

# May COBRA Coverage Be Terminated Retroactively When an Employee's Gross Misconduct Is Discovered After Coverage Has Begun?

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**QUESTION:** Three months ago, our bookkeeper retired, saying she wanted to spend more time with family. She timely elected COBRA coverage under our company's medical plan and is current on her premium payments. This week, we discovered that she embezzled thousands of dollars' worth of cash and property from our company during her ten years of employment. If the embezzlement had been discovered while she was employed, she would have been terminated for her gross misconduct. Since COBRA need not be offered to employees terminated for gross misconduct, can we now retroactively terminate our bookkeeper's COBRA coverage?

**ANSWER:** Probably not. You are correct that COBRA coverage need not be offered to employees terminated because of their gross misconduct, but your bookkeeper was not terminated due to gross misconduct; she voluntarily retired and elected COBRA before her misconduct was discovered.

As background, if a covered employee is terminated for gross misconduct, there is no COBRA qualifying event for the employee or any covered dependents. However, employers wishing to deny COBRA coverage because of gross misconduct should do so with great caution after consulting with legal counsel and any insurers (including stop-loss insurers). COBRA contains no definition of "gross misconduct," and while various courts have provided definitions, they have not agreed on a common standard. This means that a less-than-clear legal standard must be applied to facts that are often hotly disputed, so denial of COBRA coverage because of gross misconduct carries a higher-than-usual risk of litigation. Even if the employer wins, the expense of the lawsuit could easily negate any financial advantage gained from not having to provide COBRA.

But your company faces an additional obstacle. While we would not expect much disagreement that embezzlement constitutes gross misconduct for COBRA purposes, your employee's termination was due not to her gross misconduct, but to her voluntary retirement. Courts have generally reasoned that an employer's decision to deny COBRA based on gross misconduct should be evaluated based on evidence available to the employer at the time of the employee's discharge. The U.S. Supreme Court has rejected an employer's use of after-acquired evidence to justify a termination of employment, and several courts have similarly rejected the use of after-acquired evidence of gross misconduct in the COBRA context. We think it is unlikely that a court would allow COBRA coverage to be terminated—retroactively or going forward—when gross misconduct is discovered after an employee has elected COBRA. For more information, see EBIA's COBRA manual at Section VII.B.5 ("Gross Misconduct Exception").

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