

# Recent Court Decision May Impact Preventive Services

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## Quick Facts

- In March 2023, a Texas District Court issued an opinion in the ACA preventive services case *Braidwood Mgmt. Inc. v. Becerra (Braidwood)*.
- The case challenges the Constitutionality of the ACA preventive services mandate.
- The court vacated ACA preventive services recommended by the USPSTF issued after March 23, 2010.
- The Department of Justice filed both a notice of the decision to appeal and a motion to stay soon after the decision.
- On April 13, 2023, the Departments released clarifying guidance to promote compliance with preventive service requirements while the case is pending.

## Background

On March 30, 2023, Texas District Court Judge Reed O'Connor [issued a ruling](#) in the case *Braidwood Mgmt. Inc. v. Becerra*, invalidating some preventive services mandates under the Affordable Care Act (ACA). Judge O'Connor also ruled that it was unlawful for the ACA to require that plans cover Human Immunodeficiency Virus (HIV) prevention measures such as pre-exposure prophylaxis (PrEP) with no cost-sharing, expanding on a more limited ruling from last September. The Biden Administration immediately indicated they would appeal the decision and file a motion for a stay to the Fifth Circuit Court of Appeals and the case may eventually go to the Supreme Court before a final decision is made.

On April 13, 2023, the Department of Labor (DOL), the Department of Health and Human Services (HHS), and the Treasury (collectively, the Departments) released a set of [frequently asked questions](#) (FAQs) clarifying the impact of the *Braidwood* decision on preventive services.

## Preventive Services Under the ACA

[Section 2713 of the ACA](#) requires non-grandfathered group health plans to provide certain preventive services at no cost-sharing, including:

- Recommended preventive services rated 'A' or 'B' by the United States Preventive Services Task Force ("USPSTF")
- Recommended immunizations approved by the Centers for Disease Control and Prevention Advisory Committee on Immunization Practices ("ACIP")
- Recommended preventive services and screenings for women, infants, children, and adolescents provided for in the Health Resources and Services Administration's ("HRSA") guidelines

The list of required preventive services is updated periodically. Since the ACA's inception, there have been several updates and additions to the list of recommended services. The ACA preventive services requirements went into effect on September 23, 2010, six months after ACA was signed into law. It required new preventive service recommendations to be covered by health plans at the plan year beginning date which is one year following the recommendation approval.

## ***Braidwood Mgmt. Inc. v. Becerra***

### **Background**

In September 2022, Judge O'Connor [ruled](#) that certain aspects of the ACA preventive services mandate are unlawful under the Constitution and the Religious Freedom and Restoration Act (RFRA). In *Braidwood*, six Christian-owned businesses challenged the preventive services mandate claiming that it violated:

- The "Appointments Clause" of the United States Constitution
- The "Vesting Clause" of the US Constitution
- The non-delegation doctrine
- The RFRA due to the requirement to cover a PrEP, an HIV prevention medication

The suit further alleged that the preventive service requirements only apply to recommendations that were already in place when the ACA was signed into law (March 23, 2010).

In a decision for a motion for Summary Judgment, the court ruled against the plaintiff stating that the preventive services mandate only covers recommendations in effect at the time ACA was signed into law. The court further dismissed the plaintiff's claims that ACIP and HSRA experts' appointments are unconstitutional and dismissed claims that USPSTF experts violated the Vesting Clause and the nondelegation doctrine.

The court ruled in favor of the plaintiffs regarding the USPSTF experts' appointments under the Appointments Clause, reasoning that the task force should be confirmed by the Senate. The court reasoned that officers of the United States were not properly appointed as required by the Appointments Clause of the Constitution. Judge O'Connor did not issue a remedy at the time of the September decision. Regarding HIV preventive medication, O'Connor invoked the Supreme Court decision in *Burwell v. Hobby Lobby*, ruling that the USPSTF recommendation for PrEP substantially burdened religious exercise and failed to meet the highest standard of judicial scrutiny, therefore rendering the PrEP mandate a violation of RFRA, but did not issue a remedy for that claim.

