ACA COMPLIANCE BULLETIN

New FAQs Provide Guidance on Preventive Care Following *Braidwood* Decision

On April 13, 2023, the Departments of Labor, Health and Human Services, and the Treasury (Departments) issued [frequently asked questions (FAQs)] regarding the Affordable Care Act's (ACA) preventive care coverage requirement. The Departments issued these FAQs in response to a recent court decision from Texas ([*Braidwood Management Inc. v. Becerra*]) that invalidated a portion of the ACA's preventive care mandate.

The FAQs include the following important guidance for employer-sponsored health plans:

- Due to *Braidwood* decision, health plans are not required to cover preventive care items or services that have an "A" or "B" recommendation by the U.S. Preventive Services Task Force (USPSTF) on or after March 23, 2010. However, the Departments strongly encourage plans and issuers to continue to cover such items and services without cost sharing;
- Health plans must continue to cover, without cost sharing, items and services recommended with an "A" or "B" rating by the USPSTF before March 23, 2010, in addition to other recommended preventive care services; and
- State laws regarding preventive care coverage requirements for insured health plans are not impacted by the *Braidwood* decision.

Action Steps

The future impact of the *Braidwood* decision is unclear; the ruling may be put on hold pending appeal and ultimately reversed or upheld by a higher court. In the meantime, employers that want to make changes to their preventive care benefits should carefully review their options. Additionally, employers that make any plan changes should make sure to notify plan participants timely.

Highlights

- In *Braidwood*, a federal district court struck down part of the ACA's preventive care coverage mandate.
- The court's ruling only impacts items or services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010.
- Health plans and issuers must continue to comply with all other preventive care coverage requirements.
- State laws regarding preventive care continue to apply to insured plans.

Future of Ruling

- The Biden administration has appealed the court's decision to the 5th Circuit Court of Appeals.
- It has also asked the 5th Circuit to put the ruling on hold pending appeal.
- It is uncertain at this point whether the ruling will be reversed or upheld by a higher court.

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ACA Preventive Care Coverage Requirements

The ACA requires non-grandfathered health plans and health insurance issuers to cover a set of recommended preventive services without imposing cost-sharing requirements (such as deductibles, copayments or coinsurance) when the services are provided by in-network providers. The recommended preventive care services are:

- Evidence-based items or services that have, in effect, a rating of "A" or "B" in the current recommendations of the USPSTF;
- Immunizations for routine use in children, adolescents and adults that are currently recommended by the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention;
- Evidence-informed preventive care and screenings for infants, children and adolescents provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA) guidelines; and
- Additional preventive care and screenings for women provided for in comprehensive guidelines supported by HRSA.

Court Decision

On March 30, 2023, the U.S. District Court for the Northern District of Texas ruled in *Braidwood* that the ACA's preventive care coverage requirements based on an "A" or "B" rating by the USPSTF on or after the ACA's enactment on March 23, 2010, violate the U.S. Constitution. Accordingly, the court granted an injunction against the enforcement of those requirements and vacated the Departments' related enforcement actions. The Biden administration disagrees with the court's decision. It filed a notice of appeal on March 31, 2023, and a motion for a stay on April 12, 2023.

FAQs

The Departments issued the following FAQs to provide initial guidance on how the *Braidwood* decision affects the requirement to cover preventive services without cost sharing under the ACA. The Departments anticipate issuing additional guidance in the future to further address plans' and issuers' obligations in light of the *Braidwood* decision.

Q1: Which USPSTF-recommended items and services are affected by the *Braidwood* decision?

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 Departments recognize that the USPSTF has updated a significant number of the recommendations since March 23, 2010, such as by changing their rating from an "A" or "B," changing the recommendation so that it applies to different populations, changing the recommendation to refer to a different subset of items or services, or rescinding the recommendation. The Departments anticipate providing additional guidance with respect to the pre-March 23, 2010, recommendations.

Q2: Following the *Braidwood* decision, are plans and issuers required by the ACA to continue to provide coverage, without cost sharing, for items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010?

The *Braidwood* decision prevents the Departments from implementing and enforcing the ACA's coverage requirements for items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010. However, the

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Departments strongly encourage plans and issuers to continue to cover such items and services without cost sharing. Preventive services help people avoid acute illness, identify and treat chronic conditions, reduce the risk of cancer or facilitate early detection, and improve health. Coverage for USPSTF-recommended preventive services has reduced disparities in, and improved, disease and condition screening rates. Analysis suggests that 60% of participants, beneficiaries and enrollees use a preventive service each year and have come to rely on receiving coverage without cost sharing for preventive items and services. The *Braidwood* decision does not preclude plans and issuers from continuing to provide the full extent of such coverage.

Q3: Does the *Braidwood* decision affect the ACA's requirements to provide coverage without cost sharing for immunizations recommended by ACIP or preventive care and screenings for infants, children, and adolescents, as well as for women as provided for in comprehensive guidelines supported by HRSA?

