



Seyfarth Shaw LLP

SCOTUS On Employee Benefits

What the Supreme Court decisions in *King*
and *Obergefell* will mean for employers and
plan sponsors



Legal Disclaimer

The contents of this presentation should not be construed as legal advice or a legal opinion on any specific facts or circumstances.

These materials are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

The logo consists of three overlapping triangles pointing to the right: a light blue triangle on top, a dark blue triangle in the middle, and a purple triangle on the bottom.

Agenda

- The future of Obamacare following the *King* decision
- The impact of *King* on employee benefit plans
- The *Obergefell* decision on same-sex marriage
- Next steps for employee benefit plan sponsors following *Obergefell*
- Other key employee benefits cases on deck with the Supreme Court in 2016

The future of Obamacare following the *King* decision

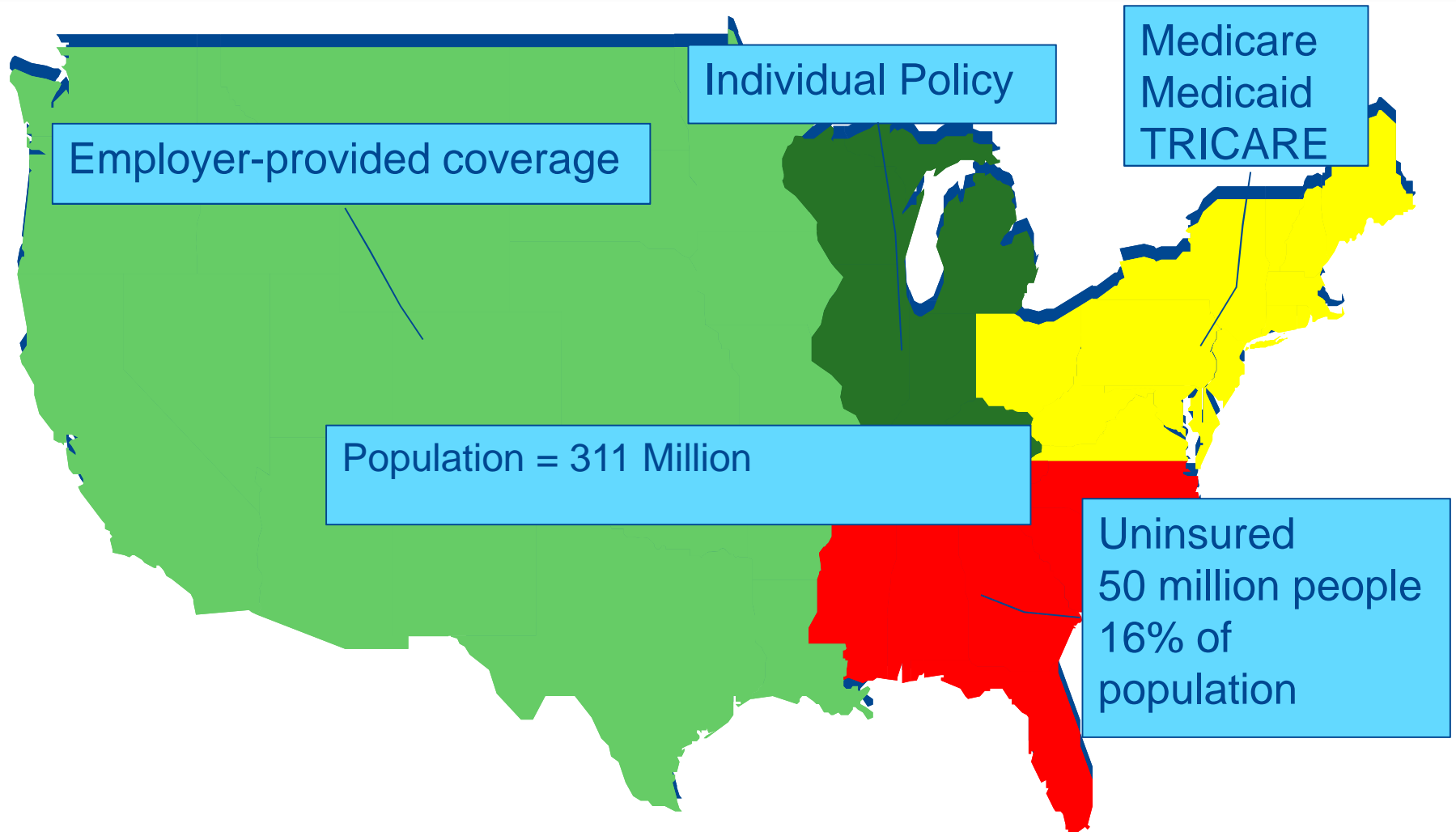


King v. Burwell

- Key takeaways:
 - Premium tax credits available on Health Marketplaces established by a state *or* by the Federal government.
 - ACA remains intact

