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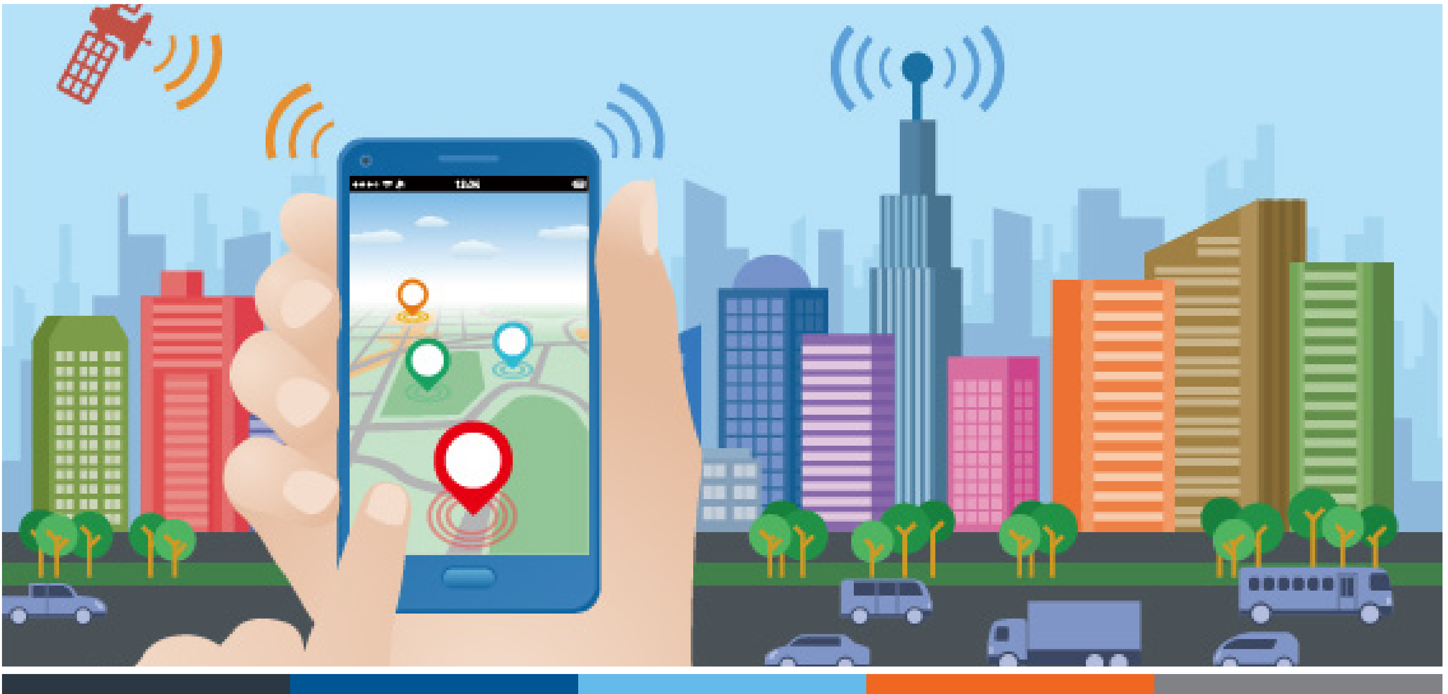
HR Focus

HUMAN RESOURCES NEWSLETTER FALL 2017



Geofencing—Recruiting's New Golden Technique?

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Given the continuing advances in technology, it is not surprising that companies are using new ways to target potential employees.

One that is catching our eye these days is "geofencing." Recruiters are now borrowing this technique, which has been honed by digital marketers and social media platforms to get advertising, marketing and brand messages to hyper-focused audiences.

The idea behind geofencing is simple, even if the technology that powers it is complex. You set up a virtual perimeter around a particular geographic "zone," whether a specific zip code, neighbor-hood or business area. Once individuals enter the zone, they receive specific messages or advertisements on their cellphones or tablets.

Increasingly, companies are using geofencing to locate and attract specialized talent. A company might buy a database of potential recruits, culled from online profiles or educational records, and then set up geographic zones where the coveted recruits work or live. When someone with relevant credentials enters a geofenced zone, an ad inviting the person to apply will

appear on his or her mobile phone. Recruiters say this approach provides a more cost-effective and targeted method of recruiting than traditional methods.

