

# DIRECT PRIMARY CARE Summit



2018

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# Legal Risk Mitigation for DPC Physicians

Philip Eskew, DO, JD, MBA

Submit your questions to: [aafp3.cnf.io](http://aafp3.cnf.io)

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# Learning Objectives

- Understand the recent state DPC “not insurance” laws and enforcement actions.
- Understand the HITECH Act, and how it may be used to by patients as a right to obtain private & transparent pricing.
- Review common questions surrounding opting out of Medicare.

# Direct Primary Care Defined

- 1) CHARGE A PERIODIC FEE
- 2) NOT BILL ANY THIRD PARTIES ON A FEE FOR SERVICE BASIS, AND
- 3) ANY PER VISIT CHARGE MUST BE LESS THAN THE MONTHLY EQUIVALENT OF THE PERIODIC FEE

# AES Question

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Does this definition do the following:

Exclude a hybrid practice?

a) Yes

b) No



Does this definition do the following:

Meant to be exclusive?

a) Yes

b) No

Does this definition do the following:

Meant to imply illegality of other models?

a) Yes

b) No

Does this definition do the following:

Consider that an employer/state might pay the monthly fee?

a) Yes

b) No

Does this definition do the following:

Distinguish DPC from concierge?

a) Yes

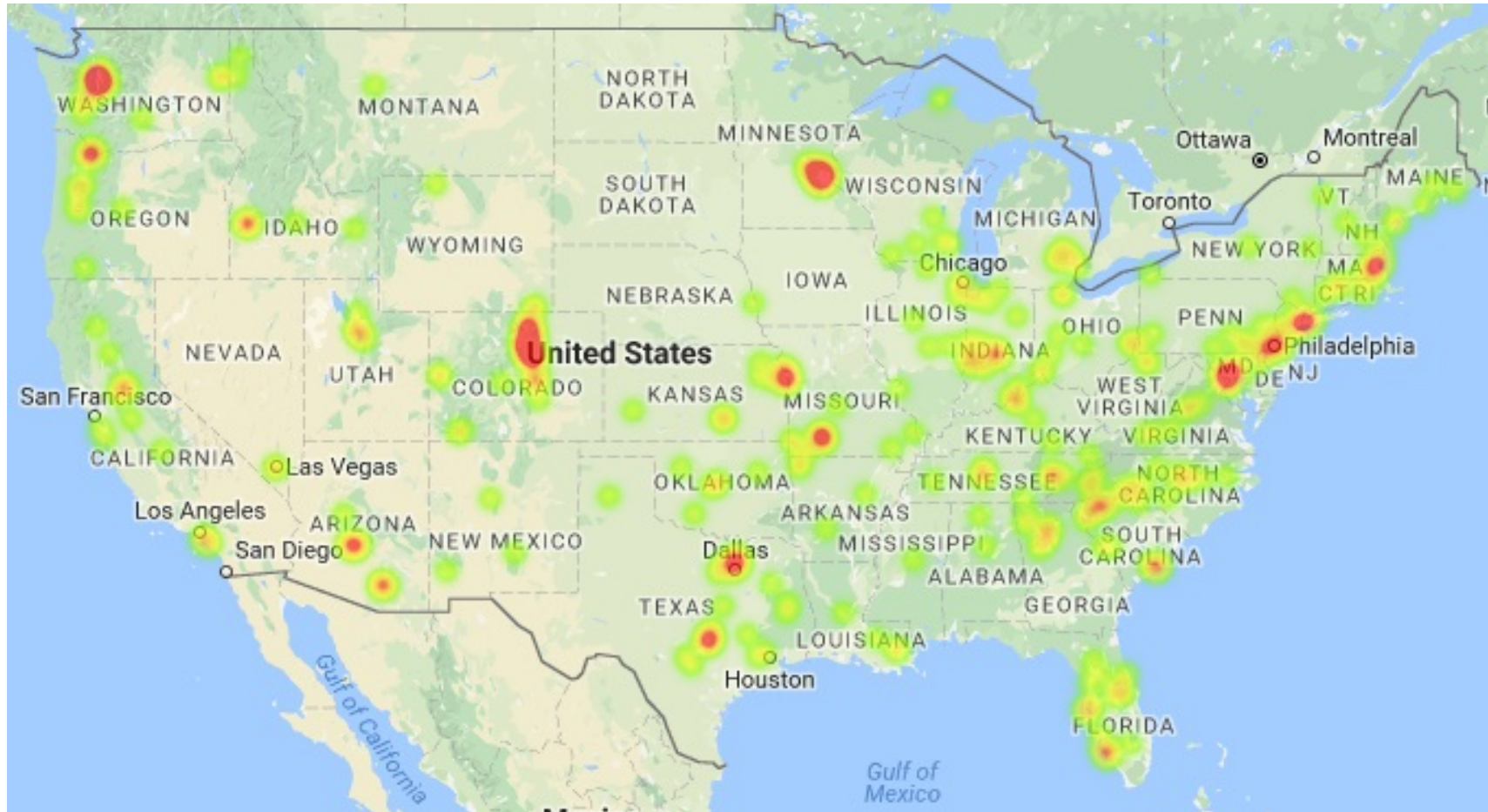
b) No

# June 2014 – 125 Locations

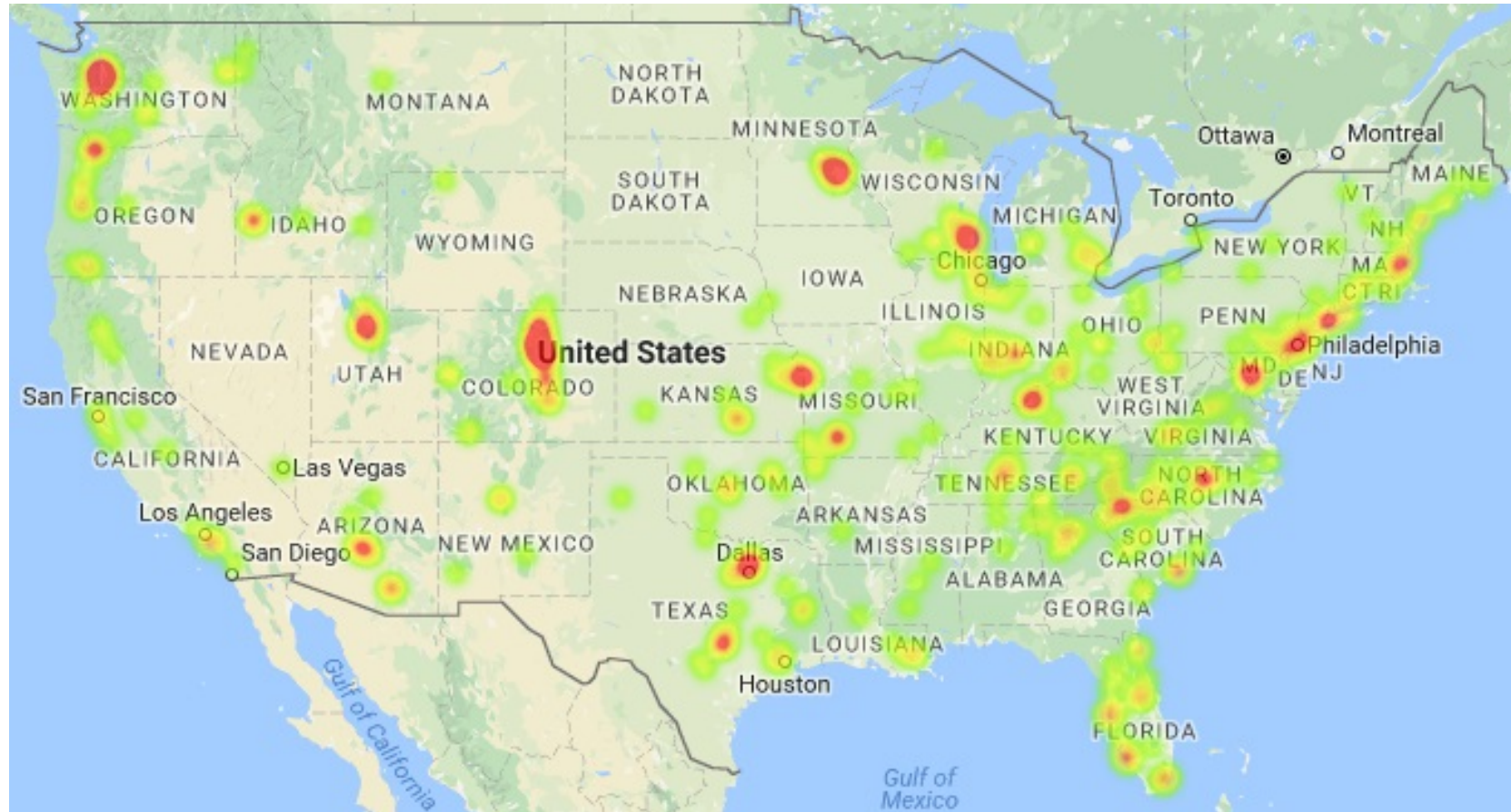




# Sept 2016 – 445 Locations

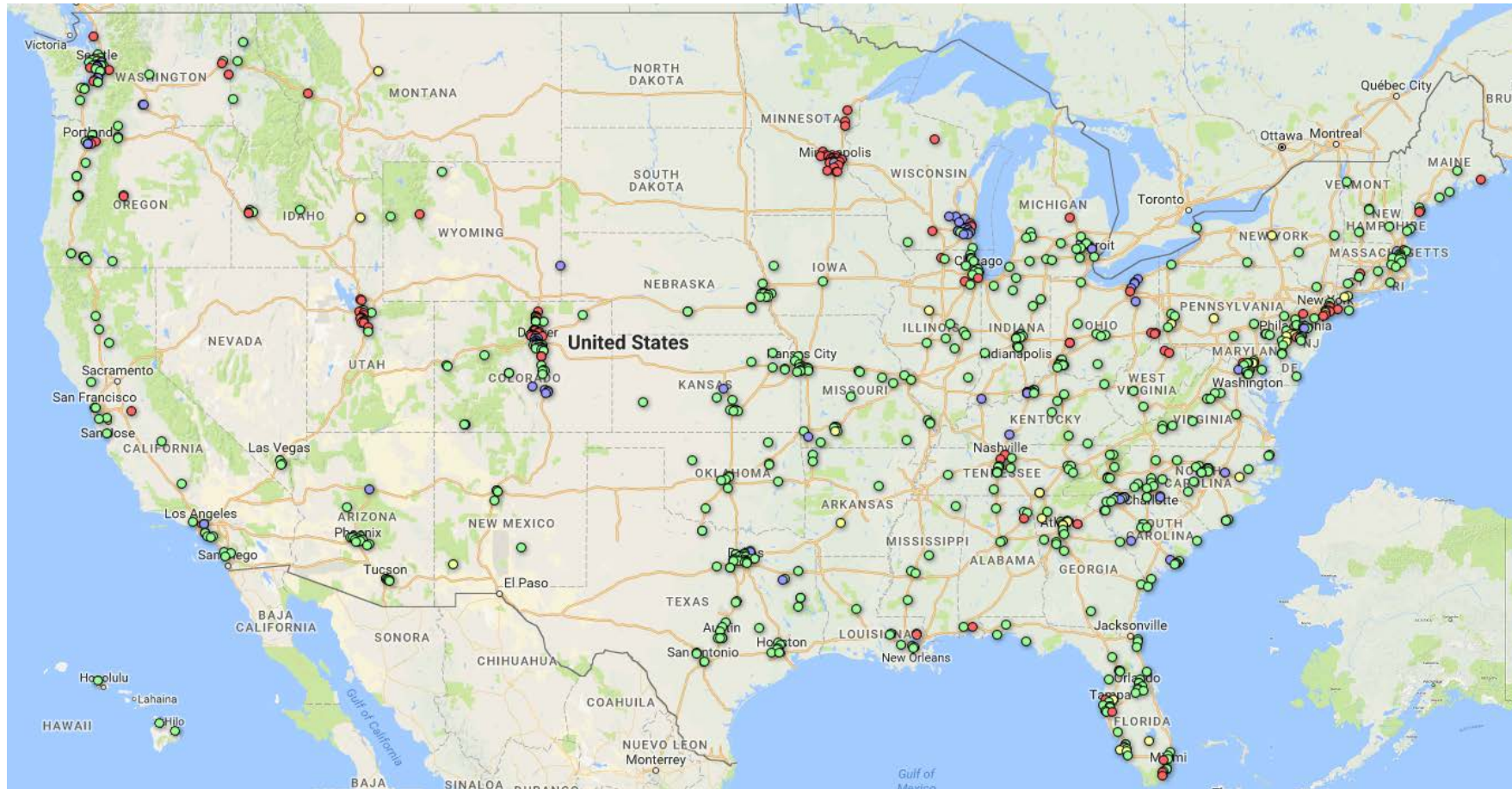


# April 2017 - 620 Locations

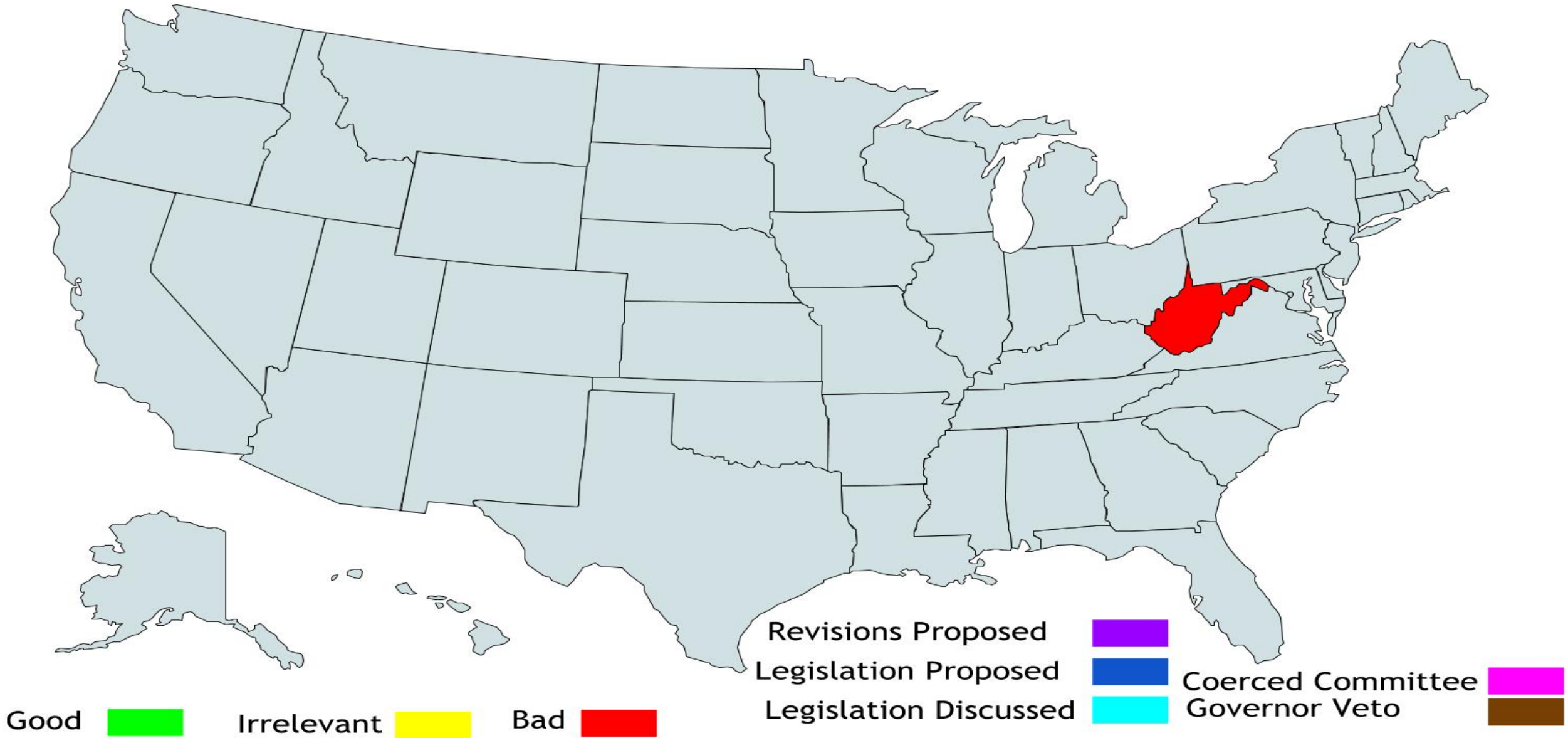




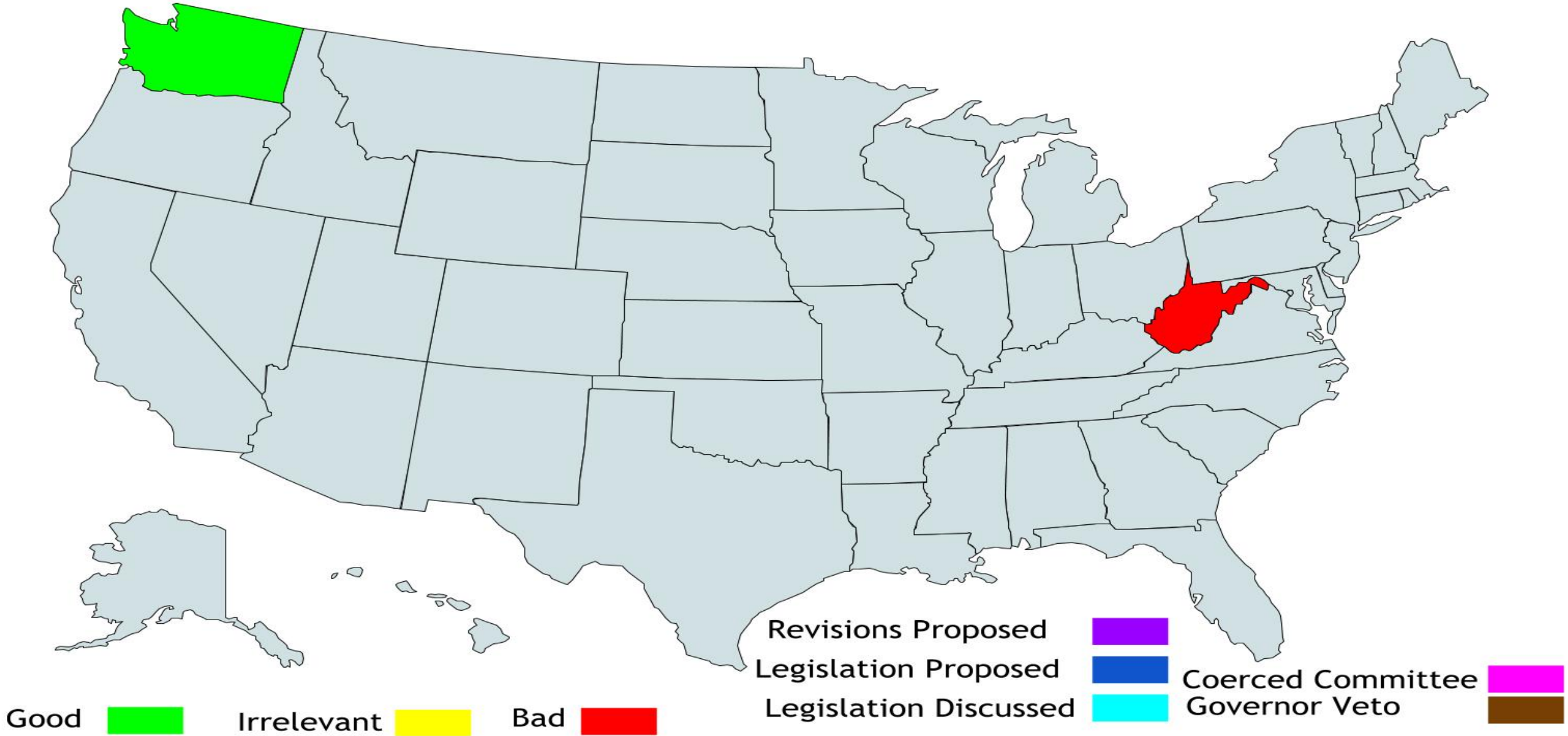
# June 2018 – 840 Locations



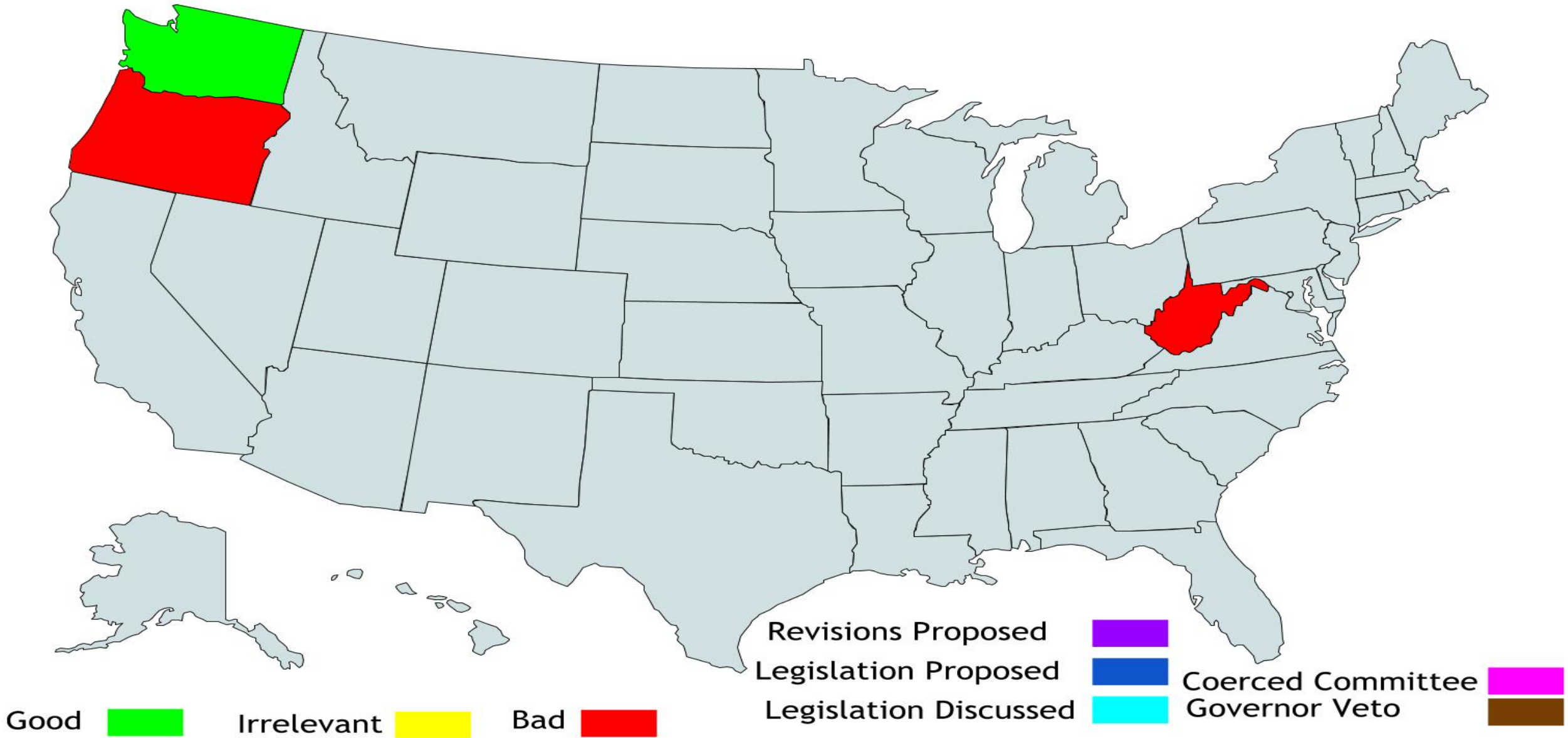
