

Legal Developments Impacting Health Plans

2023 Year-End Update

1. A federal district court in Texas previously ruled that the United States Preventive Services Task Force (USPSTF) lacked authority to determine which services are covered by the Affordable Care Act's preventive care mandate, and this year the court **invalidated all agency action** (back to March 23, 2010, and going forward) **to implement or enforce preventive care coverage requirements** in response to an "A" or "B" rating by the USPSTF.¹ In response, the DOL, HHS, and IRS (the Departments) issued guidance emphasizing the limited scope of this ruling (including, for example, that contraceptive requirements under guidance issued by government bodies other than USPSTF remain effective) and clarifying that HDHPs may continue covering, without cost-sharing, the preventive care items subject to the ruling. The district court ruling is currently on hold pending its appeal before the Fifth Circuit.
2. Following recent legislation and regulations promoting **transparency in healthcare**, group health plans must disclose healthcare cost and other plan information to participants, the public, and governmental entities. See our bulletin for information on current and upcoming disclosure requirements.
3. States are increasingly **regulating Pharmacy Benefit Managers (PBMs)** following the Supreme Court's 2020 ruling which upheld an Arkansas law restricting PBMs' ability to set the amount they reimburse pharmacies for drugs dispensed to ERISA health plan participants; however, a recent Tenth Circuit decision suggests some state laws might be preempted by ERISA, to the extent they dictate the design of an ERISA plan. See our bulletin for more details on these state laws and the cases challenging them.
4. The DOL's latest annual report on **Mental Health Parity and Addiction Equity Act (Parity Act) enforcement** suggests that plans struggle most to demonstrate compliance with the Parity Act's non-quantitative treatment limitation (NQTL) requirements, including the comparative analysis that plans and insurers must now produce to demonstrate NQTL compliance. The DOL reports that it tries to "work with the plans' service providers (such as third-party administrators . . .) to obtain broad corrections, not only for the particular plans investigated, but also for other plans that contract with those service providers."

Plaintiffs also continue to file Parity Act lawsuits, with many focusing on plans which limit **residential or wilderness treatment** coverage more than skilled nursing coverage, or which limit coverage of eating disorders, autism spectrum disorder, or other disorders causing developmental delay.

The Departments recently **proposed revisions** to the Parity Act regulations, which would generally increase the Parity Act's NQTL requirements.

5. Extending a trend we've previously observed,² courts continue to strike down health plan exclusions of **gender affirming care** as prohibited sex discrimination. It remains to be

¹ *Braidwood Management Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229 (N.D. Tex. Mar. 30, 2023).

² See [our article](#) discussing litigation surrounding exclusions of gender affirming care.

seen how courts will address claim denials of such care under other exclusions—for example, one district court found a plausible gender stereotyping claim where an insurer denied gender-affirming facial feminization surgery under the plan’s cosmetic surgery exclusion because the plaintiff “did not demonstrate a facial appearance outside the broad range of normal for the female gender.”³ The court reasoned that this showed the exclusion was impermissibly based on “what is ‘normal for the female gender.’”

Infertility benefits have also been the center of sex discrimination claims where plans condition coverage on a certain period of unprotected heterosexual intercourse without achieving pregnancy or a specified number of unsuccessful artificial insemination attempts (with the latter often generating more out-of-pocket costs). Same-sex couples argue these requirements preclude or encumber their coverage as compared to opposite-sex couples. One class action recently survived a motion to dismiss on these grounds, and so we may soon see more.⁴

6. **“Cross-plan offsetting”**—that is, the third-party administrator (TPA) practice of recouping overpaid claims to a provider by underpaying other claims to the same provider on behalf of a different plan—may lead to fiduciary liability under ERISA. In addition to lawsuits on this issue in prior years, the DOL recently announced a settlement with the insurer and TPA, EmblemHealth, Inc., to end cross-plan offsetting and to make whole all affected participants and beneficiaries back to 2015. The DOL asserted EmblemHealth violated its fiduciary duties by shortchanging some plans in favor of others and mistreated participants by underpaying their covered medical bills.
7. HHS continues to **penalize providers and health plans for HIPAA violations**, including a \$1.25 million settlement with an Arizona hospital system and a \$1.3 million settlement with a health plan over their failures to properly secure health information. HHS also emphasized the importance of multi-factor authentication for preventing security breaches and issued guidance on drafting sanctions policies to hold employees accountable for HIPAA violations.
8. The **Patient Centered Outcomes Research Institute (PCORI) fee** increased from \$3.00 to \$3.22 per covered life for plan years ending after September 2023 and before October 2024. Payments for plan years ending after September 2022 and before October 2023 are due by July 31, 2024.
9. The **annual dollar limit** on employee contributions to health Flexible Spending Accounts (FSAs) increased from \$3,050 to \$3,200. The limit on Health Savings Account (HSA) contributions for self-only coverage increased from \$3,850 to \$4,150, and from \$7,750 to \$8,300 for family coverage. The age 55+ HSA catch-up limit remains at \$1,000.

From all of us here at MMPL, your employee benefits law firm.

Not intended as legal advice.

³ *Doe v. Independence Blue Cross*, No. CV 23-1530, 2023 WL 8050471 (E.D. Pa. Nov. 21, 2023).

⁴ *Murphy v. Health Care Service Corp.*, No. 22-CV-2656, 2023 WL 6847105 (N.D. Ill. Oct. 17, 2023).