



Agree to Disagree *Independent Dispute Resolution & the No Surprises Act*

August 23, 2023

Introduction

Healthcare & Michael Best

- Business Formation
- Risk Management
- Litigation
- Reimbursement
- Regulatory Compliance & Defense
- Healthcare Innovation & Technology
- Data Privacy & Cybersecurity
- Health Tech & Innovation



Our Perspective



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firm with 19
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This presentation is not legal advice & does not create or give rise to an attorney-client relationship or privilege.

Agenda

1. History of Surprising Billing Concerns
2. The No Surprises Act
3. Implementation & Challenges

History of Surprising Billing Concerns

What is “Surprise Billing”?

- “Surprise medical bills” referred to charges arising from an insured person “inadvertently” receiving care from an out-of-network provider.

Examples of Common “Surprise Billing”

What is “Balance Billing”?

- “Balance billing” occurred when providers accepted the allowable amount of the payer and then billed the balance to the patient.

Charge	Allowable	Balance	Billed
\$1,000	\$950	\$50	\$1,000

Background on Healthcare Reforms

On March 23, 2010, President Obama signed the Affordable Care Act (“ACA”) into law.

The ACA had two main goals:

Expand Health Insurance Coverage
Encourage Innovation to Lower Costs

Background on Healthcare Reforms

After the 2016 election, President Trump also focused on regulating the healthcare industry.

The Trump Administration focused on

- Lowering prescription drug prices
- Expanding access to affordable coverage
- Allowing Americans to access trusted doctors
- Delivering hospital and insurer price transparency

Background on Healthcare Reforms

HEALTH REPORTING IN THE STATES

How A Urine Test After Back Surgery Triggered A \$17,850 Bill

February 16, 2018 · 5:01 AM ET
Heard on [Morning Edition](#)

