

New York Joins List of States Prohibiting Geofencing Near Health Care Facilities

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New York and several other states have recently enacted laws that prohibit “geofencing” near health care facilities in connection with advertising and data collection.

These geofencing laws, enacted partly in response to the Supreme Court Dobbs decision (to prevent advertisers from targeting people receiving reproductive services), have far-reaching implications. Geofencing poses privacy issues when used in a health care context, and a growing number of states have enacted legislation to regulate this activity.

More generally, these laws are part of the emerging patchwork of authority at the state level regarding consumer health data and information. The laws also complement recent developments at the federal level.

WHAT IS GEOFENCING?

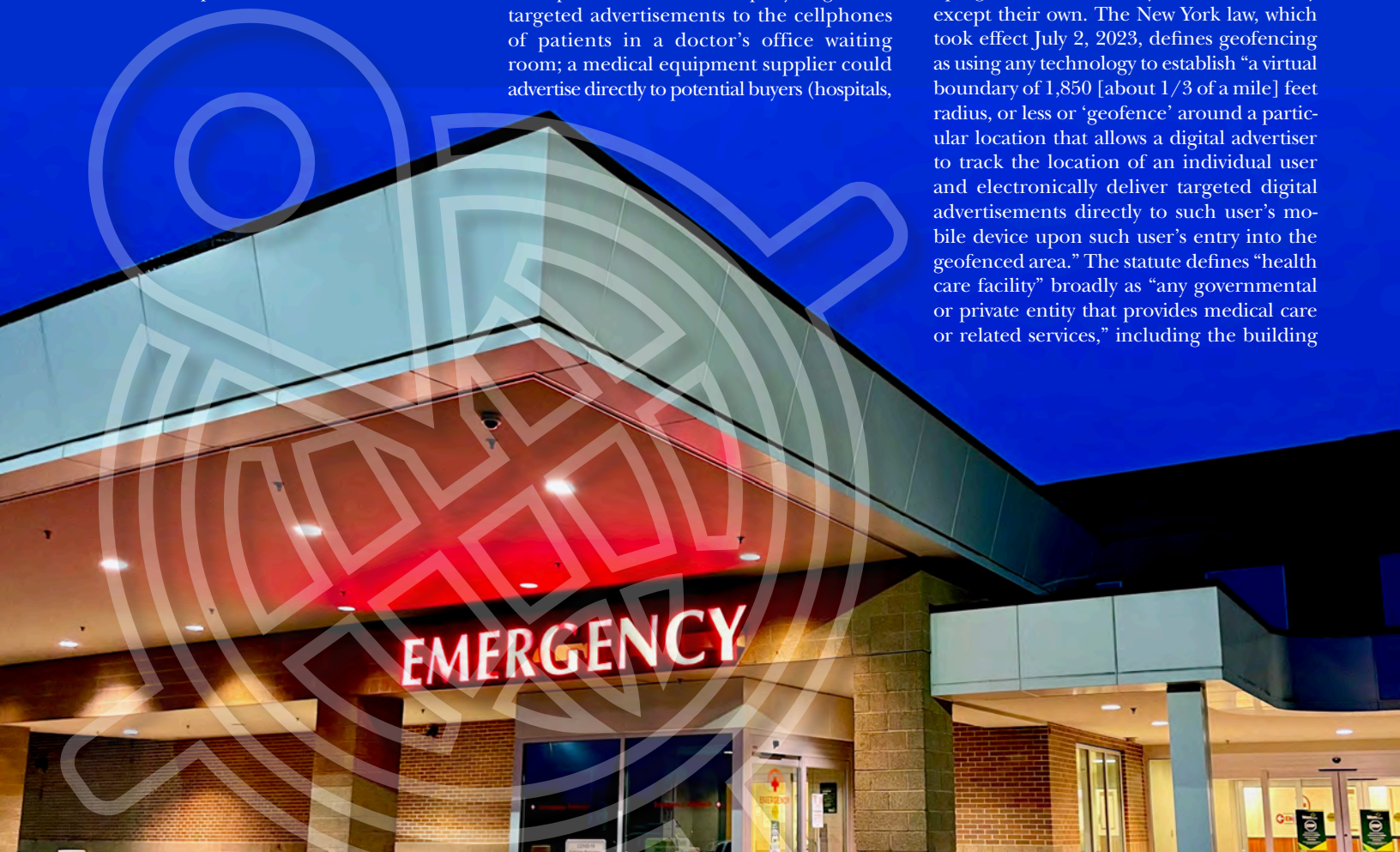
Geofencing involves setting up a virtual perimeter around a specific geographic zone or location. Businesses large and small use geofencing to deliver location-based advertisements. Businesses can do this themselves, through an app, like Snapchat, or through a digital marketing company. Geofencing allows businesses to deliver advertisements to specific zip codes, Wi-Fi or IP addresses, or to an event such as a concert or conference by using GPS. These advertisements may be received by users as social media ads, app notifications, push notifications and text messages.

In the health care industry, geofencing can be used for a variety of purposes. For example, a telehealth company might run targeted advertisements to the cellphones of patients in a doctor’s office waiting room; a medical equipment supplier could advertise directly to potential buyers (hospitals,

clinics etc.); a pharmaceutical company could advertise its medication to a very specific audience, such as cardiology patients; or a health insurance company could advertise specific products to potential enrollees in an assisted living facility. In addition, geofencing can be used to share targeted job opportunities for recruiting potential employees. Some personal injury law firms have reportedly run advertisements to patients crossing *geofences set up around emergency rooms*.