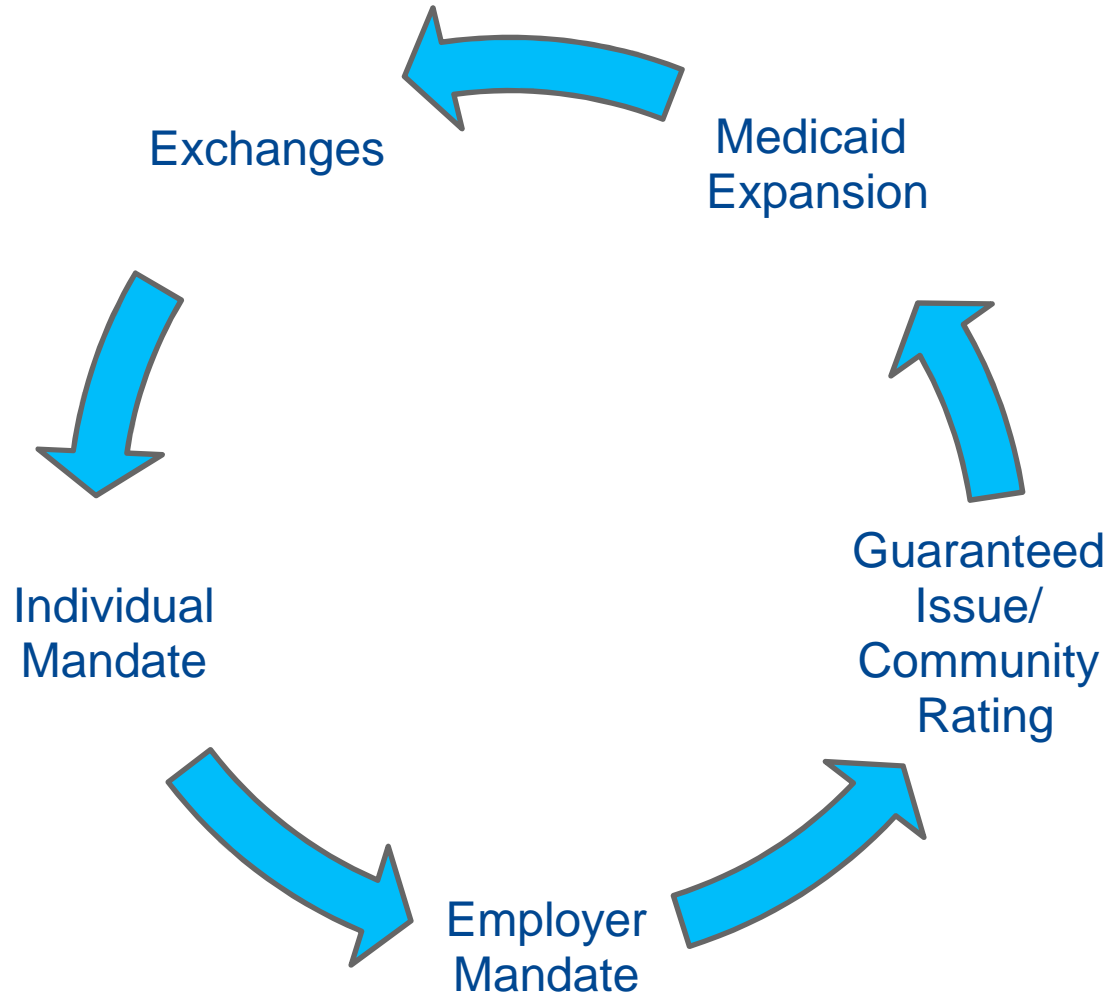


King v. Burwell: Background



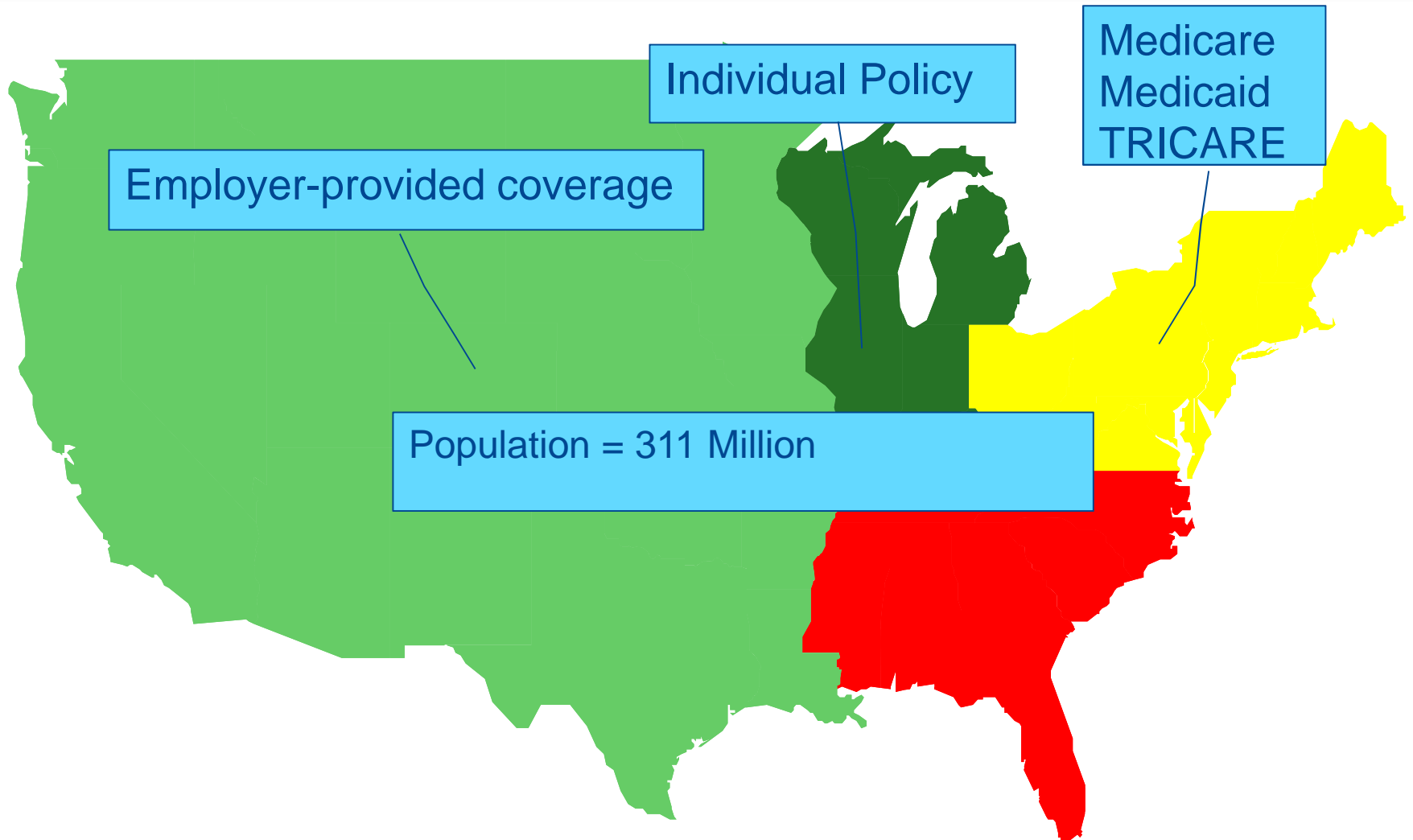


King v. Burwell: Background



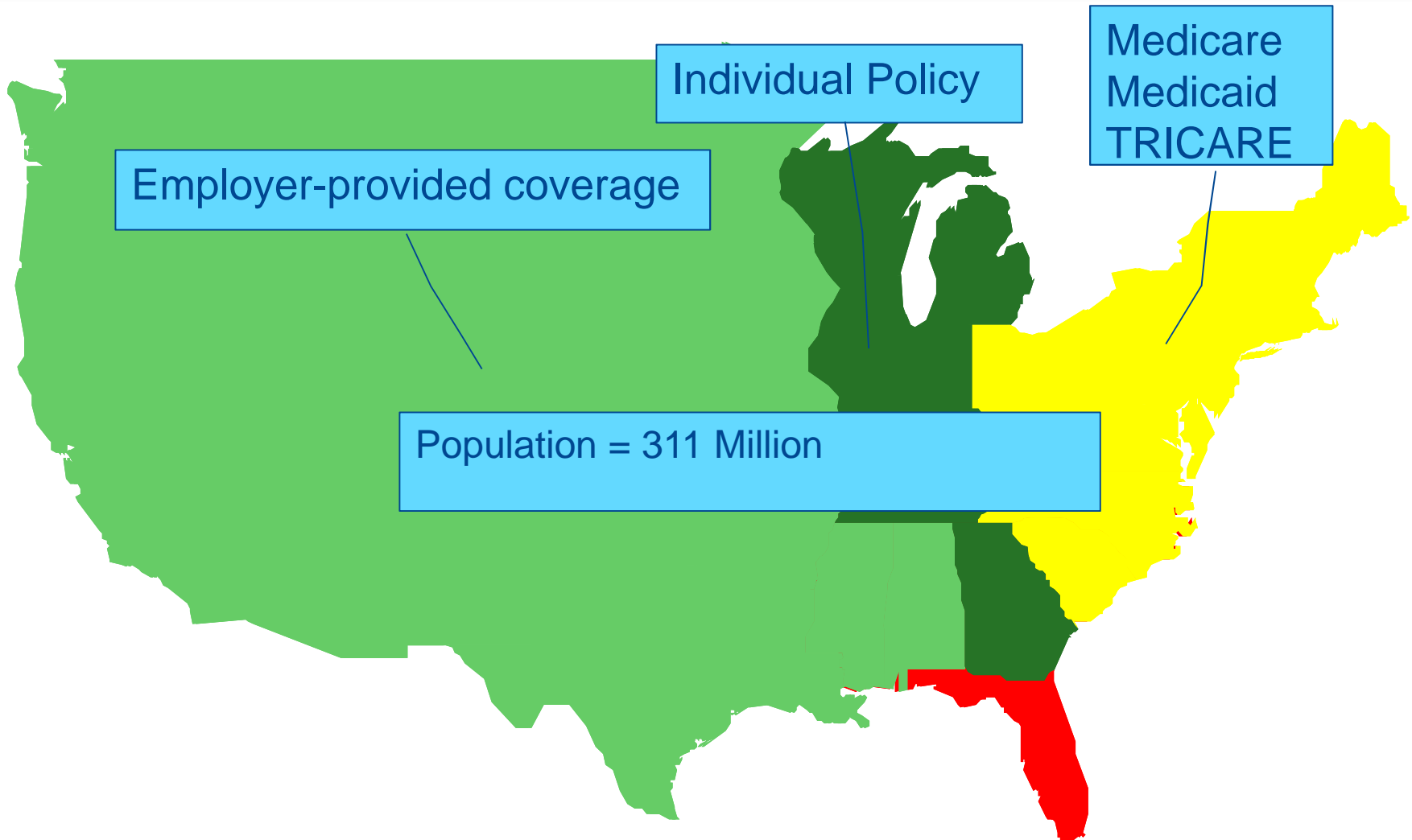


King v. Burwell: Background



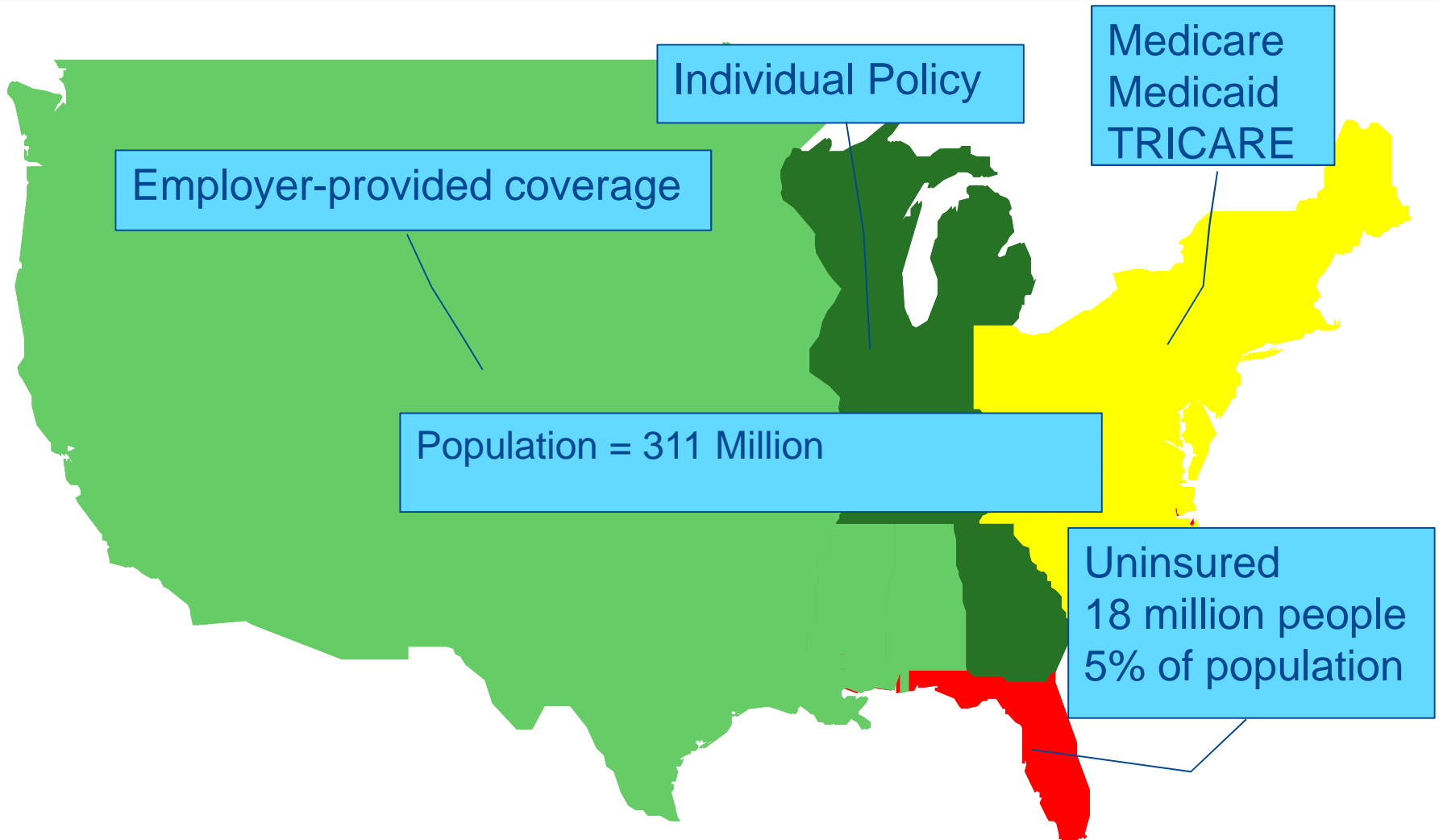


King v. Burwell: Background





King v. Burwell: Background



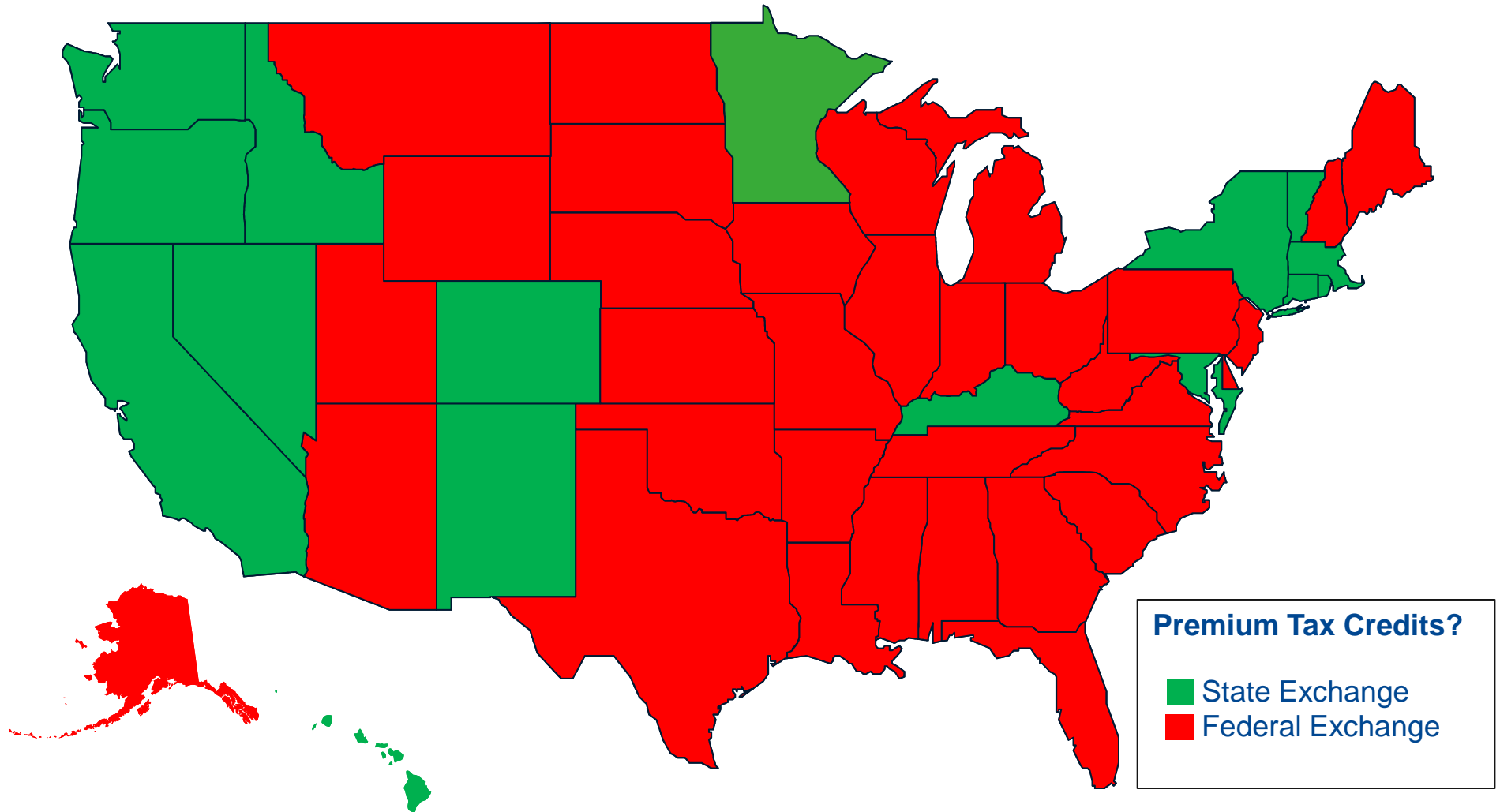


***King v. Burwell*: Background**

- Petitioners argued that statutory language below should be read literally:
 - Premium tax credits only available through “an Exchange established *by the State....*” (emphasis added)
- Potential implications for:
 1. Premium tax credit availability
 2. Individual mandate
 3. Employer mandate
 4. Exchanges and broader insurance marketplace



