

Publications

Braidwood: A Challenge to the ACA's Preventive Services Mandate

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On September 7, 2022, the District Court for the Northern District of Texas ruled a key component of the Patient Protection and Affordable Care Act's ("ACA") preventive services mandate unconstitutional. *Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2022 WL 4091215 (N.D. Tex. Sept. 7, 2022).

The ACA requires group health plans and health insurance issuers offering individual and group coverage to provide the following preventive services without cost-sharing.^[1]

1. United States Preventive Services Task Force ("USPSTF") recommended preventive services rated 'A' or 'B';

2. Centers for Disease Control and Prevention Advisory Committee on Immunization Practices ("ACIP") recommended immunizations;

3. 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

4. Preventive screenings and care for infants, children, and adolescents that are provided for in the HSRA guidelines.

[*Public Health Service Act* § 2713(a) ("*PHSA*").]

Six individuals and two Christian-owned businesses challenged the preventive services mandate arguing it violated (1) the Constitution's "Appointments" Clause, (2) the Constitution's "Vesting" Clause, (3) the nondelegation doctrine, and (4) the Religious Freedom Restoration Act ("RFRA") due to the requirement to cover PrEP (a medication taken to prevent HIV contraction). Additionally, Plaintiffs argued that the preventive services requirement was applicable only to recommendations in effect when the ACA was passed (*i.e.*, March 23, 2010).

On cross motions for summary judgment, the court ruled partially in favor of the Plaintiffs and partially in favor of the Government.

The court disagreed with the Plaintiffs' statutory interpretation claims contending that the preventive services mandate only covers recommendations in effect at the time of the ACA's passage and dismissed that claim. The court also disagreed that the ACIP

or HSRA experts' appointments were unconstitutional, dismissing those claims, and found that the USPSTF experts did not violate the Vesting Clause or the nondelegation doctrine, dismissing those claims.

However, the court did find that the USPSTF experts' appointments^[2] violated the appointments requirements laid out in Article II of the Constitution, but the court reserved on the appropriate remedy.

Lastly, applying *Burwell v. Hobby Lobby* analysis, the court determined that the PrEP mandate violated RFRA – at least as to the Plaintiffs' in this case. The court reserved its remedy for the RFRA claim as well.

The court ordered and scheduled supplemental briefings regarding appropriate remedies.

Significance of the *Braidwood* Case:

Not All Preventive Services Are Impacted: Only USPSTF Preventive Services

As noted above, only the USPSTF 'A' or 'B' rated recommended preventive services are at issue. The district court did not find the recommendations by ACIP, mandating immunization preventive coverage, or HRSA, requiring contraception coverage for women and preventive services for children, unconstitutional. However, the USPSTF recommendations cover a broad array of preventive services, such as tobacco cessation, mental health, and cancer screenings.^[3]

Immediate Effects for Group Health Plans and Health Insurance Issuers

A final decision regarding the USPSTF preventive services is unlikely to occur before 2024. The district court ordered supplemental briefings regarding the appropriate remedy and the current impact of the *Braidwood* case is limited. We also expect the Government to appeal the final decision to the Fifth Circuit, likely further delaying the finality of any decision.

Recommendations for Group Health Plans and Health Insurance Issuers

The district court has not ruled on the appropriate remedy for the appointment violation and, if briefing occurs as currently scheduled, will not do so before January 2023 (at the earliest), plans and issuers should continue to offer the USPSTF-required preventive services without cost-sharing. Plans and issuers should also be mindful that states may have incorporated PHSA section 2713 into their state insurance codes, which could also impose the same or similar preventive services requirements on health insurance issuers. Additionally, issuers may also be contractually obligated to offer preventive services for a set period of time, regardless of the *Braidwood* ruling.

If the status of preventive services continues to be uncertain in the spring rate filing season, issuers may consider requesting their respective states' Department of Insurance or applicable regulator for permission to file two sets of rates: one including the USPSTF preventive services without cost-sharing and the other dropping or adding cost sharing to such services.

For more information on the impact of the *Braidwood* decision, please contact the authors or any of our Groom attorneys.