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SO, HOW ARE REMOTE MEDIATIONS AND ARBITRATIONS WORKING OUT?

BY KENNETH A. REICH

As the pandemic hit the country with full force last spring, there was a lot of discussion among dispute resolution (DR) professionals and members of the bar about the pros and cons of remote arbitration and mediation as a necessary option with the reality of the courts being closed for some indefinite period. Some lawyer commentators expressed concerns about the lack of personal contact, inability to assess witness credibility/body language and the loss of opportunities for informal or casual interactions between attorneys and the mediator, and even between the parties themselves. But mediators and arbitrators had no other choice than to roll up their sleeves and begin making necessary adjustments to their practices for this new reality. So, how have things worked out 18 months into this new routine?

The DR community has had plenty of experience with conducting remote arbitrations and mediations since the courts essentially closed to in-person proceedings last year. Although the author is unaware of any systematic study of the results of remote DR and of the reactions of the participants — mediators, arbitrators, attorneys and parties — to this new world, he was fortunate to have had the opportunity to moderate and serve as a panelist on a number of interactive panel discussions of this topic co-hosted by the Massachusetts Bar Association's DR Section and individual subject matter area sections during the first half of 2021. In all, there were six such panel discussions featuring mediators/arbitrators and lawyers from the Civil Litigation Section, the Real Estate Section, the Labor & Employment Section, the Civil Rights & Social Justice Section, the Family Law Section and the Complex Commercial Litigation Section. Needless to say, those panel discussions were also held remotely. What follows are my own personal observations based on these panel discussions. These views do not reflect the official views of the DR Section or of any of the other sections that participated in this series of sessions.

1. On the whole, both mediators/arbitrators and lawyers thought that remote DR worked reasonably well, in some cases much better than expected, although it was not without its bumps, technological and otherwise.
2. The perspective of most mediators and arbitrators was that their ability to conduct a mediation or arbitration remotely was not substantively different than conducting one in person, with some notable and surprising exceptions, discussed below, and that the process had some distinct advantages.
3. One DR professional thought that mediations were shorter because of the competing demands from being at home rather than in a neutral setting where the pressure was to stay longer. Other DR professionals commented on these other advantages of remote DR:
   - avoiding travel costs
   - avoiding the delays of travel, even travel within the Boston metropolitan area, with its horrific traffic
   - ease of scheduling the sessions
   - ability to have all key decision-makers involved directly in the mediation when inability to travel is not an excuse
   - ability to achieve some "personal touch" by shuttling participants in and out of private breakout rooms in ways that are easier than when parties are stuck in their individual rooms in an in-person mediation
   - ability to establish rapport prior to the opening session of a mediation or arbitration by "meeting" in advance with the parties and their counsel to plan the session. This is different than in-person arbitrations where the parties, their counsel and the arbitrator may not actually meet until the day of the arbitration.
   - in a complex business case, particularly an international case, there is the opportunity to involve more parties where travel is not a factor and the cost savings from not traveling can be used to spend more time on the mediation.
4. Many mediators found that they were able to communicate adequately with the parties and clients and probably obtained a better "read" because, unlike in an in-person mediation during the pandemic, no one was wearing masks.

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5. Some of the disadvantages of remote DR according to mediators/arbitrators: the client or lawyer is always on screen, and if you grimace or grin, the neutral and other parties will see your expression. And even if clients are warned not to record the session or have someone in the background assisting them, the DR professional may not detect if this is happening.
6. Specifically with respect to arbitration, an arbitrator commented on these concerns:
   - difficulty of managing exhibits
   - harder to assess the credibility of witnesses
   - distracted parties and witnesses who may be multitasking
   - with an international case, difficulty of dealing with different time zones
7. Lawyer panelists had mixed feelings about remote mediation. Some commented that mediations were far easier remotely than in person. However, many lawyers missed the opportunities for informal contacts and subtle communications with the mediator and other lawyers in in-person sessions that occur on the way to the restroom or to get a snack. Others observed that participants were more likely to take a more rigid position when they were not face to face with the other side. One lawyer observed that it appeared to take longer for parties in a remote mediation to "get started," perhaps because they didn't feel they had as much "skin in the game," not having had to travel to the mediation and being able to participate from home. Another lawyer commented that remote mediation allowed the participants to hide behind the screen and that it was harder to be persuasive than

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Remote Mediations
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in person and harder to establish rapport with the other parties and lawyers.

8. Other concerns expressed by the lawyers are the extra time needed to prep their clients, including advising on where they should set up at home to avoid unnecessary distractions — from spouses and kids, to pets, to inappropriate pictures on the wall — checking the adequacy of lighting, ensuring the reliability of technology and having practice sessions with the clients on how to see and be seen on camera. Also, lawyers needed to make a plan with their clients of how to communicate privately during the session — by cellphone, text, taking a break to talk, etc. All of these new demands added time and worry to the normal process of preparing clients.
9. Lawyers also commented on how much more burdensome it was to handle exhibits remotely, in terms of the need to have them delivered to multiple parties further in advance of the proceeding than usual and the need for careful planning and organization when parties and counsel were not all in the same place.
10. Finally, both arbitrators/mediators and lawyers commented that it is necessary to adjust our expectations to realize that electronic screwups go with the territory of remote proceedings and likely cannot be avoided, to the terror of all of us perfectionists.