HEALTH REPORTING IN THE STATES

First Came Kidney Failure. Then There Was The \$540,842 Bill For Dialysis

July 22, 2019 · 5:01 AM ET
Heard on [Morning Edition](#)
By Jenny Gold

FROM **KFF** Health News

HEALTH REPORTING IN THE STATES

Bill Of The Month: A Tale Of 2 CT Scanners — One Richer, One Poorer

April 9, 2018 · 4:53 AM ET

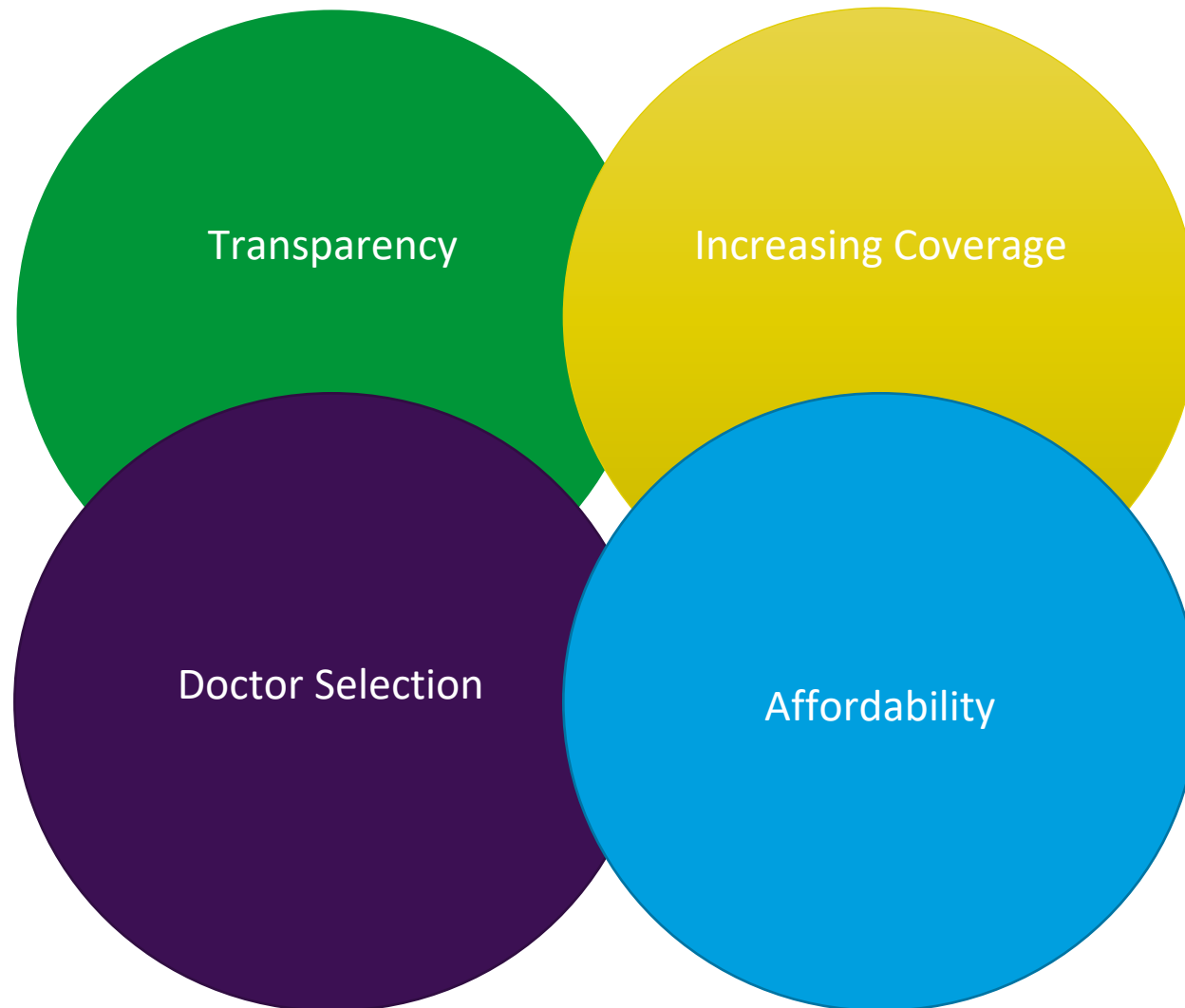
HEALTH REPORTING IN THE STATES

Life-Threatening Heart Attack Leaves Teacher With \$108,951 Bill

August 27, 2018 · 4:57 AM ET
Heard on [Morning Edition](#)
By Chad Terhune

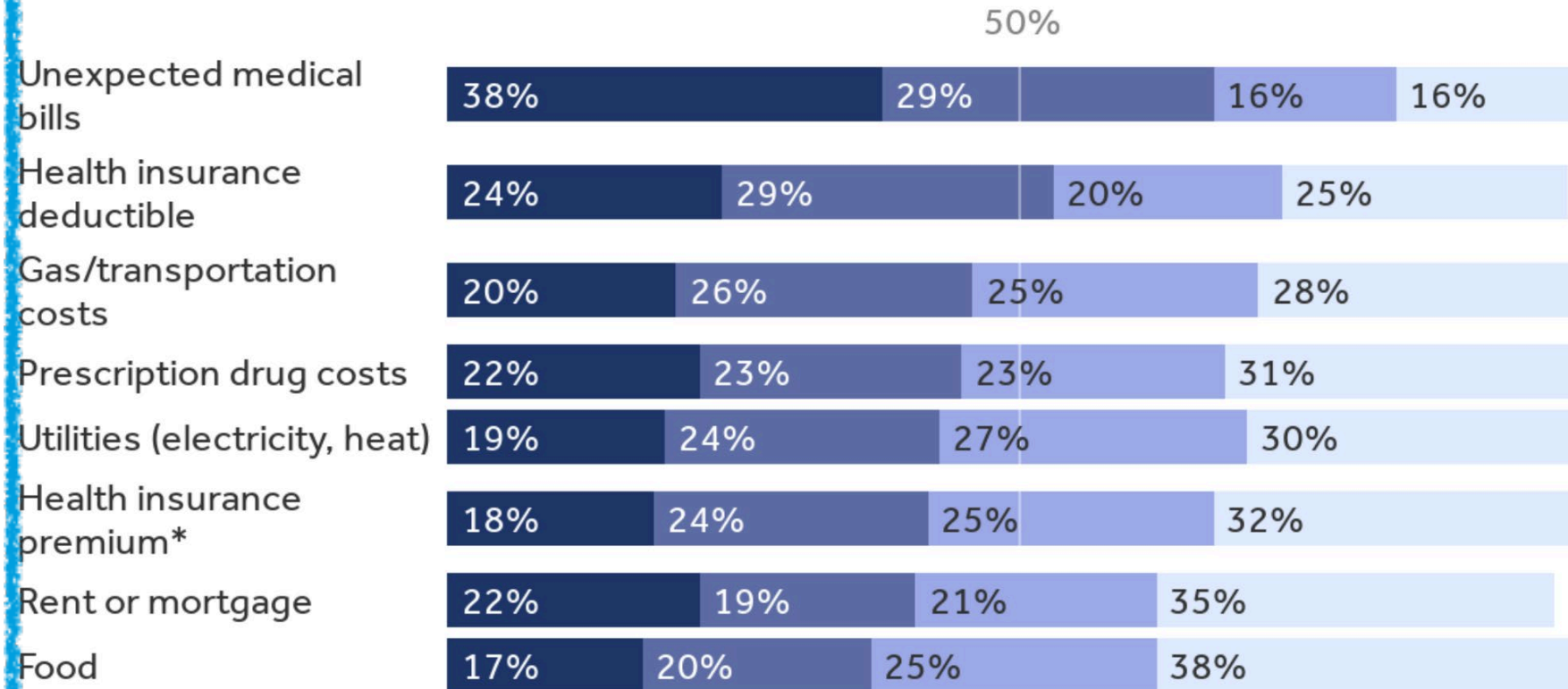
FROM **KFF** Health News

Background on Healthcare Reforms



How worried, if at all, are you about being able to afford each of the following for you and your family?

