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Exercise Caution Before Relying on the Gross-Misconduct Exception Under COBRA

By **Brandon P. Long**

A little more than two months ago, President Obama signed into law the **American Recovery and Reinvestment Act of 2009** ("ARRA"). Since then, employers have been scrambling to understand ARRA's impact on the **Consolidated Omnibus Budget Reconciliation Act of 1985**, commonly known as **COBRA**.

By now, employers generally understand that under ARRA certain eligible employees who are involuntarily terminated between September 1, 2008 and December 31, 2009 are eligible to pay 35% of the cost of COBRA continuation coverage, and the federal government will subsidize the remaining 65% for up to nine months.

An employer's obligation to offer COBRA continuation coverage can be triggered when an employee is involuntarily terminated. An employer is not, however, obligated to offer COBRA continuation coverage if the employee was terminated for "gross misconduct." And if the employer is not obligated to offer COBRA continuation coverage, ARRA's new COBRA subsidy does not apply.

Maybe because of the administrative aspects of this new COBRA subsidy or because of the perceived impact that the subsidy may have on the overall cost of providing health coverage, employers that have ignored COBRA's gross-misconduct exception for years are now interested in understanding more about it. Specifically, many employers want to know:

> *When does an employee's misconduct that causes the termination of his employment rise to the level of "gross misconduct?"*

Unfortunately, COBRA does not define gross misconduct, and courts across the country have used varying definitions. Nonetheless, courts appear to agree that gross misconduct is more than mere termination for cause. That is, gross misconduct may be conduct that is intentional, reckless, or in deliberate indifference to an employer's interests. But it involves something more than mere minor breaches of the employer's standards.

Perhaps the best way to understand what is and what is not gross misconduct is to consider a few examples:

- Employee becomes drunk during a business meeting, causes an injury accident while driving a company car on company business, and pleads guilty to a related misdemeanor. Gross misconduct? Probably yes.
- Employee is terminated for being late for work. Gross misconduct? Probably not.
- Employee is terminated for embezzling $100,000 from her employer. Gross misconduct? Probably yes.
- Employee is terminated for violating employer's confidentiality rule when she overheard and then repeated a confidential conversation to another employee. Gross misconduct? Probably not.

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While these examples are illustrative of what may or may not be gross misconduct, the problem is that the know-it-when-a-court-sees-it distinction between (a) conduct that is gross in nature and (b) conduct involving mere minor breaches of the employer's standards, makes it impossible for an employer to conclude with any certainty that an employee's misconduct rises to the level of gross misconduct. While stealing $100,000 from an employer is probably gross misconduct and being late to work is probably not, it is hard to know when conduct that falls between these extreme examples constitutes gross misconduct.

And unfortunately, if an employer fails to provide COBRA continuation coverage (and thus the new COBRA subsidy) because the employer improperly concludes that an employee was terminated for gross misconduct, the employer can face significant penalties and liability. Thus, an employer should be very cautious about relying on the gross-misconduct exception, and should always consult with their benefits lawyer.

Brandon Long *is an* ***employee benefits*** *attorney with* ***McAfee & Taft****.*

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