CONCLUSION

In general, the mediators/arbitrators and lawyers gave a qualified thumbs-up to remote proceedings, although it is fair to say that most would prefer to return to in-person sessions. However, so long as the pandemic and its variants persist, and there are severe restrictions on travel and on meeting indoors without participants being vaccinated and masked, remote mediation and arbitration are likely to be the norm. And as clients and insurance adjusters get used to avoiding the hassles of travel, they may demand remote mediation and arbitration even when the pandemic ends. It is possible that future DR proceedings in the wake of the pandemic might be conducted on a hybrid basis, although it will take some time before DR professionals are comfortable in resuming in-person sessions, for personal and liability reasons.

*I wish to acknowledge especially the efforts of my fellow DR Section and DR Council colleague, attorney/mediator Maureen Reilly, who shouldered an equal load in organizing and moderating these MBA sessions. I also wish to acknowledge the hard work and valuable contributions of the mediators, arbitrators, lawyers, and current and retired judges who served on the panels. Last, but not least, thank you to Serena Dassatti and the other MBA staff who so seamlessly transitioned to holding CLEs by Zoom and who so ably assisted us in advertising, organizing and running these sessions without a technological glitch, including holding our feet to the fire when it was warranted, which was often. ■

DELVING INSIDE THE SILVER LINING FOR DISPUTE RESOLUTION ALTERNATIVES

BY MICHAEL ZEYTOONIAN

As we step out from the shadows imposed upon us by the COVID pandemic, it's an understatement to say that COVID changed everything. Its effects were horrible and devastating on many levels, from death and serious illness to lost opportunities in many aspects of our lives, and for people of all ages and backgrounds. We've shared in the sadness, pain, suffering, sorrows and losses of thousands.

But the silver lining is that the pandemic has forced us to recalibrate many aspects of our lives. It has opened a think tank environment within which to take a hard look at the way we did things before and how we want to live going forward. Rather than quickly reverting to "life before COVID," it would be good to think things over carefully first before just making a knee-jerk return to status quo ante.

This pandemic has given us profound messages and wake-up calls, and a golden opportunity to adjust, fix or reshape how we do things going forward. Call it a correction, do-over, divine intervention or turning of the soil. In each of those lies a chance for a "new normal" that is better than normal: extraordinary. President John F. Kennedy once noted that the Chinese word for crisis was composed of the symbols of danger and opportunity. We've seen the danger; it's time to let the opportunities percolate.

I am fortunate to serve an organization with a mission of eradicating various kinds of discrimination. I work as a problem solver and resolve disputes that arise out of the workplace, housing issues or places of public accommodation. In all three settings, this pandemic has given the parties in disputes, their lawyers and me a clear opportunity: "Rethink things."

Perhaps the most profound reset is in the workplace, and with that, how we interrelate with each other. As we emerge from COVID, people are being called to physically come back to the workplaces. But working remotely has already shown us that companies and employees can be equally productive — perhaps more so — working from home as they were in their offices. Remote working allows people to better manage their work-life balance and shape approaches that can reduce stress and allow them to enjoy quality time with families and friends. Through this transition, many service-oriented companies haven't lost a beat, and have begun to see the savings in reduced brick and mortar costs, improved morale and decreased stress in their employees. Employees and employers who have a shared interest in avoiding the expenses and time of travel, lodging and parking, and increasing productivity, have both reaped benefits.

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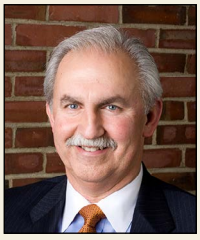

As we return, we have a chance to consider what would be the most productive way forward. Most of us in the services sector will never go back to being in the office five days a week. That cow has left the barn. The creative challenge we are called to figure out is what hybrid arrangements are best for all involved.

In my field of law and subfield of dispute resolution (DR), we are looking at hybrid models as well. Those that dispute resolution serves — the public good, the parties to disputes, the lawyers who represent them, the courts, administrative agencies and DR

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professionals — are all working at what will work best and satisfy most interests. There has been overwhelming support for continuing to do mediations and conciliations remotely using effective video tools like Zoom. The advantages expressed have been largely pragmatic: saving time; avoiding costs of travel, lodging, meals and parking, and lost man hours that come with that; and reducing stress. One challenge is to transition without losing the quality, efficiency and personal touch of face-to-face meetings and negotiating in the same physical space.

Beyond these benefits, there are also other opportunities here that we don't want to overlook. How can we use these technological tools and vehicles to improve on what we have been doing? What opportunities and creative techniques are presented to us by working remotely with full sound and video access? What negative aspects are now avoided by not being physically together?