Very worried
Somewhat worried
Not too worried
Not at all worried



Note: "Not applicable" (vol) and Don't Know/Refused responses not shown. Question wording modified; see topline for full wording. *Among insured.

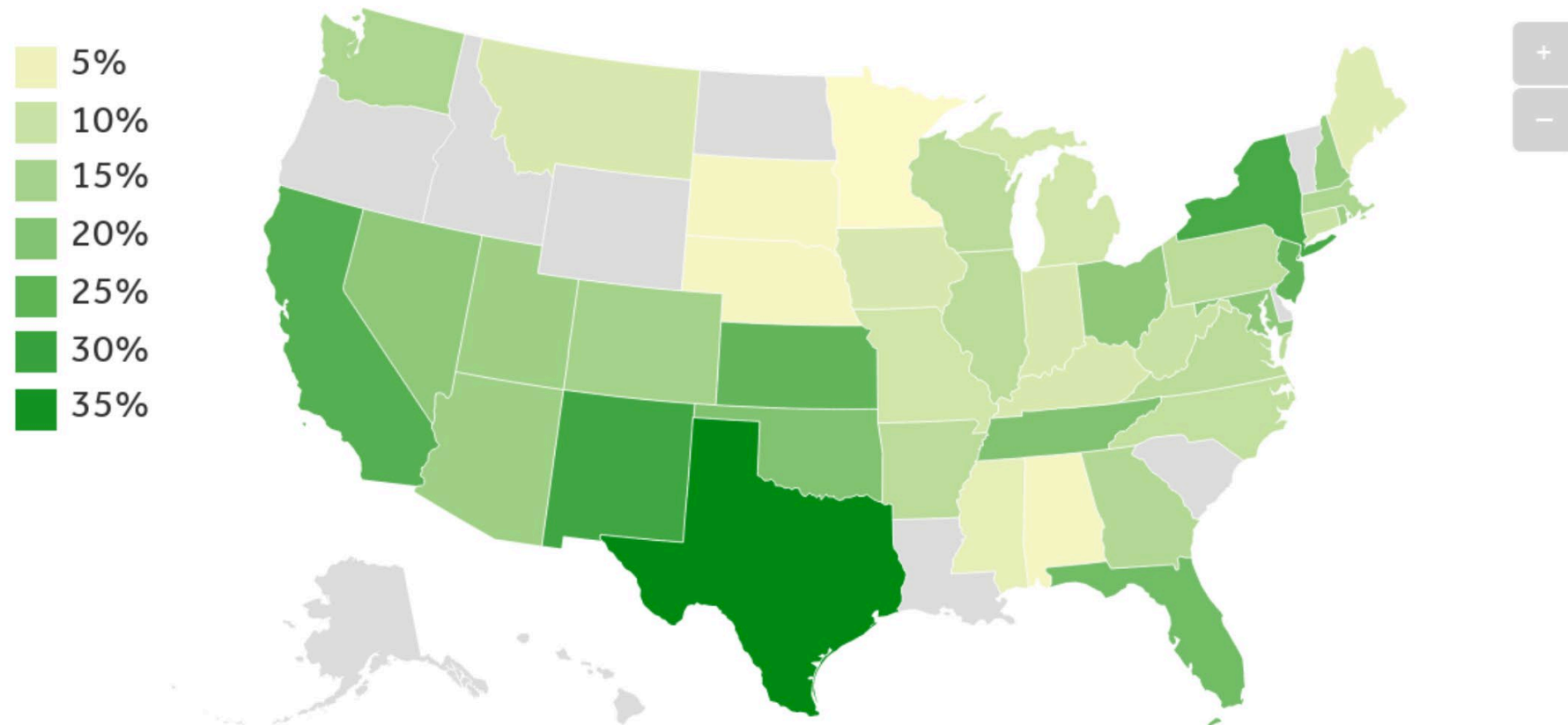
Source: KFF Health Tracking Poll (conducted August 23-28, 2018)

Peterson-KFF

Health System Tracker



Among people with large employer coverage, the share of emergency visits with at least one out-of-network charge, 2017



