

COMPLIANCE ALERT



EMPLOYEE BENEFITS | April 26, 2023

DOL Issues Guidance on Preventive Care Court Order

On March 30, 2023, the United States District Court for the Northern District of Texas issued an order in *Braidwood Management Inc. v. Becerra* (“*Braidwood*”), vacating any and all actions taken by the DOL and other federal agencies (in the past and in the future) to implement or enforce provisions of the ACA that require group health plans and health insurance issuers (“plans and issuers”) to cover certain preventive care services with a rating of “A” or “B” by the United States Preventive Services Task Force (“USPSTF”) without cost sharing. The court found that Congress’ delegation of authority to the USPSTF under the ACA violates the Appointments Clause of Article II of the U.S. Constitution. The *Braidwood* decision does not impact coverage of preventive care services recommended by the Health Resources and Services Administration (“HRSA”) for infants, children, adolescents, or women, or immunizations for routine use in adults, adolescents, or children recommended by the Advisory Committee on Immunization Practices (“ACIP”), which are also required to be covered without cost sharing.

In response, on April 13, 2023, the DOL and other federal agencies released [FAQs](#) that provide guidance regarding how the agencies are interpreting the decision. The FAQs strongly encourage plans and issuers to continue covering preventive services with an “A” or “B” rating by the USPSTF despite the *Braidwood* decision. The guidance is summarized below.

Background

The Affordable Care Act (“ACA”) requires non-grandfathered plans and issuers to cover, without cost sharing, certain preventive care services. The ACA specifies the categories

and agencies who are responsible for determining the preventive care services that must be covered including the frequency, method, treatment, or setting for the recommended service. Three entities were tasked with identifying and recommending preventive care services in four different categories:

- USPSTF (recommends “A” or “B” ratings for specific evidence-based items or services among all populations)
- ACIP (recommends pediatric and adult immunizations); and
- HRSA (recommends preventive care and screening for adolescents and children); and
- HRSA (recommends preventive care and screening for women).

Some preventive care items and services cross between the categories listed above and may be recommended by two different agencies.

Members of ACIP and HRSA fall within the purview of HHS such that HHS is responsible for creating and overseeing the members. On the other hand, the USPSTF’s membership is comprised of volunteers who are not affiliated with a federal agency and, unlike ACIP and HRSA, USPSTF is not part of HHS or any other federal agency.

Braidwood Case

The *Braidwood* case centers on 2011 HRSA guidance that mandates coverage of all FDA-approved contraceptive methods (including certain birth control methods that have

abortifacient properties) and the USPTFs 2019 “A” rating issued for PrEP drugs, which are drugs that prevent the spread of the HIV virus. The plaintiffs alleged that forcing them to pay for insurance coverage for items or services they will either (a) not use due to their religious beliefs, or (b) object to on religious grounds, violates the Religious Freedom Restoration Act, Article II’s Appointments Clause, the nondelegation doctrine, and Article II’s Vesting Clause.

The court dismissed the claims related to the 2011 HRSA guidance recommending coverage of all FDA-approved contraceptives; however, the court determined, among other things, that the ACAs delegation of authority to the USPTF to make recommendations binding on health plans, issuers, and, in turn, participants, violates Article II’s Appointments Clause. The court vacated any prior actions by the federal agencies (since 2010) to implement or enforce the provisions of the ACA requiring plans to cover preventive services with a “A” or “B” rating by the USPSTF without cost sharing and enjoin them from further implementing or enforcing this requirement on plans or issuers in the future.

The Department of Justice, on behalf of the DOL and other federal agencies, appealed the decision on March 31, 2023, and on April 12, 2023, requested that the appellate court issue a stay of the decision while the appeal is pending.

DOL FAQs/Guidance

The DOL and other agencies’ guidance provides the following:

- Only preventive care items and services that have received an “A” or “B” recommendation/rating by the USPSTF on or after March 23, 2010, are impacted by the Braidwood decision. Thus, this does not impact the requirement for plans and issuers to cover vaccination recommendations made by ACIP (including the COVID-19 vaccine even though it is also recommended by USPSTF) without cost sharing, HRSA recommended preventive care items or services for children, adolescents, or women (including FDA-approved contraceptive methods) without cost sharing, or methods recommended by the USPSTF prior to March 23, 2010. The agencies

will release guidance on how to address recommendations made by the USPSTF prior to March 23, 2010.

- Although the agencies are prohibited from enforcing or implementing coverage requirements for items and services recommended by USPSTF with an “A” or “B” rating, they strongly encourage plans and issuers to continue to cover these items or services without cost sharing.
- States are not bound by the Braidwood decision, so states may implement mandates to cover all items or services with an “A” or “B” rating by the USPSTF. Further, contractual arrangements may bind fully insured and self-funded plans to cover these items or services for the remainder of their plan year even though the agencies cannot enforce the coverage requirements.
- To the extent a plan or issuer decides to change coverage under their plan because of the Braidwood decision, such changes would likely impact information that is included in the summary of Benefits and Coverage (“SBC”), which requires 60 days advance notice of the change by the plan or issuer. If information included in the SBC is not impacted, then due to the material reduction in benefits that would result from such a change in covered items or services, a plan or issuer would still have to provide notice to participants within 60 days after adopting the changes.
- Unless further guidance is issued providing otherwise, the Braidwood decision does not impact the ability of a HDHP to cover items or services with an “A” or “B” rating by the USPSTF prior to a participant meeting the applicable deductible under the plan.

Conclusion

It is likely that the District Court’s decision in Braidwood will be stayed pending appeal. In that case, none of the above guidance will be required as the DOL and other agencies can continue with business as usual, consistent with the provisions of the ACA, unless or until a Federal Court of Appeals or the

United States Supreme Court determines that this particular provision of the ACA is unconstitutional and unenforceable. Accordingly, employers should consult directly with counsel before making any plan design changes in reliance on the Braidwood decision.

This alert was prepared for Woodruff Sawyer by Marathas Barrow Weatherhead Lent LLP, a national law firm with recognized experts on the Affordable Care Act. Contact Stacy Barrow or Nicole Quinn-Gato at sbarrow@marbarlaw.com or nquinnгато@marbarlaw.com.

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