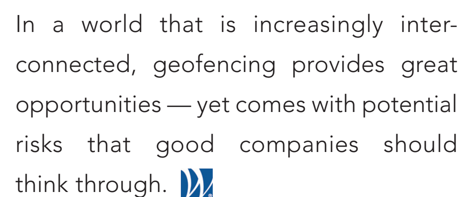
But it also raises questions about protecting the privacy of the individuals you are targeting. If your organization collects personally identifiable data in connection with a geofencing campaign, then you should also put mechanisms in place to protect the data from the malicious activities of hackers and from improper use or disclosure by authorized users. As with any individually identifiable data that you collect, you should consider the following questions:

- **Who has access to the information obtained?** Whenever you collect individually identifiable information, you want to limit access to just those who absolutely need to use the information. The more people who have access to the data, the greater the opportunity for someone to lose or misuse the information.
- **What and how much information is collected?** The more sensitive the information, the more protection that it needs. Certain information, like social security numbers, bank account details and medical records, typically need the most protection—but even profiles of individuals can be tempting targets for criminals interested in using the information for identity fraud. Companies should always think about the types of information they are collecting. The less information you collect, the less you must protect, which will save you money while also reducing your risk of a potential data breach.
- **Over what time frame has the information been collected? How long will you retain it?** The longer that you retain information, the more you end up storing and having to protect. Moreover, the information also tends to grow stale over time, meaning that it becomes less reliable. Again, it costs money to protect information. You will reduce risk and expense if you set time limits on your retention of personally identifiable information.

- **Where is the information being stored?** When using a third-party vendor to collect and/or store information, your date is only as secure as your vendor. Do your due diligence before selecting a vendor, then follow it up with a solid contract that spells out expectations. Conduct audits of your vendors to verify compliance. If you do business internationally, be sure to know the laws for data use and storage in each country where you collect and store.
- **Is the information adequately protected?** Different types of information will be subject to different standards, which may be set by industry, state, federal or even international laws. Increasingly, legal standards require active IT risk management to ensure you are doing what is needed to protect sensitive information.

In the event of a security breach, your company could find itself subject to investigation, meaning these questions could become front and center. If you have not adequately addressed these issues, you could face a public backlash.

In a world that is increasingly inter-connected, geofencing provides great opportunities — yet comes with potential risks that good companies should think through.



Does the ADA Require More Than the FMLA's 12 Weeks Medical Leave?

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Your employee, Joan, has a serious health condition. She has cancer. You granted Joan 12 weeks of leave under the FMLA. But now the 12 weeks are exhausted and Joan cannot return to work. So Joan asks for more time off. Must you grant Joan more leave time as an accommodation under the Americans with Disabilities Act (ADA)? And if so, how much more time?

The Equal Employment Opportunity Commission (EEOC) certainly thinks you may have to grant Joan more time — and maybe a lot more time. The EEOC has been very aggressive in this position and has forced some large employers into big settlements on this issue.

For example, United Parcel Service (UPS) agreed to pay $1.7 million to settle a nationwide lawsuit brought by the EEOC challenging UPS's policy of terminating workers who can't return from medical leave after 12 months.

But now the federal 7th Circuit Court of Appeals has thrown a monkey wrench into the EEOC's position. In *Severson v. Heartland Woodcraft, Inc.*, the court held that the ADA may require an employer to allow workers to take a few more days or weeks off, but a long-term medical leave over a number of months is not a required accommodation under the ADA. According to the court, the ADA is "an anti-discrimination statute, not a medical leave entitlement."

This is a major development. But it needs to be kept in context.

First, the 7th Circuit only has jurisdiction over Illinois, Indiana and Wisconsin. And while the rationale of the court might be compelling to other courts, the decision is not conclusive outside those three states.

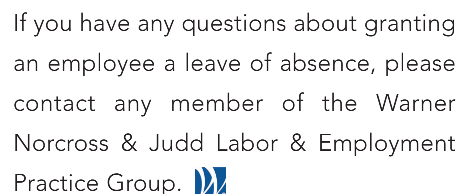
Second, the EEOC isn't accepting this decision on a nationwide basis. A spokesperson for the EEOC has already stated that the EEOC is "disappointed" in the decision. But the EEOC at some point will become controlled by Trump administration appointees. So it is possible that a reconstituted EEOC may adopt the reasoning of the 7th Circuit.