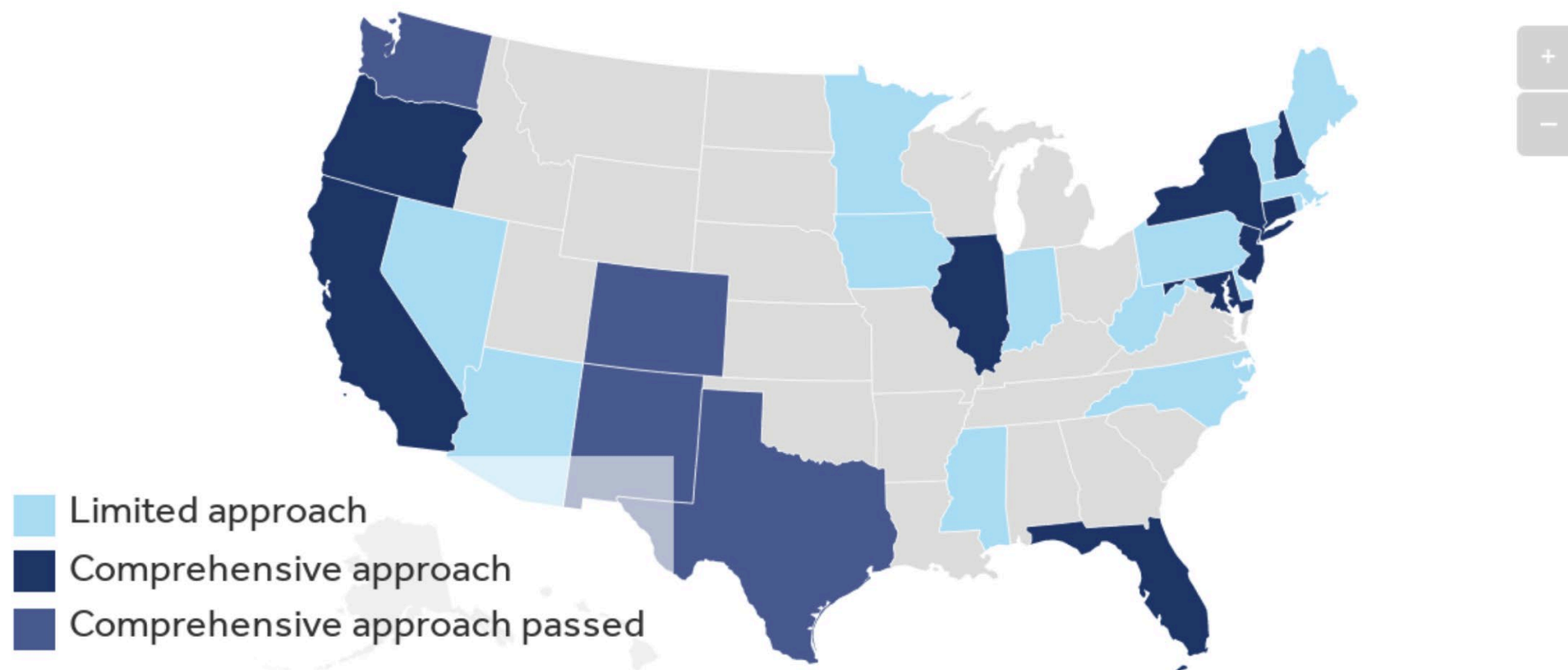
States shaded gray have insufficient data

Source: KFF analysis of IBM MarketScan 2017 data

Peterson-KFF

Health System Tracker

State balance billing protections for state-regulated plans



Note: Four states have passed comprehensive protections that have not yet gone into effect as of June 2019

Source: See Jack Hoadley, Kevin Lucia, and Maanasa Kona, "State Efforts to Protect Consumers from Balance Billing" for summary of state laws enacted through 2018. Updated by KFF to reflect action as of June 2019.

