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# Employer Update

## Legal Implications of Employee Wellness Programs

*By Jeffrey S. Klein, Nicholas J. Pappas, and Courtney Fain*

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Employee wellness programs are popular with employers seeking to improve employee well-being and boost productivity, as well as stem rising health care costs. According to the Kaiser Family Foundation, 94 percent of employers with more than 200 workers and 63 percent of smaller employers offer some sort of wellness program. The prevalence of such programs likely will increase over the next few years following the full implementation of the Affordable Care Act (ACA), which permits employers to expand upon existing wellness programs.

While the ACA codified the long-standing regulations implementing the Health Insurance Portability and Accountability Act of 1998 (HIPAA), which expressly permit such programs, there are unanswered questions as to whether wellness programs, and particularly incentive-based programs that may reward employees for meeting various health benchmarks, nonetheless may be discriminatory under other federal laws. On May 8, 2013, the Equal Employment Opportunity Commission (EEOC) heard from representatives of business and advocacy groups about the need for guidance as to how employers can avoid violating federal anti-discrimination laws in the design and implementation of wellness programs.

The recent hearing highlights that employers considering the adoption or expansion of wellness programs must consider whether their programs comply with federal anti-discrimination laws, including the Genetic Information Non-Discrimination Act of 2008 (GINA), the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), and the Age Discrimination in Employment Act (ADEA). This article will analyze the requirements of these statutes as applied to the design of wellness programs and the open issues remaining in the wake of minimal regulatory guidance.

### Background

Many employers adopt wellness programs in an effort to control illnesses and unhealthy behaviors before they become more serious and costly. These programs seek to encourage employees to take preventative measures and make healthier choices. Wellness programs derive cost-savings not only from reducing health care costs, but also through reduced absenteeism, increased productivity, decreased rates of injuries and disability claims, increased retention and recruitment of employees, and improved employee relations and morale.

There are two types of wellness programs. Participatory programs are available to all employees and do not condition a reward on an individual satisfying a specific standard or benchmark. For example, rewarding all employees who attend a free health education seminar is a participatory program. Incentive-based programs provide an award to participants based on satisfaction of a health standard. For example, a program that provides for reduced premiums for employees who do not use tobacco products or participate in a smoking cessation program is an incentive-based program.

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Both participatory and incentive-based programs are clearly permissible, subject to certain limitations, under HIPAA and the ACA. Participatory wellness programs do not implicate HIPAA's anti-discrimination provisions because such programs do not condition a reward on an individual satisfying a standard that is related to a health factor. *See* 29 C.F.R. § 2950.702(f)(1).

As to incentive-based programs, while HIPAA's nondiscrimination provisions generally prohibit group health plans governed by the Employee Retirement Income Security Act (ERISA) from using a "health factor" as a basis for discrimination with regard to either eligibility to enroll or premium contributions (*see* 29 U.S.C. § 1182(a) and (b)), there is a long-standing exception that allows employers to create incentive-based wellness programs that give employees premium discounts or provide other financial incentives to employees who satisfy certain standards based on health factors. *See* 29 C.F.R. § 2950.702(f)(1). Under the 2006 HIPAA regulations, such outcome-based programs are permissible so long as (1) the reward does not exceed 20 percent of the cost of coverage for the employee; (2) the program is reasonably designed to promote health and prevent disease; (3) the program gives individuals eligible for the program the opportunity to qualify for the reward under the program at least once per year; (4) the rewards under the program are available to all similarly situated individuals and the program allows a reasonable alternative standard or waiver for any individual for whom it is unreasonably difficult due to a medical condition, or medically inadvisable to satisfy the condition; and (5) all plan materials describing the program disclose the availability of a reasonable alternative standard or the possibility of waiver of the otherwise applicable standard. *See* 29 C.F.R. § 2950.702(f)(2).

The ACA codified the 2006 HIPAA regulations, except that effective for plan years beginning on or after January 1, 2014, the maximum reward available to participants in incentive-based programs is increased to 30 percent of the total cost of coverage. Further, the Departments of Treasury, Labor, and Health and Human Services (the Departments) can increase the reward to up to 50 percent of the cost of coverage if they deem it appropriate. *See* 42 U.S.C. § 300gg-4(j).