Finally, employers should not forget that many states also have anti-discrimination laws, including some that prohibit discrimination based on disability. It is possible that states will amend their laws (or interpret existing state laws) to provide for leave beyond that provided by the FMLA.

SO WHAT SHOULD AN EMPLOYER DO?

- Know that this is an area of the law in transition.
- Carefully evaluate an employee's request for leave beyond that required by the FMLA.
- Consider the jurisdiction in which the employee works and whether granting additional leave beyond FMLA is prudent in light of the law within that jurisdiction.
- Consider your own policies. Do you already grant leave beyond FMLA to coincide with your short-term disability policy?

If you have any questions about granting an employee a leave of absence, please contact any member of the Warner Norcross & Judd Labor & Employment Practice Group.



The Nation's Focus on Mental Health Turns to Group Health Plans

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Increased attention around the country on mental health and substance abuse issues has also increased attention on a lesser-known federal law that affects many group health plans sponsored by employers: The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), which took effect January 1, 2010.

The MHPAEA generally requires a covered group health plan that offers mental health or substance use disorder (MH/SUD) benefits to provide those benefits at a level consistent with other medical and surgical benefits in the same category. The MHPAEA defines six categories of benefits that each requires parity: inpatient in-network, inpatient out-of-network, outpatient in-network, outpatient out-of-network, emergency care and prescription drugs. Within each benefit category, there must be parity between MH/SUD benefits and substantially all of the medical/surgical benefits in the category with respect to:

Financial Requirements:
The cost of treatment, such as copays, coinsurance, deductibles and out-of-pocket maximums.

Quantitative Treatment Limitations:
Numerical limits that affect the scope or duration of benefits for treatment, such as annual visit limits.

Non-Quantitative Treatment Limitations:
Non-numerical limits that affect the scope or duration of benefits for treatment, such as preauthorization requirements.

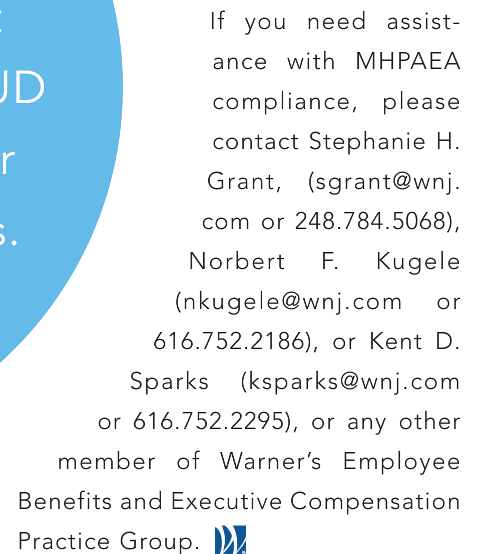
An important thing to remember about the MHPAEA is that it does not mandate coverage of MH/SUD benefits. Instead, the MHPAEA generally prevents group health plans that do provide MH/SUD benefits from imposing stricter limitations on those benefits than on medical/surgical benefits.

Recently, there have been efforts to help participants better understand the MH/SUD benefits that may be offered under their health plan. The 21st Century Cures Act, signed into law in late 2016, directed the

U.S. Departments of Labor, Treasury and Health and Human Services to develop additional guidance on the MHPAEA, including methods that plans may use for disclosing information to individuals to confirm a plan's compliance with the MHPAEA. For example, the U.S. Department of Labor is currently reviewing comments it received on a draft of a template form that an individual can use to request documentation from his or her plan that non-quantitative treatment limitations comply with the MHPAEA.

We encourage employers to take a closer look at any limitations on MH/SUD benefits provided under their group health plans. Examples of requirements or limitations on MH/SUD benefits that could indicate a MHPAEA compliance issue include:

- Your plan states that if the participant is admitted to a mental health or substance abuse facility for non-emergency treatment without prior authorization, the participant will be responsible for the entire cost of services received.
- In order for residential treatment of MH/SUD to be covered, your plan requires that the treatment will likely result in improvement of the MH/SUD condition.
- For MH/SUD benefits, your plan requires a written treatment plan prescribed and supervised by a doctor.
- Your plan imposes a geographical limitation related to treatment for MH/SUD conditions but does not impose any geographical limits on medical/surgical benefits.



