

Judge's Decision Would Make Some No-Cost Cancer Screenings a Thing of the Past

The Texas ruling builds on a case in which a plaintiff objected, on religious grounds, to providing free HIV prevention PrEP to employees.

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A federal judge on Thursday overturned a portion of the Affordable Care Act that makes preventive services, such as some cancer screenings, free to enrollees, a decision that could affect health insurance policyholders nationwide.

The decision from the U.S. District Court for the Northern District of Texas could open the door for insurers or employers to reinstate copayments for some of those preventive services, although many may be reluctant or unable to do so, at least immediately.

The ruling by [U.S. District Judge Reed O'Connor](#) builds on a September judgment in which he also said the ACA requirement that employers cover preexposure prophylaxis treatment to prevent HIV violates the Religious Freedom Restoration Act.

His ruling is the latest shot in the legal battle over the ACA. "Previous cases threatened the very existence of the law and fundamental protections. This decision does not do that," said Larry Levitt, KFF executive vice president for health policy. But "it strikes down a portion of the law, albeit a very popular one, that is used by a lot of people."

It is almost certain to be appealed, possibly by both sides: the conservative groups that brought the case and had hoped the decision would be broader, and the Biden administration, which supports the ACA.

"The stakes are really high," because the ultimate decision could affect millions of Americans, said [Andrew Twinamatsiko](#), associate director of the health policy and the law initiative at the O'Neill Institute at Georgetown University.

"Americans should have peace of mind there will be no immediate disruption in care coverage," said [Matt Eyles](#), president and CEO of AHIP, the health insurance industry's leading lobbying group.

Now, the Department of Justice must decide whether to seek an emergency order putting the ruling on hold during the appeal process.

The decision could affect the no-copay screenings and similar preventive services that most insured Americans have as part of their health plans. But consumers may see little impact initially.

“The word prevention appears a couple hundred times in the ACA,” said [Timothy Jost](#), law professor emeritus at Washington and Lee University School of Law, who closely follows the ACA. “Part of the idea of the ACA was we thought to try to prevent disease or at least identify it earlier when it’s more curable.”

Making such care free to enrollees was a way to encourage screening for disease.

But O’Connor’s ruling said one of the ways those no-cost services are selected — by the U.S. Preventive Services Task Force, a nongovernmental advisory group — is unconstitutional. In his September opinion, O’Connor wrote that members of the task force, which is convened by a federal health agency, are actually “officers of the United States” and should therefore be appointed by the president and confirmed by the Senate.

The judge said his decision specifically does not apply to no-copay contraceptives or vaccines, which are selected by other agencies, although the conservative groups that brought the case had sought their inclusion as well.

Mammograms are among those preventive services that may be in a special category because they, too, are recommended by one of those other agencies, so experts at KFF say they will probably continue to be covered without patient cost sharing, even with this ruling.

O’Connor issued a [summary judgment](#) in the case in September. At the time, the decision applied only to the employers that brought the case.

Thursday’s ruling expands that to all employers and insurers nationwide.

For now, consumers, especially those who buy their own coverage through the ACA marketplace, are likely to continue to get no-cost preventive care in many plans, experts said.

That’s because most such plans run on the calendar year and enrollees have essentially signed contracts “which will cover those services through the end of the year,” said Jost.

Still, depending on the outcome of the appeals, over time each insurer will likely weigh the pros and cons of reinstituting such patient cost sharing.

They will start to make “business decisions to either continue to cover without cost or to impose cost sharing,” said Twinamatsiko at Georgetown.

In job-based plans, through which most insured Americans get their coverage, initial impact may

also be muted.

Eighty percent of human resources directors said they would not restore cost sharing for preventive care, according to a recent nonscientific survey of 25 human resources directors at companies with a collective total of about 600,000 workers.

Doing so could upset employees, noted [Paul Fronstin](#), director of health benefits research at the Employee Benefit Research Institute, which ran the survey. And fully covering enrollees' preventive care, without requiring copayments, is relatively inexpensive. In a [separate study](#), he found that even one of the more costly preventive care treatments — the nearly \$14,000-a-year PrEP, to prevent HIV — adds only 0.4% to annual employer spending on health care. Even if an employer were to add a 20% copayment for the worker, it would reduce overall spending by less than one-tenth of 1%, according to the study.

Outside of a few employers that might want to restrict no-cost coverage on religious grounds for treatments like PrEP, [James Gelfand](#) said, he doubted many companies would reinstitute copayments. Gelfand is president of the [ERISA Industry Committee](#), which represents large, self-insured employers.

Services endorsed by the U.S. Preventive Services Task Force were selected because they work and “can prevent more acute conditions later,” which are far more costly, said Gelfand.

While most of the task force's recommendations are noncontroversial, a few have elicited an outcry from some employers, including the parties to the lawsuit, who argue they should not be forced to pay for services or treatments they disagree with, such as HIV-prevention drugs.

O'Connor's ruling upheld the contention by plaintiff Braidwood Management, a Christian for-profit corporation owned by [Steven Hotze](#), which objects to providing free PrEP to its 70 employees, saying it runs afoul of its religious beliefs to do so.

The judge agreed, saying that forcing Braidwood to provide such free care in its self-insured plan violates the Religious Freedom Restoration Act.

The ruling eliminating preventive coverage without cost sharing for PrEP on religious grounds shows “clear bias,” said Carl Schmid, executive director of the [HIV+Hepatitis Policy Institute](#).

Some states have passed laws that will continue to require coverage of ACA-mandated preventive services even if the federal protections are eliminated.

[At least 15 states](#) have laws requiring insurers that sell individual plans to cover the preventive services that the ACA requires, according to an analysis by researchers at Georgetown's Center on Health Insurance Reforms.

Like the ACA, those state laws mandate the coverage at no cost to consumers.

In some of the states, workers in group insurance plans regulated by the state — called “fully insured” plans — also receive those protections, the analysis found.

Those state laws do not apply to the [65% of covered workers nationwide](#) whose employers pay their health care claims directly rather than buy insurance for that purpose.

Overall, preventive services can lead to better outcomes, said Lisa Lacasse, president of the [American Cancer Society Cancer Action Network](#).

Millions of people get screened for breast, colorectal, lung, or cervical cancer each year, she said, adding there is evidence showing any kind of copayment or deductible deters people from getting such testing.

Lacasse said she hopes insurers will continue not to charge copays because such a sharp change midyear would be disruptive, and that enrollees should keep going in for preventive care.

“If you have a screening, you should move forward with that,” she said.

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