DePaul Law Review

Volume 42
Issue 1 *Fall 1992: Symposium - Confronting the Wall of Separation: A New Dialogue Between Law and Religion on the Meaning of the First Amendment*

Article 32

"A Modest Proposal" for Defining "Gross Misconduct" for COBRA Coverage Disqualifications

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COMMENTS

"A MODEST PROPOSAL" FOR DEFINING "GROSS MISCONDUCT" FOR COBRA COVERAGE DISQUALIFICATIONS

INTRODUCTION

Much has been written since the enactment of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985[1] discussing, analyzing, and deciphering the controversial title.[2] In general, COBRA requires certain employers to offer continued group health insurance coverage to qualified employees and their beneficiaries. This coverage is triggered by specified events[3] which would otherwise cause the cessation of employees' or their beneficiaries' employer-provided group health insurance coverage.[4] COBRA made identical amendments to the Employee Retirement Income Security Act of 1974 (ERISA),[5] the Internal Revenue Code (I.R.C.),[6] and the Public Health Services Act,[7] implementing this required

1. Consolidated Omnibus Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 81, 222-37 (Title X of the Act codified as amended at 29 U.S.C. §§ 1161-1168 (1991)). The 1985 Act was not actually signed into law until April 7, 1986. Title X of the Act, which is titled Private Health Insurance Coverage but is more commonly referred to as COBRA, was effective, generally, for plan years beginning on or after July 1, 1986. *Id.* For the purposes of this Note, COBRA refers to Title X.

2. The controversial nature of the passage of Title X of the 1985 Act is reflected in the responses of various commentators in the employee benefits arena. *See* Barry Newman, *What Court Decisions on COBRA Coverage Denials Mean to Employers*, J. COMPENSATION & BENEFITS, May-June 1991, at 18 (noting that many employers and members of the employee benefits community were "caught completely by surprise"); James P. O'Sullivan, *COBRA: A New Law Requires Immediate Attention to Group Health Plans*, 22 ARIZ. B.J. 8, 8 (1987) (stating that Title X was passed with "little fanfare" but required employers' prompt attention). Others have gone so far as to spoof how certain "Hill staffers had stuffed [Title X] there [in COBRA 1985] because they could never have gotten it passed if Congress had had the opportunity to consider it carefully and vote on it separately." Ethan Lipsig, 1988 Tax Analysts (Tax Notes), June 13, 1988.

3. *See infra* notes 67-73 and accompanying text (discussing and defining a qualifying event).

4. *See infra* notes 64-66 and accompanying text (discussing and defining a covered employee).

5. 29 U.S.C. §§ 1001-1461 (1988 & Supp. 1990).

6. 26 U.S.C. §§ 1-9510 (1988 & Supp. 1990).

7. 42 U.S.C. §§ 201-300 (1988 & Supp. 1989).

coverage.[8]

One specific provision of COBRA, however, has received noticeably limited attention. This provision provides that employers need not offer continued health insurance coverage to employees terminated for "gross misconduct."[9] The proposed regulations to COBRA, the numerous subsequent amendments to COBRA, and legal commentators merely restate the language of the provision. There is virtually no analysis or discussion of what constitutes gross misconduct or how this provision should be applied.

Given this limited attention, relying on and applying this provision remains a problem area for affected employers. Employers who rely on their own interpretation of gross misconduct may later discover they wrongfully denied coverage to otherwise entitled employees or plan beneficiaries. As a result, such employers may find they must provide retroactive health coverage as well as pay federal sanctions for failing to comply with COBRA.[10] The problem of defining gross misconduct persists because neither COBRA as amended, nor the proposed regulations, provide a workable definition of the term.[11] Both also fail to provide useful guidelines interpreting the statute.[12] Employers need guidance to arrive at a definition of gross misconduct which is both consistent with the purpose of COBRA and useful in ensuring compliance.[13]

Employers are merely told that they are to operate their group health plans "in good faith compliance with a reasonable interpretation of the statutory requirements"[14] as well as in compliance with

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8. H.R. REP. No. 453, 99th Cong., 1st Sess. 562-63 (1985).

9. 29 U.S.C. § 1163(2). *See also* I.R.C. § 4980(B)(f)(3)(B); ERISA § 603.

10. *See infra* notes 74-77 and accompanying text (discussing sanctions for noncompliance).

11. The proposed regulations are found at 52 Fed. Reg. 22,716 (1987). The legislative history of COBRA suggests a possible explanation for the lack of guidance. The original purpose was to provide continued employer-provided health insurance to employees' spouses, mostly women, and dependent children left uninsured because of the death of, or divorce from, an employee. In its final form, however, the enlarged purpose of COBRA was expanded, without analysis, to also provide continued coverage to employees who terminate employment and would otherwise be faced with a gap in health coverage.

12. 52 Fed. Reg. 22,716 (1987).

13. This definition, once found, should be included in relevant group health plan documents and COBRA implementation rules. *Many Questions Generated at Seminar on COBRA's Termination Requirements*, Pens. Rep. (BNA) No. 30, at 1305 (July 28, 1986) [hereinafter *COBRA Seminar*]. In July 1986, at a New Hampshire seminar for employers on the subject of COBRA continuation requirements, one speaker stated that the definition of gross misconduct "ultimately rests with the employer." *Id.* He recommended employers define the term clearly in their COBRA implementation rules. *Id.*

14. H.R. REP. No. 241, 99th Cong., 2d Sess. 4-7 (1985).

the proposed regulations issued on June 15, 1987.[15] Not only must employers interpret what Congress meant by gross misconduct, but also what constitutes "good faith"; both terms defy consistent interpretation. Currently, these definitions must be gleaned without statutory or regulatory guidance from Congress or the Internal Revenue Service. The challenge is to draft both a definition of gross misconduct and explanatory regulations that, if followed, will ensure that an employer is in "good faith" compliance with COBRA's gross misconduct provision.[16]

This Comment reviews three possible options for defining gross misconduct. The first option is for employers simply to use a dictionary definition. The second is to review how analogous areas of law define and apply terms which are similar to gross misconduct. The two areas of analogous law discussed here are state unemployment insurance law and relevant federal employee health benefits law. The third and final option discussed here is to convince Congress to amend COBRA to add a uniform statutory definition of gross misconduct and to pressure the Internal Revenue Service (IRS) into issuing regulations that provide substantive guidance specifically addressing gross misconduct.[17]

A discussion of COBRA legislative history and the proposed regulations is included in the Background section. This section also discusses the various interpretations of COBRA's gross misconduct provision and a review of the three employer options. Special attention is given to the second option, areas of analogous law, because it offers the most insight into drafting a uniform definition of gross misconduct. Ultimately, the Analysis and Conclusion sections argue that the best solution is the third option: to amend COBRA to include a single, uniform definition of gross misconduct. To this end, a suggested uniform statutory definition of gross misconduct and regulatory language is proposed in the Appendix.

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15. 52 Fed. Reg. 22,716 (1987). *See also Employers Should Make "Good Faith" Efforts to Comply With COBRA Health Care Provisions,* Pens. Rep. (BNA) No. 25, at 1151 (June 23, 1986) [hereinafter *Employer "Good Faith" Efforts*] (noting that according to a BNA interview of employer representatives, benefits consultants, insurers, and others, employers should make an attempt to comply with the Health Benefits Act in good faith).

16. 52 Fed. Reg. 22,716 (1987).

17. The Joint Conference Committee divided responsibility for issuing explanatory regulations between the Internal Revenue Service, the Department of Labor, and the Department of Health & Human Services to avoid duplication. H.R. REP. NO. 453, *supra* note 8, at 562-63.