For instance, the traditional model for mediation is one session — a half day or a full day, hopefully resulting in a resolution or a settlement. Remote video sessions allow us to break the mediation down into more than one session, each addressing different aspects of the negotiation and providing ample time and opportunity for the parties (and lawyers) to fully address things that need more than one session. Different components of dispute resolution require different environments, mindsets and approaches. It is difficult if not impossible to make that shift in the same mediation session and setting. Since people don't have to travel, park, and spend overnights away again for a second or third session, certain types of cases would benefit by breaking the mediation down into more than one session. There may be a need for an emotion-driven session offered for people to say their piece and "have their day in court." This is the opportunity to satisfy what mediator and educator Bernard Mayer calls their "emotional due process" needs, or what "White Space" proponent Juliet Funt would refer to as a chance to "drain the well." It's not optimal to then expect those same people to quickly shift into a pragmatic, logical problem-solving mode and discussion. There is a need for these emotion-driven things to simmer for a while before the parties are mentally and emotionally ready for the next step.

Taking a page from the collaborative law approach and playbook, there's great value to dedicating different sessions to each agenda item: e.g., identifying the needs and interests of the parties — and doing this together so each side can hear and acknowledge the interests of the other side and often recognize that there are shared interests. But after identifying these, time is often needed to think about how to best satisfy those interests. It's easy for DR professionals — neutrals — to make that emotional and mental shift because we are not involved personally. But it is not easy or efficient to expect the parties and maybe even the lawyers to be able to make an immediate transition from active and empathetic listening to critical, analytical and creative thinking in the next five to 10 minutes.

A remote, video-based model can serve these needs to schedule the mediation over more than one session and spread out as needed over time, whereas parties would not be so willing to make three trips to Boston to hold the mediation in person and pay their lawyers for the same three trips and travel time and expenses. The one-day, one-shot session puts pragmatism and cost, not to mention some old-school thinking, above efficiency and quality.

In sexual harassment cases and some discrimination cases, the person bringing the claim does not usually want to be in the same physical place as the alleged perpetrator. In family disputes, parties may be able to process and assess better from the comfort and security of their own homes than in a mediation conference room.

In cases involving insurance coverage, some parties like to have their insurance adjusters — who are often out of state — "sitting in" on the virtual mediation, something far more likely to be possible in shorter and/or remotely held mediations than the one-day in-person model. Adjusters also have the benefits of seeing the parties and being able to come in and out of the mediation as needed rather than being on the other end of telephone calls when the insured party calls to get authority to increase a counteroffer.

What about physical space? In the offices of busy law firms and alternative dispute resolution providers, and even in the courts, there are often many functions that require the use of conference rooms. A mediation will require the use of at least two and sometimes three conference rooms. Conference rooms are often also needed for a variety of reasons: staff meetings, public hearings, motion hearings, presentations, client meetings, and various types of conferences. Using technology such as Zoom for mediations done remotely alleviates the demand for conference rooms and other space.

Similar thought processes are going on with every employer, focused on making creative, thoughtful and productive adjustments that benefit not only the companies, but the employees that work with them and the clients or customers being served.

COVID offers a silver lining of new opportunities, if we are wise enough, agile enough and courageous enough to make the transformations, some that were already needed long before the health crisis arose. Beyond the logistical adjustment, we are given the chance to rethink how we can reform our respective professions, how we will work and live our lives in a more extraordinary, centered way, and how to shape a more organic relationship between the two. ■

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To inquire about submitting an article to *SECTION REVIEW*, contact Kelsey Sadoff (KSadoff@MassBar.org).

TAXATION LAW

THE PANDEMIC, WAGES AND DEFERRED COMPENSATION: A SURVEY OF APPLICABLE LAW

BY EVELYN A. HARALAMPU

BACKGROUND

The COVID-19 pandemic significantly disrupted the American workplace. On March 13, 2020, President Donald Trump declared a national emergency releasing Federal Emergency Management Authority resources to the states, which in turn took initiatives to manage the local spread of the disease. "Non-essential" workplaces, schools, public transportation, restaurants, hotels, entertainment and other venues were shut down across the country as a result. During the initial phase of the pandemic, the U.S. unemployment rate spiked to 15.9 million, representing a rate of 14.7%, up from 3.6% just prior to the shutdown.[1] Those who could work remotely during the pandemic did so, keeping many businesses afloat, and ushering in a paradigm shift in employees' relationship to the workplace and management.

With the modulating effects of widespread vaccination, the viral spread has decreased substantially, and unemployment rates have been coming down, but are still not at pre-pandemic levels.[2] Those returning to work are not necessarily going back to their pre-pandemic positions, and others have exited the workplace altogether, many to retire or address child care, which was significantly disrupted by the pandemic.[3] Employers eager to hire employees are now competing to attract new employees from a smaller available U.S. pool, and are offering enhanced compensation packages and other benefits to do so.

