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A “Mixed Bag” Decision, ACA Preventive Care Litigation Continues

At the end of last month, the U.S. Court of Appeals for the Fifth Circuit upheld a lower court ruling that a portion of the ACA’s preventive care mandate is unconstitutional. However, the court said the ruling should apply only to the plaintiffs who brought the case. The plaintiffs objected on religious grounds to providing coverage of services such as pre-exposure prophylaxis medications for HIV. Calling the decision a “mixed bag,” the court indicated that a universal injunction impacting the preventive care mandate was not warranted.

The case, Braidwood v Becerra, centered around first-dollar coverage of services that have been approved since 2010 by the U.S. Preventive Services Task Force (USPSTF), the Advisory Committee on Immunization Practices (ACIP), and Health Resources and Services Administration (HRSA).

In the underlying suit, the plaintiffs raised religious objections to a 2019 recommendation from the U.S. Preventive Services Task Force that drugs that prevent HIV transmission be fully covered, along with other preventive care coverage requirements under the health care law.

In 2022, a lower court ruled that the coverage requirements related to USPSTF recommendations were unlawful because the members of the taskforce should be subject to a congressional confirmation process. That ruling resulted in a universal injunction being ordered in 2023.

The ACA requires employers with non-grandfathered group health plans to cover these USPSTF-recommended services, such as colonoscopies, various cancer screenings, chemotherapy for breast cancer, and, as mentioned, HIV PrEP care, with no cost-sharing obligation to the employee. If these plans were given discretion to require cost-sharing for preventive care, employees could potentially see out-of-pocket costs for services that were previously covered at 100%. From a health perspective, employees might be less likely to seek the type of screenings and checkups they need. Employers would not be obligated to incorporate USPSTF-recommended services in their package of essential health benefits for their employees.

In its ruling, the Fifth Circuit agreed with the lower court that USPSTF members wield significant, unsupervised authority that should render them principal officers of the U.S. They should be nominated by the president and confirmed by the Senate. But, the panel disputed the idea that a remedy should be applied universally. The goal was to redress the plaintiff’s issues, not to offer universal relief.

The ruling also addressed the plaintiffs’ appeal that ACIP and HRSA recommendations pose the same issues as those issued by the USPSTF. The appeal was denied but sent back to the lower court. So, this case is far from over. The dispute concerning ACIP and HRSA centers around the fact that the recommendation made by these agencies fall under HHS authority, yet there was no notice and comment period associated with any ratification memo.

While the lower court seems unlikely to decide that any injunction on mandatory coverage of ACIP and HRSA-recommended services should apply nationally, the plaintiffs ultimately could take their case to the

Supreme Court in pursuit of a universal injunction. Potentially, a high court ruling would affect recommendations from all three bodies if the lower court and an appeals court determine that HHS' ratification of the ACIP and HRSA recommendations was unlawful.

For now, the key takeaway for employers is that the universal injunction on the mandate that plans cover USPSTF-recommended preventive care without cost-sharing is no longer in place. Unless and until another ruling indicates otherwise, employers without grandfathered plans should ensure that their plans cover these services at no cost to participants. We will continue to monitor this case and provide updates as they become available.