

# State Health Reforms vs. ERISA Preemption

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Next Steps in Health Reform  
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# 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.

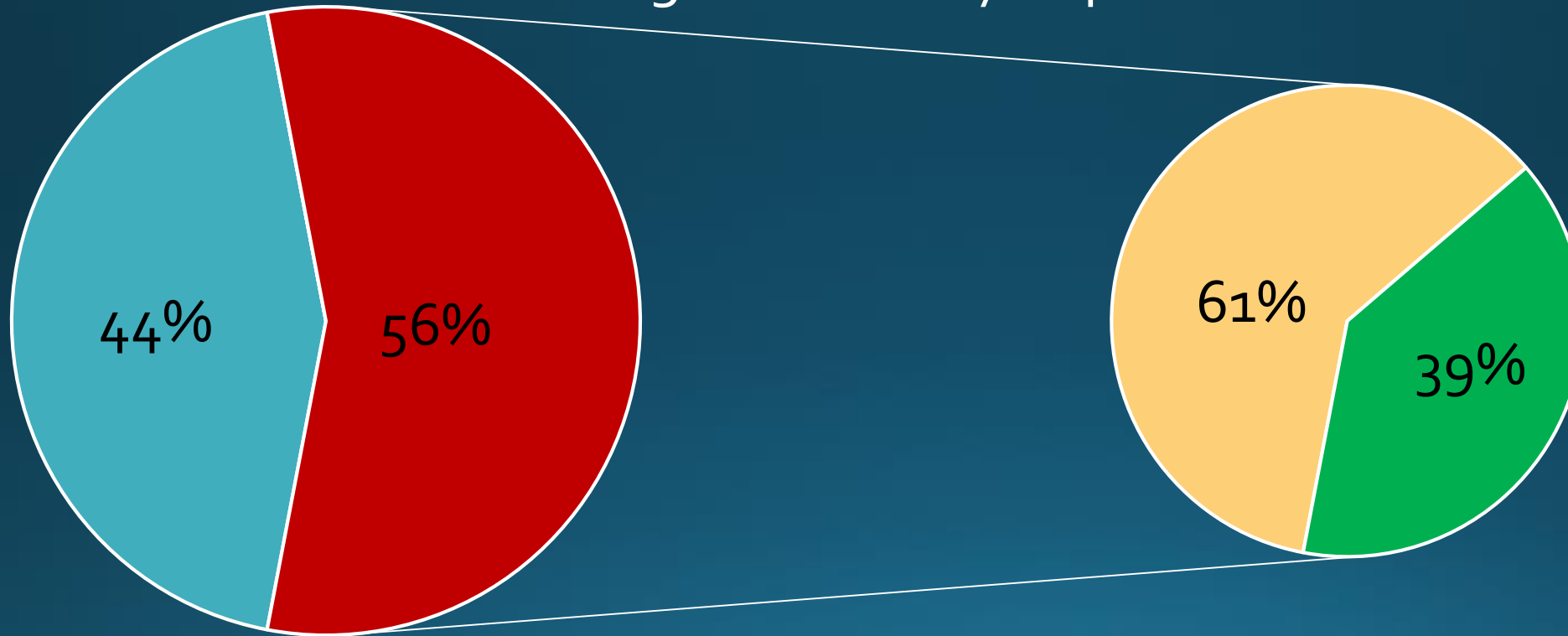
# ERISA Preemption

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

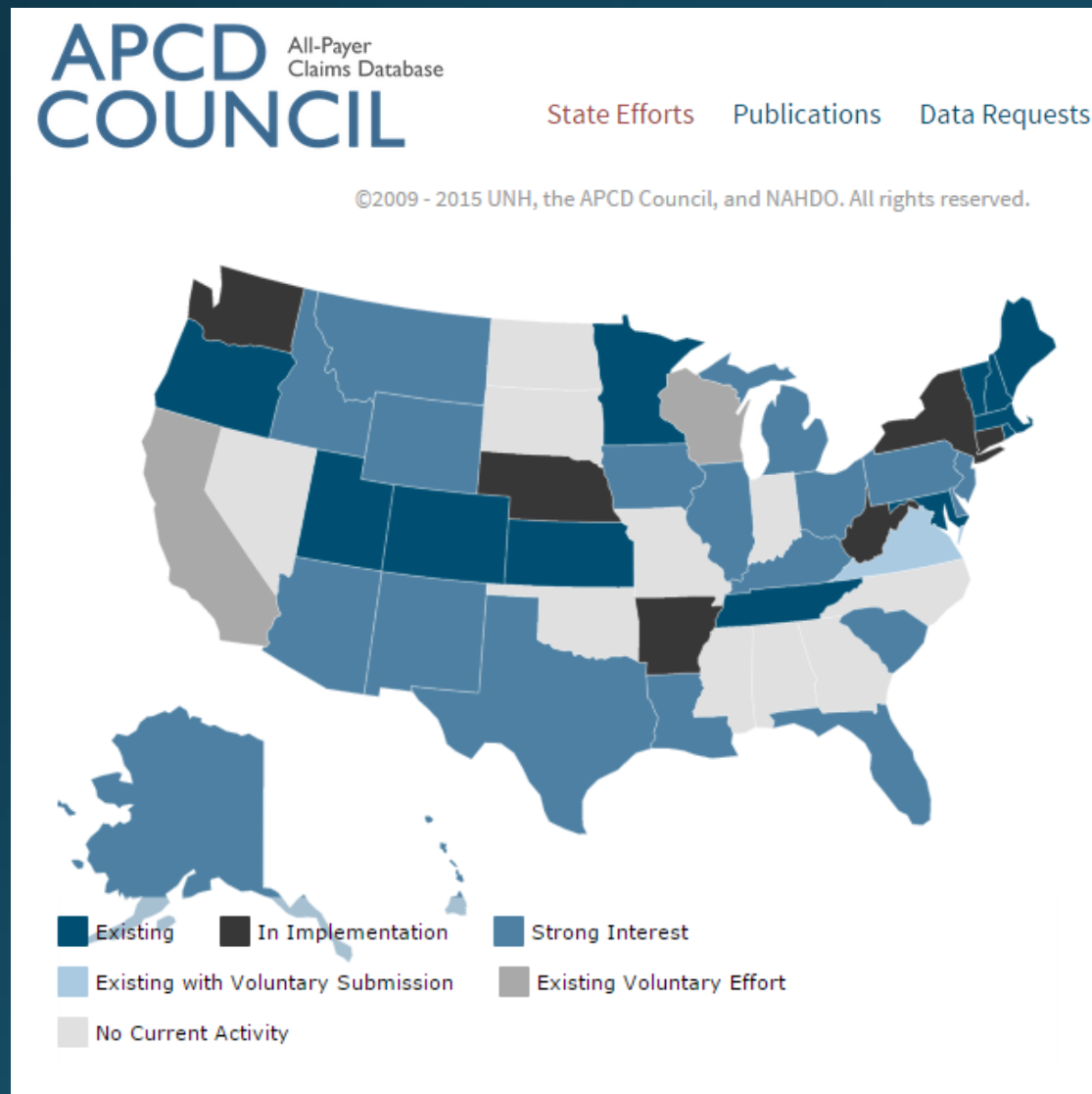


□ Other    ■ Employer    ■ Self-Funded    ■ Fully insured

# 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

# All-payer claims databases



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# ERISA Preemption of APCDs

- *Gobeille v. Liberty Mutual Ins. Co.*
- Held: ERISA preempts Vermont'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
- PBMs act as third-party administrators for ERISA plans
- *Pharm. Care Mgmt. Assn. v. Gerhart* (8th Cir. 2017)
  - ERISA preempts Iowa's law for PBMs 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!

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