

## **DISCUSSION OF WHAT IS GROSS MISCONDUCT UNDER COBRA**

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There is one exception for extending COBRA coverage to former employees. That exception would be when the employee is terminated for gross misconduct. When that happens, the termination is not considered a COBRA-qualifying event and the employer does not have to offer COBRA continuation coverage to the ex-employee, or the ex-employee's covered spouse or dependent child(ren).

The COBRA statute does not specifically define the term gross misconduct, so the courts have taken the lead on deciding whether to apply it on a case-by-case basis. That means it is up to employers to determine whether their gross misconduct definition meets the standards that were previously ruled on from past court cases as well as regulatory and legal developments.

Courts that have faced the gross misconduct case generally refer to the two questions below when deciding if the conduct is truly gross misconduct.

Was the conduct intentional, willful, deliberate, or reckless, and was that conduct performed with a conscious or reckless disregard of the consequences of one's acts for the very purpose of causing harm or with knowledge that harm would result in the employer's best interest?

Did the conduct have a connection or series of connections or physical presence linking the gross misconduct or performance directly to the employer, a co-worker or a current or former client or customer?

To minimize their risk, many employers have decided not to apply the gross misconduct exception at all, but, instead, to extend COBRA to all terminated employees regardless of the reason for the termination. Another way an employer can limit their risk is to clearly communicate to employees the type of behavior an employer considers to be gross misconduct. This can be done by adding this policy to its employee handbook or to an employee's contract of employment. When an employer identifies gross misconduct in advance, it must inform its employees what it considers to be significant, and this will assist the employer later should it find it has a claim for not providing COBRA to an employee who was terminated for this cause.

Here is a list of conduct that most employers would consider to be gross misconduct:

- Fighting, physical assault, abuse, or threatening behavior
- Blatant disregard for the safety of others or serious breaches of health and safety rules
- Deliberate acts of vandalism or sabotage
- Any attempts to financially defraud the company or theft
- Significant levels of insubordination
- Dishonesty, falsification of documents, or other forms of misrepresentation
- Offensive or unlawful behavior (such as discrimination, harassment, or bullying)
- Working under the influence of illegal drugs or alcohol

Should an employer decide to deny COBRA to an ex-employee on the basis of gross misconduct, be sure it keeps detailed records of the process used to determine the gross misconduct along with any notices or correspondence to the ex-employee.

Just remember, COBRA mistakes can be costly whether they were intentional or not. Employers may be liable for a penalty of up to \$110 per employee or family member for each day of noncompliance. The Employee Retirement Income Security Act (ERISA) provides for additional penalties and gives affected persons—as well as the Department of Labor—the right to file a lawsuit. Be sure that the employer is sending timely notifications to its plan administrator when a qualifying event occurs, including terminations or a reduction in hours, such as a leave of absence or a layoff.