

## U.S. Court of Appeals Partially Upholds *Braidwood Management, Inc. v. Becerra*: Finds Appointment of USPSTF Unconstitutional

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Last month, the United States (U.S.) Court of Appeals for the Fifth Circuit partially upheld a lower court ruling in *Braidwood Management, Inc. v. Becerra* that invalidated the preventive care mandate under the Affordable Care Act (ACA). The ACA requires group health plans and health insurance issuers (health plans) to cover certain preventive services recommended by the U.S. Preventive Services Task Force (USPSTF) without cost-sharing. The ACA also mandates coverage of immunizations recommended by the Advisory Committee on Immunization Practices (ACIP) and preventive services for women and children recommended by the Health Resources and Services Administration (HRSA).

In *Braidwood*, the plaintiffs originally brought the case to challenge on religious grounds the ACA's requirement that health plans cover medication for HIV prevention and other preventive services.

The plaintiffs argued that the administrative bodies that recommend the preventive services are "principal officers" who must be nominated by the U.S. President and confirmed by the Senate under the U.S. Constitution's Appointments Clause. In defense, the government argued that U.S. Health and Human Services Secretary Xavier Becerra's authority to remove the members at will made them "inferior officers" who were not required to be nominated and confirmed under the U.S. Constitution's Appointments Clause. The district court judge ruled that the USPSTF members should have been appointed by the U.S. President and approved by the U.S. Senate. Because they were not, their appointment was unconstitutional. Accordingly, the district court ruled that the requirements based on the recommendations of the USPSTF violated the Appointments Clause and, thus, requiring coverage for preventive care services without cost-sharing was no longer required for health plans to be ACA-compliant. The district court also imposed a nationwide injunction prohibiting the U.S. Department of Health and Human Services from enforcing the mandate, which was put on hold as the case went through the appeals process.

On appeal, the Fifth Circuit affirmed in part, reversed in part, and remanded for further proceedings. The Fifth Circuit's decision:

- Upheld the lower court's declaration that the USPSTF is unconstitutional and that the USPSTF members must be nominated by the President and confirmed by the Senate.
- Overturned the nationwide injunction, which means that health plans must continue to cover ACA-mandated preventive care services without cost-sharing for the time being. The decision with respect to the USPSTF

recommendations was limited, and held that the injunction only applied to the plaintiffs' health care plans (thus, only the plaintiffs are relieved from having to provide HIV preventive medicines with no cost-sharing.)

- Remanded the case back to the lower court to decide whether guidelines for preventive care services from the ACIP and HRSA were properly implemented. Note: ACIP and HRSA provide guidelines for preventive care services not addressed by the USPSTF, such as vaccines and contraception.

## WINSTON TAKEAWAY

The decision in *Braidwood* was limited to the plaintiffs, and held that the injunction was only applicable to the plaintiffs' health care plans. Thus, other health plans must continue to provide preventive care services mandated under the ACA at no cost to participants. However, because the Fifth Circuit determined that the appointment of the USPSTF members was unconstitutional, it is likely that the USPSTF coverage requirement will not be enforceable against any health plan in the Fifth Circuit. The decision also leaves open the possibility that the district court could invalidate the preventive care mandate based on the ACIP's and HRSA's recommendations and guidelines, which include immunizations and women's health services, respectively. In addition, there will likely be further challenges to preventive care services under the ACA in other circuits, including the possibility that the case will eventually make its way to the U.S. Supreme Court. The U.S. Department of Labor is likely to issue clarifying guidance on the ACA preventive care mandate in light of this ruling. We will continue to keep our clients updated on this case and others involving coverage for preventive care services and compliance with the ACA.

Kristine Lofquist, Senior Paralegal, co-authored this blog.

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## Authors

[Amy Gordon](#)

[Susan Nash](#)

[Jamie Weyeneth](#)

[Erin Haldorson Weber](#)

Kristine Lofquist

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Amy Gordon



Susan Nash



Jamie Weyeneth



Erin Haldorson Weber

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