

# ALSTON & BIRD



## HEALTH & WELFARE PLAN LUNCH GROUP

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## Health & Welfare Benefits MONTHLY UPDATE

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### Health & Welfare Benefits

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### April 2023 Agenda

- *Braidwood Management v. Becerra*
- The Public Health Emergency is Ending – So Now What?
- The Outbreak Period is Ending – But When?
- Oh no. It's Time to Renegotiate my ASO

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# *Braidwood Management v. Becerra*

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# *Braidwood Management v. Becerra - Summary*

- On March 30, 2023, Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas issued an opinion and order invalidating certain of the ACA preventive care requirements.
  - This follows up his Sept. 7, 2022 decision which left open the issue of the appropriate remedy.
- All actions taken by DOL, HHS, and IRS to enforce or implement the preventive care coverage requirements in response to an "A" or "B" recommendation by the U.S. Preventive Services Task Force (USPSTF) made *on or after March 23, 2010* are vacated and the agencies are enjoined from enforcing these requirements in the future.
- Mandated coverage of the PrEP medication (taken to prevent contraction of HIV) violates the plaintiff's rights under the Religious Freedom Restoration Act (RFRA), and the federal agencies cannot implement or enforce the PrEP mandate against the plaintiffs.
  - The PrEP coverage requirement also falls under the ruling on the USPSTF recommendations, as it was added after March 23, 2010.

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### ***Braidwood*** – Background on preventive services

- The ACA requires non-GF plans to cover certain preventive vaccines, screenings, drugs and other services (preventive services) without any cost sharing.
- The ACA definition of and process for determining preventive services was intended to be adaptive and allow for future medical developments.
- Preventive services have four different sources:
  - Services that receive an “A” or “B” recommendation from the USPSTF. These, include for example, colonoscopies, mammograms, and cancer screenings.
  - Immunizations recommend by the CDC Advisory Committee on Immunization Practices (ACIP).
  - Comprehensive guidelines issued by the Health Resources and Services Administration (HRSA) with respect to infants, children, and adolescents for preventive care and screenings.
  - HRSA guidelines with respect to women for “such additional preventive care and screenings” not covered above. This includes contraceptive coverage.

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### ***Braidwood*** – Decision and next steps

- The Appointments Clause of Article II of the Constitution requires that principal officers of the United States must be nominated by the President and confirmed by the Senate.
  - Judge O’Connor ruled that the members of the USPSTF are principal officers of the United States and that, because the members are not nominated by the President or confirmed by the Senate, the Task Force is unconstitutional.
    - However, recommendations made before the ACA was enacted, i.e., before March 23, 2010 are not impacted. The rationale is that Congress effectively approved those recommendations in the ACA.
  - Unlike the USPSTF, the recommendations of ACIP and HRSA are subject to approval by the Secretary of HHS, who is properly appointed. Thus, Judge O’Connor ruled that preventive services designated by those agencies are valid.
- Next steps in the litigation:
  - The DOJ has already filed an appeal.
  - A stay of the District Court opinion pending appeal is possible.
  - Final disposition of the case likely to take some time.

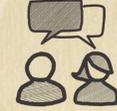
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### **Braidwood - Implications**

- Plans are not required to make any changes and can continue to cover preventive services without regard to the decision. It's anticipated that few plans/insurers will stop covering USPSTF preventive services at this point.
- Plans that wish to consider making changes now need to take into account a number of issues, such as:
  - Implications of making a change given that the decision may be stayed pending appeal and ultimately may not be upheld.
  - Impact of state law for insured plans.
  - Making sure that pre-March 23, 2010 USPSTF A or B recommendations remain covered without cost-sharing (and remember that none of the non-USPSTF recommendations are impacted by the case).
  - Administrative requirements with respect to plan changes, including SBC 60-day advance notice requirement.
- If the decision stands, other issues may arise, such as:
  - Post-ACA USPSTF A and B recommendations generally should meet the definition of preventive care for HDPH/HSA purposes even if no longer required, but clarification from the IRS could be helpful.
  - Self-funded and large group plans are not required to offer mental health or substance abuse benefits. MHPAEA regulations provide that offering only MH/SUD benefits that are required preventive services does not require a plan to offer any other MH/SUD benefits. At this point it's unclear whether this position will continue for previously required preventive care if the decision in *Braidwood* stands.

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### **The Public Health Emergency is Ending – So Now What?**

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### Public Health Emergency Mandates

- HHS announced on February 9 that the Public Health Emergency (PHE) would end on May 11, 2023.
- Congress and the agencies established several mandates for group health plans that were tied to the duration of the PHE.

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### Public Health Emergency Mandates

- COVID testing (prescribed and OTC)
- OON Covid vaccine as preventive care (IN coverage is required under ACA and not tied to PHE)
- Exception for Stand-alone telehealth/remote care for those ineligible in GHP (end of current plan year)
- EAP ability to cover COVID testing/vaccinations
- Collateral issues
  - Potential impact on MHPAEA testing if services covered by telehealth with no cost share
  - Potential increases in cost of vaccines, etc.