I. BACKGROUND

The concern over availability and accessibility of health care was a catalyst to the enactment of COBRA.[18] The overall goal of COBRA, to offer the option of continuing health coverage under employer-sponsored group health plans upon cessation of such coverage, addresses this concern.[19] According to a 1985 study by the Department of Health and Human Services, since 1977 the number of Americans without health insurance had increased 40% to between twenty-five and thirty-five million people.[20]

The original proponents of continued health coverage were particularly concerned with the plight of employees' family members.[21] Family members, such as spouses, former spouses, and dependent children, who received their insurance through an employer-provided group health plan, generally lost this coverage upon the death of, or divorce from, an employee.[22] Without employer-provided health insurance, these family members were forced to pay costly individual health insurance rates, and in many cases were unable to obtain health insurance at all.[23] With these concerns in mind, both houses of Congress began introducing legislation addressing continued employer-provided health coverage.

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18. H.R. REP. NO. 300, 99th Cong., 1st Sess. 308 (1985). Most people obtain their health insurance through their employers. CONGRESSIONAL BUDGET OFFICE, A CBO STUDY, SELECTED OPTIONS FOR EXPANDING HEALTH INSURANCE COVERAGE 12 (July 1991) [hereinafter EXPANDING HEALTH INSURANCE]. Therefore, according to the Congressional Budget Office, access, or lack of access, to employer-provided coverage is "the most important factor that determines whether or not people are insured." *Id.*

19. H.R. REP. NO. 300, *supra* note 18, at 308. *See also* H.R. 21, 99th Cong., 1st Sess. (1985); S. 1632, 99th Cong., 1st Sess. (1985) (introducing the original proposals for continued employer-provided health coverage).

20. H.R. REP. NO. 300, *supra* note 18, at 308. A 1991 CBO Study estimates that 33.4 million people, or 13.6% of the U.S. population, were uninsured in March 1990. CONGRESSIONAL BUDGET OFFICE, A CBO STUDY, RISING HEALTH CARE COSTS 69 (April 1991). According to a national survey conducted in 1987, the American population includes 36.1 million uninsured persons. THE ROBERT WOOD FOUNDATION, CHALLENGES IN HEALTH CARE: A CHARTBOOK PERSPECTIVE 1991 104 (1991). This survey also determined that 59% of the uninsured between the ages of 18 and 64 are members of families in which at least one person works. *Id.*

21. H.R. 21, *supra* note 19, at 363; S. 1632, *supra* note 19. With a 21.8% uninsured rate, adults and children living in single-parent families are the most likely to be uninsured. EXPANDING HEALTH INSURANCE, *supra* note 18, at 9. Characteristically, the uninsured also include young adults and the poor and near-poor. *Id.*

22. H.R. 21, *supra* note 19; S. 1632, *supra* note 19.

23. H.R. 21, *supra* note 19; S. 1632, *supra* note 19.

A. Legislative History of COBRA

Prior to the enactment of COBRA, no federal law required employers who sponsored group health plans to offer continued coverage.[24] However, tax advantages were, and still are, available to both employers and employees, providing incentives for employers to offer health insurance benefits.[25] For example, employer contributions used to fund health benefit plans are tax deductible to the employer.[26] In addition, employees can deduct from their gross income any employer contributions, made on such employee's behalf, to a plan providing accident and health coverage.[27] Also, benefits paid to employees are not subject to income, social security, or unemployment tax.[28] The COBRA legislation surfaced as an addition to these existing tax incentives.

1. Legislation from the House of Representatives

In 1985, Representatives Peter Stark of California and William Clay of Missouri co-sponsored a bill addressing the concern over access to continued health coverage.[29] This bill, House Bill 21, proposed mandating availability of continued health insurance under employer-sponsored plans for surviving and former spouses and dependents of covered employees.[30] The continued health coverage, if accepted by a spouse or dependent, would be extended for five years after the event (i.e., the death of, or divorce from, an employee) which qualified them for continued coverage.[31] In other words, the intent was to turn coverage-disqualifying events into coverage-qualifying events.

House Bill 21 did not address continued coverage for terminated employees.[32] However, this bill was followed by a companion bill in the Senate, and by subsequent Senate amendments, which proposed

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24. S. REP. No. 146, 99th Cong., 1st Sess. (1985).

25. *Id.* at 362.

26. *Id.*; *see also* 26 U.S.C. § 106 (1991) (stating that contributions by an employer to qualified accident and health plans are deductible); *Id.* § 162 (stating that ordinary and necessary business expenses are deductible); *Id.* § 212 (defining allowable deductions).

27. S. REP. No. 146, *supra* note 24, at 362.

28. *Id.* When effectively communicated, such tax-favored benefits provide a means for employers to attract and retain quality employees. EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 177-79 (4th ed. 1990).

29. H.R. 21, *supra* note 19.

30. *Id.*

31. *Id.*

32. H.R. 3128, 99th Cong., 1st Sess. (1985).

expanding the group of potential beneficiaries.

2. *Legislation from the Senate*

Also in 1985, Senator John Heinz of Pennsylvania, sponsored Senate Bill 1632.[33] This bill modified House Bill 21 to cover not only family members of deceased or divorced employees, but also family members of employees who become eligible for Medicare.[34] This modification recognized that, like death or divorce, when an employee becomes eligible for Medicare, the employee and his or her beneficiaries become ineligible for coverage under the employer plan. Coverage under this bill would have been extended for only two years, following death, divorce, or Medicare-eligibility.[35] At the end of this two year period, however, individuals receiving continued coverage would have the option of converting to individual coverage.[36]

Although the general concept of these first two bills was incorporated into what eventually became COBRA, the original focus and, thus, the purpose were altered. The early bills did not provide continued coverage to terminated employees and their families.[37] However, subsequent amendments sponsored by the Senate changed this.[38]

For example, Senate Bill 1730 required that the opportunity for continuing one's health coverage also be offered to laid-off workers and their families, thus enlarging the group of covered individuals.[39] This step appeared to bring the pre-COBRA legislation in line with the purpose of unemployment insurance — namely, to protect workers during a period of involuntary unemployment. However, the next proposed Senate amendment expanded the coverage still further to include employees who terminated employment voluntarily or involuntarily, except if terminated "for cause."[40] This amendment also

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33. S. 1632, *supra* note 19.

34. *Id.*

35. *Id.*

36. *Id.* Employers would have been allowed, as they are allowed under COBRA, to charge qualified beneficiaries who accept the continued coverage 102% of the group rate. *Id.* This bill also detailed employer requirements to notify eligible employees and beneficiaries of their rights to continue coverage and provided that any individual electing to receive continued coverage would bear the cost of the premium. *Id.*

37. H.R. REP. NO. 453, *supra* note 8, at 563.

38. *Id.*

39. S. REP. NO. 146, *supra* note 24, at 453-54.

40. H.R. REP. NO. 453, *supra* note 8, at 564.

covered employees whose hours were reduced and who, as a result, were no longer eligible for health coverage.[41]

3. *The Final Pre-COBRA Phase*

The final version of COBRA was drafted by a Joint House and Senate Conference Committee which combined the original concept of the earlier bills and the Senate amendments.[42] The result was very different from the original concept, which was to provide protection to women and dependent children from the burdens accompanying the loss of health insurance.[43] As enacted, COBRA covers not only the individuals the original bill specifically intended to cover, but also most voluntarily and involuntarily terminated employees.[44] While the potential number of covered individuals was thus enlarged under the final version of COBRA, the provision allowing employers to disqualify certain involuntarily terminated employees was narrowed.[45] The Senate proposal that employees terminated "for cause" not qualify for continued coverage was replaced during Conference Committee by the stricter standard of termination for "gross misconduct."[46]

These amendments were accompanied by little or no analysis or explanation of what the amendments would mean or how they would be applied in practice. The problems that accompany legislation which has developed in this manner are reflected in the language of COBRA, subsequent regulations, and employer attempts to comply.

