



Susan Nash Discusses Patient Protection and Affordable Care Act's Preventive Care Requirement with Law360

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Winston & Strawn partner Susan Nash was quoted in a Law360 article discussing the petition from the federal government being considered by the U.S. Supreme Court which seeks review of a Fifth Circuit decision concluding that a federal task force's role in the Patient Protection and Affordable Care Act's preventive care requirement is unconstitutional. The petition focuses on the constitutionality of the U.S. Preventive Services Task Force, which determines the preventive services that need to be covered cost-free under the ACA.

The plaintiffs in the case are Texas-based individuals and employers that object, on religious grounds, to covering PrEP, a medication used to prevent HIV. The Fifth Circuit's decision focused on the appointments clause under Article 2 of the Constitution, concluding that the task force comprises "principal officers" who were not appointed by the president and approved by the Senate. Its decisions are not meaningfully overseen by the secretary of the U.S. Department of Health and Human Services, the court said, in violation of the appointments clause.

The court declined to adopt a March 2023 district court ruling blocking the federal government from enforcing the preventive care mandate. The appeals court instead affirmed the ruling from U.S. District Judge Reed O'Connor saying they failed to properly make their Administrative Procedure Act claim that would have allowed for more universal relief. The decision leaves open the possibility that the plaintiffs or other similarly situated parties can try to get a nationwide block on the cost-free requirement.

Susan said that even if the preventive care requirement is eliminated by the courts, payors wouldn't necessarily be eager to shift costs for those services onto beneficiaries. Simply put, it's hard to take away benefits once they've been in place.

"It's a very well-established part of the law, and employers and health insurance issuers have been in compliance with it since 2010," she said. "I don't think people will immediately change their benefit plans — there would be a lot of thought and consideration put into whether to start charging for things that have been free for so many years."

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