King v. Burwell: Background





***King v. Burwell*: Decision**

- In a 6-3 decision, the majority held that the statute provided for premium tax credits on the marketplaces established by the states *or* by the Federal government.
- Reasoning:
 - Statute is ambiguous
 - So, Court must read the provision in context
 - “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.”



King v. Burwell: Decision

- Dissent: Scalia unhappy
- “We should start calling this law SCOTUScare”
- “... interpretive jiggery-pokery.”



The impact of *King* on employee benefit plans



King v. Burwell: Impact

- Employer mandate in effect today for most “applicable large employers”
- Significant legislative changes unlikely before 2017 (at the earliest)
- Origination clause challenges still pending (5th Circuit and DC Circuit)
- Contraceptive mandate challenge still pending (discussed later in this presentation)

The *Obergefell* decision on same-sex marriage



Obergefell v. Hodges

Two questions before the Court:

- 1) Whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex; and
- 2) Whether the Fourteenth Amendment requires a state to recognize a same-sex marriage legally licensed in a different state.



Obergefell v. Hodges: Holding

- The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.
- Due Process Clause Rationale and Equal Protection Clause



Obergefell v. Hodges: Holding

- First Amendment allows persons to disagree with same-sex marriage
- Gay individuals not recognized as a protected class and anti-discrimination not recognized as a type of sex-discrimination

Next steps for employee benefit plan sponsors following *Obergefell*



***United States v. Windsor*: Background**

- *United States v. Windsor* - June 26, 2013
 - DOMA Section 3 Unconstitutional
- Impacted interpretation of federal laws



Big Question Following *Windsor*:



....OR....





Qualified Retirement Plans

- Post-*Windsor* - ERISA and IRC references to “spouse” include same-sex spouses based on state of celebration, including:
 - Pre-retirement death benefits
 - Spousal consent requirements:
 - upon election of alternate forms of distribution