No. The *Braidwood* court did not enjoin enforcement of the ACA or vacate its implementing regulations and guidance related to immunizations recommended by ACIP and preventive care and screenings provided for in comprehensive guidance supported by HRSA (including, but not limited to, contraceptive coverage), so those requirements are not impacted by the *Braidwood* decision. **Plans and issuers must continue to cover such items and services—which include, but are not limited to, immunizations recommended by ACIP, as well as contraceptive services, breastfeeding services and supplies, cervical cancer screening, and pediatric preventive care recommended by HRSA—without cost sharing, consistent with all applicable regulations and guidance.**

Some of these recommendations and guidelines overlap with items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010. **To the extent a recommendation is made by ACIP or provided for in comprehensive guidelines supported by HRSA, plans and issuers are required to provide coverage, without cost sharing, for these items and services, even if they also are items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010.**

Q4: Does the *Braidwood* decision prevent states from enacting or enforcing state laws that require health insurance issuers offering group or individual health insurance coverage to provide coverage, without cost sharing, for items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010?

No. The *Braidwood* decision generally does not affect the application of state laws that require health insurance issuers offering group or individual health insurance coverage to provide coverage without cost sharing of items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010, and issuers generally must continue to comply with any such applicable state laws.

Q5: To the extent a plan or issuer is permitted and elects to make changes to its coverage, may it make those changes in the middle of the plan or policy year?

As stated in Q2, although the *Braidwood* decision prevents the Departments from implementing and enforcing the ACA's coverage requirements for items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010, **plans and issuers are not required to make any changes to coverage or cost sharing as a result of the *Braidwood* decision, and the Departments strongly encourage plans and issuers to continue to cover, without cost sharing, items and services affected by the court's decision.**

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Plans and issuers should consider other provisions of applicable federal and state law when determining whether changes to the terms of the plan or coverage may be made during a plan or policy year. Further, plans and issuers, including self-insured plans, may still be required to cover the full scope of recommended preventive services under other legal and contractual requirements. This includes any applicable state law requirements, as well as the terms of any contracts, including collective bargaining agreements or other requirements, that may prevent changes during a plan or policy year.

Q6: Must plans and issuers notify participants, beneficiaries, and enrollees if they change the terms of their coverage with respect to USPSTF-recommended items and services that were affected by the *Braidwood* decision?

To the extent a plan or issuer is permitted and elects to make changes to coverage, the plan or issuer must comply with applicable notice requirements when making any changes to the terms of coverage with respect to items and services recommended by the USPSTF. This includes complying with the ACA's requirements for the Summary of Benefits and Coverage (SBC), which provide that if a group health plan or health insurance issuer offering group or individual health insurance coverage makes a material modification (as defined under ERISA) to any of the terms of the plan or coverage that would affect the content of the SBC, that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or re-issuance of coverage, the plan or issuer must provide notice of the modification to enrollees not later than **60 days prior to the date on which the modification will become effective**.

Plans and issuers also must comply with any additional applicable notice requirements, including requirements that apply in the event of a reduction in covered benefits or services or other modification of plan terms. This includes the requirement that a plan subject to ERISA generally must provide a summary of material reduction in covered services or benefits within 60 days of the adoption of a material reduction in group health plan services or benefits.

HDHPs and Preventive Care

Generally, a health plan will fail to be treated as a high deductible health plan (HDHP) if it provides benefits for any year before the applicable minimum deductible for that year is satisfied. However, an HDHP may provide preventive care benefits without a deductible or with a deductible below the amount otherwise required for an HDHP.

IRS Notice 2004-23 describes preventive care services that may be provided by an HDHP before the satisfaction of the minimum annual deductible, including an appendix of preventive care screening services. The list of preventive care services that may be provided by an HDHP under the safe harbor has been expanded over the years. IRS Notice 2013-57 clarifies that a health plan will not fail to qualify as an HDHP merely because it provides the preventive care services required by the ACA without a deductible.

Q7: Following the *Braidwood* decision, may an HDHP continue to provide benefits for items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010, before the minimum annual deductible has been met?

Yes. Until further guidance is issued, items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010, will be treated as preventive care for purposes of HDHPs, regardless of whether these items and services must be covered, without cost sharing, under the ACA.

Rapid Coverage of Preventive Services and Vaccines for Coronavirus

The CARES Act requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to cover, without cost-sharing requirements, any qualifying coronavirus

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preventive service. Under the statute, the term "qualifying coronavirus preventive service" means an item, service, or immunization that is intended to prevent or mitigate COVID-19 and that is:

- An evidence-based item or service that has, in effect, a rating of "A" or "B" in the current recommendations of the USPSTF; or
- An immunization that has, in effect, a recommendation from ACIP with respect to the individual involved.

Coverage of a qualifying coronavirus preventive service must begin 15 business days after the date on which an applicable recommendation is made by USPSTF or ACIP.

Q8: How does the *Braidwood* decision affect the requirement under CARES Act to cover qualifying coronavirus preventive services?

As stated in Q3, the *Braidwood* decision does not change the requirement to cover without cost sharing immunizations recommended by ACIP. Therefore, plans and issuers must continue to provide coverage, without cost sharing, for any qualifying coronavirus preventive service that is an immunization that has in effect a recommendation from ACIP with respect to the individual involved, including COVID-19 vaccines and their administration. As of April 13, 2023, the USPSTF has not recommended any qualifying coronavirus preventive services with an "A" or "B" rating, so there is no impact to plans' and issuers' coverage of these services.

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