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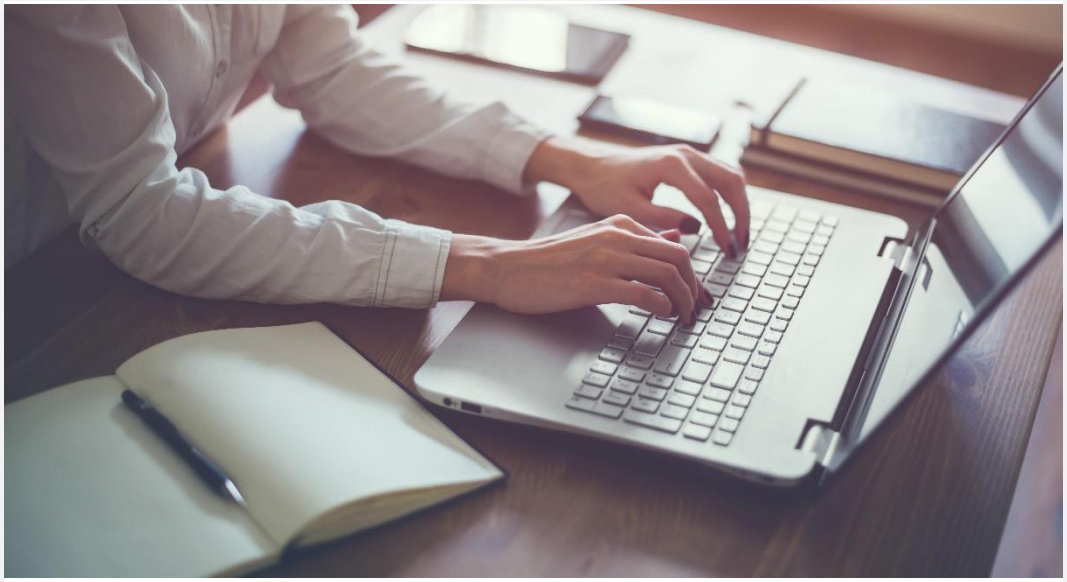

In this Issue:

Supreme Court Set to Hear Oral Arguments in Case Challenging Constitutionality of ACA Preventive Services Mandate

On April 21 the Supreme Court is scheduled to hear oral arguments in a case that challenges the constitutionality of the Affordable Care Act's preventive services mandate. Depending on how the Supreme Court rules in *Braidwood Management v. HHS,* the ACA preventive services mandate could be significantly curtailed, or altogether invalidated.

Overview of the ACA Preventive Services Mandate

In general, the ACA requires group health plans to cover the following preventive services without cost-sharing:

- Evidence-based items or services with an A or B rating by the United States Preventive Services Task Force (USPSTF)
- Immunizations for routine use as recommended by the Centers for Disease Control's Advisory Committee on Immunization Practices (ACIP)
- Preventive care and screenings for children as provided for in guidelines supported by the Health Resources and Services Administration (HRSA)
- Preventive care and screenings for women as provided for in guidelines supported by the HRSA

The USPSTF periodically updates its ratings. As the ratings change, so too do the relevant preventive services that group health plans must cover pursuant to the ACA.

Case Background

The questions before the Supreme Court relate to the enforceability of the USPSTF ratings, as well as to the overall constitutionality of the ACA preventive services mandate.

Initially a Texas district court generally held that the preventive services mandate with respect to USPSTF ratings of A or B issued on or after March 23, 2010 (the date the ACA was enacted) violates the Constitution's Appointments Clause. That holding was subsequently confirmed by the 5th Circuit Court of Appeals.

Basically, the Appointments Clause provides that certain officers of the U.S. must be appointed by the President with the "advice and consent" of the Senate. In previous cases, the Supreme Court has distinguished between "principal" officers and "inferior" officers, noting that the latter can be appointed by the President or agency heads without Senate confirmation. USPSTF members are appointed by the Secretary of Health and Human Services for 4-year terms.

The other question before the Supreme Court is whether the entire ACA preventive services mandate violates the Constitution's non-delegation clause. That clause limits Congress's ability to delegate its legislative authority to the executive branch. The Texas district court held that the preventive services mandate did not violate the non-delegation clause, and the Fifth Circuit Court of Appeals did not address the issue.

Outlook

As noted, the Supreme Court is scheduled to hear oral arguments in the case on April 21. A decision is expected by the end of the Court's current term, either in late June or early July.

Wave of Litigation Targets Tobacco Surcharges in Wellness Programs

Employers recently have been facing a series of lawsuits challenging their "tobacco surcharge" wellness programs, pursuant to which employees who smoke are required to pay more for health insurance than non-smokers.

Background

As a general rule, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits discrimination in group health plan eligibility, benefits, and premiums based on specific "health factors," including health status, a medical condition, or medical history. However, as amended by the Affordable Care Act (ACA), HIPAA has an exception to this rule that permits insurers to charge up to 50% higher premiums based on an individual's tobacco use. HIPAA requires that these tobacco surcharges are part of a wellness program that satisfies certain conditions.