 - electing non-spouse beneficiary
 - Qualified Domestic Relations Order
 - Default beneficiaries
- Post-*Obergefell* – No change



Health and Welfare Plans

- Neither ERISA nor IRC mandate coverage for “spouses” in health and welfare plans
- Post-*Windsor* – Employers free to define “spouse” for health and welfare plans
- If health plan covered same-sex spouses:
 - Can pay for benefits on pre-tax basis for federal tax purposes
 - COBRA right to coverage if lose spouse’s coverage, i.e., divorce





Health and Welfare Plans (cont'd)

- Interplay of State and Federal Law
 - For fully insured plans - state insurance law may require that plans covering opposite-sex spouses must also cover same-sex spouses
 - In non-marriage recognition states:
 - Potential different tax treatment of benefits under state and federal law



Health and Welfare Plans (cont'd)

- *Post-Obergefell*
 - For fully insured plans - state insurance law mandates for “spouses” apply to same-sex spouses
 - State tax treatment
 - Benefits should no longer be subject to state tax
 - States may issue guidance about effective date
 - Employers who continue to define “spouse” for these benefits as opposite-sex spouses only at increased risk of litigation



Future of Domestic Partner Benefits

- Many employers implemented domestic partner benefits to provide equal benefits to employees who could not legally marry
- Will employers continue to offer benefits to domestic partners?



