Many Preventive Medical Services Cost Patients Nothing. Will a Texas Court Decision Change That?

The ruling centered on PrEP as HIV prevention but could apply to cancer screenings and other services and drugs.

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A federal judge's ruling in Texas has thrown into question whether millions of insured Americans will continue to receive some preventive medical services, such as cancer screenings and drugs that protect people from HIV infection, without making a copayment.

It's the latest legal battle over the Affordable Care Act, and Wednesday's ruling is almost certain to be appealed.

A key part of the ruling by Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas says one way that preventive services are selected for the no-cost coverage is unconstitutional. Another portion of his ruling says a requirement that an HIV prevention drug therapy be covered without any cost to patients violates the religious freedom of an employer who is a plaintiff in the case.

It is not yet clear what all this means for insured patients. A lot depends on what happens next.

O'Connor is likely familiar to people who have followed the legal battles over the ACA, which became law in 2010. In 2018, he ruled that the entire ACA was unconstitutional. For this latest case, he has asked both sides to outline their positions on what should come next in filings due Sept. 16.

After that, the judge may make clear how broadly he will apply the ruling. O'Connor, whose 2018 ruling was later reversed by the U.S. Supreme Court, has some choices. He could say the decision affects only the conservative plaintiffs who filed the lawsuit, expand it to all Texans, or expand it to every insured person in the U.S. He also might temporarily block the decision while any appeals, which are expected, are considered.

"It's quite significant if his ruling stands," said Katie Keith, director of the Health Policy and the Law Initiative at the O'Neill Institute for National and Global Health Law at the Georgetown

University Law Center.

We asked experts to weigh in on some questions about what the ruling might mean.

What does the ACA require on preventive care?

Under a provision of the ACA that went into effect in late 2010, many services considered preventive are covered without a copayment or deductible from the patient.

A recent estimate from the U.S. Department of Health and Human Services found that more than 150 million people with insurance had access to such free care in 2020.

The federal government currently lists 22 broad categories of coverage for adults, an additional 27 for women, and 29 for children.

To get on those lists, vaccines, screening tests, drugs, and services must have been recommended by one of three groups of medical experts. But the ruling in the Texas case centers on recommendations from only one group: the U.S. Preventive Services Task Force, a nongovernmental advisory panel whose volunteer experts weigh the pros and cons of screening tests and preventive treatments.

Procedures that get an "A" or "B" recommendation from the task force must be covered without cost to the insured patient and include a variety of cancer screenings, such as colonoscopies and mammograms; cholesterol drugs for some patients; and screenings for diabetes, depression, and sexually transmitted diseases.

Why didn't the ACA simply spell out what should be covered for free?

"As a policymaker, you do not want to set forth lists in statutes," said Christopher Condeluci, a health policy attorney who served as tax and benefits counsel to the U.S. Senate Finance Committee during the drafting of the ACA. One reason, he said, is that if Congress wrote its own lists, lawmakers would be "getting lobbied in every single forthcoming year by groups wanting to get on that list."

Putting it in an independent body theoretically insulated such decisions from political influence and lobbying, he and other experts said.

What did the judge say?

It's complicated, but the judge basically said that using the task force recommendations to compel insurers or employers to offer the free services violates the Constitution.

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 decision does not affect recommendations made by the other two groups of medical experts: the Advisory Committee on Immunization Practices, which makes recommendations to the Centers for Disease Control and Prevention on vaccinations, and the Health Resources and Services Administration, a part of the Department of Health and Human Services that has set free coverage rules for services aimed mainly at infants, children, and women, including birth control directives.

Many of the task force’s recommendations are noncontroversial, but a few have elicited an outcry from some employers, including the plaintiffs in the lawsuit. They argue they should not be forced to pay for services or treatment they disagree with, such as HIV prevention drugs.

Part of O’Connor’s ruling addressed that issue separately, agreeing with the position taken by plaintiff Braidwood Management, a Christian, for-profit corporation owned by Steven Hotze, a conservative activist who has brought other challenges to the ACA and to coronavirus mask mandates. Hotze challenged the requirement to provide free coverage of preexposure prophylaxis (PrEP) drugs that prevent HIV. He said it runs afoul of his religious beliefs, including making him “complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman,” according to the ruling.

O’Connor said forcing Braidwood to provide such free care in its insurance plan, which it funds itself, violates the federal Religious Freedom Restoration Act.

What about no-copay contraceptives, vaccines, and other items that are covered under recommendations from other groups not targeted by the judge’s ruling?

The judge said recommendations or requirements from the other two groups do not violate the Constitution, but he asked both parties to discuss the ACA’s contraceptive mandate in their upcoming filings. Currently, the law requires most forms of birth control to be offered to enrollees without a copayment or deductible, although courts have carved out exceptions for religious-based employers and “closely held businesses” whose owners have strong religious objections.

The case is likely to be appealed to the 5th U.S. Circuit Court of Appeals.

“We will have a conservative court looking at that,” said Sabrina Corlette, co-director of Georgetown University’s Center on Health Insurance Reforms. “So I would not say that the vaccines and the women’s health items are totally safe.”

Does this mean my mammogram or HIV treatment won't be covered without a copayment anymore?

Experts say the decision probably won't have an immediate effect, partly because appeals are likely and they could continue for months or even years.

Still, if the ruling is upheld by an appellate court or not put on hold while being appealed, "the question for insurers and employers will come up on whether they should make changes for 2023," said Keith.

Widespread changes next year are unlikely, however, because many insurers and employers have already drawn up their coverage rules and set their rates. And many employers, who backed the idea of allowing the task force to make the recommendations when the ACA was being drafted, might not make substantial changes even if the ruling is upheld on appeal.

"I just don't see employers for most part really imposing copays for stuff they believe is actually preventive in nature," said James Gelfand, president of the ERISA Industry Committee, which represents large, self-insured employers.

For the most part, Gelfand said, employers are in broad agreement on the preventive services, although he noted that covering every type or brand of contraceptive without a patient copayment is controversial and that some employers have cited religious objections to covering some services, including the HIV preventive medications.

Religious objections aside, future decisions may have financial consequences. As insurers or employers look for ways to hold down costs, they might reinstitute copayments or deductibles for some of the more expensive preventive services, such as colonoscopies or HIV drugs.

"With some of the higher-ticket items, we could see some plans start cost sharing," said Corlette.

This article was originally published September 9, 2022, by Kaiser Health News. It is republished with permission. To read more about the Texas lawsuit, see the POZ.com article "Judge Rules That Mandate to Cover PrEP as HIV Prevention Violates Religous Freedom."

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