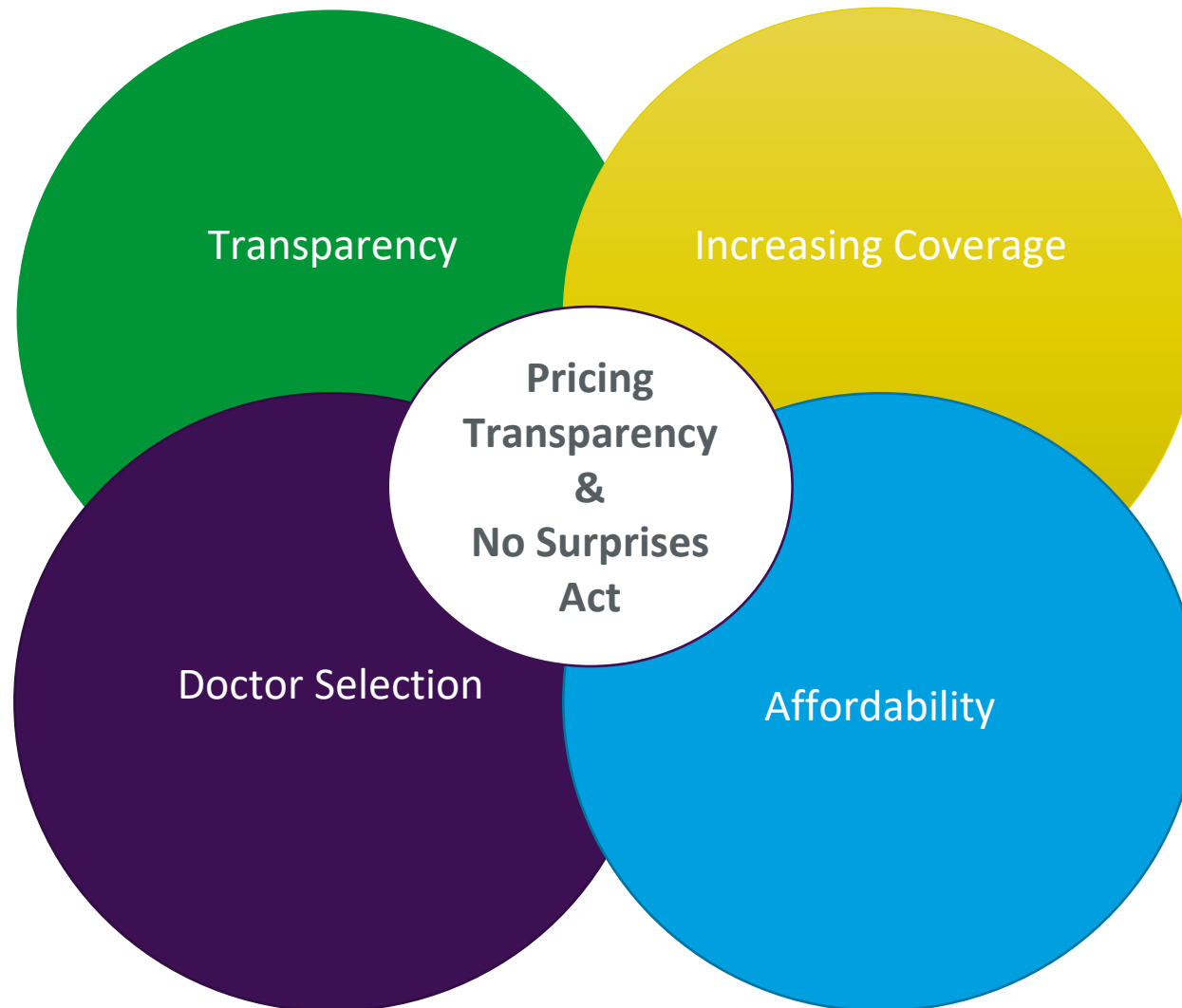
Peterson-KFF

Health System Tracker

Background on Healthcare Reform

- The state-by-state approach had two main problems:
 - It created an inconsistent patchwork.
 - It was significantly limited in reach by the Employee Retirement Income Security Act of 1974 (ERISA).

Background on Healthcare Reforms



The No Surprises Act

2019 Legislative Attempt to Regulate

- In 2019, the Senate attempted to pass bipartisan legislation addressing surprise medical bills.
- There was significant disagreement on how out-of-network providers and facilities should be paid for “surprise medical bills.”
- In broad terms, arguments were over “benchmarking” versus arbitration.
 - Payers and patient advocates wanted benchmarking;
 - Providers wanted arbitration.
- The political infighting caused the legislation to stall.

Predecessors to the No Surprises Act

Senate HELP	House Energy & Commerce Committee	House Education & Labor Committee	House Ways & Means Committee	Roe-Ruiz
<ul style="list-style-type: none"> • Emergency services • Air Ambulance • Post-emergency inpatient stabilization • Out-of-network provider services within in-network hospitals/facilities 	<ul style="list-style-type: none"> • Emergency services • Post-emergency inpatient stabilization • Out-of-network provider services within in-network hospitals/facilities 	<ul style="list-style-type: none"> • Emergency services • Air Ambulance • Post-emergency inpatient stabilization • Out-of-network provider services within in-network hospitals/facilities • Protections applicable to all group and individual plans, including grandfathered plans 	<ul style="list-style-type: none"> • Emergency services • Post-emergency inpatient stabilization • Out-of-network provider services within in-network hospitals/facilities • Protections applicable to all group and individual plans 	<ul style="list-style-type: none"> • Emergency services • Out-of-network provider services within in-network hospitals/facilities