B. COBRA 1985 — The Act

The legislation that became known as COBRA was finally signed into law in 1986.[47] COBRA requires certain "employers"[48] who pro-

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41. *Id.*

42. *Id.*

43. 131 CONG. REC. H4012 (daily ed. June 6, 1985) (stating that 85% of health insurance is provided through the principal wage earner's work, and as a result, six million widows and divorced women are left without insurance).

44. 29 U.S.C. § 1163(2) (providing an insurance continuation right due to loss of coverage resulting from termination, other than for gross misconduct, of the covered employee's employment).

45. H.R. REP. NO. 453, *supra* note 8, at 565.

46. *Id.*

47. The 1985 Act was not signed into law until April 7, 1986. Consolidated Omnibus Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 81, 222-237 (codified as amended at 29 U.S.C. §§ 1161-1168 (1991)).

48. 29 U.S.C. § 1167(4).

vide a "group health plan"[49] to offer each qualified "covered employee,"[50] or each covered employee's "qualified beneficiary"[51] who would lose coverage under the plan as a result of a "qualifying event,"[52] the option of continuing the same coverage he or she was receiving at the time of the qualifying event.[53] The period of coverage depends on the nature of the qualifying event,[54] and a person electing to continue health coverage under the employer's group health plan can be charged a premium of up to 102% of the group rate.[55] As mentioned earlier, failure to comply with COBRA may result in extensive sanctions against the noncomplying employer.[56]

Before going any further, it is worth discussing more fully several of the terms referred to above.

1. Definitions of Relevant Terms

For purposes of COBRA, "employer" generally refers to any employing entity that provides group health coverage.[57] Employer group health plans not affected by COBRA include: 1) plans of em-

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49. *Id.* § 1161.

50. *Id.* § 1167(2).

51. *Id.* § 1167(3).

52. *Id.* § 1163.

53. *Id.* § 1161.

54. The period of coverage begins on the date of the qualifying event and ends not earlier than:
- 18 months from the termination or reduction in hours of a covered employee's employment; and
- 36 months from the death of a covered employee, divorce or legal separation from a covered employee, bankruptcy proceedings, a covered employee's entitlement of Medicare, or cessation of a covered employee's child as a dependent. *Id.* § 1162(2)(A)(i)-(v).

If another qualifying event occurs within the 18-month period following a termination or reduction in hours, except a bankruptcy proceeding, the period of coverage will be extended 12 months, or 36 months from the original qualifying event. *Id.* Further, if at the time of termination or reduction in hours a covered employee is disabled for purposes of Medicare eligibility, and notifies the employer of this before the end of the 18-month period, such employee is entitled to have the period of coverage extended 11 months, or a total of 29 months. *Id.*

An individual's continued coverage, once offered and accepted, may be terminated in several ways. In addition to the natural expiration of the coverage period, coverage may also be terminated if: 1) the employer terminates the plan and offers no group health plan to any employee; 2) the qualified beneficiary fails to pay the premiums within 30 days after the due date; 3) the qualified beneficiary becomes eligible under any other group health plan which does not exclude any preexisting condition or the qualified beneficiary becomes eligible for Medicare; or 4) a Medicare disabled employee ceases to be disabled and is once again eligible for non-COBRA coverage. *Id.* § 1162(2)(B)-(E).

55. *Id. See also* 52 Fed. Reg. 22,716, 22,731 (1987).

56. *See infra* notes 74-77 and accompanying text.

57. 52 Fed. Reg. 22,716, 22,720 (1987) (cross-referencing I.R.C. § 414(b),(c),(m), and (o)). An "employer" includes all members of a controlled group of a corporation, a group of partnerships or proprietorships under common control, and any successor employer or entity. *Id.*

ployers who employed fewer than twenty employees on a typical business day in the calendar year immediately preceding the calendar year in which the failure to comply occurred;[58] 2) plans of the federal government and its subdivisions;[59] and 3) any church plan.[60]

A "group health plan" refers to an insured or self-insured employee welfare benefit plan[61] which provides medical care coverage to plan participants through, for example, insurance or reimbursement.[62] "Participants" in a plan may include employees, former employees, or employee family members.[63]

A "covered employee" is an employee who is eligible for coverage and is actually covered under the employer-sponsored group health plan, by virtue of his or her employment, at the time of a qualifying event.[64] A "qualified beneficiary" is any individual who is a beneficiary under the plan because he or she is a covered employee's spouse or dependent child at the time of the qualifying event.[65] A covered employee may also be a qualified beneficiary, but only in the case of his or her own termination or reduction in hours of employment which results in the loss of coverage.[66] For example, if an employee who is covered under an employer-provided group health plan quits her job, she is both a covered employee and a qualified

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58. Small-employer plans — group health plans sponsored by one or more employers, each of which maintain fewer than twenty employees on 50% of its working days during the preceding calendar year — are not affected by the Act. 29 U.S.C. § 1161(b); 52 Fed. Reg. 22,716, 22,721 (1987) (proposed June 15, 1987). *See also* 26 U.S.C. § 4980B(d)(1) (1991) (including the identical provision in the Internal Revenue Code portion of the United States Code).

59. 26 U.S.C. § 4980(d)(2) (1991) (citing 26 U.S.C. § 414(d) which defines government plans).

60. *Id.* 4980(c)(3).

61. S. REP. NO. 146, *supra* note 24, at 364. An employee welfare benefit plan is defined as any plan, fund, or program established or maintained by an employer or employee organization, or both, for the purpose of providing participants or their beneficiaries, through the purchase of insurance or otherwise: medical, surgical, or hospital benefits or benefits in the event of sickness, accident, disability, death, or unemployment. Such benefits may also include vacations, apprenticeship or training programs, day care centers, scholarship funds, or prepaid legal services. 29 U.S.C. § 1002(1) (1991); *see also* ERISA § 213(d).

62. 29 U.S.C. § 1167(1) (citing 26 U.S.C. § 213(d)). In Question & Answer 7 of the proposed rules, the IRS explains that an employer sponsored group health plan includes plans provided through insurance, reimbursement, or otherwise (e.g., self-insured), and cafeteria plans or other flexible benefit arrangements. 52 Fed. Reg. 22,716, 22,720 (1987).

63. 52 Fed. Reg. 22,716, 22,720 (1987).

64. 29 U.S.C. § 1167(2). Examples include retired or former employees still covered under the employer plan pursuant to previous employment, agents (or independent contractors), and corporate directors. 52 Fed. Reg. 22,716, 22,724 (1987). Employees who are eligible for coverage but choose not to be covered are not covered employees. *Id.*

65. 29 U.S.C. § 1167(3)(A).

66. *Id.* § 1167(3)(B).

beneficiary for purposes of COBRA. If this same employee instead continues working and divorces her spouse, she retains her plan eligibility and is not a qualified beneficiary. In both situations, the spouse and any dependent children who lose coverage are qualified beneficiaries.

A "qualifying event" is an event which would, but for COBRA, result in the loss of health coverage.[67] The statutory qualifying events include: 1) the death of a covered employee;[68] 2) the termination (other than by reason of such employee's gross misconduct), or reduction in hours of the covered employee's employment;[69] 3) the divorce or legal separation of the covered employee from his or her spouse;[70] 4) the covered employee becoming eligible for Medicare benefits;[71] 5) a dependent child of the covered employee ceasing to be dependent;[72] and 6) a bankruptcy proceeding of an employer which would result in loss of coverage to a covered retired employee.[73]

From these definitions, it is apparent that legislators took great pains to define many of the terms used in COBRA. Nevertheless, conspicuous in its absence is a definition of gross misconduct.

2. *Noncompliance Sanctions*

In light of the potential for extensive sanctions, employers are especially concerned about complying with COBRA. In addition to retroactive liability for wrongfully denying continued coverage, a noncomplying employer and certain employees could be subject to three types of sanctions. These include: 1) an employer excise tax of $100 for each day of noncompliance, but not more than $200 a day where there is more than one qualified beneficiary affected by a single qualifying event;[74] 2) a denial of an income exclusion of any

67. *Id.* § 1163. *See also* I.R.C. § 4980B(f)(3); ERISA § 603.