# 2006 DPC Laws



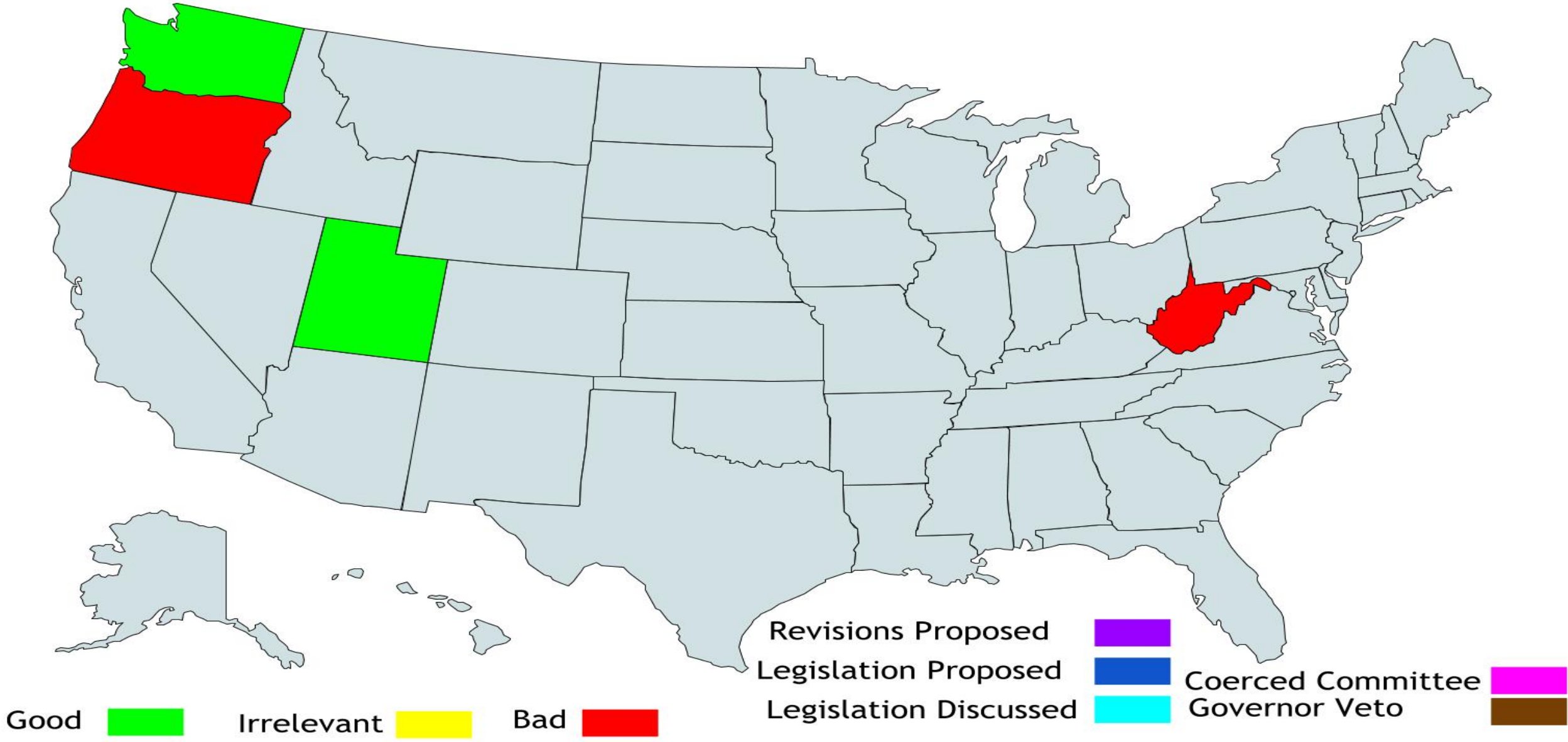
# 2007 DPC Laws



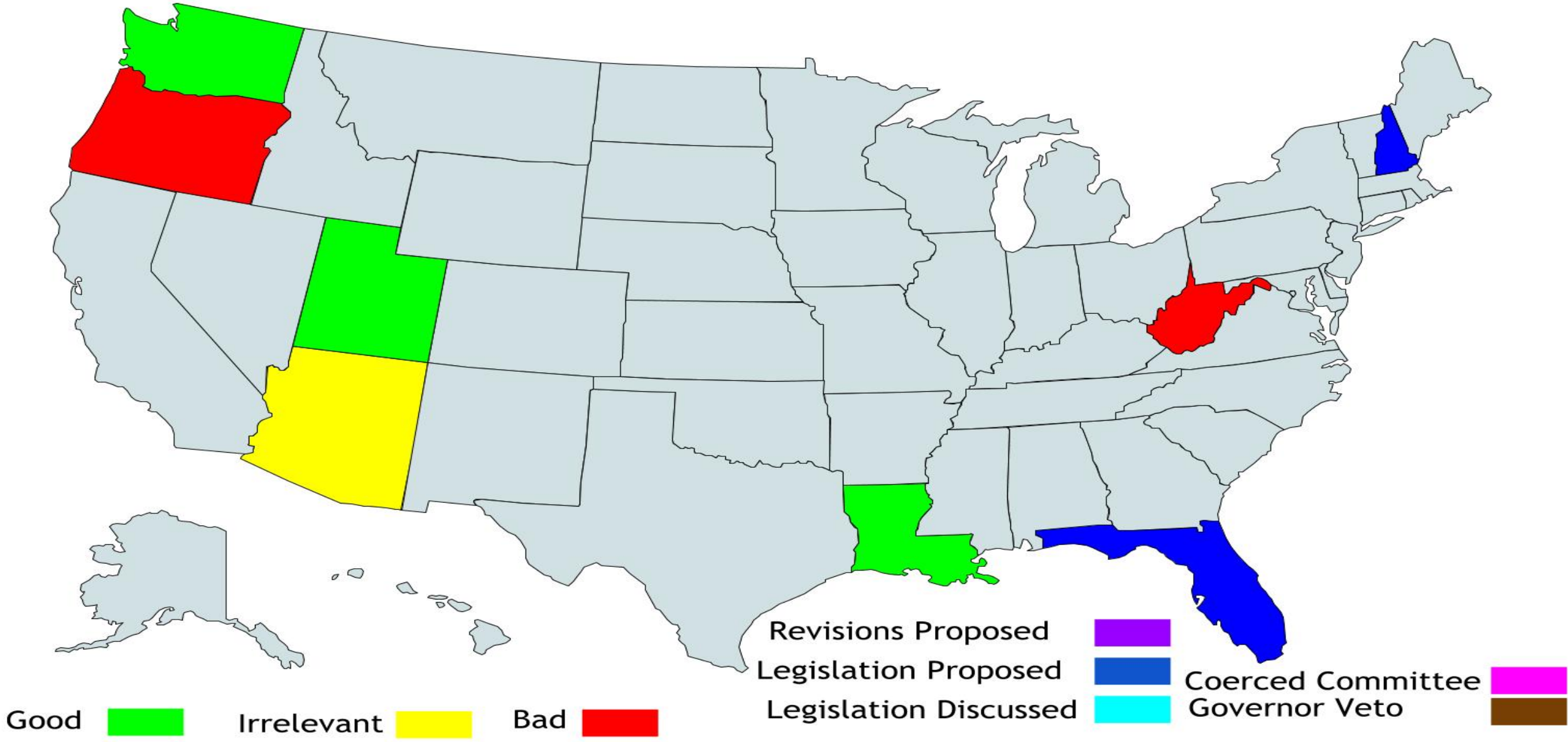
# 2011 DPC Laws



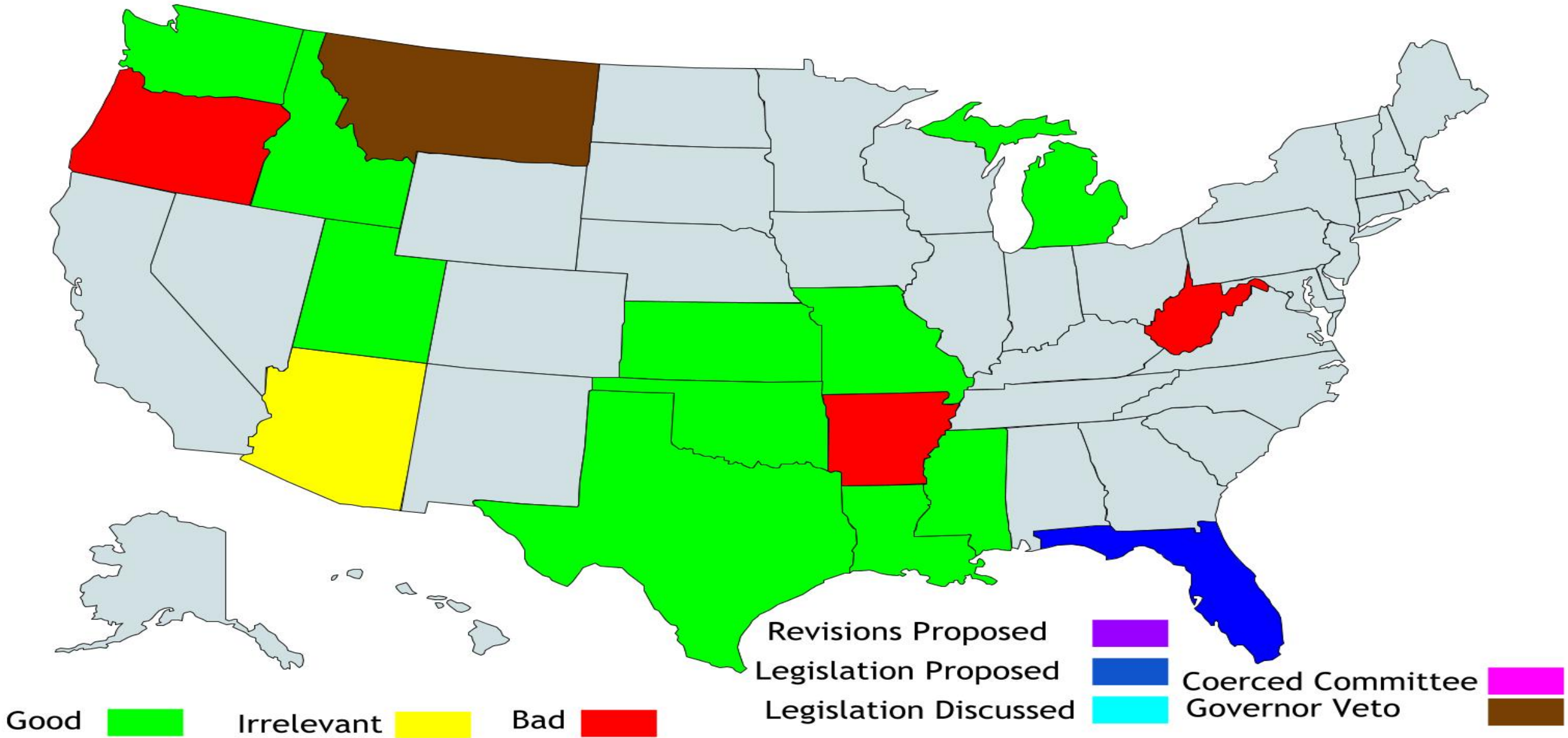
# 2012 DPC Laws



# 2014 DPC Laws



# 2015 DPC Laws

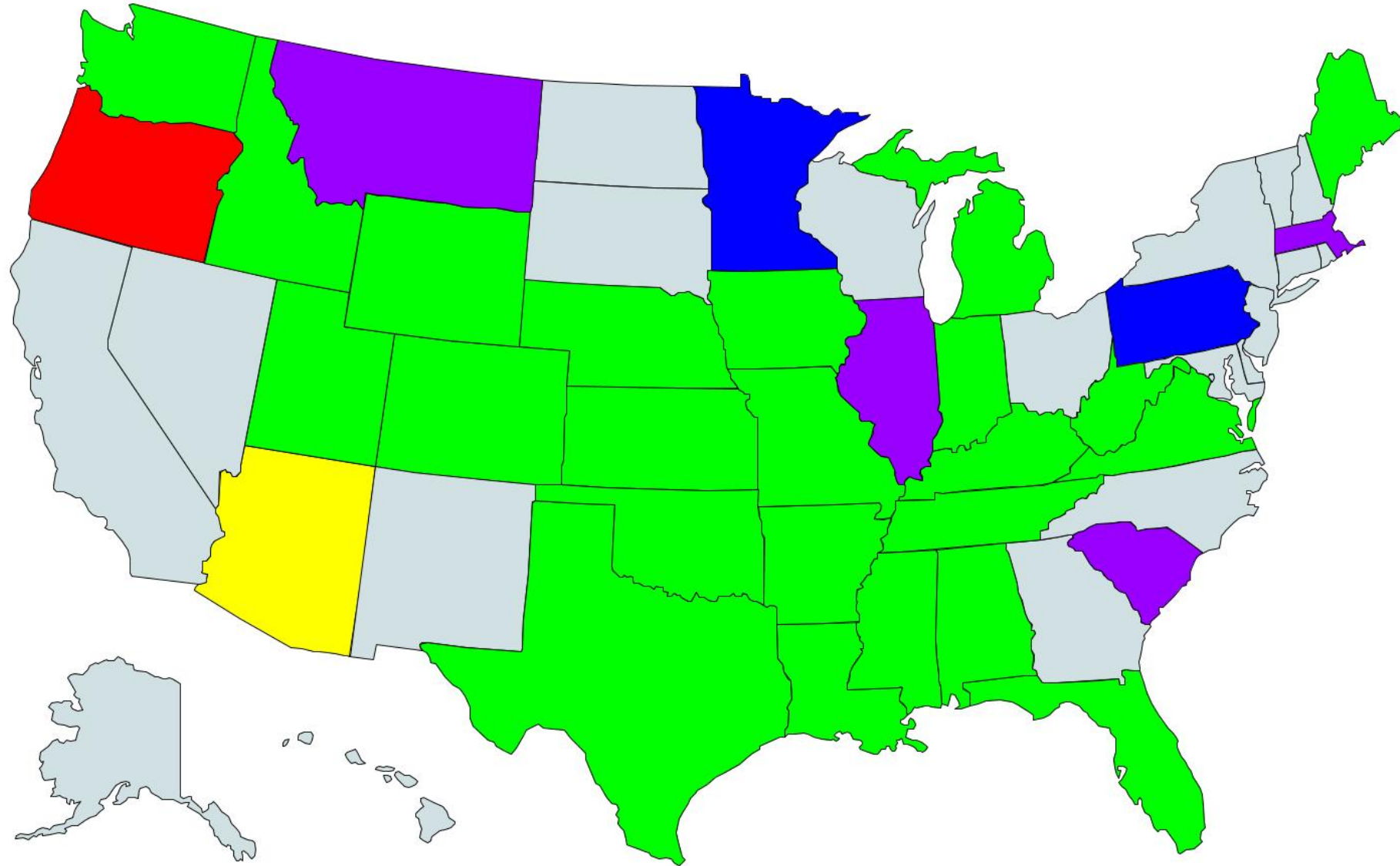








# 2018 DPC Laws



Good ■ Irrelevant ■ Bad ■ Ins Commish Guide ■ Proposed ■

# New York Enforcement

- 1) Included Benefits: All Members in good standing shall be entitled to regular preventive checkups for adults and/or well baby checkups (**including all vaccinations** up to the age of ten except the Gardasil vaccine). Preventive checkups may include all treatments, testing and care identified in Appendix I and Appendix II.
- 2) Benefits at Additional Charge: Members will also enjoy the benefit of **unlimited** sick visits charged at \$10 per visit. . . .
