

Compliance Corner: Gross Misconduct and COBRA

Ouida Peterson
Vice President of Education
CONEXIS

"What is the definition of gross misconduct?" THAT is probably the #1 COBRA question! And sadly, there is not a clear answer. And yet, the question still comes – and unfortunately, in this day and age, it seems to be coming more often.

The Plan is not required to offer COBRA continuation to any employee that is terminated by reason of gross misconduct. It is expressly excluded from the COBRA list of qualifying events.

But, again, the COBRA law gives no clear definition of gross misconduct. Even Labor laws skirt a definition. The burden and definition fall to the employer.

As I always say in seminars, when an employer fires someone for gross misconduct, the least of their problems is whether or not to offer COBRA – the employer needs to be sure there is a good gross misconduct firing – advise best served, contact their lawyer before they do the firing. If I read 10 COBRA court cases in a month, six of them will be on gross misconduct firings - and employers aren't winning those. It has nothing to do with COBRA – the employer didn't have a good firing.

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The Rush to Spend

By Genevieve Bookwalter, Special to The Times

For some people, a flexible spending account is a tax-free, no-interest loan to pay for laser eye surgery or in vitro fertilization.

For others, it's money forgotten about until the end of the year, when they scramble for ways to spend thousands of dollars before losing the cash for good. Anything they don't spend by a certain date will be kept by their employers.

If you're scurrying to spend last year's flex money before the deadline, there are many ways to do it. Flexible accounts "are quite popular because they are so easy for employees to use," said Bob Scharin, editor of Warren, Gorham & Lamont/RIA's Practical Tax Strategies, a monthly publication for tax professionals.

First, some background: Since the 1970s, employers have offered tax-free funds in which employees can stash a designated sum of money to pay for medical expenses. The money is withdrawn from paychecks throughout the year, but the total amount is available for employees on Jan. 1.

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One school district fired a teacher – he was accused of having mis-appropriate activities with a student. He was arrested; they fired him for gross misconduct; they cancelled his insurance and did not offer him COBRA because it was a gross misconduct firing!

THEN, the charges were dropped. When he was released from jail he went straight to his lawyer's office and sued the school district for "wrongful termination" – he won the case. You see, the school's policy said "if you are convicted of a felony. He hadn't been convicted; he had only been arrested. The school made themselves judge, jury and hangman – and look who got hung!

He also sued them for canceling his insurance benefits. He also won that case. If they had simply contacted their lawyer, in less than a minute they would have been told you can't do anything until it is settled.

Courts have ruled both ways – but, without good guidance from the IRS or DOL, employers should be very cautious when taking the position of "we don't have to offer COBRA – you were fired for gross misconduct!"

Employers have lost court cases when they "believed" or had a suspicion of misconduct. NO – there must be documented proof. Some courts have even given the opinion that the misconduct must involve conduct that is or could have an adverse impact on the employer's business – disclosure of confidential information or

mishandling company money. But, without documentation and communication of this action being grounds for immediate termination, the employer may have a difficult defense.

Many employers offer COBRA regardless of the termination reason. It may be safer and less costly to simply send the letter. This is no time to hold a grudge!

And, if the employee is given the option to resign or be terminated, that resignation IS a COBRA qualifying event!

But again, COBRA is not the biggest problem here – be sure it is a good firing. 🚫



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Employer-Sponsored Healthcare Coverage appears to be Meeting Needs of U.S. Adults

Managed Care Weekly Digest

The latest Wall Street Journal Online/Harris Interactive Health-Care Poll reveals that most adults with employer-sponsored health insurance feel very or somewhat confident that their coverage will meet their needs in the upcoming year (89%) and relatively few individuals expect to switch (6%) or drop (less than 0.5%) their current coverage next year.

Furthermore, most individuals believe their out-of-pocket costs at the point of care - co-pays and deductibles - will remain about the same compared to this year (out-of-pocket for a doctor visit after the deductible 69% and out-of-pocket for prescription drugs after the deductible 68%). By comparison, adults with employer-sponsored health insurance are more likely to anticipate an increase in their monthly premiums (34%), though this group still represents a minority.

These are some of the results of an online survey of 3,561 U.S. adults, ages 18 and older, conducted by Harris Interactive between November 28 and 30, 2006 for The Wall Street Journal Online's Health Industry Edition.

As costs have risen over the past decade, there has been an expansion in the market of accounts that can help individuals save for and

cover their out-of-pocket costs for healthcare. These include flexible spending accounts, medical saving accounts, health reimbursement accounts and health savings accounts. Plans, employers and the Bush administration see these savings vehicles as an effective means of helping individuals manage their out-of-pocket costs for healthcare. These findings, however, show that few insured adults are taking advantage of these savings accounts:

- Seventeen percent of adults who will have employer-sponsored health insurance next year say they are enrolled or will enroll in flexible spending accounts, while 69% say they won't.
- Six percent or fewer say they will enroll in medical saving accounts, health reimbursement accounts or health savings accounts.
- Higher-income individuals are more likely to say they are enrolled or plan to enroll in such plans.