68. 29 U.S.C. § 1163(1); *see also* I.R.C. § 4980B(f)(3)(A); ERISA § 603(1).

69. 29 U.S.C. § 1163(2); *see also* I.R.C. § 4980B(f)(3)(B); ERISA § 603(2).

70. 29 U.S.C. § 1163(3); *see also* I.R.C. § 4980B(f)(3)(C); ERISA § 603(3).

71. 29 U.S.C. § 1163(4); *see also* I.R.C. § 4980B(f)(3)(D); ERISA § 603(4).

72. 29 U.S.C. § 1163(5); *see also* I.R.C. § 4980B(f)(3)(E); ERISA § 603(5).

73. 29 U.S.C. § 1163(6). The bankruptcy proceeding qualifying event was added by the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 2075. *See also* I.R.C. § 4980B(f)(3)(F); ERISA § 603(6).

74. I.R.C. § 4980B. The noncompliance period is the period which begins on the date when the employer fails to comply and ends on the date when the employer complies or six months after the last day the affected qualified beneficiary's coverage expires, whichever occurs first. *Id.* § 4980B(b)(2). An employer will not be subjected to the tax if it did not discover the failure while

amount spent on the health coverage for certain highly compensated employees of the noncomplying employer;[75] and 3) additional employer "non-tax" sanctions under ERISA.[76] Injured parties may also pursue private legal action for injunctive relief and civil penalties against noncomplying employers.[77]

C. *Proposed Regulations and Subsequent COBRA Amendments*

When drafting the final version of COBRA, to avoid duplication the Joint House and Senate Conference Committee divided the responsibilities for promulgating regulations among the Secretary of the Department of Labor (DOL), the Secretary of Health and Human Services (HHS), and the Secretary of the Treasury (through the Internal Revenue Service).[78] The DOL is responsible for issuing regulations explaining implementation and procedures for reporting and disclosure.[79] The HHS is responsible for regulations addressing the requirement that state and local governments provide health coverage.[80] Finally, the Internal Revenue Service (IRS) is responsible for regulations defining coverage, deductions,

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exercising reasonable diligence, nor if the failure was for reasonable cause and is corrected within 30 days. *Id.* § 4980(B)(c)(1)-(2). Limits are also placed on the maximum tax imposed in any taxable year where the failure is unintentional. *Id.* § 4980B(c)(4). This excise tax sanction replaced the former denial of an employer's tax deduction for all plan contributions and expenses in 1988. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3616 (adding § 4980B to the Internal Revenue Code). *See also* H.R. REP. NO. 453, *supra* note 8, at 562; 52 Fed. Reg. 22,716, 22,718 (1987) (detailing sanctions requirements in Questions & Answers 2 and 3).

75. H.R. REP. NO. 453, *supra* note 8, at 562-63; 52 Fed. Reg. 22,716, 22,718 (1987) (explaining the sanction against the highly compensated in Question & Answer 2). A highly compensated employee is any employee who, during the year or preceding year:

> (A) was at any time a 5-percent owner,
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> (B) received compensation from the employer in excess of $75,000,
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> (C) received compensation from the employer in excess of $50,000 and was in the top-paid group of the employer for such year, or
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> (D) was at any time an officer and received compensation greater than 50 percent of the amount in effect under section 415(b)(1)(A) for such plan year.

26 U.S.C. § 414(q)(1)(A)-(D) (1991).

76. H.R. REP. NO. 453, *supra* note 8, at 562; 52 Fed. Reg. 22,716, 22,718 (1987) (listing in Question & Answer 2 sanctions added to Title I of ERISA by COBRA and enforced by the Department of Labor).

77. H.R. REP. NO. 453, *supra* note 8, at 562-63 (noting that the only sanction imposed on covered state and local governments under COBRA amendments to the Public Health Services Act is a suit for equitable relief).

78. *Id.*

79. *Id.*

80. *Id.*

and income provisions.[81] The responsibility placed on the IRS is particularly relevant here.

A year after COBRA was passed, the IRS issued the first proposed explanatory regulations to COBRA.[82] The proposed regulations were issued without a definition of gross misconduct and without any substantive guidance for arriving at one.[83] According to these regulations, except for situations involving gross misconduct, the facts surrounding an employee's termination are irrelevant.[84] It does not matter whether the covered employee's termination or reduction in hours was voluntary or involuntary.[85] For example, regardless of whether a covered employee's job termination is based on a strike or walk-out, a lay-off or discharge, the employee will generally be eligible for COBRA coverage. Surrounding circumstances are relevant only in a termination situation allegedly based on gross misconduct.[86] The proposed regulations state only that employers subject to COBRA should "operate in good faith compliance with a reasonable interpretation of the statutory requirements."[87] As a result, employers are left to their own understanding of good faith and their own interpretation of gross misconduct.

Since the enactment of COBRA and the issuance of the proposed regulations, a number of laws have been passed amending COBRA. None, however, has defined or provided guidance for defining gross misconduct.[88] Therefore, employers must look elsewhere to deter-

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81. *Id.*

82. 52 Fed. Reg. 22,716 (1987) (providing guidance, in Question & Answer form, on certain changes made to ERISA by COBRA 1986 and the Tax Reform Act of 1986).

83. *Id.*

84. *Id.* at 22,725.

85. *Id.* (responding to the question of voluntary terminations in Question & Answer 19).

86. *Id.*

87. *Id.* at 22,716.

88. Five major acts have been passed which include provisions amending COBRA. The Omnibus Budget Reconciliation Act of 1986 extended continuation coverage rights to retirees covered by the employer plan at the time an employer enters bankruptcy. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 2075. The Tax Reform Act of 1986 then amended election rights, notification requirements, and treatment of secondary qualifying events. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2936. The Technical and Miscellaneous Revenue Act of 1988 replaced the tax deduction denial sanction with an excise tax and clarified which parties (i.e., both employers and insurance companies) are liable for payment of COBRA sanctions. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3616. Next, the Omnibus Budget Reconciliation Act of 1989 created an exception allowing continued coverage of preexisting conditions under the former employer's plan where a subsequent group health plan will not cover the preexisting condition. It also extended coverage to 29 months for certain Medicare disabled employee beneficiaries. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2294. Finally, the Omnibus Budget Reconciliation Act of 1990

mine what Congress intended and how best to apply the gross misconduct provision.

D. Interpretations of COBRA's Gross Misconduct Provision

Although few and far between, there have been some attempts, by experts and even by courts, to interpret COBRA's gross misconduct provision. These attempts have resulted in a variety of definitions, which differ greatly in their strictness.

1. Early Interpretations

The initial interpretations of what Congress intended by gross misconduct varied.[89] At one end of the spectrum, the ERISA Industry Committee (ERIC) suggested, shortly after COBRA's enactment, that state unemployment insurance policy be followed. ERIC argued that when employees leave their employment voluntarily, employers should not be required to provide continued health coverage.[90] ERIC also suggested that disqualification for COBRA benefits be based on *misconduct,* not *gross misconduct.*[91] ERIC's concern was that "plan administrators would be required to make distinctions that would result in the extension of coverage where it is improper to do so."[92]

At the other end of the spectrum were those commentators who argued that, according to "legislative aides and others close to the legislation," Congress intended gross misconduct to mean "almost criminal" conduct.[93] These proponents of COBRA supported requiring employers to show a very high level of gross misconduct when denying an employee COBRA coverage. Also in this camp was the Pension Counsel for the House Education and Labor Subcommittee, who stated that although gross misconduct is not defined, Congress intended the provision to "rarely" be applied.[94] Since these early

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modified the small employer exception and made allowances for Medicaid to pay COBRA premiums in certain situations. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-161.