Predecessors to the No Surprises Act

Senate HELP	House Energy & Commerce Committee	House Education & Labor Committee	House Ways & Means Committee	Roe-Ruiz
Health plan's median in-network payment rate	Health plan's median in-network payment rate in 2021, indexed to CPI-U in subsequent years	Health plan's median in-network payment rate in 2019, indexed to CPI-U in subsequent years	No default payment amount	No default payment amount
No IDR	IDR	IDR	IDR	IDR

Consolidated Appropriations Act of 2021

- CAA 2021 was an omnibus spending bill worth \$2.3T passed by large bipartisan majorities in congress on December 21, 2020 and signed by President Trump on December 27, 2020.
- Division BB - Private Health Insurance & Public Health Provisions
 - Title I - No Surprises Act
 - Title II - Transparency

No Surprises Act - Consumer Protection Rights

- Required private health plans to cover:
 - surprise medical bills for emergency services, including air ambulance;
 - out-of-network provider bills for services rendered at in-network hospitals and facilities;
 - without pre-auth and with in-network cost sharing.

No Surprises Act - Consumer Protection Rights Cont.

- Banned balance billing by out-of-network emergency service providers.
- Providers prohibited from billing patients or holding them liable for an amount in excess of the in-network cost sharing amount for the service provided.
- Providers must provide good faith quotes for services to uninsured patients or good faith estimates to certain payers.

No Surprises Act - Right to Payment

- In exchange for the new consumer rights, the No Surprises Act requires insurance companies to reimburse out-of-network providers at a statutorily calculated "out-of-network rate."
- There are three ways to determine the out-of-network rate:
 1. All-Payer Model Agreement (e.g. MD, VT, CO)
 2. State Law
 3. Litigation (a/k/a independent dispute resolution)

No Surprises Act - Independent Dispute Resolution

- NSA adopted a baseball arbitration model:
 - **Notice:** Provider / Facility has 30 days from receipt of “an initial payment or a notice of denial of payment” to begin “open negotiations.”
 - **Open Negotiation:** Once negotiations are initiated, the parties have a 30-day open negotiation period to resolve the claim on an agreed-upon amount.
 - **IDR:** If open negotiations fail, a party to the negotiations may initiate IDR by giving notice to the other party and the Secretary (HHS) within four days after the open negotiation period ended.

No Surprises Act - Independent Dispute Resolution

- The IDR Process is overseen by a certified “IDR Entity.”
- To be certified, the entity must:
 - Have sufficient medical, legal, and other expertise to make determinations within a timely basis.
 - Is not an NSA covered entity or an affiliate or subsidiary of a covered entity.
 - Has appropriate indicators of fiscal integrity.
 - Complies with HIPAA.

No Surprises Act - Independent Dispute Resolution

The IDR Entity is empowered to determine the payment but must consider:

1. The qualifying payment amounts (QPA) for the applicable year for items or services that are comparable to the qualified IDR item or service and that are furnished in the same geographic region (as defined by the Secretary for purposes of such sub-section) as such qualified IDR item or service.
2. The level of training, experience, and quality and outcomes measurements of the provider or facility that furnished such item or service (such as those endorsed by the consensus-based entity authorized in section 1890 of the Social Security Act).
3. The market share held by the nonparticipating provider or facility or that of the plan or issuer in the geographic region in which the item or service was provided.
4. The acuity of the individual receiving such item or service or the complexity of furnishing such item or service to such individual.
5. The teaching status, case mix, and scope of services of the nonparticipating facility that furnished such item or service.
6. Demonstrations of good faith efforts (or lack of good faith efforts) made by the nonparticipating provider or nonparticipating facility or the plan or issuer to enter into network agreements.

The IDR Entity cannot consider:

- Usual & Customary Charges.
- Public Payor Rates (Medicare, Medicaid, CHIP).

