

Publications

Latest Update to the Ongoing Challenge to the ACA's Preventive Services Mandate

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On June 21, 2024, the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”) issued its ruling in *Braidwood v. Becerra*.^[1] The court determined that the Affordable Care Act’s (“ACA”) requirement that group health plans and health insurance issuers cover the United States Preventive Services Task Force (“USPSTF”) A and B rated recommended preventive services without cost-sharing (“USPSTF Preventive Care Requirement”) is unconstitutional. Specifically, the Fifth Circuit held that members of the USPSTF constitute “principal officers” that must be nominated by the President and confirmed by the Senate in accordance with Article II of the U.S. Constitution. However, the court disagreed that a national injunction is the appropriate remedy and limited this portion of the ruling only against the particular plaintiffs in this case.

The Fifth Circuit also determined that the Department of Health and Human Services (“HHS”) Secretary has the authority to ratify the Advisory Committee on Immunization Practices (“ACIP”) and the Health Resources and Services Administration (“HRSA”) preventive services recommendations. Yet, the Court reserved judgement on whether the HHS Secretary properly ratified ACIP and HRSA recommendations under the Administrative Procedures Act (“APA”) and remanded that question back to the district court.

Background

The ACA obligates non-grandfathered group health plans and health insurance issuers offering individual and group coverage to cover certain preventive services recommended by the USPSTF, ACIP, and HRSA without cost-sharing.

On September 7, 2022, the District Court for the Northern District of Texas found aspects of the ACA’s preventive services mandate unconstitutional under the Appointments Clause of the Constitution. The court preserved the ACA’s coverage mandate for preventive services recommended by ACIP (immunization preventive

coverage) and HRSA (women’s preventive care, including contraception coverage, and preventive services for children) but found the USPSTF Preventive Care Requirement unconstitutional. The court did not issue a remedy in this opinion and requested additional briefings from both parties. [See our prior alert [here](#).]

On March 30, 2023, the district court issued an opinion and order that vacated implementation of the USPSTF Preventive Care Requirement and enjoined enforcement of this requirement by the Departments of Labor, Health and Human Services, and Treasury (“Departments”). The court additionally found that the mandate to cover PrEP (i.e., a preventive HIV medication) violated the plaintiffs’ rights under the Religious Freedom Restoration Act and enjoined the Departments from enforcing this mandate against the plaintiffs. [See our prior alert [here](#).]

The Fifth Circuit’s Decision

The Fifth Circuit agreed that the USPSTF Preventive Care Requirement is unconstitutional because the USPSTF members were not properly appointed under Article II of the Constitution. The court noted that USPSTF members exercise “substantial” power by effectively regulating private health coverage. The court also emphasized the lack of oversight from the HHS Secretary (or other federal officers), noting that ACA’s statutory scheme “contemplates complete autonomy” for the USPSTF. Since the court determined USPSTF members are principal officers, the HHS Secretary could not save this component of the ACA coverage mandate via ratification of USPSTF’s recommendations.

However, the court disagreed that a national injunction is the appropriate remedy. Instead, the court held that the Departments cannot enforce the USPSTF Preventive Care Requirement only against the particular plaintiffs in this case and not health insurers and group health plans generally.

GROOM INSIGHT: Despite the court’s holding being limited in application to the plaintiffs in the case, the decision that the USPSTF Preventive Care Requirement is constitutionally defective is still binding law in the Fifth Circuit – i.e., Texas, Louisiana, and Mississippi. Thus, the USPSTF Preventive Care Requirement is unlikely to be enforced in these states.

The Fifth Circuit did not reach a decision on the merits as to whether the mandate to cover ACIP and HRSA recommended services is enforceable. Notably, the court agreed that the HHS Secretary has the authority to ratify their recommendations, as these administrative bodies are subject to oversight by the HHS Secretary. The court remanded the case to the district court to determine whether the HHS Secretary’s ratification of these recommendations complied with the APA.

GROOM INSIGHT: While the USPSTF Preventive Care Requirement remains effective for most, the future of the preventive services mandates remains uncertain, at least in the Fifth Circuit. The district court could determine that the HHS Secretary’s ratification of the ACIP and HRSA recommendations and guidelines violated the APA – which could lead to a determination that the mandate to cover ACIP and HRSA recommended preventive services without cost-sharing is unlawful.

Importantly, the Departments could cure the ACIP and HRSA defects raised by the plaintiffs on appeal and sent back to the district court for consideration. For example, the Departments could issue a proposed rule, subject to notice and comment, on the ACIP and HRSA standards. Similarly, the Departments may have regulatory options to effectively cure the defects related to the USPSTF standards, although the Departments may prefer to continue to defend the recommendations of the USPSTF as constitutional.