We encourage employers to take a closer look at any limitations on MH/SUD benefits provided under their group health plans.

Failure to comply with the MHPAEA could result in lawsuits for breach of fiduciary duty, claims for payment of MH/SUD benefits alleged to be due under the plan and damages for unpaid benefits, interest and attorney's fees. Additionally, the IRS may impose excise taxes for a group health plan's failure to comply with the MHPAEA's requirements.

The MHPAEA has been around for almost a decade, but attention to this law has ramped up in recent years. The government has increased enforcement efforts to bring group health plans into line with the MHPAEA, litigation under the MHPAEA is abundant and we are seeing increased focus from the government on transparency between plans and participants with respect to MHPAEA compliance. We do not anticipate attention to the MHPAEA slowing down any time soon.

If you need assistance with MHPAEA compliance, please contact Stephanie H. Grant, (sgrant@wnj.com or 248.784.5068), Norbert F. Kugele (nkugele@wnj.com or 616.752.2186), or Kent D. Sparks (ksparks@wnj.com or 616.752.2295), or any other member of Warner's Employee Benefits and Executive Compensation Practice Group.

NEWS DIGEST:

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Department of Labor Takes Aim at Smoking Cessation Programs

Many employers with wellness programs impose a premium surcharge for participants who are smokers but allow participants the ability to avoid the surcharge by completing a tobacco cessation program. Under ERISA regulations, an employee who meets a wellness program's alternative standard must earn the full reward for the plan year. The Department of Labor (DOL) recently took action against an employer for allegedly violating this rule. In this case, when an employee completed the smoking cessation program during the plan year, the employer only stopped applying the surcharge for the remainder of the plan year. But, the DOL argued that the employer must also reimburse the participant for the surcharge retroactively to the start of the plan year.

Have You Reviewed Your Benefit Plan's Service Providers Lately?

Service providers play a critical role in administering benefit plans, but a plan sponsor is ultimately responsible for the plan's operation. An important part of a plan sponsor's fiduciary duties is regularly reviewing its service providers, including a review of fees, scope of services, expertise and overall performance. While a plan sponsor doesn't necessarily have to change service providers based on this review, regularly engaging in—and documenting—a thorough review process is critical to showing compliance with its fiduciaries duties.

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Federal Government Disagrees with Itself: Does Title VII Prohibit Sexual Orientation Discrimination?

In July, the U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission (EEOC) filed conflicting briefs in the federal Second Circuit Court of Appeals. The court is considering whether Title VII prohibits discrimination based on sexual orientation. The EEOC argues that federal law prohibits sexual orientation discrimination. The DOJ argues that the law does not. The EEOC's position is consistent with its interpretation of the law and its prior enforcement efforts. In contrast, the DOJ's argument is a reversal from its prior position under the Obama Administration. The federal Sixth Circuit Court of Appeals (which has jurisdiction over Michigan) has consistently held that Title VII does not prohibit sexual orientation (or gender identity) discrimination. This issue may well end up before the U.S. Supreme Court.

Back from the Dead: DOL Considers Issuing New Overtime Rule

In 2016, the U.S. Department of Labor issued a new overtime rule under the Fair Labor Standards Act. That rule raised the salary threshold for exempt employees from $455/week to $913/week. Before the new rule could take effect, a federal court in Texas issued a nationwide temporary injunction. After President Trump took office, the DOL essentially dropped its appeal of the injunction. In July, the DOL published a new request for information regarding the overtime exemptions for executive, administrative, professional, outside sales and computer employees. The DOL's RFI indicates that changes to the overtime rules are likely still coming. DOL Secretary Alexander Acosta has indicated that he is not opposed to raising the exemptions' salary threshold, just not to the high level set in the 2016 rule. The comment period for the DOL's RFI has now closed. The DOL will use the comments to prepare a Notice of Proposed Rulemaking, which will then have its own comment period before a new final rule is issued.