ATTRACTING EMPLOYEES WITH MORE INNOVATIVE COMPENSATION PACKAGES

In response to these challenges, employers in competitive industries are raising base wages and offering signing bonuses and other enhancements. Nonprofit organizations aiming to attract and retain key employees typically offer enhanced deferred compensation packages as well.

For businesses with growth potential or more limited cash flow, compensation tied to the equity growth of the employer and other various types of deferred compensation are part of the standard toolkit for giving employees a stake in the growth of a business, and a financial incentive toward meeting future business targets. For example, awards of equity interests, such as stock options, profits interests, phantom equity, stock appreciation rights and restricted stock, are types of deferred compensation that tie compensation to the future value of the employer.

Other types of deferred compensation include nonqualified deferred compensation plans designed to supplement standard retirement benefits, incentive pay plans designed around financial goals of the employer, deferred cash or non-cash compensation, and deferred compensation payable on a change in control of the employer. These forms of compensation, which are a powerful tool for attracting and retaining top workers, are not covered under the Wage Act.

DEFERRED COMPENSATION: WHAT LAWS APPLY?

State wage laws generally apply to employee base pay, vacation and some definitely determinable benefits, and due and payable commissions. Federal law, on the other hand, regulates deferred compensation, benefits, and executive compensation packages, and incorporates a complex array of requirements related to the taxation of deferred compensation.

A short review of the law related to compensation controlled under the Massachusetts Wage Act in comparison to that subject to federal laws illustrates the point.

MEANING OF "WAGES" UNDER MASSACHUSETTS WAGE ACT

The Massachusetts Wage Act[4] regulates the prompt payment of wages to protect employees who have provided services. Once the employee has performed the services that give rise to wages, Massachusetts law specifically prohibits delaying their payment beyond certain statutory parameters.

Massachusetts courts have discussed the deadlines for paying accrued wages in two illustrative cases: *Stanton v. Lighthouse Financial Services, Inc*,[5] and *Parker v. EnerNOC, Inc*.[6]

In *Stanton v. Lighthouse Financial Services, Inc.,* the parties agreed to the rate of the employee's base salary, then decided to defer its payment until the startup business had enough cash to pay the employee. Although the employee had initially agreed to the "deferral" of the payment of his salary, after working for more than a year, without pay, he changed his mind and sued. The U.S. District Court in Massachusetts held that withholding the payment of an employee's base salary for longer than what the Massachusetts Wage Act allows, and after the employee has already provided the services, violates the timing requirement for paying wages under the law. The *Stanton* opinion agreed with the view in *Dobin v. CIOview Corp.*[7] that base salaries are wages protected by the Massachusetts Wage Act, and that contracts to defer base salary are void as a matter of law and contrary to the Wage Act. Even though the employee agreed in writing to defer the payment of all of his base wages, the court voided the contract and found the employer in violation of the Wage Act.

In *Parker v. EnerNOC, Inc.*,[8] the employer had fired the employee for complaining about wage violations, then refused to pay her the commissions for sales that she had made because she was not employed at EnerNOC when the commission payment was due, contrary to the company policy. The employer had argued that the employee's right to commissions on her sales ended upon her termination of employment, and for that reason, the commissions were not "due and payable," and, therefore, not wages protected by the state law. In rejecting this argument and holding for the employee, the Supreme Judicial Court (SJC) found the commissions in question due and payable wages under the Massachusetts Wage Act.

The SJC noted that the law establishes commissions as wages protected under the Massachusetts Wage Act only if they are both "definitely determinable" and "due and payable."[9] It noted that the employer's retaliation in firing the employee for making a wage

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complaint itself violates the Wage Act,[10] and, further, was the sole reason for the employee's failure to meet the employment condition for the payment of commissions. The court found the employer's conditioning payment of commissions on the employee's continued employment void under these circumstances, and treated the commissions as having accrued.

The SJC held that, despite the existence of a written sales commission plan with an integration clause, the conduct of the parties supported a jury finding that there was a contractual obligation to pay commissions, sufficient to support a Wage Act award of damages. Further, a commission that is not "due and payable" at the time of an employee's termination may nevertheless constitute "lost wages" and be trebled under the Wage Act if the reason that the commission was not due was the employer's unlawful termination of the employee's employment to prevent her from receiving that commission.

The holdings in these cases require the payment of base wages and definitely determinable and due and payable commissions by the deadlines in the Wage Act because in each case, the employee had met the conditions of payment of protected wages by rendering service. The employee's receipt of accrued base pay, certain commissions, and vacation and holiday pay cannot be forfeited or delayed under the Wage Act, and contracts and other devices designed to avoid the payment of such compensation are void as a matter of law.[11]

There are specific types of compensation not covered by the Massachusetts Wage Act. Case law specifically excludes from Wage Act protections conditional compensation such as deferred compensation subject to forfeiture, discretionary bonuses, severance and unused sick time.[12] These types of compensation are not for services already performed[13] and are not necessarily arithmetically determinable.[14]

The Massachusetts appellate courts have held that the act does not cover contributions to tax-deferred compensation plans or severance pay.[15] In addition, M.G.L. c. 154, § 8, specifically excludes from coverage under the Wage Act certain types of deductions from compensation made by an employer at an employee's request, including deductions of amounts used to purchase company stock pursuant to an employee stock purchase plan, or premiums on insurance. The Massachusetts Wage Act does not cover deferred compensation arrangements under which the conditions for payment, such as vesting, have not been met.[16] Rather, deferred compensation packages for executives and key employees are governed exclusively under federal law.

