

# **ERISA Preemption Narrowing?**

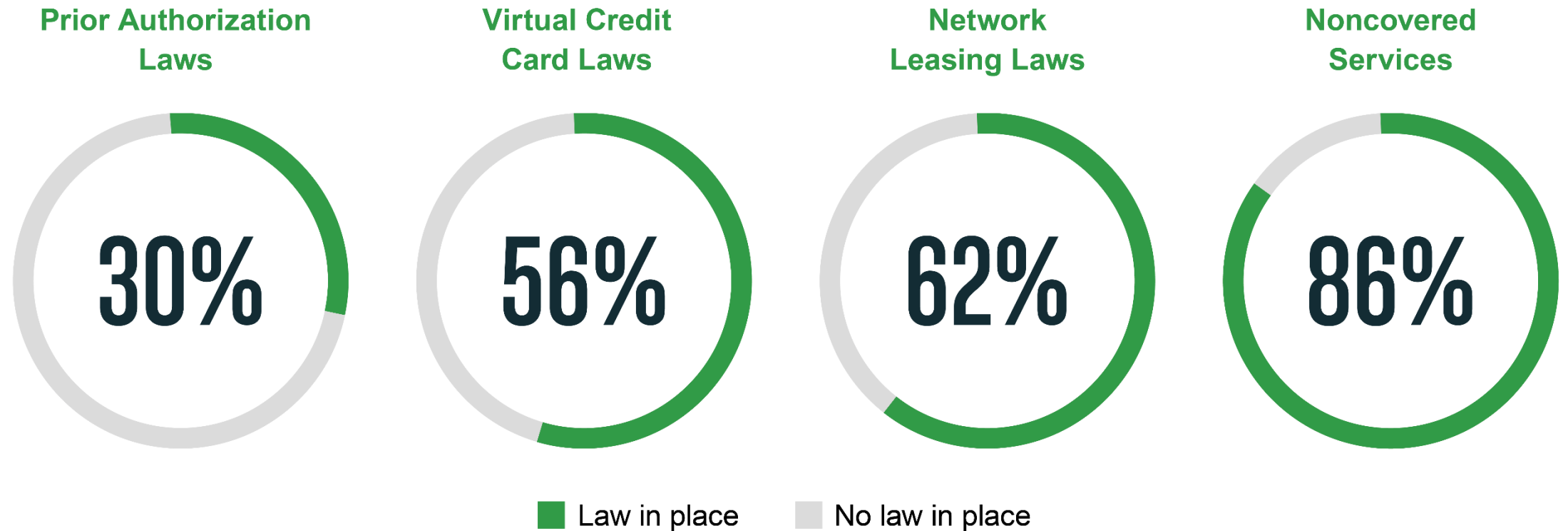
**How Supreme Court Decisions  
Impact States' Ability to Enforce  
Dental Insurance Reforms**

**Randall Markarian, DDS, American Dental  
Association Trustee**

# How does ERISA preemption impact insurance laws?

- Organizations that represent healthcare providers work with legislators to pass laws that are good for patients and providers.
- Insurance companies that manage plan benefits ignore the laws based on a belief that the laws are preempted by ERISA.
- Insurance commissioners and attorneys general may be hesitant to enforce laws based on the same belief.

## Dental Insurance Reform Laws Based on National Council of Insurance Legislators (NCOIL) Models Widespread Enactment of Dental Insurance Laws in the U.S.



# Why is *Rutledge v. PCMA* important?

- The Supreme Court clarified the types of laws that ERISA preempts and rejected some broad interpretations of ERISA preemption in *Rutledge v. Pharmaceutical Care Management Association*, 141 S. Ct. 474 (2020).
  - The Court rejected the argument that a statute that applies to all benefit plans equally is preempted under the “refers to” prong of the analysis.
  - Clarified that ERISA preemption analysis should focus on whether State laws interfere with plan administration by:
    - (1) dictating benefits;
    - (2) determining who is eligible to be a beneficiary; or
    - (3) regulating in areas that ERISA regulates.
  - A state law that passes the *Rutledge* test for avoiding ERISA preemption can apply to all plans, insured and self-funded, regardless of whether the state law regulates insurance.

# How will ERISA preemption be applied going forward?

- The ability of states to enforce laws within their traditional authority over insurance and healthcare will be impacted by how the conflict between the Eighth Circuit and Tenth Circuit is resolved.
  - Oklahoma has filed its petition in the Supreme Court.
  - The Supreme Court has a strong incentive to review the case to resolve the conflict and prevent a federal statute from being applied inconsistently based on geography.
  - Eighth Circuit's decision appears more consistent with the language and analysis in *Rutledge*.

# Rehearing on *Mulready*: Update from Supreme Court

- In September, the Supreme Court has “Called for the Views of the Solicitor General” (CVSG) on whether the court should grant a petition for a writ of certiorari on the case
- A CVSG is generally a good sign, indicates the Court is at least considering reviewing the case
- The Supreme Court issued only 20 CVSGs in 2016 and 15 in 2017
- There is no deadline for the Solicitor General to respond
- The Solicitor General has taken as few as two months and as long as eight months to respond, with the average being a little over four months
- Having issued a CVSG, the Supreme Court will hold off deciding the petition until it hears from the Solicitor General

# States Are Already Empowered

- We believe Rutledge empowers states to enforce dental insurance laws on carriers if preemption is not triggered
- The ADA is already working with other groups like the American Optometric Association
- The time for departments of insurance to take a look at this is now
- We are not against ERISA preemption
- Rather we support an appropriate narrowing of the preemption that empowers the states to enforce laws that benefit the patients covered by the plans and the providers offering the care