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ACA Preventive Care Court Ruling and FAQ

On April 13, 2023, the Departments of Labor, Health and Human Services and the Treasury (collectively, “the Departments”) issued FAQ Part 59, providing guidance as it relates to the recent decision in *Braidwood Management Inc. v. Becerra*. In this case, a district federal court in Texas ruled that many of the ACA’s preventive care mandates cannot be enforced nationwide.

■ Background

Under the ACA, non-grandfathered group health plans must provide coverage for in-network preventive items and services and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or deductible) with respect to those items or services. Specifically,

- 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 (“USPSTF”);
- Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices (“ACIP”) of the Centers for Disease Control and Prevention (“CDC”);
- With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (“HRSA”); and
- With respect to women, preventive care and screening provided for in comprehensive guidelines supported by HRSA, to the extent not already included in certain recommendations of the USPSTF.

■ Summary of the Case

Plaintiffs are six individuals and two businesses who challenge the legality of the preventive care mandates as violative of the Constitution's Appointments Clause and the Religious Freedom Restoration Act ("RFRA"), specifically as it relates to coverage for PrEP drugs (medication for HIV prevention), contraception, the HPV vaccine, and the screenings and behavioral counseling for STDs and drug use.

Among other things, the court in *Braidwood* ruled against the Departments and held that all agency action taken to implement or enforce the preventive care coverage requirements by the USPSTF (the "A" and "B" recommendations) on or after March 23, 2010, is unlawful and unenforceable nationwide. With respect to the RFRA claims, the court ruled in favor of the plaintiffs enjoining the Department from enforcing coverage as it relates to PrEP with respect to these plaintiffs. The court declined to strike down ACA mandates that provide coverage for contraception, HPV vaccine, and screenings related to STDs and drug use.

While the Department of Justice has filed an appeal and requested a stay of enforcement, the FAQs released provide initial guidance on the impact of the decision.

■ Effect on Plans

The decision merely enjoins the Departments from enforcing the preventive services requirements that were given an "A" or "B" rating by the USPTF on or after March 23, 2010. Importantly, the requirements to cover contraceptive services, preventive care and screenings, breastfeeding services and supplies, cervical cancer screening, and pediatric preventive care recommended by HRSA, in addition to immunizations recommended by ACIP, were not impacted by the decision. As such, non-grandfathered plans must continue to cover those services without member cost sharing.

While plans are not required to cover more recent "A" or "B" rated recommendations from the USPTF, the Departments strongly encourage plans to continue to do so without cost-sharing. In addition, the court's decision does not affect the application of state laws that may require fully insured plans to continue to cover such services.

However, if a plan chooses to eliminate the coverage or apply cost-sharing, it may require certain notices to participants. Any mid-year change to benefits that affects the content of the Summary of Benefits and Coverage ("SBC") requires a 60-day advanced notice. If the plan is subject to ERISA, it may also require a Summary of Material Reduction ("SMR") in benefits within 60 days following the reduction in coverage (the SMR requirements are met with the delivery of an updated SBC). If plans choose to do nothing, no participant notice is required.

■ Coverage of Coronavirus Vaccine

Since the ruling had no impact on immunizations recommended by ACIP, the order does not impact the requirement for plans to continue to cover the COVID-19 vaccine and any approved COVID-19 boosters without member cost-sharing.

■ Impact on High Deductible Health Plans

For a plan to be considered a high deductible health plan ("HDHP") (used in connection with a health savings account ("HSA")), it cannot provide any benefits before the applicable minimum deductible for that year has been satisfied. There is a safe harbor that allows an HDHP to cover certain preventive care before the deductible. While many of the preventive care services that the IRS includes in the safe harbor are also services that are covered by the USPTF recommendations, a



plan will be able to continue the status quo until further guidance is issued. In other words, providing coverage for “A” and “B” recommended preventive care items and services before the deductible is met will not disqualify the HDHP or jeopardize an individual’s HSA eligibility.

■ Employer Action

With the DOL appealing the court’s decision, the litigation on these issues is not over. It could be the Supreme Court that ultimately decides whether the “A” and “B” recommendations of the USPTF can continue to be enforced. Moreover, further legal challenges may continue with respect to other aspects of the preventive care mandate, including coverage for contraceptives and ACIP recommendations on vaccines.

At this point, it is too early to tell whether carriers and plans will make broad changes to covered preventive care items and services as a result of the court’s decision. If employers elect to make changes to their plans to eliminate coverage or apply cost-sharing with respect to the affected “A” and “B” items and services, they should abide by the respective notice requirements and do so in accordance with state law (fully insured plans). All employers should watch for further guidance clarifying uncertainties that exist as a result of this ruling.