- 3) Services Not Available: THIS AGREEMENT DOES NOT COVER HOSPITAL STAYS, EMERGENCY ROOM VISITS, SERVICES OF SPECIALISTS NOT EMPLOYED BY [THE INQUIRER], TREATMENT (INCLUDING BUT NOT LIMITED TO IMAGING) PROVIDED ANYWHERE OTHER THAN AT [THE INQUIRER'S] FACILITIES, AND ALL LAB TESTS **OTHER THAN THOSE IDENTIFIED IN APPENDIX II.**

# New York Enforcement

Here, the **unlimited benefits** described in the inquirer's materials include items that are **clearly dependent on fortuitous events**, such as tetanus vaccines after injury. Moreover, it seems **unlikely that the \$10 co-payment truly covers the cost of rendition of the physician's services**. Thus, it appears that the inquirer is doing an insurance business, which requires a duly issued license from the Department pursuant to Insurance Law § 1102

# Maryland Enforcement (2009 Issue Spotting)

- 1) Annual retainer fee covers **unlimited** office visits or a limited number of services that the physician **cannot reasonably provide** to each patient in his or her panel;
- 2) **No limitations on the number of patients** accepted into the practice;
- 3) Annual retainer fee does not represent the **fair market value** of the promised services;
- 4) Physician has substantial financial **risk for the cost of services rendered by other providers**; or
- 5) The retainer agreement is non-terminable during the contract year and/or does **not provide for pro-rated refunds**.

# Maryland Enforcement (2015)

- 1) 2015 - A dental practice was forced to abandon a "premium plus dental plan" because it appeared to be an unlawful insurance plan.
  - A. Aggressive Language = "works similar to many dental plans on the market. You pay a monthly membership fee for benefit coverage on your dental expenses... All questions regarding plan coverage, verifying benefits, changing coverage types, or any other questions should be directed to our staff..." The plan was "designed to cover preventive services such as cleanings and oral exams" and "**offers excellent coverage** for major dental procedures like crowns, root canals, bridges, and dentures."
  - B. A better approach would have been to charge a clearly described up front nonrefundable enrollment fee, and then otherwise bill a monthly fee in arrears (at the end of the month). Allow the patients to leave at any time (obviously no refunds would be owed if they are paying at the end of the month) and list a maximum patient panel size.

