

Benefit Minute

April 2023

Recent Regulatory & Judicial Activity

This issue provides an update on recent regulatory and judicial activity at both the federal and state level.

Covid National Emergency Ends

In January, the Biden administration announced its intention to end the Covid National Emergency on May 11, 2023. However, Congress was unwilling to continue to wait for the Covid National Emergency to end, so they passed H.J. Res. 7 which President Biden signed into law on April 10, 2023. As a result, the Covid National Emergency ended on that date.

The end of the National Emergency means that the Covid Outbreak Period, which tolled certain ERISA and COBRA deadlines, should end 60 days later (June 9, 2023) instead of the originally anticipated date of July 10, 2023. However, in a recent FAQ, the agencies stated that Outbreak Period relief generally continues until 60 days after the announced end of the COVID-19 National Emergency or another date announced by DOL, the Treasury Department, and the IRS (the Departments). The DOL has informally stated that the anticipated deadline of July 10, 2023 will remain the relevant date for the end of the Outbreak Period to avoid potential confusion and changes to administrative processes already in progress. Further clarification and formal guidance should be forthcoming. In the meantime, plan sponsors should continue to plan for the Outbreak Period to end on July 10, 2023 as initially expected.

ACA Preventive Care Services Litigation

The Affordable Care Act (ACA) requires health insurers and group health plans to cover certain in-network preventive care services at no cost to participants. The required preventive care services include those that have an “A” or “B” recommendation from the U.S. Preventive Services Task Force (USPSTF). These recommendations are periodically updated and revised by the USPSTF.

In the recent case of *Braidwood Management Inc. v. Becerra*, the U.S. District Court for the Northern District of Texas held USPSTF is not directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate. Therefore, any recommendation (or revised recommendation) made after March 23, 2010 (date of passage of the ACA) was not subject to the requirement to be offered as a free preventive care service.

While drafting the preventive care services provision of the ACA, Congress looked to existing advisory bodies and agencies that could evaluate evidence and make appropriate, timely recommendations that would then be automatically incorporated into the law. In some cases, these advisory bodies are overseen by a regulatory agency, but the judge in this case ruled that the USPSTF is not directly overseen by or accountable to any agency. As a result, new and changed recommendations cannot be enforced.

The Department of Justice filed a notice of appeal on March 31, 2023, and a motion for a stay on April 12, 2023. In the meantime, the Departments have issued a set of FAQs that encourage health insurers and group health plans to continue to cover such items and services without cost sharing. They state that preventive services help people avoid acute illness, identify and treat chronic conditions, reduce the risk of cancer or facilitate early detection, and improve health.

The FAQs also clarify:

- ACA preventive care services recommended by other bodies (ACIP and HRSA) are not impacted by this court decision and must still be covered at no cost, including Covid vaccines
- state insurance laws that require health insurers to provide coverage without cost sharing of items and services recommended with an "A" or "B" rating by the USPSTF are not impacted by this decision
- items and services recommended with an "A" or "B" rating by the USPSTF covered at no cost in a qualified high deductible health plan will be treated as preventive care for purposes determining eligibility to contribute to a health savings account

Health insurers and group health plans that wish to amend coverage for certain preventive care services must comply with 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 revised SBCs

which must be provided not later than 60 days prior to the effective date of the change, and SMMs which must be provided within 60 days of adoption of the material reduction in group health plan benefits.

Changes Made to Maryland's Time to Care Act

In 2022, Maryland enacted the Time to Care Act (the Act), a paid family and medical leave program. During the 2023 legislative session, certain changes were made to the program, which provide some clarification and give employers additional time to plan for implementation. These changes, which have not yet been signed into law by the governor, include:

- start date for contributions has been delayed until **October 1, 2024** (was originally October 1, 2023)
- start date for benefit payments has been delayed until **January 1, 2026** (was originally January 1, 2025)
- program cost will be split **50%/50%** between employer and employee (split not originally stated in the Act); no employer contribution if fewer than 15 employees
- the total contribution rate will not exceed **1.2%** of an employee's wages, capped at the social security wage base; the initial rate must be announced by October 1, 2023 and will be in effect through June 30, 2026
- the provision that an employee must exhaust all employer-provided leave before receiving benefit payments under the Act has been eliminated
- the requirement that the state pay the employee share of the contribution for employees making less than \$15 per hour has been eliminated
- employees and employers may agree to use employer-paid leave to supplement the benefits available under the Act up to 100% of wages, but employers cannot require this
- regulations must be issued by **January 1, 2024** (was originally June 1, 2023). Presumably the regulations will provide additional information on private plan options, requirements, and the approval process

Mifepristone Litigation

On April 21, 2023, the Supreme Court issued a stay of a lower court decision that revoked FDA approval of the abortion medication mifepristone. This stay preserves access to mifepristone across the U.S. as the case works its way through the court system. The importance of this case is twofold: 1) continued access to abortion medications and 2) the authority of the FDA to approve prescription medications. This case is another factor for plan sponsors to consider as they evaluate coverage of reproductive health services.