee” and prohibited all employers from retaining the employee’s tips.⁵ Controversially, these regulations applied irrespective of whether the employer relied on a tip credit or paid the full minimum wage as a direct cash payment. The 2011 amendments also modified the requirements for tip pools, in which employees split the amount of tips received amongst themselves, such as when a waiter splits his or her tips with a bartender and busser. The 2011 amendments required that such tip pools “only include those employees who customarily and regularly receive tips,” again regardless of whether or not the employer used a tip credit to meet its minimum wage obligation.⁶

The validity of the 2011 amendments was the subject of much litigation, with a circuit split emerging as to whether the amendments were within DOL’s authority. First, the Oregon Restaurant and Lodging Association (ORLA), along with a number of other service-oriented associations, challenged DOL’s authority to enact the 2011 amendments with respect to employers that do not take a tip credit and instead choose to pay a direct cash wage of at least the minimum wage. The plaintiffs claimed that such tip regulations contradict the language of the FLSA, which restricts only the employers that take a tip credit. After the district court ruled against the validity of the 2011 amendments, the Ninth Circuit reversed the district court’s decision and upheld the validity of the amendments. The Ninth Circuit applied a *Chevron* analysis concluded that because the FLSA does not address employers that do not take a tip credit, the 2011 amendments were

a reasonable application of DOL's authority to construe the FLSA.⁷

On the other hand, the Tenth Circuit in *Marlow v. New Food Guy, Inc.* held that the 2011 amendments were not valid because the FLSA does not impose any restrictions on employers who pay the full minimum wage as a direct cash payment and do not rely on a tip credit. The court rejected the Ninth Circuit's conclusion that the FLSA's "silence" about the status of employers not using the tip credit authorized DOL to issue its regulations.⁸

On December 5, 2017, DOL published a Notice of Proposed Rulemaking in the Federal Register seeking comments on a proposal to rescind some of the more controversial portions of the 2011 amendments.⁹ Specifically, DOL proposed to eliminate the application of the FLSA's tip regulations to employers who do not rely on the tip credit and instead pay their employees a direct cash payment that is greater than or equal to the FLSA minimum wage. If enacted, this change would permit employers, for purposes of the FLSA, to implement tip pools that include employees who do not "customarily and regularly" receive tips. It would also leave the ownership of tips, as between employer and employee, as a matter of contract or state law as employers could retain the tips received by employees. This would essentially eliminate the FLSA regulations' distinction between tips (left to the customer's discretion) and service charges (amounts the employer requires customers to pay), which may already be retained by the employer. DOL also announced that, pending the amendment, its Wage and Hour Division would no longer enforce the 2011 tip regulations against employers who do not utilize a tip credit to meet their minimum wage obligation. Employers should note that even if the FLSA tip regulations are amended, state or local law may continue to require that tips be considered the property of the employee and restrict the usage of tip pools.

On the one hand, DOL's proposed amendment to the FLSA tip regulations could provide relief to employers such as restaurants that employ a tipped workforce as the tipped minimum wage comes under fire. Such employers could retain the tips received by employees, or a portion of those tips, as a way to mitigate (without increasing prices) the increased labor costs they would experience from paying the full minimum wage. On the other hand, the amendment could have the unintended effect of heightening income inequality as tipped employees of lower-end establishments, who presumably have less bargaining power than employees of more luxurious establishments, lose their tips and tipped employees of higher-end establishments are potentially able to keep some or all of their tips.



Jack Blum is an associate in the Employment Law and Commercial Litigation practices at the law firm of Paley Rothman in Bethesda, Maryland. Mr. Blum represents employers in claims involving allegations of employment discrimination, agency charges, wage and hour issues, non-compete and non-solicitation covenants, trade secrets, and the interpretation of employment agreements. In the area of commercial litigation, Mr. Blum represents a wide range of clients in cases involving shareholder and partnership disputes, business torts, breaches of contract, real estate, and complex trust and estate issues.

Martha is a third-year student at Howard University School of Law. She is a 2012 graduate of Wake Forest University and is interested in employment law and commercial litigation.

Endnotes:

¹State Minimum Wages, National Conference of State Legislatures, available at, <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-char.aspx#Table>.

²DOL Wage and Hour Division Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA), available at, <https://www.dol.gov/whd/regs/compliance/whdfs15.htm>

³See Alaska Stat. §23.10.065(a); Cal. Lab. Code §351; Mont. Code Ann. §§39-3-402, 39-2-404, Mont. Admin. R. 24.16.1508(1); Nev. Rev. Stat. §608.160(1)(b); Or. Rev. Stat. §653.035; Rev. Code Wash. 49.46.020, Wash. Admin. Code 296-126-022.

⁴See Minn. Stat. Ann. §177.24, subd. 1, 2; 2014 Minn. Sess. Law Serv. Ch. 166; Haw. Rev. Stat. Ann. §387-2; and 12 NY ADC 146-1.3 (Dec. 4, 2015)

⁵29 C.F.R. 531.52.

⁶29 C.F.R. 531.54.

⁷*Oregon Restaurant and Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016).

⁸*Marlow v. New Food Guy, Inc.*, 861 F.3d 1157 (10th Cir. 2017)

⁹Wage and Hour Division, Department of Labor; Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57395 (Dec. 5, 2017).