Attorney Spotlight: Justin Stemple on ESOPs

Why did you choose to become an attorney?

I decided in high school that I wanted to be an attorney because the idea of continuing to learn and do something mentally challenging appealed to me. I entered undergrad as pre-law and selected courses I thought would help me with law school. I attended the College of William & Mary Law School in Virginia and much of the focus was on litigation, case law study and writing. I remember a passing mention of ERISA during an employment law course, but during law school I would not have expected to become a specialist in employee benefits.

Why did you decide that Warner Norcross was the right fit?

I wanted to work in a small or mid-sized city, but at a larger firm. During the interview process I got the feeling that the work-life balance could be achieved here. I also thought the firm and its attorneys clearly represented who they are and the nature of the work we do. I also thought that Warner Norcross and Grand Rapids would be a great fit for me and my family. Thirteen years later, I'm glad I made the choice I did.

What is your area of expertise?

My practice consists of helping employers with qualified retirement plans, non-qualified deferred compensation plans and executive compensation, with an emphasis on employee stock ownership plans (ESOPs), incentive programs and equity compensation. I learned about ERISA, and specifically ESOPs, from Vern Saper, who mentored me into this practice area.

When and why should a business consider implementing an ESOP in their organization?

An ESOP is one of several transition options an owner may be considering. Usually an owner makes a decision to sell the company to an ESOP for a variety of reasons. In some cases the ESOP may deliver tax benefits that make an ESOP a better financial option. In other cases the owner may have a strong desire to keep the company independent or to give back to the employees who helped build the business. In the perfect situation both of those can be true. ESOPs are unique because they can be a win-win-win for the owner, company and the employees.

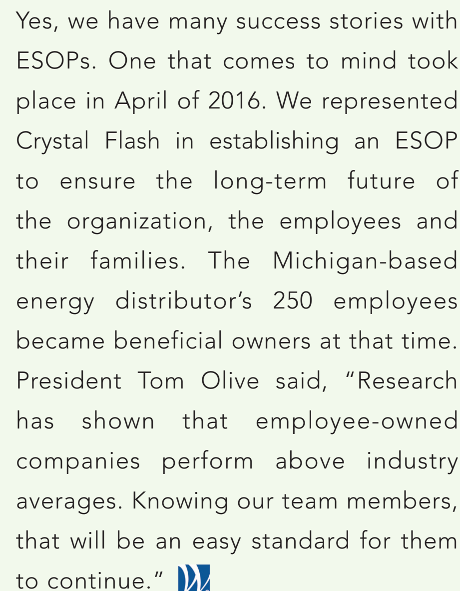
What kinds of businesses are good fits for ESOPs?

Traditionally, ESOPs tended to be in manufacturing companies, although more recently they have become common in service companies as well. A company needs to be a corporation or able to become a corporation and will typically have over 25 employees and over $1 million in company enterprise value to justify the cost of implementing and maintaining an ESOP program, and to comply with certain legal requirements. There really is no upper limit to the employees or value. A well-known example of a large ESOP company is Publix, although most ESOP companies range from twenty-five to several hundred employees.

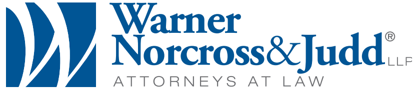
What is the current ESOP trend?

Right now, the Baby Boomer generation have businesses to sell and sometimes their children aren't interested in taking over the company. So, they are exploring other options, including ESOPs. The market is right for ESOPs, as valuations are strong and financing is available for successful companies. ESOPs continue to be on the rise and when I speak with others in the industry, they are as busy as they've ever been.

Any success stories you can share?



Yes, we have many success stories with ESOPs. One that comes to mind took place in April of 2016. We represented Crystal Flash in establishing an ESOP to ensure the long-term future of the organization, the employees and their families. The Michigan-based energy distributor's 250 employees became beneficial owners at that time. President Tom Olive said, "Research has shown that employee-owned companies perform above industry averages. Knowing our team members, that will be an easy standard for them to continue."



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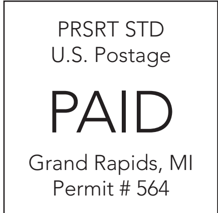

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