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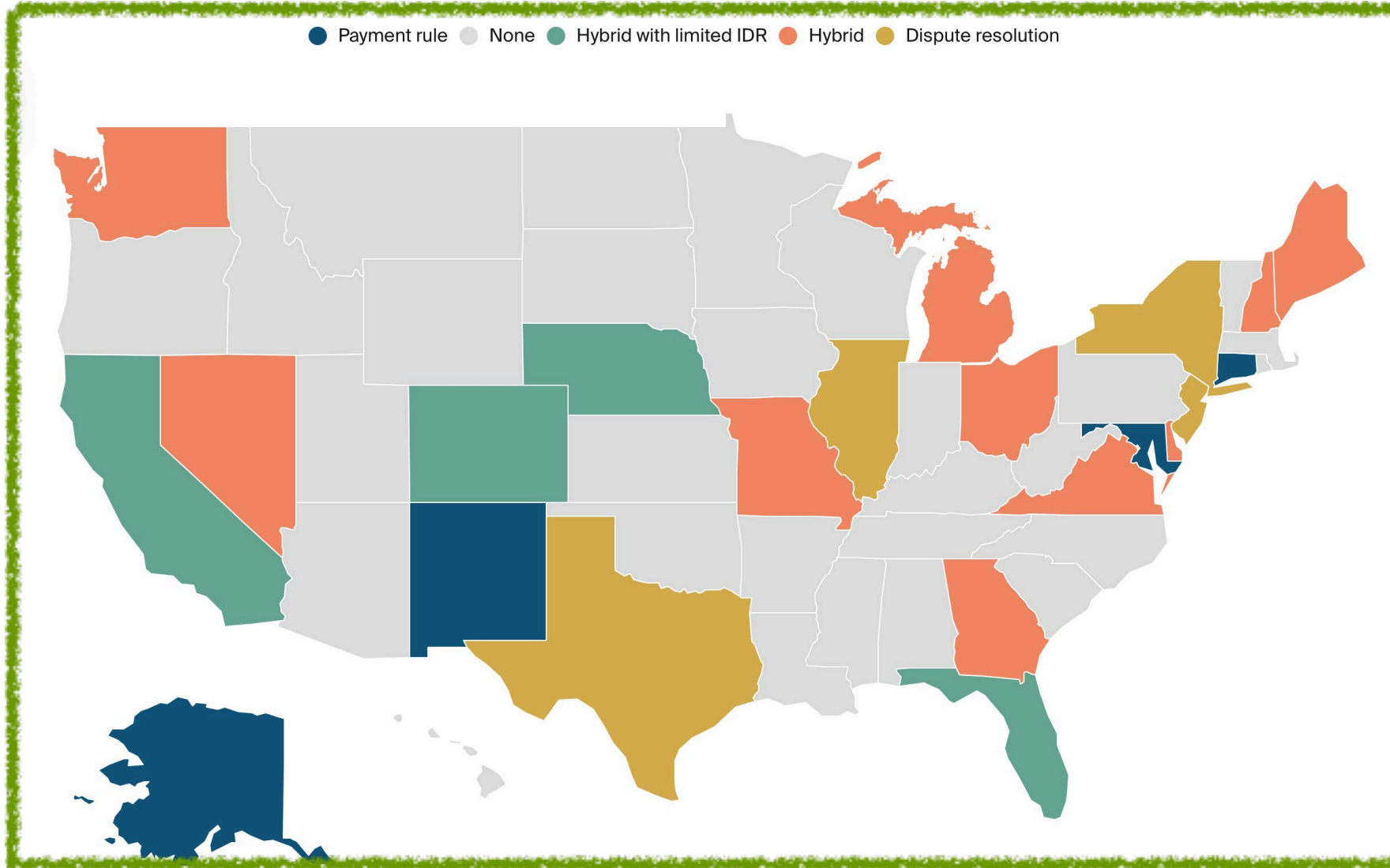
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No Surprises Act - Independent Dispute Resolution

The IDR Entity is immune from judicial review without corruption, fraud, or specific kinds of misconduct of the arbitrators.