Employers, therefore, can take comfort in knowing that incentive-based programs are explicitly permitted, subject to certain limitations, under HIPAA and that these programs can be expanded under the ACA. However, other federal laws may limit the design of such incentive-based programs.

## EEOC Guidance

At the recent EEOC hearing, panelists addressed both the need for clarification of existing guidance as well as additional guidance as to how employers can avoid violating federal anti-discrimination laws in the design and implementation of wellness programs. Following the hearing, EEOC Chair Jacqueline A. Berrin noted "[t]oday's meeting underscored the importance of insuring that [wellness] programs are designed and implemented in a manner that is consistent with federal equal employment opportunity laws." We discuss below the limited guidance provided to date, and additional considerations for employers in designing and implementing wellness programs.

## GINA

GINA prohibits discrimination on the basis of genetic information with respect to health insurance and employment. *See* 42 U.S.C. § 2000ff-1. GINA also amended § 702 of ERISA to restrict the collection and use of genetic information by group health plans and insurers by prohibiting them from (1) adjusting the premium or contribution amounts for a group on the basis of genetic information; (2) requesting or requiring an individual or family member to undergo a genetic test; and (3) requesting, requiring, or purchasing genetic information (including family medical history) prior to or in connection with enrollment, or at any time for underwriting purposes.

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In 2009, the Departments issued regulations implementing GINA, which make clear that health plans are prohibited from requiring individuals to complete a Health Risk Assessment ("HRA") that requests family medical history in order to receive a reward under a wellness program on grounds that such request is deemed a request for underwriting purposes. The EEOC followed with its own regulations interpreting Title II of GINA in 2010, stating that in order to comply with GINA, a wellness program may not condition receipt of an incentive on an employee providing genetic information. *See* 29 C.F.R. § 1635.8(b)(2). For example, the regulations provide that if an employer offers a $150 incentive for employees who complete an HRA that asks about the employee's family medical history, the HRA must state that any incentive will be given for completing the HRA regardless of whether the employee answers the questions seeking genetic information. *See* 29 C.F.R. § 1635.8(b)(2)(ii).

Therefore, while HIPAA and the ACA permit the use of incentive-based wellness programs, the discrimination provisions of GINA limit the ability of employers to implement wellness programs that require employees to provide information related to family medical history, as any such disclosure must be voluntary and employers cannot condition receipt of an award on providing such protected information. Speaking on behalf of ERISA plans, one panelist at the hearings urged the EEOC to reconsider its interpretation of GINA because "employees are effectively discouraged from procuring and providing family medical history, information that often provides a very significant window into an individual's health risk factors, both present and future."

## ADA

The ADA prohibits discrimination against qualified individuals on the basis of disability in regard to job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment. *See* 42 U.S.C. § 12112. Two provisions of the ADA impact the implementation of wellness programs: (1) the reasonable accommodation requirement and (2) the prohibition on disability-related inquiries.

If a health factor on which a wellness program conditions a reward constitutes a disability as defined by the ADA, the program must comply with the ADA's reasonable accommodation requirement, and the employer must engage in an interactive process with the employee to develop a reasonable alternative that satisfies the goals of the wellness program and the individual's need for a reasonable accommodation. *See* 42 U.S.C. § 12102(1); 29 C.F.R. 1630.2.

Additionally, the ADA prohibits all disability-related inquiries and medical examinations prior to an offer of employment and, after a conditional offer is made, allows disability-related questions and medical examinations only if they are job-related and consistent with business necessity. *See* 42 U.S.C. § 12112(d). A limited exception to the general prohibition on disability-related questions and medical examinations allows for "[a] covered entity [to] conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site" so long as the information is kept confidential and not used for discriminatory purposes. *See* 42 U.S.C. § 12112(d)(4)(B).

The EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA states that disability-related inquiries and medical examinations are permitted as part of a voluntary wellness program. *See* http://www.eeoc.gov/policy/docs/guidance-inquiries.html. While the EEOC considers a wellness program to be voluntary if employees are neither required to participate nor penalized for non-participation, it has not taken a formal position on what level of financial inducement is permitted, and much of the testimony before the EEOC focused on the need for clarification. Moreover, the EEOC has not provided guidance as to whether withholding an incentive is a "penalty." In its most recent informal guidance, the EEOC noted that "[it] has not taken a position on whether and to what extent a reward [for participation] amounts to a requirement to participate, or whether withholding of the reward from non-participants constitutes a penalty, thus rendering the program involuntary. *See* EEOC Informal Discussion Letter, dated Jan. 18, 2013.

