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The Battle Over Preventive Care

Federal Judge Rules Against ACA's Preventive Care Requirements

Since its creation, the Affordable Care Act (ACA) has been subject to numerous legal challenges in state and federal courts. In the latest, *Braidwood Management Inc. v. Becerra*, a Texas federal district court judge ruled that a portion of the ACA's preventive care requirement is unconstitutional. The judge issued this ruling on March 30, 2023, striking down the mandate to provide certain preventive care effective immediately on a nationwide basis.

This Alert summarizes the ACA's preventive care mandate, the judge's ruling, the current status of the mandate, and what this means for employer group health plan sponsors.

Case background

Under the ACA, non-grandfathered group health plans must cover specified preventive care services without participant cost sharing. The covered preventive care services include certain cancer screenings, immunizations, and medications such as preexposure prophylaxis (PrEP) to prevent HIV/AIDS. The ACA's required preventive services are based on recommendations from the Advisory Committee on Immunization Practices (ACIP) and Health Resources and Services Administration (HRSA) as well as those with a "A" or "B" rating from the US Preventive Services Task Force (USPSTF)—a group appointed by the head of the Agency for Healthcare Research and Quality.

The *Braidwood* plaintiffs argued the preventive care services requirement was unconstitutional as the expert bodies who recommend the services to be covered did not have the authority to do so under the US Constitution's Appointments Clause, which states legally significant government decisions must be made by federal offices appointed by the President or a department head. In particular, the plaintiffs objected to mandated coverage of PrEP, as they felt it went against their religious beliefs and violated the Religious Freedom Restoration Act. The district court partially agreed with this constitutional argument and struck down the requirement for health plans to provide any services recommended by the USPSTF after the ACA's effective date (March 23, 2010).[1]

The district court judge in *Braidwood* is the same judge who ruled the entire ACA unconstitutional back in 2018.[2] That judgement went to the Supreme Court of the United States, which ultimately dismissed that argument and preserved the ACA.

The government's response

The Departments of Labor, Health and Human Services (HHS) and the Treasury (collectively, the "Departments") disagreed with the ruling. On March 31, 2023, the Department of Justice filed an appeal and a motion for a stay on April 12, 2023.

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[1] Since the Secretary of HHS can accept or reject service recommendations made by the ACIP and HRSA, the delegation to those groups was not found to be in violation of the Appointments Clause. As a result, preventive service recommendations from those organizations related to immunizations or women's and pediatric healthcare are not affected by the judge's ruling.

[2] *California v. Texas*, No. 19-840

The United States Court of Appeals for the Fifth Circuit (the "5th Circuit") or the Supreme Court may grant a stay leaving the affected preventive services mandates in effect while the litigation progresses, but this has not occurred as of the date of this Alert.

In the meantime, the Departments cannot enforce any coverage requirements for services and items with an "A" or "B" rating implemented by USPSTF on or after March 23, 2010. However, in a recent FAQ they strongly encourage plans and issuers to not make any changes and continue covering those services and items without cost sharing.[3] In other words, the Departments are asking plans to voluntarily comply with the mandates while the litigation plays out.

Note: The *Braidwood* ruling does not impact the requirement under the CARES Act to cover the COVID vaccine without cost sharing, and it does not affect the preventive care safe harbor for high deductible health plans and health savings accounts (HSAs).

What do we do now?

For now, we cautiously recommend employers do nothing. While plans could technically be amended to exclude any of the affected preventive services and items, this would be a lot of administrative work to change their current process for what may be a short time depending upon whether the courts grant a stay and the outcome of the litigation.

About the author

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[3] FAQs about Affordable Care Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 59.