89. *See COBRA Seminar, supra* note 13, at 1305.

90. *See Employer "Good Faith" Efforts, supra* note 15, at 1151.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Employers Should Make "Good Faith" Effort to Comply with New Health Benefits Law, Experts Say,* Daily Lab. Rep. (BNA) No. 125, at CC-1 (June 30, 1986) (referring to statements by Phyllis C. Borzi, Pension Counsel for the House Education and Labor Subcommittee).

comments, no particular view has been verified or denied. The resulting case law also provides only limited interpretive value.

2. *COBRA Case Law Defining "Gross Misconduct"*

There are few reported cases specifically addressing the issue of whether an employer's denial of COBRA coverage to a covered employee was based on a termination for gross misconduct. Those cases that do address the issue provide limited guidance.

In 1989, the Department of Labor pursued its first case on this issue.[95] In *Dole v. Dayton-Hudson,*[96] the DOL charged Dayton-Hudson and its subsidiary, Lechmere, with violating COBRA by improperly denying continued health coverage to otherwise qualified beneficiaries.[97] Lechmere, a retail household appliance store, argued that the employees were terminated for gross misconduct and therefore were ineligible for COBRA coverage. The employees were fired for the unauthorized sale of merchandise service contracts. According to the DOL, this did not constitute gross misconduct.[98] The case, however, was settled after the DOL advised the employer that it intended to look to Massachusetts unemployment insurance laws to define gross misconduct.[99] Therefore, no specific guidance was provided.

The same approach for defining gross misconduct was recently endorsed twice by the United States District Court for the Northern District of California in *Paris v. F. Korbel & Bros.*[100] and in *Adkins v. United International Investigative Services, Inc.*[101]

In *Paris,* the plaintiff-employee was promoted to "hospitality assistant," which entailed giving tours of her employer's winery and waitressing at the poolhouse where executives and their guests

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95. Dole v. Dayton-Hudson Corp., No. 89-1901-Z (D. Mass. filed Aug. 31, 1989). The Regional Solicitor for the Department of Labor in the First Circuit stated that his office looked to Massachusetts unemployment security law for some guidance in defining gross misconduct for COBRA purposes. Interview with Michael Felsen, Regional Solicitor, U.S. Department of Labor, 1st Circuit, Boston, Massachusetts (Aug. 27, 1991).

96. No. 89-1901-Z (D. Mass. filed Aug. 31, 1989).

97. *Id.*

98. *Id.*

99. Interview with Felsen, *supra* note 95. For a discussion of how Massachusetts defines and interprets misconduct for purposes of unemployment insurance disqualification, see *infra* notes 175-90 and accompanying text.

100. 751 F. Supp. 834 (N.D. Cal. 1990).

101. No. C91-0087BAC, 1992 U.S. Dist. LEXIS 4719 (N.D. Cal. March 30, 1992).

dined.[102] The employer advised the plaintiff that anything she overheard in her new position was confidential and that if she breached this confidence she would be terminated.[103] In the course of performing her job, the plaintiff overheard some executives discussing another employee, a pilot for the defendant's private fleet of airplanes.[104] They were discussing allowing him to become a part-time employee "to ease some personal family stress."[105] The plaintiff was a friend of the pilot and relayed this information to the pilot's wife, who then told her husband.[106] Upon learning that his personal problems were being discussed poolside, the pilot confronted his supervisor about the breach of confidence.[107] An investigation ensued, and the plaintiff was terminated for divulging what she had overheard.[108] The employer did not offer the plaintiff continued health coverage.[109]

The plaintiff sued her employer after learning about COBRA coverage while later seeking medical attention for her son.[110] The employer argued that the plaintiff was ineligible for COBRA because her breach of confidentiality constituted gross misconduct in that it caused the pilot to become angry, thereby risking the safety of executives who flew with the pilot.[111] The plaintiff suggested the court not rely on the employer's interpretation of gross misconduct, but that it look instead to the definition of misconduct under state unemployment insurance law.[112] Under California unemployment insurance law, "conduct evincing such willful and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee" constitutes misconduct.[113] Good faith errors in judgment or discretion do not constitute misconduct.[114]

The *Paris* court pointed out that neither the statute nor any regu-

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102. *Paris*, 751 F. Supp. at 835.
103. *Id.*
104. *Id.* at 836.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 836-37.
111. *Id.* at 836.
112. *Id.* at 838.
113. *Id.* (quoting Amador v. Unemployment Ins. Appeals Bd., 677 P.2d 224 (Cal. 1984)).
114. *Id.* at 838-39.

lations defined gross misconduct under COBRA and that the legislative history and proposed rules merely require employers to apply the law in good faith and within a reasonable interpretation of the substantive rules.[115] The court then accepted the plaintiff's suggestion, concluding that state unemployment case law "sheds more light on possible meanings than do [defendant's] protestations of good faith."[116] Although the plaintiff may have acted with poor judgment, the court concluded that her actions did not amount to gross misconduct.[117]

More recently, in *Adkins v. United International Investigative Services, Inc.*,[118] the plaintiff was originally a security guard for Burns Security Service, which had a contract for services with two armories.[119] Burns discovered that the plaintiff had left his post and was sleeping at home. The plaintiff also had falsified the daily log by adding the name of an employee who did not exist in order to collect a second paycheck.[120] Burns told the plaintiff he could either seek other employment or have these incidents reported in his personnel file.[121] The plaintiff opted for neither and went to work for a second armory that Burns serviced.[122] He did this knowing that this armory had a contract with Burns which prohibited the transfer of guards terminated for misconduct.[123] Burns's security service contracts with the armories were later taken over by United International Investigative Services, the defendant, who continued to employ the plaintiff.[124] However, upon learning of the plaintiff's previous acts of misconduct, the defendant terminated him, as provided for under the service contracts.[125]

The plaintiff elected COBRA coverage and, shortly after his ter-

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115. *Id.* at 838. This limited guidance requires employers to "operate in good faith compliance with a reasonable interpretation of the statutory requirements" and proposed regulations issued June 15, 1987. 52 Fed. Reg. 22,716 (1987).

116. *Paris*, 751 F. Supp. at 838.

117. *Id.* at 839. The court does not discuss the fact that the state unemployment insurance law refers to misconduct and COBRA refers to gross misconduct. This may be because here the court found the employee's conduct was not bad enough to meet even the misconduct requirement.

118. No. C91-0087BAC, 1992 U.S. Dist. LEXIS 4719 (N.D. Cal. Mar. 30, 1992).

119. *Id.* at *1-2.

120. *Id.* at *1.

121. *Id.* at *1-2.

122. *Id.* at *2.

123. *Id.*

124. *Id.* at *3.

125. *Id.*

mination, underwent heart surgery.[126] Pursuant to his election for COBRA coverage, the plaintiff sent his insurance premiums to the defendant who sent them on to Burns's insurance carrier. The insurance carrier refused coverage.[127] The plaintiff responded by filing a claim alleging a violation of COBRA, and thus ERISA.[128] The defendant argued, among other things, that the plaintiff was not entitled to COBRA coverage because he was terminated for gross misconduct.[129] Using the rationale of *Paris*, this court agreed with the defendant.[130] Looking at the specific acts of alleged misconduct, the court concluded that the plaintiff's desertion of his post constituted a "substantial disregard" of the defendant's interest and that his falsification of the daily log was "gross misconduct under even the most lenient standards."[131] The plaintiff's transfer, in knowing violation of Burns's contract with the armory, also was found to constitute gross misconduct.[132] Thus, in *Adkins*, the court used the state unemployment law definition to support an employer's decision not to extend coverage.