Future of Domestic Partner Benefits



At the time of the ruling . . .

Slightly more than half of employers responding to the survey believe the Supreme Court ruling will have an impact on their organization.



Same-Sex Domestic Partner Benefits

57% of all organizations offered benefits to unmarried **same-sex** domestic partners.



Opposite-Sex Domestic Partner Benefits

45% of all organizations offered benefits to unmarried **opposite-sex** domestic partners.

7/10

will likely continue providing benefits to same-sex domestic partners

4/5

will likely continue providing benefits to opposite-sex domestic partners

Source: IFEBP



Future of Domestic Partner Benefits



Source: IFEBP



***Obergefell* will impact employment law**

- No right under ERISA to same-sex spousal benefits. *Roe, et al. v. Empire Blue Cross Blue Shield*, 2014 U.S. App. LEXIS 24247 (2d Cir. Dec. 23, 2014)
 - But...
- While not directly on point it will shape how courts view gay rights (and especially employment)
- Courts are increasingly being called on to do this



Future Trends: Recasting Title VII

- “We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”
Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1998)
- EEOC adoption of broad reading of Title VII. *Castello v. U.S. Postal Serv.*, EEOC Request No. 0520110649 (Dec. 20, 2011); *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821
- Historical judicial reluctance to adopt a broader view of Title VII (but that may be starting to change)



Hobby Lobby

- Religious Freedom
 - Free exercise clause of the First Amendment (US Const. amend I)
 - Religious Freedom Restoration Act of 1993 (RFRA) (42 USC §§2000bb—2000bb-4)
- Closely held corporations can hold religious views under federal law
- “Right to Discriminate” laws



Likely Litigation Battleground

- Employer denial of health coverage to same-sex spouse as violative of Title VII?
 - *Hall v. BNSF*; *Cote v. Wal-Mart*
- Sex stereotyping/discrimination v. Religious freedom/textual reading (*i.e. Price Waterhouse v. Hobby Lobby*)
- Indiana mini-RFRAs (Given new life by Justice Kennedy?)
- Reverse discrimination lawsuits in domestic partnership context

Other Sexual Orientation/Gender Considerations in the Workplace



State of the Law Re GLBT Rights

- Federal Law
 - No federal statute addressing employment discrimination based on sexual orientation or gender identity
- 18 states + D.C. have nondiscrimination laws that cover sexual orientation and gender identity/expression
- 3 states have law banning discrimination based on sexual orientation alone: Wisconsin, New Hampshire, New York



What does the law prevent?

- ***Discrimination*** based on sexual orientation or gender identity/expression
- ***Harassment*** based on based on sexual orientation or gender identity/expression
 - Unwelcome conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment



Discrimination

- ***Federal Circuit Split:*** Federal Courts currently disagree on whether or not discrimination against transgender people on the basis of transgender status is prohibited.
- ***EEOC:*** The Equal Employment Opportunity Commission currently believes that discrimination on the basis of transgender status is itself discrimination on the basis of gender under Title VII.



Healthcare and Transgender Employees

- ***Plans***: Many health plans and providers are still working to incorporate trans-inclusive health care options.
- ***Affordable Care Act***
 - Section 1557 prohibits discrimination based on sex by any health program receiving federal financial assistance
 - HHS confirmed this prohibition extends to prohibitions on discrimination based on gender identity



Healthcare and Transgender Employees

- ***Affordable Care Act***

- Requires non-grandfathered employer group health plans to cover 100% of cost of preventive care
- DOL, IRS and HHS guidance
 - Cannot limit preventive services based on individual's sex assigned at birth
 - Determination made by individual's attending provider



Thank you!

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