OVERVIEW OF FEDERAL LAW AND DEFERRED COMPENSATION

Wages, protected by the Massachusetts Wage Act and paid late in violation of the act, are not the same as "deferred compensation," as regulated by federal law. "Deferred compensation," as that term typically describes executive compensation or special benefits to other employees, does not refer to base salary, holiday and vacation pay, or accrued commissions that are "definitely determinable" and "due and payable." Rather, it is a term of art referring to cash or non-cash compensation paid on the meeting of future contingencies, such as financial objectives or other conditions that have not yet occurred, or that may never occur. Until the stated conditions are met, such deferred compensation is typically forfeitable, not "earned" or taxed, and is not a wage under state law.

Deferred compensation is typically tailored to the quantitative and qualitative goals of the employer. For example, a company doing research and development might tie the award of nonqualified stock options to the achievement of research and development goals, such as a new, patentable technology. Alternatively, a company might choose to provide incentive compensation to key employees if certain companywide financial targets are met.

Such compensation is outside the purview of the Massachusetts Wage Act, and is taxed under the Internal Revenue Code of 1986, as amended ("Code"), and can be subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA). ERISA is a federal tax and labor law regulating retirement plans, certain types of deferred compensation, medical plans, and other welfare benefits that employers provide their employees.[17] It encompasses federal tax code sections relating to deferred compensation, retirement and health benefits, and preempts state law that relates to any employee benefit plan.[18]

ERISA "TOP-HAT" PLANS

Deferred compensation designed to motivate key employees under an ongoing arrangement is a special type of ERISA plan, a so-called "top-hat" plan. "Top-hat" plans may pertain only to key management or the highly compensated, and are unfunded or insured, and are exempt from many substantive requirements of ERISA.[19] They are ongoing administrative arrangements of the employer that are not subject to state wage laws because of ERISA preemption.[20] Consequently, benefits under top-hat plans are permitted to be deferred, forfeitable and not necessarily paid in cash, without violating any state laws.

Deferred compensation awarded under top-hat plans is taxed under an array of federal tax provisions. To avoid income taxation before the executive is in receipt of the deferred compensation, the plan of deferred compensation must be carefully designed. For example, deferred compensation under a "top-hat" plan is typically subject to forfeiture unless and until certain objectives are met, and, if they are met, the compensation is payable only on specified events. To complicate matters, the tax rules pertaining to executives of for-profit entities are different from those pertaining to executives of nonprofits, and must be considered when designing executive compensation for a charity.[21] In addition, a deferred compensation arrangement should be designed to avoid premature income taxation and the penalties under Section 409A of the Code.[22]

STOCK OPTIONS

Another type of deferred compensation is an offer to buy stock of a company at a set price. Stock options can be designed as incentive stock options under Code Section 422 ("qualified options"), or nonqualified options, taxed under Section 83. Because stock options are awarded on a conditional basis, typically upon meeting future goals, they are not subject to state wage laws.

Non-cash property that is awarded as part of a compensation package and subject to a substantial risk of forfeiture is governed under Section 83 of the Code.[23] Section 83 controls the transfer of property, such as real estate, nonqualified stock options, profits interests, or insurance contracts, in exchange for service. Property paid for services is generally taxable when it is transferred without any substantial risk of forfeiture; however, it can be forfeited prior to that time.[24]

FEDERAL TAXATION OF PAYROLL ARRANGEMENTS AND OTHER DEFERRED COMPENSATION

The federal tax law makes a distinction between wages that have been earned and are currently taxable, and compensation designed

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to reward a future event, or provide a welfare benefit, and defer taxation. Some programs are designed to provide welfare benefits or deferred compensation under ERISA. Other benefits are purely products of the Code, such as cafeteria plans under Section 125,[25] fringe benefits under Section 132, health reimbursement accounts under Section 105(h), and tax-sheltered annuities under Section 403(b) of the Code.[26] Such tax-deferred arrangements typically provide benefits to employees in exchange for payroll reductions that are not subject to withholding taxes, and are specifically excluded from the Massachusetts Wage Act, as discussed above.[27]

ATTRACTING AND RETAINING EMPLOYEES

As the pandemic winds down, employers will need to take a fresh good look at their remaining workforce and its changed expectations. The pandemic put a new emphasis on health, family and time, and diminished the size of the available workforce. It motivated many workers to take a hard look at their current employment situations and recalibrate their personal values and goals. Changed attitudes will be reflected in the workplace, and, in many cases, employers will need to rethink compensation to attract and retain employees in a competitive market.