Loser pays the IDR Entity's Fees

No Surprises Act - State Law IDR

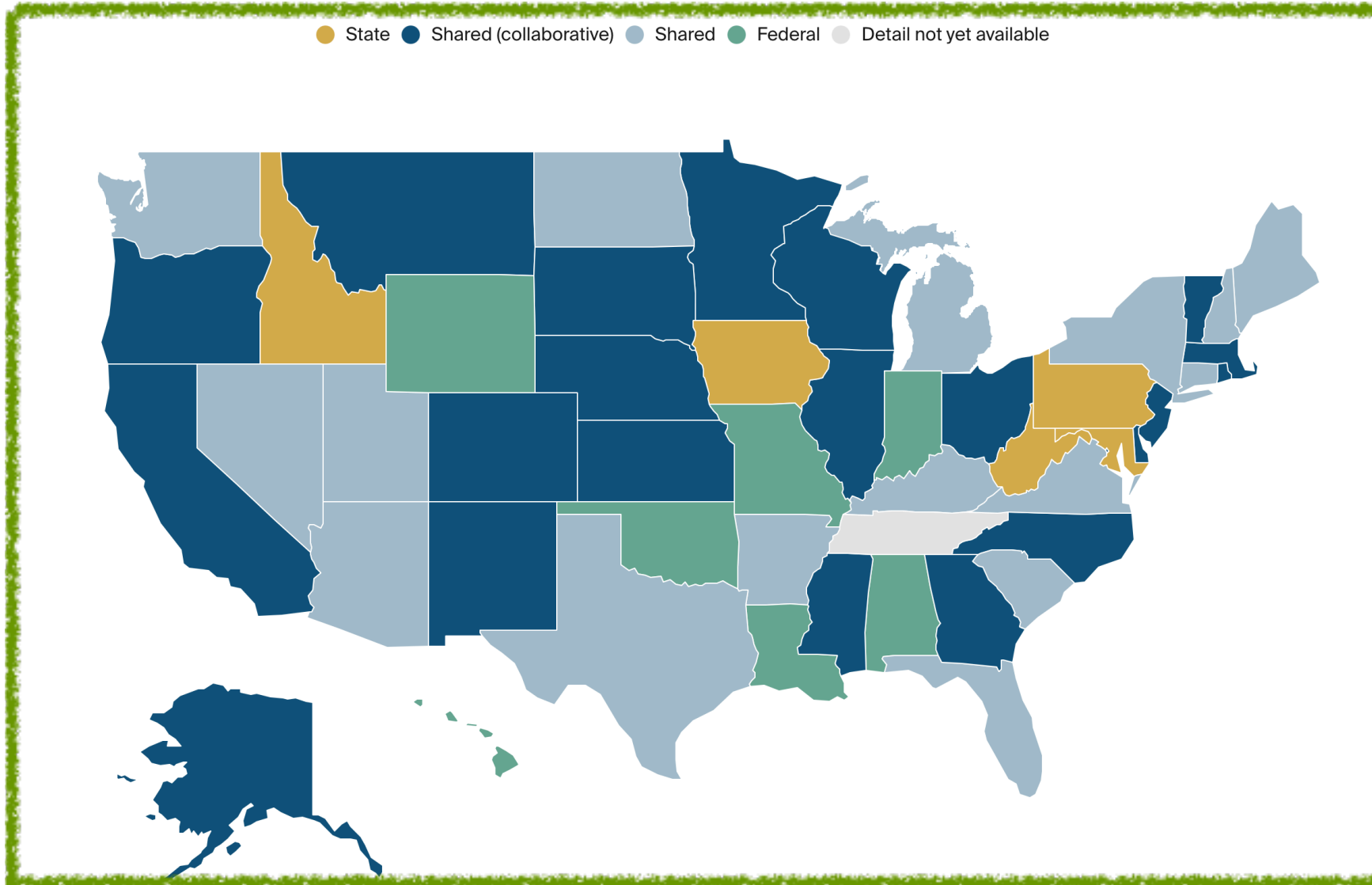


Available at:
<https://www.commonwealthfund.org/publications/maps-and-interactives/2022/feb/map-no-surprises-act#map>

No Surprises Act - Enforcement

- The NSA did not entirely preempt the previously existing state surprise billing laws. State laws were only preempted if they conflicted with the federal law.
- States can enforce federal requirements against health plans regulated properly by the states (non-group health plans and fully-insured employer-sponsored plans).
- Federal government has primary authority over self-insured group health plans.
- The Treasury, Labor, and Health and Human Services Department share jurisdiction in enforcing the NSA.
- Penalties up to \$10,000 per violation can be applied to providers and facilities.

No Surprises Act - Enforcement



Available at:
<https://www.commonwealthfund.org/publications/maps-and-interactives/2022/feb/map-no-surprises-act#map>

Implementation & Challenges

Initial Agency Rules

- In July 2021, HHS, DOL, and Treasury rolled out **Requirements Related to Surprise Billing; Part I.**
- In October 2021, the agencies rolled out **Requirements Related to Surprise Billing; Part II.**
- On August 19, 2022, the agencies finalized their rules through: **Requirements Related to Surprise Billing: Final Rules**

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Legal Challenges

- Texas Medical Association v. U.S. Dep't of H.H.S.
(ED Tx 2/23/22) (TMA I)
- LifeNet, Inc. v. U.S. Dep't of Health & Hum. Servs.
(ED Tx 7/26/22)
- Texas Medical Association v. U.S. Dep't of H.H.S.
(ED Tx 2/06/23) (TMA II)
- Ass'n of Air Med. Servs. v. United States HHS
(D.D.C. 8/9/23)
- Texas Medical Association v. U.S. Dep't of H.H.S.
(ED Tx TBD) (TMA III)
- Texas Medical Association v. U.S. Dep't of H.H.S.
(ED Tx 8/03/23) (TMA IV)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TEXAS MEDICAL ASSOCIATION,
DR. ADAM CORLEY, and TYLER RE-
GIONAL HOSPITAL, LLC,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, OF-
FICE OF PERSONNEL MANAGEMENT,
DEPARTMENT OF LABOR, DEPART-
MENT OF THE TREASURY, XAVIER
BECERRA *in his official capacity as the Sec-
retary of Health and Human Services;*
KIRAN AHUJA *in her official capacity as the
Director of the Office of Personnel Manage-
ment,* JANET YELLEN *in her official capac-
ity as the Secretary of the Treasury,* and
MARTIN J. WALSH *in his official capacity
as the Secretary of Labor*

Civil Action No. _____

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Questions



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Partner

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