Not all courts confronted with this issue have relied on state unemployment laws for defining gross misconduct. In *Avina v. Texas Pig Stands, Inc.*,[133] the United States District Court for the Western District of Texas found that an employee's termination was based on gross misconduct.[134] The court arrived at this conclusion without relying on language in state unemployment insurance law.[135] In *Avina*, the employee was a district manager in the employer's San Antonio office, a position which "required a high degree of trust and confidence."[136] After the employer and employee "agreed" that the employee would be terminated, the employee sent his COBRA application to the insurer; however, he was denied continued coverage when the application arrived late.[137] In a subsequent suit against the employer, the employee alleged a COBRA

126. *Id.*
127. *Id.* at *4.
128. *Id.* at *4-5.
129. *Id.* at *5.
130. *Id.* at *11 (citing Paris v. F. Korbel & Bros., 751 F.Supp. 834, 838 (N.D. Cal. 1990)).
131. *Id.* at *11-12.
132. *Id.* at *12.
133. No. SA-88-CA-13, 1991 U.S. Dist. LEXIS 13957 (W.D. Tex. Feb. 1, 1991).
134. *Id.* at *4.
135. *Id.* at *4-5.
136. *Id.* at *2.
137. *Id.* at *3.

violation, grounded in the employer's untimely COBRA notification.[138] The court did not rule on the notification violation but concluded that because the employee's termination was based on gross misconduct, the employer was not even required to offer him coverage.[139] Without discussing the facts surrounding the termination, the court held that gross misconduct by a managerial employee is defined as the "substantial deviation from the high standards and obligations of a managerial employee that would indicate that said employee cannot be entrusted with his management duties without danger to the employer."[140] Instead of relying on state unemployment insurance law, the court apparently accepted the employer's definition as satisfying COBRA's good faith application requirement. In effect, the court required a lesser degree of misconduct for managerial employees.

The early interpretations of what Congress intended gross misconduct to mean along with the case law to date offer only limited assistance to employers attempting to utilize this provision. No uniformity has resulted, nor is there a consensus concerning the best definition. Possible definitions range from a lesser degree of misconduct for managers to the various state unemployment insurance misconduct standards to a stricter criminal standard. The three employer options mentioned earlier offer additional insight and are discussed next.

E. Options for Defining Gross Misconduct

There are several potential approaches for arriving at a useful definition of gross misconduct. The three options discussed here are: 1) using a dictionary definition, 2) using the definitions of similar terms in analogous areas of law, and 3) seeking an amendment to COBRA by Congress and/or the issuance of explanatory regulations from the IRS.

1. Option One — The Dictionary Definition

One option for employers is to consistently rely on a single dictionary definition. For example, an employer might look to *Black's Law Dictionary* which defines "gross" as "beyond allowance, fla-

138. *Id.*
139. *Id.* at *4-5.
140. *Id.* at *5.

grant or shameful."[141] Further, it defines "misconduct" as a "transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, or improper or wrong behavior, but not negligence or carelessness."[142] Therefore, an act of gross misconduct might be defined as anything from "flagrant, unlawful behavior" to a "shameful transgression of some established and definite rule," two very different definitions.

The dictionary approach may offer ease of administration; however, because of the varying terms it provides for defining both "gross" and "misconduct," it does not promote consistency within a particular employer or among different employers. Nor has this option been specifically endorsed by a primary authority as satisfying the good faith compliance requirement.

2. *Option Two — Similar Terms in Analogous Laws*

The second option, looking to the definition and interpretation of similar terms in analogous areas of law, offers a useful alternative because the groundwork has already been laid by existing case law. Two areas of law, state unemployment health insurance law and federal employee health benefits law, are analogous to COBRA and thus provide insight for drafters of a COBRA gross misconduct definition.

a. State unemployment insurance law

The respective roles of COBRA and state unemployment insurance laws are parallel in many ways. COBRA provides for continued health benefit coverage during a period when coverage would otherwise cease due to, among other events, employment termination. Similarly, state unemployment insurance provides continued income benefits during a period of unemployment. There are, however, as many differences as there are similarities.

One major difference is that state unemployment insurance is intended to protect and cushion workers and their families when employees become unemployed through no fault of their own.[143] These

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141. BLACK'S LAW DICTIONARY 702 (6th ed. 1990).

142. *Id.* at 999.

143. Nichols v. Department of Employment Sec., 578 N.E.2d 1121, 1126 (Ill. App. 1991) (stating the purpose of the law and citing Siler v. Department of Employment Sec., 549 N.E.2d 760 (1989)). *See, e.g.*, Garland v. Department of Labor, 472 N.E.2d 434 (Ill. 1984) (holding that

laws are generally construed liberally to effectuate the legislative policy of protecting employees against the severe economic consequences that may result from involuntary unemployment.[144] COBRA, on the other hand, provides continued health coverage to a much broader group of covered employees and qualified beneficiaries.[145] Both voluntarily terminated and most involuntarily terminated employees and their qualified beneficiaries qualify for COBRA coverage.

Like COBRA's gross misconduct provision, state unemployment laws also provide for certain situations in which an employee may

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unemployment insurance law is a benefit for employees who become unemployed involuntarily); Grobe v. Board of Review, 101 N.E.2d 95 (Ill. 1951) (holding that two weeks of paid vacation taken by union employees when the employer shuts down the department in which employees work does not amount to involuntary unemployment for benefit purposes); Dohoney v. Director of Div. of Employment Sec., 386 N.E.2d 10 (Mass. 1979) (rejecting a female employee's suggestion that maternity leave be established as involuntary per se for unemployment insurance purposes). *See also* CAL. UNEMP. INS. CODE § 1256 (West 1986 & Supp. 1992) ("An individual is disqualified for unemployment compensation benefits if the director finds that he or she left his or her most recent work voluntarily without good cause or that he or she has been discharged for misconduct connected with his or her most recent work."); Cusack v. Director of Div. of Employment Sec., 378 N.E.2d 992, 993 (Mass. 1978) ("It is well settled that the purpose of the [unemployment insurance law] is 'to afford benefits to persons who are out of work and unable to secure work through no fault of their own.' " (citations omitted)); *In re* Ferrara, 176 N.E.2d 43, 46-47 (N.Y. 1961) (stating that the purpose of the unemployment insurance law is to protect wage earners from the hazards of unemployment through no fault of their own). *But see* Raytheon Co. v. Director of Div. of Employment Sec., 307 N.E.2d 330, 332-33 (Mass. 1974) (arguing that the broader purpose of the law, to provide temporary relief to employees compelled to leave work through no fault of their own, includes a night-shift employee who loses her transportation to work and, because there are no day shift openings, leaves her job).

144. *See, e.g.*, Lipman v. Board of Review, 462 N.E.2d 798, 800 (Ill. App. Ct. 1984) ("The Unemployment Compensation Act . . . is to be liberally construed in order to effectuate the legislature's public policy . . . of protecting against the severe economic consequences resulting from involuntary unemployment."). *See also* Gilles v. Department of Human Resources Dev., 521 P.2d 110, 118 (Cal. 1974) ("The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objectives."); Mangan v. Bernardi, 477 N.E.2d 13, 16 (Ill. App. Ct. 1985) (holding that a laid-off employee's refusal of a position under which he would no longer be eligible for health and other fringe benefits was based on good cause, was not a voluntary termination, and therefore, did not disqualify him for unemployment insurance benefits under a liberal construction of the law); General Elec. Co. v. Director of Div. of Employment Sec., 207 N.E.2d 289, 291 (Mass. 1965) (interpreting the law to require a liberal construction in support of its goal of alleviating the burden on unemployed workers and their families); *In re* Krieger, 107 N.Y.S.2d 916, 918 (N.Y. 1951) (holding that the law is to be construed reasonably, not as a guarantee of unemployment benefits but as an emergency measure). *But see* Redlich v. Corsi, 88 N.Y.S.2d 868, 871 (N.Y. 1949) (holding that unemployment insurance law does not purport "to confer benefits on every person out of employment," and is "not intended to apply to casual or intermittent workers").

