

## Publications

# ACA Preventive Service Requirements Partially Vacated

## ATTORNEYS &amp; PROFESSIONALS

**Kathryn Bjornstad Amin**

[kamin@groom.com](mailto:kamin@groom.com)

202-861-2604

**Lisa Campbell**

[lcampbell@groom.com](mailto:lcampbell@groom.com)

202-861-6612

**Tamara Killion**

[tkillion@groom.com](mailto:tkillion@groom.com)

202-861-6328

**Ryan C. Temme**

[rtemme@groom.com](mailto:rtemme@groom.com)

202-861-6659

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On March 30, 2023, the District Court for the Northern District of Texas [issued an opinion and order](#) in *Braidwood Mgmt. Inc. v. Becerra* that vacates the implementation and enforcement of certain preventive service provisions required by the Affordable Care Act (“ACA”) (“March 2023 Opinion”). Judge O’Connor previously found in *Braidwood*, among other things, that the United States Preventive Services Task Force (“USPSTF”) experts’ appointments—referenced in the ACA’s preventive services rule—violated the Constitution’s Appointments Clause. (“[September 2022 Opinion](#)”). But the court did not rule on the appropriate remedy for that violation in September, instead the court asked for additional briefing on the issue from the parties.

Following that briefing, in the March 2023 Opinion, the court:

- vacated all of the actions of the Departments of Health and Human Services, Labor, and Treasury (“Departments”) implementing and enforcing the ACA’s requirement to cover without cost-sharing USPSTF preventive services with “A” or “B” ratings and enjoined enforcement of those requirements in the future; and
- found that the PrEP (a medication taken to prevent HIV contraction) mandate violates the plaintiffs’ rights under the Religious Freedom Restoration Act (“RFRA”) and enjoined the Departments from enforcing the mandate against the plaintiffs.

## Background

As a reminder, the ACA requires non-grandfathered group health plans and health insurance issuers offering individual and group coverage to provide the following preventive services without cost-sharing:

- USPSTF-recommended preventive services rated “A” or “B”;
- Centers for Disease Control and Prevention Advisory Committee on Immunization Practices (“ACIP”) recommended immunizations;

- Any additional preventive care and screenings for women not recommended by the USPSTF but provided for in the Health Resources and Services Administration's ("HRSA") guidelines; and
- Preventive screenings and care for infants, children, and adolescents that are provided for in the HRSA guidelines.

The plaintiffs in *Braidwood* challenged the USPSTF, ACIP, and HRSA recommendations on various grounds, including that the appointment of these organizations violated the Constitution's "Appointments" clause and "Vesting" clause, the recommendations impermissibly violated the "nondelegation" doctrine, and the requirements violated the RFRA, specifically with respect to requiring coverage of PrEP.

## September 2022 Opinion

As discussed in our previous alert, the court, among other things, dismissed the ACIP and HRSA claims and the Vesting clause and nondelegation doctrine arguments. In contrast, the court held that the USPSTF experts' appointments violated the Appointments Clause of the Constitution because the USPSTF experts were officers of the United States, but were not properly appointed.

## March 2023 Opinion

To address the Appointments Clause violation, the court vacated "[a]ll agency action taken to implement or enforce the preventive care coverage requirements in response to an 'A' or 'B' recommendation by the [USPSTF] on or after March 23, 2010 and made compulsory under [the ACA's preventive services requirement]."

**GROOM INSIGHT:** The final judgment does not impact all of the ACA preventive service requirements. Specifically, the ACIP (immunizations/vaccines) and the HRSA (women's preventive care recommendations, including the contraceptive coverage requirements and preventive screenings for children) are not changed by this ruling.

Although the court previously held that the USPSTF expert appointments violated the Constitution, Congress essentially adopted the USPSTF's recommendations in effect when it passed the ACA on March 23, 2010. The order did not upset Congress' adoption of those recommendations, and thus it appears that USPSTF "A" and "B" recommendations in effect prior to March 23, 2010 remain required under the ACA.

The final judgment in *Braidwood* was entered on March 30, 2023 and both parties have 60 days to appeal the decision to the Fifth Circuit. For example, the Plaintiffs may appeal the court's decision with respect to the ACIP and HRSA claims. We expect the Departments will appeal the USPSTF part of the decision and ask for a stay of the decision pending appeal. The district court is not required to grant such a stay, and if it does not, the Departments could request a stay from the Fifth Circuit.

**GROOM INSIGHT:** For insured coverage, the terms of the insurance policy likely provide that such coverage will continue without cost-sharing until the policy renews; state laws may also limit changes to insured coverage mid-policy. For self-funded coverage, plans might consider making mid-year changes to preventive services, although such plans should be aware that the decision is likely to be appealed and may be stayed during any appeal. Any changes to preventive services cost-sharing will also likely trigger the Summary of Benefits and Coverage ("SBC") advance notice rule, which requires a plan to provide 60 days advance notice of any plan changes that would affect the content of the SBC.

The court's ruling appears unlikely to have an immediate impact on most plans and issuers. However, if the decision remains, and absent Congressional action to the contrary, plans and issuers could have more flexibility in the manner in which they cover certain preventive services.

**GROOM INSIGHT:** There are other potential implications. First, ACA preventive care services are treated as preventive care for purposes of the HSA rules. It appears that most of the USPSTF services would still qualify as preventive under the HSA rules, however, even though they are no longer preventive care under the ACA. Second, the Departments previously issued relief under which plans and issuers can avoid certain Mental Health Parity and Addiction Equity Act requirements if the plan or issuer only covers mental health/substance use disorder benefits to comply with the ACA's preventive services rule. There is an open question as to whether this relief will continue to apply with respect to USPSTF recommendations that are no longer required.