

# What ACA Preventive Care Ruling Means For Employers

By **Rachel Shim** (April 28, 2023)

A Texas district court judge **has overruled** certain preventive care mandates of the Patient Protection and Affordable Care Act.

In *Braidwood Management Inc. v. Becerra* on March 30, U.S. District Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas held that the U.S. Preventive Services Task Force does not have the constitutional authority to mandate what medical care must be covered without cost sharing — coinsurance, copays, deductibles, etc. — as ACA preventive care services.



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By issuing this ruling, the court has paved the way for employers to once again impose cost-sharing requirements on preventive care.

In the same decision, the court also held that the ACA's mandate of coverage for preexposure prophylaxis for HIV prevention violates the Religious Freedom Restoration Act, allowing employers to drop coverage for the drug.

However, employers that are considering making changes to their group health and welfare plans should consider waiting until certain appeals and procedural decisions are finalized. Employers will also want to analyze the financial and social impacts of providing coverage for preventive care services without cost sharing, and whether changes will actually have a positive impact on their bottom line and employees.

Under Section 2713 of the ACA, health plans and health insurers offering health insurance coverage must provide coverage for a range of preventive care services and may not impose cost-sharing requirements on these services.

This prohibition on cost-sharing requirements is often referred to as first dollar coverage. Generally, health plans and insurers in the group and individual markets, except for those plans that qualify as grandfathered, are required to comply with the ACA's preventive care mandates.

In defining what medical services qualify as preventive care that must be offered with first dollar coverage, the ACA identified five categories of medical services.

The first of these requirements specifies that "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force" will qualify as preventive care.[1]

Other requirements of the ACA provide that health care services recommended by the U.S. Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices and the Health Resources and Services Administration will also constitute preventive medical care.

In *Braidwood Management v. Becerra*, the court was asked to rule on various challenges brought with regard to the ACA's preventive care mandates.

In its first ruling issued on Sept. 7, 2022, the court rejected certain challenges to the

preventive care mandates, holding in favor of the defendants. However, the court also found in favor of the plaintiffs on two of the challenges.

First, the court found that under the appointments clause of Article II of the U.S. Constitution, the USPSTF was not properly appointed and, accordingly, that its recommendations with regard to preventive care services made after March 23, 2010, the ACA's effective date, are unenforceable.

Also in its decision, the court found that the preventive care mandate requiring coverage for preexposure prophylaxis violates religious employers' rights under the RFRA.

In its initial ruling, the court delayed its decision on remedies. In its March 30 decision, the court ruled on this issue holding that:

- Any prior enforcement actions of the U.S. Department of Health and Human Services, the U.S. Department of the Treasury, and the U.S. Department of Labor — referred to as the agencies — with regard to "A" or "B" recommendations made by USPSTF since March 23, 2010, are vacated.
- The agencies are prohibited from implementing or enforcing any "A" or "B" recommendations made by the USPSTF since March 23, 2010.
- Employers with a religious objection cannot be required to provide coverage for preexposure prophylaxis.

While certain preventive care mandates will remain in effect, the ruling invalidated current USPSTF guidelines that ensure first dollar coverage for care based on current 2023 thinking.

Because most of the USPSTF's "A" or "B" recommendations have been modified since 2010, the ruling could allow employers to make significant changes to when and how first dollar coverage is provided for preventive care services.

In response to the ruling, the U.S. Department of Justice filed a notice of appeal on March 31 with the U.S. Court of Appeals for the Fifth Circuit. Additionally, on April 12, the DOJ filed a motion for a stay. If the stay is issued, the ruling may not go into effect and the agencies may again be able to enforce the preventive care mandates of the ACA.

However, any stay of the ruling that is issued will not provide a final determination on the future of the ACA's preventive care mandates. Employers looking for a final decision on the case will have to wait for the appeals to work their way through the courts before having ultimate guidance on the ACA's preventive care provisions.

The agencies have also reacted to the ruling and **issued guidance** in the form of a series of FAQs.

The FAQs provide guidance on how *Braidwood Management v. Becerra* affects the requirement to cover preventive services without cost sharing under the ACA and remind

employers that first dollar coverage will still apply to certain preventive care services and that any changes to group health plans must be made in accordance with applicable federal and state law.

The agencies also note that current guidance on preventive care services for high deductible health plans and COVID-19 vaccines has not been modified by the decision.

The agencies, throughout the guidance, strongly encourage employers to continue providing first dollar coverage for all preventive care services, including those with "A" and "B" recommendations issued since March 23, 2010, by the USPSTF.