There are surely many reasons why so many individuals do not enroll in these types of accounts. Not all employers offer them, individuals may not understand how they work, and many may not be able to afford to

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set aside funds on a routine basis. These findings also suggest that many people may not recognize the need for these kinds of savings vehicles as they remain confident that their health insurance coverage will meet their needs.

Harris Interactive conducted this online survey within the United States between November 28 and 30, 2006 among a national cross section of 3,561 adults, ages 18 years and over, of whom 2,673 have healthcare coverage from work or a union. Figures for age, gender, race/ethnicity, education, income and region were weighted where necessary to align with population proportions. Propensity score weighting was also used to adjust for respondents' propensity to be online.

All surveys are subject to several sources of error. These include: sampling error (because only a sample of a population is interviewed); measurement error due to question wording and/or question order, deliberately or unintentionally inaccurate responses, nonresponse (including refusals), interviewer effects (when live interviewers are used) and weighting.

With one exception (sampling error) the magnitude of the errors that result cannot be estimated. There is, therefore, no way to calculate a finite "margin of error" for any survey and the use of these words should be avoided. 

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Comment Newsletter



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For workers who withdraw the balance but quit before the year is up, their employers eat the difference for what has not been deposited.

But for employees who don't spend it all, their employer keeps what's left at the end of the year. That helps offset the costs of those who spend the money and run, but it can infuriate consumers and discourage some from participating in the program, says Paul Fronstin, director of the Health Research and Education Program with the Employee Benefit Research Institute, a nonprofit, nonpartisan research group in Washington, D.C.

The use-it-or-lose-it clause inspired Sen. Charles E. Grassley (R-Iowa) to take action. In 2005, he successfully pushed to extend the deadline for employees to spend flex account money. Now participants have until March 15 of the following year to spend the money. He has also been pushing (unsuccessfully) for the right of workers to roll as much as \$500 into the following year's account.

Stats on how much money employees lose are not easy to come by. At Blue Cross of California, the state's largest insurer, subscribers with flex accounts set aside an average of \$2,000 each year, says spokeswoman Tammy Taylor. Most subscribers spend all the money, but those who don't usually lose less than \$100.

Here's what to do — and what to avoid — when spending your left-over flex money.

- First, check with your employer to learn the final date you can spend flex dollars from 2006. Your employer must OK the March 15 extension for it to apply to your specific plan. Make sure your company gave approval.
- Now, go through that pile of receipts accumulating on your desk or in your wallet. Did you pay for prescription drugs or a co-pay and forget to ask for reimbursement from your flex account? Even if your company did not sign up for the extra time to spend the money, you probably have a grace period for sending in last year's receipts. Check with your employer to learn when your grace period ends.
- Assuming your company gives you until March 15 to spend 2006 flex dollars, schedule that overdue checkup or dental exam, or take time to get a sports injury examined. Not only can you spend flex money on your co-pay, but you also can take care of your 2007 health plan deductibles too.
- If you wear contact lenses, this is the time to restock. Have your eye on a pricey pair of eyeglass frames? Your flex money can pay for those as well.

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- Check the expiration dates on those medicine bottles in your bathroom cabinet. Toss out what's expired, re-supply and pay for the ibuprofen, cough syrup and antihistamines with flex account dollars. Rules changed in 2003 to allow you to buy over-the-counter drugs with flex account money. But be careful: Although medications are covered, vitamins and other supplements are not, unless prescribed by a doctor for a specific illness.
- Have you always wanted to try acupuncture? Flex money will cover that. A trip to your therapist or chiropractor is also eligible, as are laser eye surgery and in vitro fertilization.
- Running might help keep you healthy, but the IRS won't let you pay for your shoes (or a gym membership) with flex account dollars. However, if you need a special type of shoe to treat a medical condition, that could be covered, Fronstin says.
- Spot's veterinarian bills don't qualify for flex account money, either, unless he is your guide dog or helps with other physical disabilities.
- Most cosmetic surgery does not qualify for flex account funds, unless the work is part of recovery from a debilitating disease or traumatic accident: Breast reconstruction surgery qualifies if it follows a mastectomy for cancer. Breast implants do not qualify if you just want to fill out that black dress.
- Don't grow glum if you can't find a way to spend all the flex money you set aside. If you spend most of it, you might still end up saving cash. You didn't pay taxes on the dollars you set aside. So if you fall into the 25% tax bracket, you saved \$250 in taxes for every \$1,000 you put in your flex account.

"People shouldn't be overly concerned about forfeiting money," Fronstin says. Instead, save all your medical expense receipts this year so you can tally them up in December. When you sign up for next year's flex account, you'll know better how much to set aside so you don't lose money again. 🔥