Therefore, while incentive-based programs are clearly permissible under HIPAA and the ACA, so long as certain other conditions are met, the EEOC has not yet stated whether employers who comply with those requirements would also be in compliance with the ADA. Industry panelists urged the EEOC to make clear that since Congress has determined that incentive-based programs do not violate HIPAA where the incentive does not exceed 30 percent of the annual cost of coverage, any programs that comply with HIPAA and the ACA should be deemed voluntary under the ADA.

### Title VII and the ADEA

There was also testimony as to whether incentive-based wellness programs that reward employees who meet certain benchmarks and penalize those who do not may also violate Title VII and the ADEA where the programs target health or risk factors that occur disproportionately among women (such as obesity), minorities (such as diabetes), or older workers (such as high cholesterol or hypertension). While the EEOC has never addressed wellness programs under Title VII or the ADEA (either through formal regulation or informal advisory letters), it invited testimony on the issue, thus signaling that it is considering whether such programs may give rise to claims under Title VII or the ADEA. Employers should examine their incentive-based wellness programs carefully to assess potential exposure, and continue to monitor closely any advisory opinions or case law involving future challenges under Title VII or the ADEA.

## Conclusion

While it is not clear that the EEOC will be issuing guidance in the near term, the recent hearing highlights the complexities of designing and implementing wellness programs to ensure compliance with federal anti-discrimination laws, and employers should continue to monitor their programs to take into account any available guidance.

# Second Circuit Addresses Scope of '*Moench* Presumption' in ERISA Stock Drop Case

*By Steven M. Margolis and Millie Warner*

In *Taveras v. UBS AG*, 708 F.3d 436 (2d Cir. 2013), the Second Circuit Court of Appeals held that ERISA plan fiduciaries are entitled to a presumption that they acted prudently by offering plan participants the opportunity to invest in employer stock when the plan terms require or "strongly encourage" offering employer stock, but not when the plan merely permits employer stock to be offered to participants. *Taveras* is the Second Circuit's sixth decision (its third published decision)[1] on the so-called *Moench* presumption of prudence, and represents a further refinement of the Second Circuit's jurisprudence on the subject. *Taveras* makes clear that, in the Second Circuit, the presumption of prudence will not apply to all 401(k) plans that offer employer stock regardless of plan language, and offers some insight into the type of plan language that will and will not be sufficient to trigger application of the *Moench* presumption.

## The *Moench* Presumption

The *Moench* presumption of prudence is named for the seminal case of *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), in which the Third Circuit Court of Appeals held that a fiduciary of an employee stock ownership plan (ESOP) who invests plan assets in the employer's stock is presumed to acted prudently. The Second Circuit adopted this presumption with respect to both ESOPs and eligible individual account plans (EIAPs) (such as 401(k) plans) in *In re Citigroup ERISA Litig.*, 662 F.3d 128, 138 (2d Cir. 2011), reasoning that the *Moench* presumption "provides the best accommodation between the competing ERISA values of protecting retirement assets and encouraging investment in employer stock."[2] As articulated by the Second Circuit, the presumption dictates that the continued offering of employer stock as an investment option is presumptively prudent and complies with ERISA unless the plaintiff can demonstrate that the "fiduciary abuse[d] his discretion in continuing to offer plan participants the opportunity in employer stock."[3] Specifically, to overcome the presumption, plaintiffs must demonstrate that, at a "given point in time" when the losses to the plan could have been prevented, the fiduciary knew or should have known facts that would have "compelled" a reasonable fiduciary to conclude that the company was facing an imminent collapse or other "dire situation."[4] In *Citigroup*, and in a companion opinion *(Gearren v. McGraw-Hill Cos.*, 660 F.3d 605 (2d Cir. 2011)) issued on the same day as *Citigroup*, the Second Circuit applied the presumption to plans that required employer stock to be offered as an investment option.