Aside from base salary, there are a number of compensation designs that can attract and retain both top-level and rank-and-file employees. These arrangements encompass both important employee benefits, such as health and disability insurance, and retirement coverage, which employees have come to expect. In addition, deferred compensation packages can be designed to build stronger workplaces by recognizing and rewarding the attainment of future goals, such as research and development milestones, mentoring and other types of succession planning, expanding business, increasing sales and profits, and motivating the retention of valuable employees. Defining the behaviors to be rewarded, making compensation programs fair and appropriate across a company, and designing tax-efficient incentives must all be considered and balanced when competing for employees from a diminished pool.

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1. Rouen, E.C., "Keep or Cut Workers? How Companies Reacted to the COVID-19 Crisis," Harvard Business School, Working Knowledge. Twenty-eight percent of U.S. public companies sampled, employing 27 million workers, laid off or furloughed staff during March and May of 2020.
2. In May 2021, 9.3 million Americans remained unemployed, a rate of 5.8%. *Id.* In June, the rate was 5.9%, and in August 5.2%. Wall Street Journal, July 3-4, 2021, A1 and Sept. 3, 2021, A3.
3. *The Wall Street Journal* noted, "Despite solid hiring and declining layoffs, the labor market hasn't fully recovered from deep losses suffered in the spring of 2020. As of July [2021], there were 5.7 million fewer jobs in the U.S. than in February 2020, before the pandemic took hold in the U.S. Within that span, the number of people in the labor force — meaning they were working or seeking work — fell by 3.1 million." Sept. 3, 2021, A3.
4. M.G.L. c. 149 s. 148, et seq.
5. 621 F. Supp. 2d 5 (2009).
6. 484 Mass. 128 (2020).
7. No. 01-00108, 2003, WL 22454602 (Mass. Super. Ct. Oct. 29, 2003).
8. 484 Mass. 128 (Supreme Judicial Court, 2020).
9. M.G.L. c. 149, § 148, fourth par. requires that commissions are wages when two conditions are met: (1) the amount of the commission "has been definitely determined"; and (2) the commission "has become due and payable." In contrast, other forms of wages, once earned, are paid on a regular schedule. M.G.L. c. 149, § 148, first par. *See, also, Wiedmann v. Bradford Group, Inc.,* 444 Mass. 698, 708 (2005), which held that commissions are "definitely determined" when they become "arithmetically determinable." In *Okerman v. VA Software Corp.,* 69 Mass. App. Ct. 771, 776-779 (2007), the Appeals Court held that commissions earned over and above a base salary were covered by the act; the court declined to limit the reach of the act, where the only limitation contained in the act's language was that commissions be "definitely determined" and "due and payable."
10. Lost wages as a result of retaliation against an employee trigger treble damages under the Wage Act. M.G.L. c. 149 s. 148A and s. 150.
11. M.G.L. c. 149 § 148.
12. *Weems v. Citigroup Inc.,* 453 Mass. 147, 151 (2009). The court stated, "The act expressly states that holiday and vacation pay due under an agreement, as well as commissions that are definitely determined and due and payable to the employee, are wages within the meaning of the act, but it does not otherwise expressly define the term 'wages.' *Id.* at [M.G.L c. 149] § 148. Our appellate courts have held that the act does not cover contributions to deferred compensation plans or severance pay. *See respectively Boston Police*, [435 Mass. 718] at 719-721; *Prozinski v. Northeast Real Estate Servs., LLC*, 59 Mass. App. Ct. 599, 605 (2003). With respect to the payment of commissions, this court held in *Wiedmann v. Bradford Group, Inc.,* 444 Mass 698, 708 (2005), that the statutory requirement that commissions be paid when they are 'definitely determined' means when they become 'arithmetically determinable.' In *Okerman v. VA Software Corp.,* 69 Mass App Ct. 771, 776-779 (2007), the Appeals Court held that commissions earned over and above a base salary were covered by the act; the court declined to limit the reach of the act, where the only limitation contained in the act's language was that commissions be 'definitely determined' and 'due and payable.'" *Cf. Tse-Kit Mui v. Massachusetts Port Authority,* 478 Mass.710,713 (2018) (unused sick time is not wages protected by the Massachusetts Wage Act).
13. *Awuah v. Coverall N.A.*, 460 Mass 484, 492 (the employer could not wait for the customer's payment before paying wages to the employee who had already performed the services and thus "earned" the wages protected by the Wage Act).
14. *Levesque v. Schroder Inv. Mgt. N. Am., Inc.*, 368 F. Supp. 3d 302 (D. Mass. 2019) (an incentive compensation plan that paid a quantitative bonus based on sales, where the employee made the sales, and the bonus was definitely determinable and due and payable, is covered by the Wage Act even if the employee is terminated before receiving the bonus. However, deferred equity compensation pay is not protected by the Wage Act where the employee had not met the vesting requirement for payment).
15. *See* note 9, citing *Boston Police Patrolmen's Ass'n. v. Boston,* 435 Mass. 718 (2002) at 719-721 (tax-deferred salary reductions under Section 457(b) of the Internal Revenue Code of 1986, as amended, are not wages protected by the Wage Act); *but see Pacheo v. H.N. Gorin, Inc.* (Mass. Sup. Ct. No 09-1946, 2011), where the court found that the employer's failure to deposit an employee's payroll reduction into the employee's individual retirement account (IRA) under a salary reduction simplified employee pension plan (SARSEP) within six days constituted a Wage Act violation because the IRA under a SARSEP is the employee's property). *Prozinski v. Northeast Real Estate Servs., LLC*, 59 Mass. App. Ct. 599, 605 (severance is not a wage protected under the law) (2003).
16. *See* footnote 14.
17. ERISA governs "employee benefit plans," which are defined either as an employee pension plan under Section 3(2) or an employee welfare plan under Section 3(3). Employee welfare plans generally provide employees non-retirement benefits, such as health care; benefits related to disability, accident, death or unemployment; and certain other benefits described in section 3(1)(A) of the Labor-Management Relations Act of 1947. 29 CFR Section 2510.3-1. Stock options, however, are outside the purview of ERISA and are governed by the Code.
18. ERISA Section 514, 29 U.S.C. Section 1144, supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." By preempting state laws relating to employee benefit plans, ERISA makes uniform throughout the country the law governing the operation of employee benefit plans. State law continues, however, to control insurance, banking and securities laws that are not preempted by ERISA.
19. ERISA sections 201(2), 301(a)(3), and 401(a)(1).
20. The U.S. Supreme Court first interpreted the ERISA definition of an employee benefit plan in Fort *Halifax Packing v. Coyne,* 482 U.S. 1 (1987). In that case, the Court examined a Maine statute requiring severance, payable in a lump sum, to any employee affected by a plant closure. It found that the Maine statute neither established, nor required an employer to maintain, a set of administrative practices, but required only a one-time, lump-sum severance payment triggered by a single event. Because a one-time severance payment required no ongoing administrative scheme, it was held not to be an employee benefit plan under ERISA. *Id.* at 8-15 (1987). Rather, an ERISA plan must involve either deferred compensation or the provision of certain types of welfare benefits to employees under an ongoing administrative scheme of an employer.

