State Health Reforms vs. ERISA Preemption

Erin C. Fuse Brown, JD, MPH
Georgia State University College of Law

Next Steps in Health Reform
October 27, 2017
Claim

• States have a growing role in health regulation and reform.

• But ERISA’s growing preemptive sweep prevents these state laws from benefitting a growing number of health care consumers—those covered by self-funded employee health plans.

• After *Gobeille*, for state health reform initiatives to achieve their maximal effect, a federal solution is necessary.
ERISA Preemption

ERISA §514 preempts state laws that relate to employee benefit plans if they either:

• (1) do not qualify as insurance regulation (Savings Clause); or

• (2) relate to self-funded employee health plans (Deemer Clause).
ERISA Coverage

Breakdown of Employer-Based Coverage Among Non-Elderly Population

- Other: 44%
- Employer: 56%
- Self-Funded: 39%
- Fully insured: 61%
State Health Reforms

• All-payer claims databases (APCDs)
• Drug price regulation of pharmacy benefit managers (PBMs)
• Measures to address surprise, out-of-network medical bills
ERISA Preemption of APCDs

• *Gobeille v. Liberty Mutual Ins. Co.*

• Held: ERISA preempts Vermont’s’s APCD reporting requirements as to self-funded ERISA plans*

• Reporting & disclosure are central to uniform plan administration under ERISA
Drug Price Transparency

- Transparency of PBM markups, rebates
- PBM acting as third-party administrators for ERISA plans
  
  *Pharm. Care Mgmt. Assn. v. Gerhart* (8th Cir. 2017)
  
  - ERISA preempts Iowa’s law for PBM acting as TPAs for ERISA plans.
Surprise Out-of-Network Bills

• Provider network adequacy

• Limits on OON provider balance-billing and cost-sharing without notice and consent.

• Requirements of plans preempted (hold-harmless, plan terms, in-network deductibles and cost sharing caps)
Federal Solution

• Option 1: Seek federal rules from DOL
  • Issue-specific rules
  • Federal standards vs. state flexibility
  • DOL requires statutory authority to act
  • Political will for more regulation?
Federal Solution

• **Option 2: Amend ERISA**

  • “Any and all” preemption ➔ “floor” preemption (like HIPAA)

  • Consistent with current emphasis on state responsibility, consumerism

  • Political will?
What States Can Do

• Focus regulation on non-ERISA entities (e.g., providers, drug manufacturers, non-ERISA plans)

• Encourage voluntary participation by self-funded ERISA plans

• *SIIA v. Snyder* (6th Cir. 2016) – allowing incidental reporting of data from self-funded plans pursuant to a state tax on plans
Tradeoffs in ERISA Preemption

• National uniformity vs. Federalism
• Deregulation vs. Consumer Protection
Takeaways

• States have innovated robust health care laws to protect health care consumers and improve transparency

• ERISA vacuum is becoming a black hole

• Federal solution is needed, but it should preserve state flexibility and

• It is time to amend ERISA
Thank you!

Erin C. Fuse Brown, JD, MPH

efusebrown@gsu.edu
@efusebrown