# South Carolina Enforcement (March 2016)

- 1) Services limited to medical care provided by the DPC practice
  - A. Do not bundle labs, meds, or specialty care
- 2) Monthly membership dues paid at the end of each month
- 3) Membership “does not involve a risk transfer but rather operates as a payment to secure access to physician’s services”
- 4) “Not health insurance” disclaimer on bold type in the agreement
- 5) **“Program materials will not be distributed to insurance agents and no solicitation or contract will be made with insurance agents to promote program membership.”**

NEVER, EVER – Under ANY circumstance – PAY a broker

# Top Ten State “Reduce Your Risk” Suggestions

- 1) Limit Panel Size
- 2) Detail Your Scope of Practice
- 3) “Not Insurance” Disclosures
- 4) Recommend Patients Purchase Insurance
- 5) Patient Partial Refund at any time
- 6) Escrow any funds received in advance
- 7) Require a visit at least annually
- 8) Require individual patient contracts
- 9) Office visit cap
- 10) Charge in Arrears



# AES Question

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Are there any states where DPC is clearly the unlawful practice of insurance?

- a) Yes
- b) No

# Are there any states without any DPC practices?

- a) Yes
- b) No

# Indiana DPC Definition

This is a contract where the physician:

- (1) agrees to provide primary care health services to the individual patient for an agreed upon fee and time;
- (2) does not bill any third parties on a fee for service basis;
- (3) charges a periodic fee for services; and
- (4) may charge a per visit charge only if the charge is less than the monthly equivalent of the periodic fee.

# Indiana “Not Insurance” Provision

- Sec. 4.(a) A direct primary care agreement is not insurance and is not subject to IC 27.
- (b) Entering into a direct primary care agreement is not the business of insurance and is not subject to IC 27.
- (c) A primary care provider who enters into a direct primary care agreement is not required to obtain a certificate of authority under IC 27-1-3-20.

# Indiana DPC Qualifiers

Sec. 5. (a) A direct primary care agreement must meet all of the following requirements:

- (1) Be in **writing**.
- (2) Be **signed** by both parties
- (3) Allow either party to **terminate** the agreement upon written notice to the other party.
- (4) Describe the **scope** of primary care health services that are covered by the periodic fee.
- (5) Specify the **periodic fee** and any additional fees for **ongoing care** under the agreement.
- (6) Specify the **duration** of the agreement and any automatic renewal periods.
- (7) Require not more than twelve (12) months of a periodic fee to be paid in advance.
- (8) Prominently state in writing that **the agreement is not health insurance**.

(b) A primary care provider **may not earn any funds** under a direct primary care agreement until the month of ongoing care is completed.

# Indiana: Declining to Start the Agreement

Sec. 6.(a) A primary care provider may not decline to enter into a direct primary care agreement with an individual or discontinue care of a patient with whom the primary care provider has entered into a direct primary care agreement **solely because of the individual's or patient's health status.**

(b) A primary care provider may decline to enter into a direct primary care agreement with an individual if: (1) the primary care provider's practice has **reached maximum capacity**; or (2) the individual's medical condition would result in the primary care provider being **unable to provide the appropriate level and type of primary care health services that the individual requires.**

# Indiana: Ending the Agreement

- (1) **Fails to pay** the periodic fee.
- (2) Performs an act of **fraud** concerning the patient's health care.
- (3) Fails repeatedly to **adhere to the recommended treatment plan**.
- (4) Is **abusive** and presents an emotional or physical danger to the primary care provider, the primary care provider's staff, or other patients.



# HITECH – Cash Pay for Privacy

- Section 13405(a) of the HITECH Act sets forth certain circumstances in which a covered entity now **MUST** comply with an individual's request for restriction of disclosure of his or her protected health information.
- §45 C.F.R 164.522(a)(1)

# HITECH – Cash Pay for Privacy

Specifically, section 13405(a) of the HITECH Act requires that when an individual requests a restriction on disclosure pursuant to § 164.522, **the covered entity must agree to the requested restriction unless the disclosure is otherwise required by law**, if the request for restriction is on disclosures of protected health information to a health plan for the purpose of carrying out payment or health care operations **and** if the restriction applies to protected health information that pertains solely to a health care item or service **for which the health care provider has been paid out of pocket in full.**

# HITECH – HMO / Medicaid Implications

If a provider is required by State or other law to submit a claim to a health plan for a covered service provided to the individual, **and there is no exception or procedure for individuals wishing to pay out of pocket for the service**, then the disclosure is required by law and is an exception to an individual's right to request a restriction to the health plan pursuant to § 154.522(a)(1)(vi)(A) of the Rule.

# HITECH – Medicare Implications

With respect to Medicare, it is our understanding that when a physician or supplier furnishes a service that is covered by Medicare, then it is subject to the mandatory claim submission provisions of section 1848(g)(4) of the Social Security Act (the Act), which requires that if a physician or supplier charges or attempts to charge a beneficiary any remuneration for a service that is covered by Medicare, then the physician or supplier must submit a claim to Medicare. However, **there is an exception to this rule** where a beneficiary (or the beneficiary's legal representative) refuses, of his/her own free will, to authorize the submission of a bill to Medicare. In such cases, **a Medicare provider is not required to submit a claim to Medicare for the covered service and may accept an out of pocket payment for the service from the beneficiary**. The **limits on what the provider may collect from the beneficiary continue to apply** to charges for the covered service, notwithstanding the absence of a claim to Medicare.

# HITECH Privacy Implementation

- Have the patient sign a request that information relative to self-paid services not be disclosed (usually called a Restrictions on Uses and Disclosures Form)
- Flag this information so that it is not shared with the “health plan”
- Inform the patient about the need to make the same request downstream (pharmacies, labs, specialists)

# HITECH Privacy Summary

- All covered entities **MUST** have a process
  - Refusal must be of patient's "own free will"
- Medicare
  - May accept cash payments, but limiting charges apply
- Medicaid
  - May or may not provide an exception (ex KY & CO)
- HMO laws (state based)
  - May or may not provide an exception
- Private Insurance Contracts
  - Federal law trumps terms of private agreements

# HITECH Medicare Opt Out Implications

- Continue to be a “participating” physician
- Could attempt to charge all Medicare privately for “covered services” (respecting Medicare limiting charge)
- Might be suspect if all patients need to sign up out of “own free will” but might be easier if you market practice based on heightened privacy
- Theoretically makes a monthly “noncovered services” fee argument stronger