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YOUNG LAWYERS DIVISION

NOT ALL NEW LAWYERS ARE YOUNG

BY SUSANNE GILLIAM

According to my mother, I showed a tendency to march to my own drummer when I was very small. I haven't changed much, which is how I found myself going to law school in my mid-50s. My first career was 20 years as a computer programmer, working on networking and operating systems. My second career began when my husband and I decided to homeschool our children to allow us more time together as a family.

When my children headed to college, it was time to go back to work and I was ready for a new challenge. I had never really thought about being a lawyer, but I saw an ad for a law school and I couldn't shake the thought that it was the perfect next career.

As life expectancy has lengthened, serial careers like mine are becoming more common, and it is worth keeping in the back of your mind as a possibility. While my husband and I carefully saved for our children to go to college, it never occurred to me that I too might want additional higher education.

I selected New England Law | Boston because of their outreach to nontraditional students like me. In my starting class group of well over 300 students, I was 18 years older than the next oldest student. In fact, the vast majority of my classmates were the age of my children. But once we'd found ourselves in the trenches of first-year classes, it really didn't matter at all.

Another choice I made was to become a solo practitioner straight after I passed the bar in 2016. The standard advice is to work for a firm for the first five to seven years while you build expertise, and then become a solo if you are interested. While that is undoubtedly good advice for some people, I couldn't see the point in working for years for someone else and then going out on my own. I felt that by starting as a solo, everything I did would be directed at building my own business.

An additional benefit is that you can focus on the parts of being a lawyer that most closely fit your particular strengths and interests. I particularly like working directly with clients and learning their stories. I know other solos that found they really didn't particularly like the interactions with clients, but they thrived when they needed to write a brief. Some of those people make a good living doing writing for other lawyers who find it unappealing.

There are many other examples, but being a solo straight out of law school has an incredibly steep learning curve. You also lack the ready access to other lawyers you can bounce ideas off of, or get advice just by checking in with a more experienced lawyer.

The downsides of being a "young lawyer" and a solo can be mitigated by making connections with other lawyers. There are bar associations that are focused on a particular type of law, or on a particular geographic area, or specific groups like the Women's Bar Association.

Most bar associations will allow you to attend a meeting or two before you join, so you can determine if it has value for you. I spent about six months after passing the bar visiting as many bar associations as I could.

My experience won't resonate with everyone, but I do have some concrete suggestions. First and foremost, you should be aware that a portion of your bar fees pay for the statewide Lawyers Concerned for Lawyers. Every state has such an organization, and while they are best known for supporting those with substance abuse problems, their offerings go well beyond that to cover all sorts of wellness.