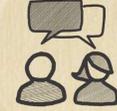
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### Public Health Emergency Mandates

- Agencies issued FAQ Part 58 on 3/29/2023
- Highlights:
  - Mandates do not have to be extended beyond May 11, 2023
    - But may be extended as is or with cost share
    - Reminder: A service is furnished on the date the services are rendered and not when the claim is submitted!
  - Plans are *encouraged* to notify participants
    - If SBCs were revised to reflect mandates and plans intend to modify or end previously mandated benefits, 60 day advance notice requirement in SBC rules is considered satisfied if:
      - Notice was previously provided IN THE CURRENT YEAR that the mandates would end or
      - Notification is provided reasonably in advance of the change
  - In network testing rules continue to apply after end of PHE
  - Covid Vaccines recommended for routine use must be covered within 15 days of recommendation
  - Below deductible coverage of COVID testing/treatment do not disqualify an otherwise eligible individual for HSA purposes . . . . Yet!

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### The Outbreak Period Is Ending (But When?)

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### National Emergency

- President Biden announced that the National Emergency will end on May 11, 2023, which would put the end of the Outbreak Period on July 10, 2023 (60 days after the end of the National Emergency).
- **BUT**, House Resolution 7 approved by both the House and Senate would end the National Emergency --apparently immediately if signed by President Biden.
- President Biden indicates that although he opposes, he will sign.
- FAQs Part 58 were issued on 3/29/2023 assuming a 7/10 end to the Outbreak Period and contain 7 examples.

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### Outbreak Period

- Applies to:
  - the 30-day period (or 60-day period, if applicable) to request HIPAA special enrollment,
  - the 60-day election period for COBRA,
  - the date for making COBRA premium payments (initial and monthly),
  - the date for individuals to notify the plan of a COBRA qualifying event or disability,
  - the date to file benefit claim under the plan's claims procedure,
  - the date to file an appeal of an adverse benefit determination,
  - the date to request external review, and
  - the date for providing a COBRA election notice.

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### Outbreak Period

- Outbreak Period generally extends deadlines to the **earlier of**:
  - Normal timeframes plus one year.
  - Normal timeframes added to the end of the Outbreak Period.
- Easy to Apply Rule
  - For any event that would have otherwise started a time period prior to July 11, 2022, the additional year will have ended by July 10, 2023 and the clock is ticking (or has expired). Apply the one year rule.
  - For any event that would have otherwise started a time period on or after July 11, 2022 and before July 10, 2023 the normal time frames are added to the end of the Outbreak Period.

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### COBRA Election Example (Assuming 7/10 End)

- Ashley was sent a COBRA election notice on July 1, 2022 (**prior to** July 11, 2022). Due to the Outbreak Period, the 60-day election period was tolled.
- The Outbreak Period for Ashley's election period will end on the anniversary of receiving the election notice which means you start the 60-day clock on July 1, 2023. and the election deadline is August 30, 2023.
- The July 10 end to the Outbreak Period has no impact on Ashley's COBRA election period.

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### COBRA Election Example (Assuming 7/10 End)

- Amy was sent a COBRA election notice on July 15, 2022 (*after* July 11, 2022). Due to the Outbreak Period, the 60-day election period was tolled.
- The end of the Outbreak Period is earlier than the anniversary of Amy receiving the election notice, so the 60-day COBRA election period is measured from the end of the Outbreak Period.
- Amy will have 60 days from July 10, 2023 (September 8, 2023) to make her COBRA election.

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### COBRA Initial Premium Example (Assuming 7/10 End)

- John had a qualifying event and receives a COBRA election notice on October 1, 2022. He elects COBRA continuation coverage on October 15, 2022 retroactive to October 1, 2022. The election is *after* July 11, 2022 and within the “normal” 60-day timeframe. Due to the Outbreak Period John’s 45-day period to make and initial COBRA premium payment was tolled.
- The end of the Outbreak Period is earlier than the anniversary of John’s COBRA election so the 45-day time period for the initial premium payment is measured from the end of the Outbreak Period.
- John has 45 days after July 10, 2023 (August 24, 2023) to make the initial COBRA premium payment. The initial COBRA premium payment would include the monthly premium payments for October 2022 through July 2023. The premium payment for August 2023 must be paid by August 30, 2023 (the last day of the 30-day grace period for the August 2023 premium payment). Subsequent monthly COBRA premium payments would be due the first of each month, subject to a 30-day grace period.
- Note: The before/after July 11, 2022 “easy to apply rule” does not always work for an initial COBRA premium payment *if* the COBRA election is made during the Outbreak Period but outside the normal 60-day timeframe because of the “year and 105-day rule” in Notice 2021-58.

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### Appeal of a Benefit Denial Example (Assuming 7/10 End)

- Carolyn received an adverse benefit determination on August 1, 2022 (**after** July 11, 2022). Carolyn's 180-day period to appeal was tolled due to the Outbreak Period.
- The end of the Outbreak Period is earlier than the anniversary of the adverse benefit determination so the 180-day time period for the appeal is measured from the end of the Outbreak Period.
- Carolyn's appeal deadline 180 days from July 10, 2023 (January 6, 2024) .