Furthermore, the court's decision in *Braidwood v. Becerra*, its impact on the preventive care mandates included in the ACA and the opinion of the agencies are not the only considerations for employers.

The effectiveness of preventive care services, costs associated with providing first dollar coverage for preventive care services, the popularity of the preventive care mandates, and the administrative and legal issues applicable when making changes to how preventive care is handled by a group health plan are also factors employers should consider.

Coverage for USPSTF recommended preventive services has improved the rates at which employees use preventive care screening and services, and therefore, may be worth the cost.[2]

Studies on preventive care mandates have also established that providing first dollar coverage for preventive care may not significantly increase the cost of group health plans.[3] Moreover, first dollar coverage for preventive care services is extremely popular with employees.

In a survey of attitudes about the ACA, a majority of respondents indicated that first dollar coverage of preventive care services is an important provision that should be kept in place.[4]

As human resources departments know, making changes to group plan provisions requires significant administrative effort and expense, and employers will have to weigh the cost of these changes against any benefit.

As a result of the court's ruling, employers are free to amend their group health plans to impose cost sharing on the impacted preventive care, and those employers with a religious objection may stop providing coverage for preexposure prophylaxis.

However, as the foregoing discussion establishes, employers now analyzing their next steps will have much to consider before making any decisions regarding provisions applicable to preventive care benefits.

Employers will have to keep in mind that the court's decision did not invalidate first dollar coverage for all preventive care services.

Congress, in adopting the ACA, authorized multiple entities to make recommendations regarding what care and services constitute preventive care. As the agencies have pointed out, the court's opinion only impacts "A" and "B" recommendations issued by the USPSTF since March 23, 2010, and the mandated coverage of preexposure prophylaxis.

Other ACA preventive care requirements remain in effect, meaning those recommended by the Advisory Committee on Immunization Practices and the Health Resources and Services Administration continue to apply, as well as recommendations made by USPSTF prior to March 23, 2010.

An employer that decides to implement cost-sharing provisions for preventive care may want to consider the costs and administrative burden associated with applying cost-sharing provisions to only some, versus all the current preventive care services.

Employers with insured programs should also confirm that separate state insurance law requirements for preventive care do not apply before making any changes.

Employers may also want to keep in mind the current legal challenges to the decision issued in *Braidwood Management v. Becerra*. An employer that elects to implement cost-sharing provisions as a result of the ruling may have to undo those changes if the stay is issued or the appeal granted.

At a minimum, most employers may want to wait to make changes until a decision is issued regarding the request for a stay of the ruling. Employers concerned with the costs and administrative burden of multiple changes may also want to wait until a decision is issued on the appeal before modifying the coverage of preventive care services.

Finally, employers may want to consider whether first dollar coverage of preventive care services is a benefit worth modifying. An employer considering changes may first want to perform an analysis of the actual cost savings associated with removing first dollar coverage for preventive care services or eliminating coverage entirely for preexposure prophylaxis.

Implications of the potential for reduced use of preventive care services and its impact on employees' health could also be considered. The impact on employee relations could also be weighed as employees generally consider first dollar coverage for preventive care services to be a valuable benefit.

The need to comply with federal and state laws, including laws that mandate how and when changes in coverage can be made, and the cost associated with making changes to group health plans are also factors employers might want to review.

If these considerations and factors are not reviewed, employers that act too quickly may find themselves in a situation in the future where they have to undo changes made to their group health plan's ACA preventive care services.

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[1] ACA Section 2713(a)(1)(i).

[2] See HHS Assistant Secretary for Planning and Evaluation, *Access to Preventive Services without Cost-Sharing: Evidence from the Affordable Care Act* (Issue Brief No. HP-202201)

(Jan. 11, 2022), available at [https://aspe.hhs.gov/sites/default/files/documents/786fa55a84e7e3833961933124d70dd2/preventive-services-ib\\_2022.pdf](https://aspe.hhs.gov/sites/default/files/documents/786fa55a84e7e3833961933124d70dd2/preventive-services-ib_2022.pdf).

[3] See the Impact of Coverage Selected Preventive Services on Employer Health Care Spending, October 20, 2022, #444, Employee Benefits Research Institute (noting that the cost for five preventive care services recommended by the USPSTF was less than 2% of the total cost of benefits).

[4] 5 Charts About Public Opinion on the Affordable Care Act, Ashley Kirzinger Follow, Alex Montero, Liz Hamel, and Mollyann Brodie, Published: Apr 14, 2022, KFF.