### **Recent Opinion and Order**

On March 30, 2023, Judge O'Connor issued an [opinion and order](#) on remedies in relation to the motion for summary judgment issued in September 2022. In his opinion, Judge O'Connor vacated all the actions of the Departments to implement and enforce the ACA preventive service mandate to cover 'A' and 'B' rated services recommended by the USPSTF at no cost-sharing. The court's ruling affects "all agency action taken to implement or enforce the preventive care coverage requirements in response to an 'A' or 'B' recommendation on or after March 23, 2010."

The court further found that because the PrEP mandate violates the RFRA, it enjoined the Departments from enforcing the mandate.

The March ruling does not impact all preventive services. First, it applies only to those recommendations made by the USPSTF; recommendations made by the ACIP and HSRA remain unchanged. Second, the court only vacated the actions of the USPSTF following the passage of ACA,

meaning that recommendations in effect before March 23, 2010, are still required to be covered at no cost-sharing under ACA.

## Department FAQs

In response to the *Braidwood* decision, the Departments released a set of [FAQs](#) in April to help clarify requirements and promote compliance.

### Coverage of Preventive Services

The FAQ guidance is clear on what items, and services are affected by the *Braidwood* decision. The guidance states, “The *Braidwood* decision applies to items and services required to be covered by plans and issuers without cost-sharing in response to an ‘A’ or ‘B’ recommendation by the USPSTF on or after March 23, 2010. This means that plans and issuers must continue to cover, without cost-sharing, items, and services recommended with an ‘A’ or ‘B’ rating by the USPSTF before March 23, 2010.” The guidance is clear that the decision does not affect other preventive items and services that are recommended by ACIP or HRSA.

The Departments go on to say that while the *Braidwood* decision prevents them from enforcing the preventive coverage requirements, the Departments strongly encourage plans and issuers to cover these items and services without cost-sharing, and the *Braidwood* decision does not prohibit plans from providing these services without cost-sharing. The Departments reiterate that while changes are not mandatory, to the extent that plans or issuers make coverage changes, the plan or issuer must comply with applicable notice requirements. For example, those requirements that state that changes that are reflected in the summary of benefits and coverage (SBC) must be provided to plan participants at least 60 days in advance of the change.

The FAQs clarify that the *Braidwood* decision does not affect state laws that require health insurance issuers to provide USPSTF ‘A’ and ‘B’ rating services at no cost-sharing. These state laws affect fully insured individual and group health plans, but not self-funded plans that are not subject to state laws.

### HDHP Preventive Care Safe Harbor

A high deductible health plan (HDHP) will not usually fail to meet the HDHP minimum deductible standard for providing services for preventive care before satisfying the deductible. In the new FAQs, the Departments state that until further guidance is issued, items and services recommended by the USPSTF affected by the *Braidwood* decision will still be considered preventive services for HDHP purposes and may be provided at no cost-sharing before satisfying the minimum annual deductible.

### Rapid Coverage of COVID-19 Preventive Services

The Coronavirus Aid Relief and Economic Security Act (CARES Act) requires non-grandfathered group health plans and issuers to cover preventive services for COVID-19 such as immunizations, no later than 15 business days following the date in which the recommendation for the service is given by the USPSTF or ACIP. According to the guidance released by the Departments, the *Braidwood* decision does not change the requirement to cover immunizations recommended by the ACIP, so the CARES Act requirement to cover COVID-19 vaccines still stands.

## Summary and Next Steps

It is likely that most group health plans will not see much if any immediate impact from the *Braidwood* decision. The recent FAQs are clear that the Departments allow and encourage plan sponsors to continue offering the affected preventive services at no cost-sharing. Fully insured plans will follow state law, many of which limit midyear changes to coverage and may also mandate certain coverage.

Self-funded plans are permitted to make changes midyear but are unlikely to do so because of the administrative burden of making changes and communicating reductions in coverage to plan participants. Plan sponsors with HDHPs with health savings accounts (HSAs) can rely on recent guidance that allows preventive services to meet Internal Revenue Service (IRS) requirements to be considered preventive care, allowing it to be covered at no cost-sharing before satisfying the deductible.

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