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### Outbreak Period: Important Dates (Assuming 7/10 End)

- August 9, 2023 – 30 days after July 10, 2023 (monthly COBRA premium payments if initial premium payment was made)
- August 24, 2023 – 45 days after July 10, 2023 (initial COBRA premium payment and all "past due" monthly payments if initial premium was not made)
- September 8, 2023 – 60 days after July 10, 2023 (COBRA election)
- October 8, 2023 – 90 days after July 10, 2023 (typical FSA run out for a calendar year plan)
- January 6, 2024—180 days after July 10, 2023 (appeal of a benefit denial)

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### Outbreak Period: Now What?

- Can we extend timeframes even longer than required?
  - FAQs state: “[N]othing in the Code or ERISA prevents a group health plan from allowing for longer timeframes for employees, participants, or beneficiaries to complete these actions, and group health plans are encouraged to do so.”
  - But if we do, is a plan amendment required?
    - DOL Blog: Employers should consider making reasonable accommodations to existing timeframes **by amending the deadlines in their plans** to minimize the possibility of individuals losing their benefits because of a failure to comply with one of these deadlines. (emphasis added).
      - <https://blog.dol.gov/2023/03/29/what-does-the-end-of-the-covid-19-public-health-emergency-mean-for-health-benefits>
    - Unclear if this reference means an amendment is required.

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### Outbreak Period: Now What?

- Do we have to communicate the end of the Outbreak Period to participants and beneficiaries?
  - DOL Blog: “Plans need to communicate key deadlines to impacted individuals in advance.”
    - What is a “communication”? Is posting on a website enough? Who are “impacted individuals”?
  - From Notice 2021-01: “For example, where the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the relief period for an individual action is exposing a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period.”
  - What if we communicated it would be the lesser of time measured one year from the event or measured from the end of the Outbreak Period?
    - Participants and beneficiaries still likely do not know the date the Outbreak Period ends.

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# Oh No. It's Time to Renegotiate My ASO

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### Parties

- Who negotiates on behalf of the plan(s)?
  - Plan Sponsor listed on Form 5500
  - Employer
  - Plan Administrator
  - What do plan documents say
- Subsidiaries and affiliates
  - Align with indemnification

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### Effective and Termination Dates

- Will services begin before or after negotiation of ASO?
  - Letter of Intent
- Will PHI be exchanged before the effective date?
  - BAA in place?
- 29 CFR §2550.408b-2(c) plan sponsor must be able to terminate ASO upon reasonable notice and without penalty

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### Compensation, Fees, and Expenses

- TPA compensation must be reasonable in light of services provided
  - Facts and circumstances test
- Funding
  - General assets v. Plan assets
- What does plan document/SPD provide regarding payment of fees and expenses?
- ERISA PT Issues (use of related parties)

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### Benefits Funding

- Employer general asset account v. plan assets
- T.R. 92-01
  - Unavailable if trust or stand-alone retiree plan
  - Insured benefits
- Consistent with plan documents and Form 5500

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### ERISA Fiduciary Status and Claims Procedure

- Who is the fiduciary
  - Align with plan documents and SPD
  - Delegation
- Eligibility/Status Change Appeals
- Fees for NSAIDR and external review
- Responsibility for erroneous payments and collections
  - How is overpayment defined?
  - Overpayment collection techniques (cross plan offsetting?)
  - Standard for repayment

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### Compliance with Laws

- Compliance with Laws Generally
  - Choice of law for areas not preempted by federal law
- Compliance with Law Specifically:
  - MHPAEA
  - HIPAA
  - ACA
  - NSA
  - Gag clause
  - Rx reporting
  - New TiC requirements
  - State Escheat Laws
  - Fee disclosure requirements

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### Indemnification and Limitation of Liability

- Generally
- Noncompliance
- Breach of Contract
- PII and PHI breaches
- Third Party Suits
- Hold Harmless
- Insurance Requirements

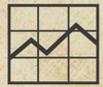
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### Audit Rights

- How often
- Selection of auditor
- Sharing report
- Use of sampling and contingent fee arrangements

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### Data, Records, and Record Retention

- How is data maintained by TPA?
  - Security
  - Risk assessment
- Who owns the data?
- Record retention requirements
- Disposal of records upon termination
- Access by plan sponsor
  - Subpoena
  - Agency audits

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### Subcontractors and Assignment

- Will TPA use subcontractors
  - Bound by same terms or substantially similar
  - Who is responsible for misconduct of subcontractor
- Offshore access to data?
- Permitted assignment in event of sale or M/A transaction?
  - Right to terminate upon reasonable notice

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### Miscellaneous

- Subrogation and Recovery
  - Medical plan TPA or separate vendor
- Responsibility for Class Actions
- Network management and selection responsibility
- IP suits, software licensing, use of trademarks
- Venue, Dispute Resolution, Mandatory Arbitration

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## Questions?