THE NEW YORK LAW

Under General Business Law section 394-g, and as detailed below, it is unlawful in New York for any person or entity to set up a geofence around any health care facility except their own. The New York law, which took effect July 2, 2023, defines geofencing as using any technology to establish “a virtual boundary of 1,850 [about 1/3 of a mile] feet radius, or less or ‘geofence’ around a particular location that allows a digital advertiser to track the location of an individual user and electronically deliver targeted digital advertisements directly to such user’s mobile device upon such user’s entry into the geofenced area.” The statute defines “health care facility” broadly as “any governmental or private entity that provides medical care or related services,” including the building



or structure in which the facility is located.

Specifically, the law prohibits any person, corporation, partnership, or association from establishing a geofence around a health care facility, except their own, “for the purpose of delivering a digital advertisement, for the purposes of building a consumer profile, or to infer health status, medical condition, or medical treatment of any person at or within a health care facility.” Further, the law prohibits any person, corporation, partnership, or association from delivering digital advertisements to a user at or within a health care facility, except their own, via a geofence. Practically, this also means a geofence can’t be used to acquire consumer health information from a health care facility, such as the patient’s mere presence at a particular facility, for purposes of sending a “delayed advertisement” to a patron once they leave a geofenced area, nor can a geofence be used to acquire and later sell information. Innocent buyers of such information may be unable to readily discern how the underlying data was collected, which poses compliance concerns.

As noted, the law does not prohibit a health care provider from establishing a geofence around their own facility. When implemented in accordance with other relevant privacy and security laws, such as HIPAA, providers and facilities in New York may establish a geofence around their own facility for purposes of automating check-in processes and sending patient experience surveys. It is unclear how regulators will view a geofence established in a densely populated area by a health care facility around its own facility that incidentally includes another facility or provider.

The law does not provide a private cause of action or penalty. Enforcement will be left primarily to the New York State Attorney General, who has not been afraid to use other sections of the General Business Law to [pursue allegations against advertisers in the past](#). Notably, as of this writing, there is no official guidance from New York State, published enforcement activity, or case law regarding the new geofencing law.

DEVELOPMENTS ACROSS THE COUNTRY

Connecticut, Washington and Nevada have enacted similar laws prohibiting geofencing near health care facilities. While the New York law is a standalone geofencing law, the Connecticut, Washington and Nevada laws are part of comprehensive legislation that regulates consumer health information more broadly. In addition, these new state laws come at a time of increased concern and enforcement action by the federal government, including the [FTC and the](#)

[U.S. Department of Health and Human Services](#), around HIPAA and non-HIPAA regulated entities that collect and potentially share patient information through various tracking technologies embedded on their websites or apps.

The Connecticut Law

Connecticut’s Data Privacy Act, which took effect October 1, 2023, prohibits the use of a geofence “to establish a virtual boundary that is within 1,750 feet of any mental health facility or reproductive or sexual health facility for the purpose of identifying, tracking, collecting data from or sending any notification to a consumer regarding the consumer’s health data.”

While New York’s law focuses on prohibiting “digital advertisements,” Connecticut’s is arguably broader in that it prohibits sending “any notification” to consumers regarding their health data, as well as prohibiting the sale, tracking or collection of that data. The Connecticut law includes an exception for state regulators, institutions of higher education, and several other groups. In addition, Connecticut’s law is restricted to consumers, which leaves open the possibility of geofence campaigns directed toward employees and management, if implemented appropriately. The law can be enforced only by the Connecticut Attorney General and violations constitute an unfair trade practice, which may result in civil fines and penalties.

The Washington Law

The Washington law was enacted as part of a comprehensive personal health data privacy law known as the My Health My Data Act. The law will be enforceable by the Attorney General as well as a private right of action. The creation of a private right of action is notable and differentiates the Washington law from that of other states. The majority of the comprehensive My Health My Data Act is slated to take effect in March 2024 and for small businesses, as defined in the Act, in June 2024. With respect to geofencing, however, the law has been effective since July 23, 2023.

The geofencing portion of the Washington law prohibits the implementation of a geofence of 2,000 feet or less from the perimeter of any entity providing in-person health care services where the geofence is used to: (1) identify or track consumers seeking health care services; (2) collect consumer health data from consumers; or (3) send notifications, messages, or advertisements to consumers related to their consumer health data or health care services.

There are exceptions for certain data already subject to existing regulatory schemes, such as HIPAA. However, it remains to be seen how these exceptions will apply to the

geofencing provision specifically.

The Nevada Law

The Nevada law, slated to take effect on March 31, 2024, broadly covers how certain “regulated entities” may use and maintain consumer health data. A regulated entity includes: (1) any person who conducts business in Nevada or produces or provides products or services targeted to consumers in Nevada; and (2) any person who determines the purpose and means of processing, sharing or selling consumer health data. The law does not apply to entities subject to certain federal regulatory schemes, such as HIPAA.

The law prohibits any person from implementing a geofence within 1,750 feet of any medical facility, facility for the dependent or any other person or entity that provides in-person health care services or products for the purpose of (1) identifying or tracking consumers seeking in-person health care services or products; (2) collecting consumer health data; or (3) sending notifications, messages or advertisements to consumers related to their consumer health data or health care services or products. The Nevada law explicitly states that it does not create a private right of action; however, violations of the law are deemed deceptive trade practices under Nevada law.

CONCLUSION

Health care industry stakeholders, particularly those with robust sales and marketing teams, should understand the scope and impact of these new geofencing laws. Entities operating in multiple markets must also consider the most effective way to ensure compliance with the varying requirements of each state’s law. In addition, non-HIPAA-covered entities that deal with consumer health information, digital advertising and analytics, must consider the most efficient way to stay compliant with both national and state developments.



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