One type of wellness program – a "health-contingent" program – requires participants to meet or maintain a specific health outcome (e.g., not smoking or losing weight) in order to obtain a reward. There are two types of health-contingent wellness programs: activity-only and outcome-based. An outcome-based program must meet the following criteria: (1) the program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year; (2) the total reward for all of the plan's wellness programs that required satisfaction of a standard related to a health factor is limited to a certain percentage of the cost of total coverage under the plan; (3) the program must be reasonably designed to promote health and prevent disease; (4) the full reward must be available to all similarly situated individuals; and (5) the plan must disclose in plan materials the availability of a reasonable alternative standard (for example, a tobacco user may still qualify for lower premium rates if they satisfy an alternative, such as attending educational classes or trying a nicotine patch).

The Lawsuits

Recently, several lawsuits have been filed challenging tobacco surcharges. In general, these lawsuits argue that employers charged tobacco premium surcharges that violated HIPAA's non-discrimination rule. Specifically, the lawsuits typically focus on the requirement that wellness program must have a reasonable alternative standard available – the plaintiffs argue that the wellness program fails to provide such a standard, and, even if an alternative is provided, the program fails to adequately communicate the alternative with plan participants. Some of the lawsuits also allege that by failing to meet these standards, the employer has breached its fiduciary duty under ERISA to act solely in the participants' best interests.

In one such case, the employer settled a lawsuit challenging its tobacco surcharge. The employer's wellness program requires employees who are tobacco users to complete a smoking cessation program and then stay tobacco-free for 90 days, or pay an additional $40 per week toward health insurance premiums. A group of employees sued, alleging that the tobacco surcharge is unlawful because the wellness program does not offer a reasonable alternative standard, the program does not properly disclose the alternative, and the program does not offer employees the "full reward" if they stop smoking – rather, the surcharge is only removed on a going-forward basis. Other large employers are facing similar litigation, though as of this writing, no court has actually ruled in a case.

In addition to the wave of lawsuits brought by private parties, the Department of Labor has also brought enforcement litigation challenging employers' wellness programs for allegedly not meeting the wellness program requirements.

Considerations for Employers

Tobacco surcharges are a common feature of many employers' wellness programs since, according to the CDC, smoking is the leading preventable cause of death, disease, and disability in the United States.

The HIPAA non-discrimination regulations clearly lay out the criteria for the wellness plan exception in general, and for tobacco surcharge programs in general. In order to mitigate the risk of lawsuits or enforcement actions, employers should review these wellness programs and make sure that they are meeting all of the proper requirements, and particularly the reasonable alternative standard requirement.

Trump Administration Issues Executive Order on Increasing Price Transparency Efforts

One of the many Executive Orders ("EOs") President Trump has signed in the first few months of his second term in office is an order designed to address health care pricing information. An EO signed in February directs federal agencies to take action to implement and enforce health care price transparency measures.

Executive Order

On February 25, 2025, President Trump signed an EO entitled "Making America Healthy Again by Empowering Patients with Clear, Accurate, and Actionable Healthcare Pricing Information," which provides that the "Federal Government will continue to promote universal access to clear and accurate health care prices and will take all necessary steps to improve existing price transparency requirements; increase enforcement of price transparency requirements; and identify opportunities to further empower patients with meaningful price

information, potentially including through the expansion of existing price transparency requirements."

President Trump signed a similar EO in 2019, and as a result of that EO, the Centers for Medicare & Medicaid Services issued regulations requiring hospitals to take steps to publicly provide pricing information and requiring health plans to publish their negotiated rates and net prices for prescription drugs.

The February 25th EO tasks the Secretaries of the Treasury, Labor, and Health and Human Services Departments with taking the following actions within 90 days to implement and enforce the health care price transparency regulations issued pursuant to the 2019 EO:

- Require the disclosure of the actual prices of items and services, not estimates;
- Issue updated guidance or proposed regulations to ensuring pricing information is standardized and easily comparable across hospitals and health plans; and
- Issue guidance or proposed regulations updating enforcement policies designed to ensure compliance with the transparent reporting of complete, accurate, and meaningful data.

Takeaways

This newest EO is a sign that the Trump Administration continues to view health care price transparency as a priority. It is not clear at this stage exactly what actions the federal agencies will take to fulfill their duty under the EO, so it remains to be seen whether the agencies will amend the existing price transparency regulations or take other steps, such as ramping up enforcement efforts. Group health plans and other stakeholders should monitor for what actions the federal agencies take in the next few months to meet the EO's requirements to implement and enforce the transparency rules.

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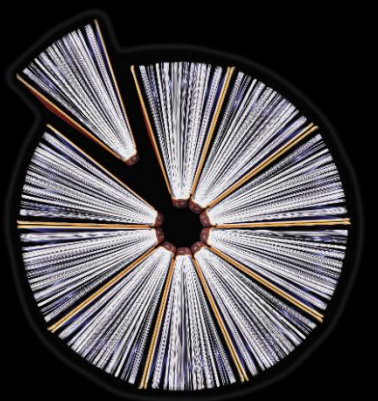

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