Labor and Employment Law Section Governing Board

CHAIR

Kathryn M. Knight
Stone Pigman Walther Wittmann
LLC
546 Carondelet St.
New Orleans, LA 70130
(504) 593-0915
kknight@stonepigman.com

VICE CHAIR

Whitney Sedwick Meister
Best Western Hotels & Resorts
6201 N. 24th Parkway
Phoenix, AZ 85016
(602) 957-5758
whitney.meister@bestwestern.com

DEPUTY CHAIR

Donna Currault
Gordon, Arata, McCollam,
Duplantis & Eagan, LLC
201 St. Charles Ave., 40th Floor
New Orleans, LA 70170
(504) 582-1111
dcurrault@gamb.law

SECRETARY

Caitlin Andersen
Seaton Peters & Revnew PA
7300 Metro Blvd., Ste. 500
Minneapolis, MS 55439
(952) 896-1700
candersen@seatonlaw.com

TREASURER

Catherine Cano
Jackson Lewis P.C.
10050 Regency Circle, Ste. 400
Omaha, NE 68114
(402) 391-1991
catherine.cano@jacksonlewis.com

IMMEDIATE PAST CHAIR

Corie Anderson
Seaton Peters & Revnew PA
7300 Metro Blvd., Ste. 500
Minneapolis, MS 55439
(952) 921-4615
cjanderson@seatonlaw.com

EDITOR, THE LABOURING OAR

Caitlin Andersen
Seaton Peters & Revnew PA
7300 Metro Blvd., Ste. 500
Minneapolis, MS 55439
(952) 896-1700
candersen@seatonlaw.com

STANDING COMMITTEES:

(All Chairs/Co-Chairs are mem-
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Standing Committee on Membership and Chapter Relations:

Co-Chairs:
Donna Currault
Gordon, Arata, McCollam,
Duplantis & Eagan, LLC
201 St. Charles Ave., 40th Floor
New Orleans, LA 70170
(504) 582-1111
dcurrault@gamb.law

Craig Cowart
Jackson Lewis P.C.
999 Shady Grove Road, Ste. 110
Memphis, TN 38120
(901) 462-2618
craig.cowart@jacksonlewis.com

Standing Committee on Publications and Public Relations:

Co-Chairs:
Caitlin Andersen
Seaton Peters & Revnew PA
7300 Metro Blvd., Ste. 500
Minneapolis, MS 55439
(952) 896-1700
candersen@seatonlaw.com

Jack Blum
Paley Rothman
4800 Hampden Ln., Sixth Floor
Bethesda, MD 20814
(301) 968-3415
jblum@paleyrothman.com

Standing Committee on Programming and Continuing Legal Education:

Co-Chairs:
Whitney Sedwick Meister
Best Western Hotels & Resorts
6201 N. 24th Pkwy.
Phoenix, AZ 85016
(602) 957-5758
whitney.meister@bestwestern.com

Danielle Brewer Jones
The Brewer Law Office, PLLC
1891 Pass Rd.
Biloxi, MS 39531
(228) 388-0053
dbrewer@brewerlegalservices.com

Phil Kitzer
Teske Micko Katz Kitzer &
Rochel, PLLP
222 S. Ninth St., Ste. 4050
Minneapolis, MN 55402
(612) 746-1558
kitzer@teskemitzo.com

Standing Committee on Finance and Expenditures:

Co-Chairs:
Catherine Cano
Jackson Lewis P.C.
10050 Regency Circle, Ste. 400
Omaha, NE 68114
(402) 391-1991
catherine.cano@jacksonlewis.com

Karleen Green
Phelps Dunbar LLP
City Plaza
400 Convention St., Ste. 1100
P.O. Box 4412
Baton Rouge, LA 70821
(225) 346-0285
karleen.green@phelps.com

Standing Committee on Executive Agency Outreach:

Jim Hammerschmidt
Paley Rothman
4800 Hampden Ln., Sixth Floor
Bethesda, MD 20814
(301) 951-9338
jrh@paleyrothman.com

Standing Committee on Legislation and Congressional Relations:

Co-Chairs:
Joel P. Schroeder
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 S. Seventh St.
Minneapolis, MN 55402
(612) 766-8860
joel.schroeder@faegrebdb.com

T.J. McGrath
Congressional Budget Office
Ford House Office Building
Fourth Floor
441 D Street, S.W.
Washington, D.C. 20515
tj.mcgrath@cbo.gov

CHAPTER REPRESENTATIVES:

(All members of the Governing
Board and Standing Committee
on Membership and Chapter
Relations.)

Puerto Rico Chapter:
Jose Gonzalez-Nogueras
Pizarro & Gonzalez
650 Plaza, Ste. 502
San Juan, PR 00924
jgonzalez@pglegal.com

Rhode Island Chapter:
Timothy Bliss
Vetter & White
CenterPlace
50 Park Row West, Ste. 109
Providence, RI 02903
(401) 421-3060
tbliss@vetterandwhite.com

Maryland Chapter:
Jack Blum
Paley Rothman
4800 Hampden Ln., Sixth Floor
Bethesda, MD 20814
(301) 968-3415
jblum@paleyrothman.com

Georgia Chapter:
Joyce Kitchens
Kitchens New Cleghorn LLC
2973 Hardman Ct.
Atlanta, GA 30305
(678) 244-2880
Jjoyce.kitchens@knclawfirm.com

San Antonio Chapter:
Rebecca Magee
U.S. District Court for the
Western District of Texas
655 E. Cesar Chavez Blvd.
San Antonio, TX 78206
Rebecca_magee@txwd.uscourts.gov



The **Labouring Oar**

Labor and Employment Section
Federal Bar Association
1220 North Fillmore Street
Suite 444
Arlington, VA 22201