## UBS ERISA Litigation

*Tavares* concerned two separate 401(k) plans sponsored by UBS: the UBS Financial Services 401(k) Plus Plan (the Plus Plan) and the UBS Savings and Investment Plan (the SIP, and, together with the Plus Plan, the Plans). Participants in the Plans determined how to allocate and invest their individual account balances (which reflected amounts contributed to the plan, as well as gains and losses on participants' account investments) among various available investment options.[5] Both Plans offered UBS stock (the UBS Stock Fund) as one of the available investment options.[6]

The Plans differed, however, in the way in which they offered the UBS Stock Fund. Both Plans expressly gave the Investment Committee the authority to add or delete authorized investment options, including the UBS Stock Fund. [7] The Plus Plan plan document, however, also mandated that one investment option "shall be the [UBS] Common Stock Fund,"[8] and stated that one of the plan's purposes was to allow employees "to acquire [UBS] Common Stock."[9] In contrast, the SIP defined the UBS Stock Fund and addressed reinvestment of dividends and participants' voting rights with respect to UBS stock, but contained no language mandating that the UBS Stock Fund "shall" be offered to participants and did not state that one of the plan's purposes was to allow employees to invest in UBS stock.[10]

Participants who had invested in the UBS Stock Fund suffered significant losses when UBS stock lost approximately 74 percent of its value between April 26, 2007 and October 16, 2008, allegedly resulting, in part, from UBS's investment in subprime mortgage-backed securities and other fixed income assets.[11] As a result, a group of participants in the Plans brought a putative class action in the United States District Court for the Southern District of New York, alleging that the defendants[12] breached their fiduciary duties under ERISA by maintaining the Plans' investment in UBS stock when it was no longer prudent to do so.[13]

## District Court Opinion

The district court granted the defendants' motion to dismiss with respect to both Plans, and dismissed the plaintiffs' complaint in full with prejudice.[14] The district court held that the language in the Plus Plan stating that one of the investment options "shall" be the UBS Stock Fund "clearly and explicitly" required the UBS Stock Fund to be offered as an investment option.[15] While the SIP did not "explicitly require that the SIP fiduciaries offer the UBS Stock Fund as an investment option," the court found that the "numerous references to the UBS Stock Fund" in the SIP plan document, and the fact that "no other fund [was] explicitly referenced in the SIP documents," "strongly suggest[ed] that the settlor intended the UBS Stock Fund to be one of the funds available to plan members."[16] Accordingly, the district court held that the fiduciaries' decisions with respect to both Plans were "entitled to a presumption of prudence," which the plaintiffs' factual allegations failed to overcome.[17]

## Second Circuit Opinion

On appeal, the Second Circuit affirmed the district court's decision that the *Moench* presumption applied with respect to the Plus Plan, but reversed the district court's conclusion that the presumption was applicable to the SIP, based on each plan's specific terms.

The Second Circuit agreed with the district court that the Plus Plan "require[d], at least initially, that the UBS Stock [Fund] be offered as an investment option," based on the plan's statement of purpose to allow employees the opportunity to acquire employer stock and the express instruction in the plan document that the UBS Stock Fund "shall" be among the available investment options.[18] The court reached this conclusion despite the language in the Plus Plan authorizing the fiduciaries to remove the UBS Stock Fund as an investment option, noting that "the ability to remove the company's fund from those funds available to plan investors existed also in *Gearren*, where we applied the presumption of prudence."[19]

**Under *Taveras*, where the plan merely permits investment in employer stock, plan fiduciaries will not be entitled to a presumption that they acted prudently in offering employer stock.**

The Second Circuit reached a different conclusion with respect to the SIP. The court acknowledged that the SIP "include[d] several mentions of the UBS Stock Fund," and that the UBS Stock Fund was the only investment option mentioned by name.[20] The Second Circuit, however, disagreed with the district court that those references "amount[ed] to strong encouragement."[21] Lacking any language mandating that the UBS Stock Fund "shall" be offered as an investment option, the Second Circuit found that the provisions in the SIP describing dividend reinvestment and voting rights with respect to UBS stock were "relevant only if the Investment Committee has already made the entirely discretionary decision to add the fund as an investment option in the first instance."[22] Indeed, the court noted that the UBS Stock Fund was not a continuously offered investment option under the SIP, and that the SIP fiduciaries did not decide to offer the UBS Stock Fund to participants until 2001.[23] This, presumably, suggested that the fiduciaries viewed themselves as free to offer UBS stock or not, in their discretion.