# Opted Out Moonlighting

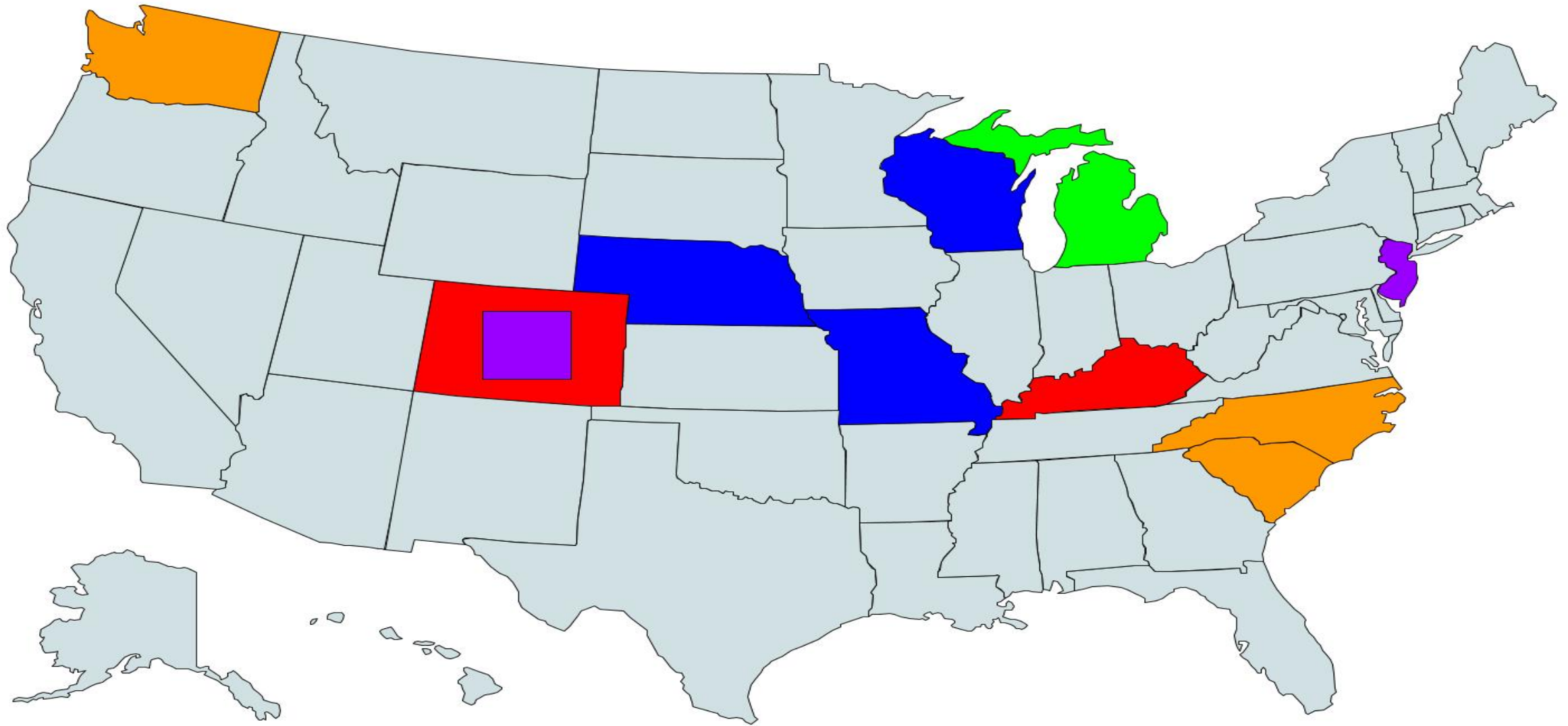
- Occ Med / Urgent Care / Emergency Care exceptions
- Cash Pay Telemedicine & Research Study Participation
- Hospice Administration
- **PACE “Programs for All Inclusive Care of the Elderly”**
- **On Site DPC with a large Employer**
- **Correctional Medicine**
  - Constitutional Right (8<sup>th</sup> Amendment)
  - Inmates cannot be covered by Medicare or Medicaid, and any private insurance they had will not apply
  - Usually care provided under private contract w/state



# Urgent & Emergency Exception

- Medicare Benefit Policy Manual
  - Chapters 15, 40.6 & 40.28.
- “Payment may be made to a [Medicare] beneficiary for services of an opt out physician/practitioner” if
- “the services are emergency or urgent care services furnished by an opt-out physician/practitioner to a beneficiary with whom he/she has not previously entered into a private contract.”
- GJ=Opt-out Physician/practitioner EMERGENCY OR URGENT SERVICES modifier
- These claims will be reimbursed at the Medicare "nonparticipating" physician rate (typically 95% of the regular rate)

# DPC Medicaid / State Employee Pilots



Passed ■ Proposed ■ State Employees ■ Medicaid Ban ■ City Employees ■

# Correctional / On-Site DPC / PACE

- No coding
- No billing
- No fee per visit
- Ongoing Messaging (via paper/text/email)
- Predictable Patient Panel (minimal recruiting)
- Patient does not pay the fee (state/employer)
- Patient has less choice of a physician

# AES Question

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If an insurance company demands a prior authorization, may you charge the insurance company to complete their paperwork?

- A) Yes – you may elect to do this on your own
- B) Yes – but only with the patient’s permission
- C) No – this is not permitted under federal law
- D) No – this is not permitted under most state laws
- E) It depends upon whether you are in “network”

If I change from a hospital employed physician to an independent DPC physician then my non-compete agreement will...

- A) Not apply by nature of my new DPC status
- B) Not apply because it is against public policy
- C) Apply because I am now competing with my old clinic
- D) Apply because I failed to move outside a geographic region
- E) Any of the above depending upon the state law variance

# Non-competes

- Non-competes: note enforceability by jurisdiction
  - Prohibited = CA, MT, ND, SD, DE, MA
  - Restrictive Statute = FL, ID, MI, OR, GA, CO
  - Physician favoritism = VA, TN, TX

An **individual patient** asks if she can use her health savings account to pay your membership fees, and you reply:

- A) Yes
- B) No
- C) Ask your accountant
- D) This is an unsettled issue, and then go into a treatise about tax law and the bipartisan Primary Care Enhancement Act



An **large employer HR director** asks if her employees can use their health savings account to pay your membership fees, and you reply:

- A) Yes
- B) No
- C) Ask your accountant
- D) This is an unsettled issue, and then go into a treatise about tax law and the bipartisan Primary Care Enhancement Act

Will you code my visit with you today so that I can submit it toward my insurance deductible?

- A) No, this is a waste of our time
- B) No, this could be insurance fraud
- C) Yes, I'll just do this each time you come in and list my cash pay rates
- D) Yes, I'll just do this once per year and will list 12 months of the fee

If I “opt out” of Medicare and do not bill Medicaid, then I am no longer subject to the:

- A) Affordable Care Act
- B) Clinical Laboratory Improvement Act
- C) False Claims Act
- D) Health Insurance Portability & Accountability Act
- E) Occupational Safety & Health Administration Regulations

# If I “opt out” of Medicare then I will no longer:

- A) Be able to privately contract for covered services
- B) Be able to privately contract for non-covered services
- C) Have an NPI number
- D) Have a PECOS number (needed for ordering labs & DME)
- E) Be able to participate in TRICARE

# If I “opt out” of Medicare then I may moonlight in the following areas:

- A) Correctional Medicine
- B) Indian Health Services
- C) Veterans Administration
- D) Locums (billing under the practice NPI)
- E) All of the Above

# Questions?

Submit your questions to:  
[aafp3.cnf.io](http://aafp3.cnf.io)

Don't forget to evaluate  
this session!

## Contact Information

Philip Eskew

Phil@DPCfrontier.com  
@PHILSQ