In Massachusetts, the umbrella group is Lawyers Concerned for Lawyers (LCL). They have a subgroup known as the Law Office Management Assistance Program (LOMAP). All services for these organizations are free to lawyers licensed in the state. Through LOMAP, I participate in a monthly support group for solos run by a psychologist that is employed full time by LOMAP. They have other support groups, but they also have an excellent program to help you sort out your technology needs and software needs.

The Massachusetts Bar Association (MBA) is a fabulous resource that I wish I had discovered sooner. While it is fee based, they have all sorts of sections devoted to specific types of law, as well as to specific portions of the profession like the Young Lawyers Division (YLD). I am also licensed in New Hampshire, which has a yearly CLE requirement. The CLE offerings of the MBA that are covered by my participation fee satisfy the requirements for New Hampshire and many other states.

SUSANNE GILLIAM practices asylum law in Massachusetts and New Hampshire. She went to law school as an encore to a career in software engineering.

Another free resource is the Small Business Administration (SBA). This resource is paid for by our taxes, and they are an invaluable source of information on running a small business, including a focus on women- and minority-owned businesses, and on doing business with the federal government. They have classes that range from the basics of financials through the impact of COVID-19 on small businesses.

The MBA, the SBA and some associations focused on specific types of law provide free mentoring to members. This can range from a one-time check on your business plan or your financials to an ongoing relationship that can nurture your business and legal knowledge.

I am still a young lawyer, even though I am not a young human being. My interests and worries are typical of those in their first years of practice. I have recently been appointed as New Hampshire's American Bar Association (ABA) YLD delegate. I was interested in this position because I wanted to understand the issues and concerns of other young lawyers, and to get some understanding of nationwide issues. There are many volunteer positions like my ABA position that can allow you to extend your circle.

Do not be afraid to volunteer — as a young lawyer, you bring a distinct perspective to any volunteer position, and you can bring forward the concerns of other young lawyers. It is easy to think that you don't know enough to fill these sorts of volunteer positions, but you know far more than you think you do.

You can also volunteer through different organizations to answer legal questions. Your subject matter expertise may begin with what you learned in law school, but you will build experience quickly, and many of these pro bono opportunities are performed completely in writing, allowing you time to double-check

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New Lawyers
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your answers. With each question you answer, your confidence in your abilities will increase.

The gap between available free legal services and those that need such services is enormous, as is the need for those of modest means. As a new lawyer, you may have more time than those with heavier client loads. That makes volunteering an excellent way to both help you meet other practitioners and give back to the community. In many cases, you may be able to be covered by malpractice insurance when you take a pro bono case, and there may also be direct mentorship available.

I believe that fear is the greatest challenge new lawyers face. If you are afraid to volunteer for pro bono cases or for positions within bar associations, you will miss out on growth opportunities that can help you develop your skills and your network. If you say "yes" and find yourself in over your head, there will be plenty of people you can ask to help you get the situation under control. Of course, you cannot endanger a client's legal case by being too quick to say "yes," but you also do harm when you hold back too much.

Expand your world as much as possible and you will find that the early part of your legal career will set the stage for you to become the go-to expert in some specific area. Find what you are good at and then figure out how you can use that to create a career that is satisfying and economically acceptable. Your worth is not measured solely by your income or the number of hours you put in. ■

The Pandemic: Applicable Law
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21. For executives of nonprofit organizations, Section 457(f) of the Code can, for example, apply to tax the entire deferral once payment begins, even though the payment of the deferred compensation is made over a number of years. In addition, a nonprofit is taxed on compensation paid to an executive that exceeds certain thresholds set under Section 4960 of the Code.
22. Section 409A of the Code was introduced into the federal tax law after the Enron debacle in 2001 in which executives accelerated the receipt of their deferred compensation to avoid losing it in the impending company bankruptcy. Section 409A accelerates the income taxation of some deferred compensation, and, additionally, applies both interest and a 20% excise tax on the amount of income involved, unless the specific distribution timing requirements are met. Had Section 409A been operative on the Enron executives, they would have taken substantial tax cuts on their deferred compensation for accelerating its payment, leaving more cash for the creditors in bankruptcy.
23. Qualified stock options, or incentive stock options, are regulated under Sections 421 and 422 of the Code. Nonqualified deferred compensation arrangements involving property, such as equity, are taxed under Section 83 of the Code.
24. Elections under 83(b) permit the immediate taxation of transferred property, at the transferee's option. Property subject to 83(b) elections does not have to be vested for the election to take effect.
25. A program under Code Section 125 relates to the nontaxable payments toward benefits such as insurance premiums or contributions to flexible spending accounts.
26. Deferrals under a 401(k) or 403(b) plan allow the employee to save for retirement by directing payroll reductions of current compensation to be paid instead to an account in a retirement plan for the employee. Because payments in a retirement plan account can be made only in the future at specified times, the tax on those amounts is deferred until payment is made.
27. *See* footnote 14, *supra*, and accompanying text.

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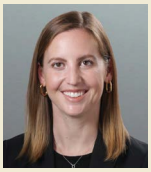

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