As a result, the Second Circuit held that "because the SIP Plan Document [did] not require or even 'strongly encourage' investment in the UBS Stock Fund, but instead simply present[ed] it as one permissible investment option, [the] fiduciaries of the SIP [were] not entitled to the presumption of prudence."[24] The court explained this conclusion in terms of the rationale the Second Circuit expressed in *Citigroup* for adopting the *Moench* presumption; namely, the need to "address the 'tension' between 'the competing ERISA values of protecting retirement assets and encouraging investment in employer stock.'"[25] No such tension exists when the fiduciaries are "free to offer [the employer stock fund], or not."[26] Accordingly, where the plan merely permits investment in employer stock, plan fiduciaries will not be entitled to a presumption that they acted prudently in offering employer stock under *Taveras.*

## Impact of *Taveras*

The *Taveras* decision and, specifically, the reversal of the district court's application of the *Moench* presumption to the SIP, shows that, at least in the Second Circuit, application of the *Moench* presumption depends on the particular plan language, and will not be extended to plans that merely refer to employer stock. *Taveras* also confirms, however, that in the Second Circuit, plan language authorizing the fiduciary to remove investment options, including the employer stock fund, does not operate as a bar to application of the *Moench* presumption, so long as other plan language requires employer stock to be offered in the first instance or otherwise strongly encourages the fiduciaries to offer participants the opportunity to invest in employer stock.

Sponsors of 401(k) plans that offer employer stock as one of the investment options who wish to take advantage of the *Moench* presumption of prudence should review applicable plan documentation to ensure that the intention to offer employer stock as an investment alternative is a clearly stated purpose of the plan and, ideally, that employer stock is hard-wired into the plan document as a required investment alternative.

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1 *See In re Citigroup ERISA Litig.*, 662 F.3d 128, 138 (2d Cir. 2011); *Gearren v. McGraw-Hill Cos.*, 660 F.3d 605 (2d Cir. 2011); *Fisher v. JP Morgan Chase & Co.*, 469 Fed. App'x 57 (2d Cir. 2012) (summary order); *In re GlaxoSmithKline ERISA Litig.*, 2012 WL 3798260 (2d Cir. Sept. 4, 2012) (summary order); *Slaymon v. SLM Corp.*, 2012 WL 6684564 (2d Cir. Dec. 26, 2012) (summary order).

2 *Citigroup*, 662 F.3d at 138, 140.

3 *Id.* at 138.

4 *Id.* at 140-41.

5 *Tavares*, 708 F.3d at 439.

6 *Id.*

7 *Id.* at 440, 444 (citing Section 11.2 of the Plus Plan), 439, 444-45 (citing Section 9.2 of the SIP).

8 *Id.* at 440, 444 (citing Section 11.2 of the Plus Plan).

9 *Id.* at 440, 443 (citing Section 1.2 of the Plus Plan). The Plus Plan summary plan description also described the UBS Stock Fund as a one of the "Core Tier" funds. *Id.* at 400, 444 (citing Section 11.2 of the Plus Plan).

10 *Id.* at 400, 444-45 (citing Sections 2.1 and 9.7 of the SIP).

11 *Id.* at 440.

12 Defendants included UBS, UBS Financial Services, UBS Americas, Inc., the members of UBS's Executive Board, the members of UBS Financial Service's Executive Committee, UBS Financial Service's Board of Directors, members of the SIP Investment Committee, members of the Plus Plan's Benefits Administration Committee and Investment Committee.

13 *Id.* at 440-41.

14 *In re UBS AG ERISA Litig.*, 2011 WL 1344734 (S.D.N.Y. Mar. 24, 2011).

15 *Id.* at *5.

16 *Id.*

17 *Id.* at *6-9.

18 *Tavares*, 708 F.3d at 443-44.

19 *Id.* at 444.

20 *Id.* at 445.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 446.

25 *Id.* at 446 (citations omitted).

26 *Id.* at 446.

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