

Proactive State Solutions to Guarantee People's Access to Free Preventive Services

A Guide to Help States Navigate Court Challenges to the ACA's Preventive Services Mandate

In recent years, federal lawmakers have taken steps to [expand access](#) to affordable health care for all people and [improve the quality of care](#) for those who already have it. One of the reforms under the Affordable Care Act (ACA) requires most commercial health plans to cover evidence-based preventive services without cost-sharing, such as deductibles or copays. Preventive services that receive an "A" or "B" rating from the panel of medical experts at the US Preventive Services Task Force (USPSTF), created in 1984 to promote access to preventive care, are required to be covered without cost-sharing under this provision.

Nearly two thirds of Americans believe these protections to be very important and more than 150 million people – including approximately 37 million children – with private insurance benefit from access to free preventive services, such as vaccinations, cancer screenings, and counseling services. And by providing these and other services at no cost, more people actually receive and use them. Concerns about possible costs can keep people from getting preventive services – nearly half of all people would not be willing to pay for some of the most common preventive services, such as prediabetes or mental health screenings.

Health Benefits are at Risk: *Braidwood Management v. Becerra*

On March 30th 2023, a federal district judge in Texas issued another ruling in the case *Braidwood Management v. Becerra*, the lawsuit challenging the ACA's preventive services requirement. After previously finding the requirement that private health plans including fully insured and self-insured plans must cover preventive services recommended by USPSTF without imposing cost-sharing unconstitutional, he held that his decision applied nationwide, not just for the parties involved in the case. The nationwide remedy affected people's access to at least 49 preventive health services, including free access to pre-exposure prophylaxis (PrEP), an HIV prevention medication.

The lawsuit was filed in March 2020, and in September 2022, the judge concluded that this key component of the ACA's preventive services requirement violated the Appointments Clause of the U.S. Constitution because members of the Task Force are not appointed by the President nor confirmed by the Senate. He also ruled against free access to PrEP by one of the plaintiff's employees because such coverage would infringe the employer's religious freedom.

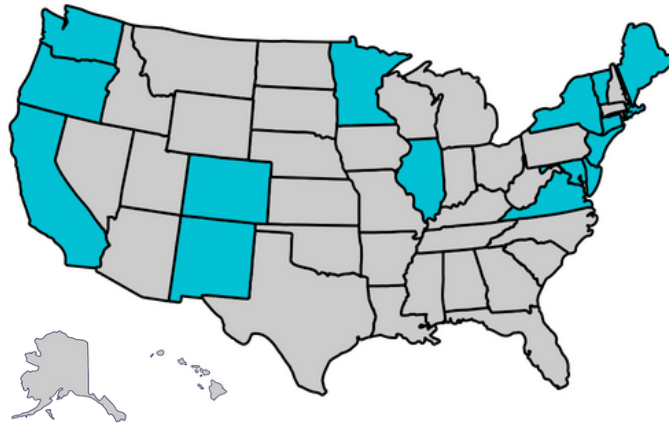
Authority of Expert Bodies

- United States Preventive Services Task Force (USPSTF); an independent group of national experts that makes determinations for general adult preventive services as well as some for children.
- Advisory Committee on Immunization Practices (ACIP); a group of experts selected by the HHS Secretary that develops vaccine recommendations for children and adults.
- Health Resources and Services Administration (HRSA); an agency within HHS that, among other things, makes coverage recommendations for preventive services and screenings for children and women.

Note that the ACA also requires certain preventive services to be covered as part of the Essential Health Benefits plans must cover, but those services are not required to be covered without cost-sharing.

Since then, The US Department of Justice appealed the District Court ruling to the Fifth Circuit Court of Appeals, and in June 2023, the Fifth Circuit granted a nationwide stay while the Court considers the case. Effectively, this means that plans must still provide free access to preventive services while the case moves through the appeals process.

Legal experts believe that this case is likely to be appealed to the Supreme Court. The district court's ruling did not extend to preventive services recommended for women, infants, and kids by the Health Resources and Services Administration (HRSA) or vaccinations by the Advisory Committee on Immunization Practices (ACIP), but these services are now at risk as the case is appealed.



States that protect access to preventive services with no cost-sharing on the individual market

Source: Georgetown. "The ACA's Preventive Services Benefit is in Jeopardy; What Can States Do to Preserve Access?" (November 2022).
 *Updated by US of Care to reflect legislation passed in 2023

While the district court's decision was temporarily halted by the Fifth Circuit Court of Appeals, people and the health care system would see significant disruption in care delivery should the Fifth Circuit or Supreme Court find free coverage of these preventive services to be unconstitutional. Without the no-cost preventive services requirement, people may be required to pay out-of-pocket - for PrEP alone that could be more than \$1,000 per month - or forgo care entirely. Reducing access to free preventive services - which we know helps improve health outcomes long-term - will cause people to delay preventive screenings and immunizations and increase the cost of health care for both individuals and the system more broadly.

Furthermore, these changes to coverage will likely have a disproportionate impact on communities of color and the LGBTQ community, [further limiting](#) these populations' access to essential preventive services and reversing progress in [reducing health disparities](#).

How States Can Act

Because certain populations, including low-income people, are [more likely](#) to postpone care due to cost, it is important that state policymakers take action now to ensure these critical services remain free so people don't face barriers to accessing care. Among the actions states should take:

- **Enact legislation.** While the large group market is regulated federally, states have jurisdiction over health plans on the individual and small group markets, as well as over state employee health plans. Lawmakers in over a dozen states have already used their authority to pass legislation requiring plans to cover preventive services without cost-sharing. Prior to states taking steps to address the cost of preventive services, states should identify whether these services are already protected under state law and required to be covered without cost-sharing. This legislation should also establish appropriate oversight methods to ensure the list of services offered without cost-sharing are up-to-date:
 - Ensure services recommended by USPSTF, ACIP, and HRSA are protected, with the ability to make updates as new recommendations come out; and
 - Establish appropriate oversight methods to ensure the list of services offered without cost-sharing are up-to-date and include requirements for the public to comment on any future proposed changes.
- **Update state regulations.** If the court's decision invalidating the ACA's preventive services requirement is upheld, states can update their own regulations to clarify existing statutory authority to ensure people have continued access to these services without cost-sharing. Many states already require insurers to cover some preventive services, although most do not have the no cost-sharing requirement. States with an individual mandate penalty can adjust their definition of what is considered "Minimum Essential Coverage" to include free coverage of preventive services, which would incentivize plans (including large group plans) to continue offering them. In addition, states could revise their essential health benefits benchmark plans to cover all preventive services recommended by USPSTF, ACIP, or HRSA.