

## A Termination for “Gross Misconduct” Won’t Always Block COBRA Benefits

From time to time, questions are raised about whether or not a county can avoid offering termination benefits, including the opportunity to continue health insurance coverage under COBRA, to an employee terminated for misconduct. Under the COBRA law, termination for “gross misconduct” may eliminate the employer’s duty to offer COBRA. The term “gross misconduct” is not defined in the statute, and according to rare interpretive legal decisions, it still has a limited applicability.

Individual past cases from other jurisdictions have determined that mere negligence or incompetence, forgetfulness or neglect, or submitting unfavorable factual reports is not gross misconduct under COBRA.

On the other hand, “gross misconduct” under COBRA has been applied to deny benefits for termination of an employee who engaged in drunken driving and wrecked the employer’s car; an employee who engaged in racial discrimination and abusive conduct toward a coworker, an employee who was guilty of theft from the employer, an employee who engaged in repeated and prolonged insubordination, and an employee who engaged in violence toward a coworker.

A recent court decision from another jurisdiction found that the employee had shown a “reckless disregard” for the employer’s interests (*Moore v. Williams College*, 2010 WL 1375401 (D. Mass, April 7, 2010) where an employee:

- a) falsified his employment application, and
- b) later pleaded guilty to various types of fraud affecting his employer.

Other jurisdictions have said either that the conduct must be extreme, outrageous, and unconscionable, or that the conduct must demonstrate “an evil design” against the employer.

All of the following consequences can arise from a COBRA compliance failure:

- a) Qualified beneficiaries may sue to recover COBRA coverage (such suits carry the potential for large damages, which, in the case of an insured plan, may not be covered by the plan’s insurance).
- b) Failure to provide adequate initial and election notices can create exposure to “other relief,” which might include damages for such things as a worsening of a qualified beneficiary’s medical condition due to failure to provide an adequate COBRA notice.
- c) In COBRA lawsuits, the court is permitted to award attorneys’ fees and interest to the prevailing party.
- d) Excise tax penalties may be assessed by the IRS (up to \$200 per day) for each day on which a plan fails to comply with COBRA.
- e) Statutory penalties of \$110 per day may be recovered (by qualified beneficiaries) for failure to provide initial and election notices under COBRA.

### What This Means For Counties

Before depriving a terminated employee of COBRA benefits, consult your county attorney. The facts of each case should be carefully examined before an opinion can be rendered and before a termination and denial of benefits occurs. Other case citations are available in the May 2010 report, “Mandated Health Benefits--The COBRA Guide”, by Thomson Publishing.

For more information, contact CTSI at 303-861-0507.