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“When Did THAT Change?”

A Q&A on COBRA and its Never-Ending Challenges

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I know COBRA law states that if you terminate someone for reason of gross misconduct, COBRA does not need to be offered. What is the definition of gross misconduct?

COBRA law gives no definition of gross misconduct and, unfortunately, many employers are learning, from a court, that what they thought was gross misconduct may not be.

As I remind employers in my compliance survival seminar, "When you fire someone for gross misconduct, the least of your worries is whether to offer COBRA continuation or not! First, be sure the firing sticks, then consider the COBRA option."

The courts are full of contested termination situations, and employers are often not on the winning side. There are a number of examples in which the employer was forced to "take back" their firing.

When an employer fires someone for gross misconduct, it is no time to hold a grudge or act in haste. Neither is it a time to hold yourself as judge, jury and hangman.

A number of court cases involve an employer terminating an employee because the employee was arrested. Yet the employee handbook identifies "conviction" as grounds for gross misconduct firing, not an arrest.

A recent U.S. District Court ruled against a school district in Philadelphia. A teacher was charged with criminal sexual assault against a former student. The plaintiff was fired and the school district did not offer COBRA continuation because of the gross misconduct dismissal. The charges were later dismissed. The plaintiff brought suit against the school district for a number of issues related to his firing, including the school's failure to offer COBRA continuation.

The school made motion to dismiss the non-offering of COBRA, stating the plaintiff had been fired for gross misconduct and was not entitled to COBRA. The court denied the school district's motion to dismiss. The court held that whether an arrest and subsequent dismissal of criminal charges constituted gross misconduct was an issue of fact to be determined at trial. The plaintiff provided evidence that he was fired not because of gross misconduct, but because he had been

arrested. He emphasized the point that he had been awarded unemployment insurance because the school district failed to establish willful misconduct by the plaintiff.

Consider the case in which an employee resigned when confronted with the proof that he had been embezzling funds from the company. The employer claimed the employee was fired for gross misconduct and did not extend a COBRA offering. The court found the employee had resigned and COBRA should have been offered.

The best defense in such situations is a firm employer definition of gross misconduct. While many would assume failure of a random drug test would be grounds for a gross misconduct dismissal, what does the employee handbook or the "agree to be tested" sign-off paper say?

Even courts are seeking a common standard to apply a definition. Some federal courts have looked to state unemployment insurance laws, the logic being to see if the employee was denied unemployment benefits for the same reason. However, state courts also have differing unemployment definition standards. Other courts have defined gross misconduct as conduct that is "so outrageous that it shocks the conscience." But, we must ask, whose conscience?

Many employers rely on the federal government's gross misconduct definition as defined in the Federal Employee Health Benefits Amendments Act of 1988, which calls it "a flagrant and extreme transgression of law or established rule of action . . ."

I don't want to make you think an employer cannot win in a gross misconduct court case. For example, in West Virginia a gross misconduct firing was upheld for actions that happened away from the workplace. An employee assaulted a co-worker in the employee's home resulting in a five-day hospital stay. In this instance the court ruled "the nature of the conduct itself is reasonably outrageous to the employer" and there is a "substantial nexus between the behavior and the working environment such that the effects of the intolerable behavior extend into the employee arena."

But again, COBRA should not be the primary concern in gross misconduct situations. It is imperative that the firing stand--then there will be no COBRA conflict.

What are the open enrollment rights of COBRA participants? I know they should be able to add dependents but can they switch between plans or be allowed to join a dental plan the employer just added?

Here is a good basic concept to keep in mind: A qualified COBRA beneficiary has the same rights as a "similarly situated active employee."

COBRA is the opportunity to continue the same coverage -- that includes not only the claims benefits, but also all of the eligibility benefits of the plan, including open enrollment opportunities. You would be surprised how many employers forget to even advise COBRA participants of their open enrollment rights.

But a question has always lingered concerning what plans remain open: "Does COBRA election in ANY plan maintain open enrollment opportunities in ALL plans?"

In the past, there appeared to be two interpretations of open enrollment opportunities where

coverage was provided through multiple separate contracts.

EXAMPLE: An active employee participates in all of the plan options available to him -- health, dental and vision. All of these plans are stand-alone programs and are provided through three separate contracts.

At COBRA election, the participant can elect participation in all three plans, just one, or any combination thereof. Some interpret the law to say if the qualified beneficiary elects COBRA for any plan, they are defined as a COBRA participant in that plan only.

But the law makes no specification of plan participation. COBRA specifies that a qualified beneficiary's rights at open enrollment are the same as the rights of "similarly situated active employees."

If I am a COBRA participant only in the health plan, has my "COBRA participation in anything" maintained my privileges in all programs I participated in prior to by qualifying event, even the dental and vision that I have not continued? Or am I only a COBRA participant in the health program?

Again, the final regulations provide that participation in ANY COBRA plan maintains opportunities in all. After all, open enrollment allows the "similarly situated active employee" to enroll in plans they have not participated in before. The February 1999 Final Regulations, "Changes in COBRA Coverage" section, questions 4 and 5, provide clarification of the "in one -- in all" ruling.

Open enrollments bring to light another problem area -- dependents who are dropped during the open enrollment. Is anyone asking why? The open enrollment could coincide with a divorce or child no longer eligible. Is the employer protecting itself and digging for qualifying event information? Stay tuned-we'll discuss this in detail in an upcoming column.

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