145. *See supra* notes 64-66 and accompanying text (outlining the definitions of covered employee and qualified beneficiary).

not qualify for unemployment insurance benefits.[146] Although the language and application of these state laws vary, common reasons for benefit disqualification include: 1) voluntary separation or termination;[147] 2) discharge for misconduct, including absences, fighting, insubordination, job application misrepresentation, refusal to follow work orders, and theft;[148] 3) refusal of suitable work,[149] and 4) unemployment due to labor disputes.[150] Disqualification for unemployment benefits due to employee misconduct is closely related to COBRA's gross misconduct exception.

While COBRA refers specifically to gross misconduct, state employment insurance statutes do not uniformly use this term. Rather, it is more common for a statute to refer to misconduct and then to define the degree of misconduct necessary to disqualify an employee for unemployment insurance purposes.[151] Most states define disqualifying misconduct as "willful,"[152] "deliberate misconduct in wilful disregard of the employing unit's interest,"[153] or the "failure to obey orders, rules or instructions or the failure to discharge the duties for which [the employee] was employed."[154] It is not at all clear that

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146. 1B Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-54.

147. EMPLOYMENT & TRAINING ADMIN. UNEMPLOYMENT INS. SERV., U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 4-4 (1992).

148. *Id. See also* N.Y. LAB. LAW § 593, ch. 312, art. 18 (McKinney 1991).

149. EMPLOYMENT & TRAINING ADMIN. UNEMPLOYMENT INS. SERV., *supra* note 147, at 4-4.

150. *Id.*

151. 1B Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-53. Note that the definition of misconduct stated by the Wisconsin Supreme Court in Boynton Cab Co. v. Neubeck, 296 N.W. 636 (Wis. 1941) is followed by many jurisdictions and administrative agencies. 1B Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-4. The *Boynton* court gave the following definition of misconduct:

> [T]he term "misconduct" . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Boynton, 296 N.W. at 640.

152. *See, e.g.*, CONN. GEN. STAT. § 31-236 (1990); 43 PA. CONS. STAT. § 802 (1990).

153. *See, e.g.*, MASS. GEN. L. ch. 151A, § 25 (1992); *see also* Newton v. Department of Employment Sec., 409 A.2d 594, 595 (Vt. 1979) (holding that an employee of the Department of Social Welfare, who knowingly failed to report his wife's return to work and continued to receive food stamps, did so in disregard of his employer's interest and was guilty of gross misconduct resulting in extended benefit disqualification).

154. EMPLOYMENT & TRAINING ADMIN. UNEMPLOYMENT INS. SERV., *supra* note 147, at 4-8 (citing Georgia law). Under Texas law, misconduct includes conduct which "places others in dan-

these definitions are applied similarly.

In Illinois, for example, disqualifying misconduct is defined as:

> [T]he deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit.[155]

In applying this definition, an Illinois court held, in *Winklmeier v. Board of Review*,[156] that an employee terminated for submitting thirteen false medical claims on behalf of his wife was properly denied unemployment insurance.[157] The court decided that the employee's actions demonstrated a willful disregard of the employer's interest and of the standard of behavior expected of an employee.[158] In *Gee v. Board of Review*,[159] the court found that arguing with an employer or supervisor without the use of abusive language or threats did not constitute misconduct for purposes of unemployment benefit disqualification.[160] However, it explained that the use of abusive language would constitute insubordination and may constitute

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ger or an intentional violation of an employer policy or law, but does not include" responses to unconscionable employer provocation. *Id.* (citing Texas law). Despite variations among the states, generally accepted principles of unemployment insurance disqualification indicate that the conduct: 1) need not violate a law or moral code; 2) may be a civil or industrial offense; 3) is generally connected with work; and 4) results in discharge of employee. 1B Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-4. The employer has the burden of producing clear and convincing evidence of the act. *Id.*

155. ILL. REV. STAT. ch. 48, ¶ 432 (1991). *See, e.g.*, Adams v. Ward, 565 N.E.2d 53 (Ill. App. Ct. 1990) (holding that an employer failed to show that it suffered actual harm because it had failed to establish that the employee's discharge was for misconduct); Siler v. Department of Employment Sec., 549 N.E.2d 760 (Ill. App. Ct. 1989) (finding that a building maintenance engineer, by merely failing to follow correct procedures or disregarding an employer's requirements for safety and sanitation, did not engage in misconduct because the actions amounted only to carelessness or negligence, not willful or wanton disregard for the employer's interest); Crowley v. Department of Employment Sec. Bd. of Review, 546 N.E.2d 1042 (Ill. App. Ct. 1989) (stating that good faith errors in judgment do not constitute misconduct). *But see* Granite City Steel Div. of Nat'l Steel Corp. v. Board of Review, 385 N.E.2d 931 (Ill. App. Ct. 1979) (holding that ineligibility is not limited to intentional wrongdoing, but that each case should be determined in accordance with the facts).

156. 450 N.E.2d 353 (Ill. App. Ct. 1983).

157. *Id.* at 353. The court stated further that the employee's misconduct need not have a direct connection with the work being performed, as long as it is contrary to the employer's interest. *Id.* at 355.

158. *Id.* at 354.

159. 483 N.E.2d 1025 (Ill. App. Ct. 1985).

160. *Id.* at 1025. *See also* Sheff v. Board of Review, 470 N.E.2d 1044 (Ill. App. Ct. 1984) (concluding that an employee who raised his voice at his employer behind closed doors, and without the use of abusive language, was not guilty of misconduct).

disqualifying misconduct.[161] Other disqualifying misconduct in Illinois includes the use of marijuana at work or evidence that an employee is under the influence of marijuana during work in violation of an employer's rules,[162] and conviction of a felony in connection with or impacting the individual's employment.[163]

California courts similarly refer to willful misconduct, but they define it as "volitional," meaning "wilful, wanton or equally culpable."[164] In *Jacobs v. Unemployment Insurance Appeals Board,*[165] a California court held that an employee who had worked for an employer for twelve years could not be denied unemployment benefits based on his discharge for chronic absenteeism due to alcoholism.[166] The court held that it was first necessary to determine whether the employee had the capacity to abstain from drinking.[167] If not, the employee could not have acted willfully or wantonly.[168]

In addition to being willful, in California disqualifying misconduct must also generally be in disregard of the employer's interest.[169] In *Rowe v. Hansen,*[170] a hostess-cashier in a restaurant was

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161. Carroll v. Board of Review, 477 N.E.2d 800, 805 (Ill. App. Ct. 1985).

162. Profice v. Board of Review, 481 N.E.2d 1229, 1232 (Ill. App. Ct. 1985) (stating that evidence of marijuana in the employee's system, the strong odor of marijuana, and the fact that a co-worker whom the employee was with was found with the drug in her purse, was sufficient to prove the misconduct); *see also* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that an employment dismissal because of the religious use of sacramental peyote was misconduct disqualifying the employee from unemployment benefits).

163. John F. Decker, *Collateral Consequences of a Felony Conviction in Illinois,* 56 CHI.-KENT L. REV. 731, 750-51 (1980) (citing ILL. REV. STAT. ch. 48, ¶ 432c (1977) and discussing the many collateral consequences which may follow a felony conviction in Illinois, including disqualification for state unemployment insurance benefits).

164. Jacobs v. California Unemployment Ins. Appeals Bd., 102 Cal. Rptr. 364, 366 (Cal. Ct. App. 1972) (holding that where a twelve-year employee was discharged for chronic absenteeism due to chronic intoxication, a determination should be made whether the employee did not have the capacity to abstain from drinking and therefore, could not be found to have acted willfully or wantonly); *see also* Morris v. Unemployment Ins. Appeals Bd., 110 Cal. Rptr. 630 (Cal. Ct. App. 1973) (finding that threatening bodily harm to supervisors is misconduct for purposes of unemployment insurance law); *but see* Moore v. Unemployment Ins. Appeals Bd., 215 Cal. Rptr. 316 (Cal. Ct. App. 1985) (holding that an employee's conduct will not be found to be disqualifying willful misconduct where he has good cause for his actions); Amador v. Unemployment Ins. Appeals Bd., 200 Cal. Rptr. 298 (Cal. Ct. App. 1984) (holding that an employee's repeated and willful refusal to obey a reasonable order by the employer, or insubordination, is not willful misconduct if the employee establishes good cause).

