

# ACA Ruling Could Mean Narrowed Benefits From Health Plans

By **Kellie Mejdrich**

Law360 (April 6, 2023, 8:46 PM EDT) -- A Texas federal court's decision blocking the government from enforcing preventative services requirements under the Affordable Care Act could ultimately lead health plans to reduce coverage, attorneys and advocates say, underscoring how a suit driven by religious objections to policy could have broader implications for public health.

U.S. District Judge Reed O'Connor's **March 30 order** blocked the U.S. government from enforcing ACA provisions that require insurance coverage without cost-sharing for many preventative treatments, including HIV prevention drugs known as pre-exposure prophylaxis, or PrEP.

The ruling built upon an earlier order from Judge O'Connor from **September** that found the ACA's preventative services requirements were imposed unconstitutionally. Judge O'Connor said that was because members of the U.S. Preventive Services Task Force, which set coverage requirements for PrEP and many other preventative treatments, were improperly appointed government officials, violating the appointments clause of the U.S. Constitution. That order also found that the government's PrEP coverage mandate for Braidwood Management Inc. — a Christian-owned, for-profit management company and lead plaintiff in the suit — ran afoul of the Religious Freedom Restoration Act.

If Judge O'Connor's policy block is upheld, that means health plans will no longer be required to cover without cost-sharing a vast array of treatments, from cancer and diabetes screenings to pregnancy and postpartum care. The ACA had specified that all preventative services that the USPSTF rated as "A" or "B" had to be covered by plans without cost-sharing, but Judge O'Connor found USPSTF members weren't properly appointed, so their post-ACA recommendations are invalid.

The federal government swiftly docketed an appeal in the Fifth Circuit on April 3, and Braidwood and the other plaintiffs also filed a notice of a cross-appeal Thursday.

Judge O'Connor, an appointee of former President George W. Bush, has garnered attention for his rulings, including a **2018 decision** striking down the ACA. The U.S. Supreme Court ultimately overturned that ruling, upholding the health care law in **2021**. In 2019, Judge O'Connor **also axed** Obama-era health insurance protections for gay and transgender people, ruling religious medical providers couldn't be punished for refusing to provide abortions or treatment related to gender transition.

Richard Hughes IV, an attorney and health policy adviser at Epstein Becker Green, said Judge O'Connor's March order and judgment outlines "a very universal remedy that is going to be very disruptive, because it really lifts two requirements off of payors, it lifts the requirement to cover, and it lifts the requirement to do it without cost-sharing."

"So to the extent that we continue to have coverage of any of these services, when new plans go into effect, they may still have some cost-sharing attached to them, and that discourages uptake," said Hughes, who is also representing the HIV+Hepatitis Policy Institute as an amicus in support of the federal government's appeal before the Fifth Circuit.

Cost pressures can push plans to reduce coverage when federal requirements go away. For example, attorneys **noted earlier this year** that plans are likely to drop coverage for out-of-network coronavirus testing when federal emergency designations end later this year and requirements lift for

coverage without cost-sharing.

While lower-cost health plans are incentivized to seek out coverage reductions, it's unclear how many employers and group health plans will rush to undo coverage because of the ruling. Certainly some will — Braidwood and other plaintiffs in the case sued over having to pay for preventive services coverage for PrEP and other treatments.

Braidwood, which provides its employees coverage through a self-funded health plan in which the company takes on health care costs directly, could stop covering preventative services in the middle of a plan year as long as plan participants are given adequate notice. In contrast, fully insured plans — where an employer purchases insurance from an insurance company, also known as an issuer — are prohibited from making midyear changes.

Still, some management-side attorneys said they're hearing questions from plans about keeping coverage in place. Lisa Campbell, principal and co-chair of Groom Law Group's health services practice, said a question that attorneys have been getting since the decision on preventative services is, "Do we have to change our plans to stop covering these without cost sharing?"

"And the answer is no, issuers and plans have flexibility to maintain what they're doing," she said.

But that flexibility isn't absolute — there is always the risk that states could move to block some of these preventative services or perhaps even require them in the wake of the ruling.

As for whether plans will reduce benefits, Campbell said, "I do at some point think there may be this cost-benefit analysis" in which some plans could cut back on coverage, noting that issuers "will have to wait" to change their benefits because federal law prohibits them from making changes during a plan year.

Campbell said employers or health plans may also choose to keep coverage for preventative services but potentially put in place stricter coverage limitations. Known in the industry as utilization management requirements, those restrictions were far more limited under requirements set by the USPSTF.

"From what we're hearing from plans, they do think that preventative services are important, generally speaking," Campbell said, noting that research shows "preventative services do, in the long run, lower costs."

Public health advocates are gearing up for a fight. But they also are still sorting through the decision to understand its impact. While Judge O'Connor's order blocks USPSTF recommendations that were made after the ACA was enacted, the task force was established under a 1984 law and was making recommendations long before the 2010 law was put into place, noted Hughes of Epstein Becker.

Anna Howard, policy principal on access to care with the American Cancer Society Cancer Action Network, said advocates are still working through the complexity of what pre-ACA recommendations made by the USPSTF still apply, which in many cases involve recommendations to cover services at older ages or for older procedures. The group signed on to an amicus brief in support of the government in the Braidwood case at the district court level.

Howard gave the example of how, after the ACA, screenings for lung and colorectal cancer were covered without cost-sharing at a younger age.

"We want to make sure that the preventive screenings in question are based on the science and the facts that we know of today," she said.

"What we don't want to see is people be misinformed and think that they no longer have coverage for preventive services ... we don't want to see individuals put off recommended cancer screenings," she added.

Beyond the courts, attorneys are also looking at whether Congress or the Biden administration might take action on preventative coverage to address the legislative problems the ruling uncovered.

Campbell, at Groom Law, said that based on past experience with court decisions that can impact health coverage, she's expecting guidance potentially from the U.S. Department of Health and Human Services and the U.S. Department of Labor's Employee Benefits Security Administration.

HHS, the DOL and the U.S. Department of the Treasury have implemented ACA regulations on preventative care, including those affecting employer group health plans regulated by the Employee Retirement Income Security Act, and were agencies named in the Braidwood suit. HHS, the DOL's EBSA and Treasury didn't respond to requests for comment on the ruling or for information on guidance related to the ruling.

Hughes, counsel for amicus on the appeal, said he's doubtful Congress will act given the political divisions. But he said he's planning to argue before the appellate court that "the administration can step in and institute processes and procedures to create appropriate accountability."

"This Congress is not going to pass legislation like that," Hughes said. "So I think the administration has to look at its options. I do think it has options."

--Editing by Abbie Sarfo.