165. 102 Cal. Rptr. 364 (Cal. Ct. App. 1972).

166. *Id.* at 367 (holding that there must be a finding made as to an employee's capacity to act in order to determine willfulness).

167. *Id.*

168. *Id.*

169. Lacy v. California Unemployment Ins. Appeals Bd., 95 Cal. Rptr. 566, 568 (Cal. Ct. App. 1971) (holding that an employee's failure to comply with an employer's order that, following a

discharged for insubordination after refusing, in front of customers, to comply with a requirement that sweaters be worn and not draped over the shoulders.[171] The California court found this conduct sufficient to harm the employer's economic interests and, thus, to constitute willful misconduct.[172] When the authority an employer gives an employee to handle day-to-day operations is "flouted, the interests of the employer suffer."[173] The court reasoned that the misconduct need not constitute an "immediate and direct economic" harm to the employer in order to harm its interests.[174]

Additional variations in the application of unemployment insurance law can be found in Massachusetts statutory and case law. There, the relevant statute requires that courts place added emphasis on the employee's state of mind.[175] In *Smith v. Director of Division of Employment Security*,[176] an employer showed that an employee had this requisite state of mind where the employee, who was aware of company rules prohibiting drinking of alcohol on the job, nonetheless drank alcohol at work.[177]

It may not always be necessary, however, for the employer in Massachusetts to make a specific showing of the employee's state of

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demotion, she train her successor-supervisor, was not done in disregard of the employer's interest and did not disqualify her for unemployment insurance benefits where such an order imposed a new and unreasonable burden on her).

170. 116 Cal. Rptr. 16 (Cal. Ct. App. 1974).

171. *Id.* at 18 (noting that the employee also refused to leave when she was asked).

172. *Id.* at 24 (holding that disqualifying misconduct need not result in immediate or direct economic harm to an employer to constitute disregard for an employer's interest).

173. *Id.*

174. *Id.*

175. MASS. GEN. L. ch. 151A, § 25 (1992) (stating that an employee's acts of misconduct must be willful to be disqualifying). *See* Smith v. Director of Div. of Employment Sec., 429 N.E.2d 700, 702 (Mass. 1981) (holding that the critical issue in determining whether misconduct was willful or intentional is the employee's state of mind); *see also* Johnson v. Director of Div. of Employment Sec., 385 N.E.2d 975 (Mass. 1979) (holding that an employee who was tardy three days in his first two weeks of work, after being warned that tardiness would not be tolerated, acted deliberately); Reavey v. Director of Div. of Employment Sec., 387 N.E.2d 581 (Mass. 1979) (holding that where an employee was discharged because he deliberately drove a forklift truck into a wall during work hours, his unemployment benefit disqualification could not be upheld without a finding as to his state of mind); Kinch v. Director of Div. of Employment Sec., 506 N.E.2d 169 (Mass. App. Ct. 1987) (holding that an employee's refusal to work in violation of a prohibition against working seven consecutive work days did not constitute misconduct, regardless of whether the employee was aware of the right not to work).

176. 429 N.E.2d 700 (Mass. 1981).

177. *Id.* at 700; *but see* Shepherd v. Director of Div. of Employment Sec., 506 N.E.2d 874 (Mass. 1987) (stating that an employee, discharged for excessive absences, who shows that he suffered from alcoholism, may be able to establish that his discharge was not based solely on deliberate misconduct).

mind. Where the nature of an action itself indicates that the conduct is deliberate, it is not necessary to scrutinize as closely the employee's state of mind.[178] For example, in *Sharon v. Director of Division of Employment Security,*[179] the court held that an employee was properly denied unemployment insurance without an inquiry into his state of mind where he called his employer a liar and other derogatory names in front of several managers and then refused to make a public apology.[180] According to the court, the employee's refusal to apologize established the requisite intent.[181]

It is also necessary under Massachusetts law to consider whether: 1) the employee's misconduct was in disregard of his employer's interest;[182] 2) there were any mitigating circumstances;[183] or 3) the employee was acting in good faith.[184] In *Wedgewood v. Director of Division of Employment Security,*[185] the court held that although sleeping on the job may establish a prima facie case of an employee's willful disregard for an employer's interest, it was necessary to investigate any mitigating circumstances, such as a medical reason for falling asleep at work.[186] In *Goodridge v. Director of Division of Employment Security,*[187] an employee who was fired for leaving work argued that he left work because of his good faith reliance on the grievance procedures in the employee handbook.[188] As in *Wedgewood,* the court determined that further investigation was necessary.[189] In particular, the lower court was directed to deter-

178. Sharon v. Director of Div. of Employment Sec., 455 N.E.2d 1214, 1215 (Mass. 1983) (quoting Garfield v. Director of Div. of Employment Sec., 384 N.E.2d 642 (Mass. 1979)).

179. *Id.* at 1214.

180. *Id.* at 1214-15.

181. *Id.* at 1215.

182. Wedgewood v. Director of Div. of Employment Sec., 514 N.E.2d 680 (Mass. App. Ct. 1987) (holding that although sleeping on the job in willful disregard of employer interest may constitute misconduct, it is necessary to consider any mitigating circumstances as well); *see also* Hawkins v. Director of Div. of Employment Sec., 465 N.E.2d 786 (Mass. 1984) (holding that an employee's intentional disregard of his employer's reasonable requests to remove his radio headphones to hear instructions was contrary to the employer's interests, and the employee had not relied in good faith on any employee handbook provision for radio listening because none existed).

183. *Wedgewood,* 514 N.E.2d at 680.

184. Goodridge v. Director of Div. of Employment Sec., 377 N.E.2d 927 (Mass. 1978) (holding that an employee's good faith, not only the question of deliberate misconduct, must be considered to determine the employee's state of mind).

185. 514 N.E.2d 680 (Mass. App. Ct. 1987).

186. *Id.* at 680.

187. 377 N.E.2d 927 (Mass. 1987).

188. *Id.* at 928-30.

189. *Id.*

mine whether the employee had acted in good faith.[190]

Finally, in New York, the courts have chosen, for purposes of unemployment disqualification, to distinguish between discharge for cause and discharge for misconduct.[191] Conduct which may constitute just cause for discharging an employee may not rise to the level of misconduct justifying unemployment insurance disqualification.[192] For example, in *James v. Levin,*[193] an employee's refusal to work overtime, which justified his discharge, was not misconduct justifying his unemployment insurance denial.[194] In fact, in *Hunt v. General Electric Co.,*[195] an employee's conviction for "body stealing," although termed "bizarre," was only sufficient to justify his discharge, not a denial of unemployment insurance.[196]

In New York, conduct generally rises to the level of misconduct for disqualification purposes if it is detrimental to the employer's interest or is in violation of a reasonable work condition.[197] Such misconduct might include insubordination, misrepresentation, certain off-duty activities, refusal to follow orders, and a violation of reasonable rules.[198] Specific examples of employee conduct deemed disqualifying include: a counter worker who continuously reported to work under the influence of alcohol;[199] a hat-check person who, after a motorcycle accident, failed to notify her employer when she would return to work and also tried to set her own work schedule;[200] and a social worker who, after handling a case unsatisfactorily, ig-

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190. *Id.* at 930.

191. Hulse v. Levine, 361 N.E.2d 1034, 1035 (N.Y. 1977) (holding that an employee's refusal to work overtime, although enough to constitute discharge for cause, does not necessarily amount to misconduct for purposes of unemployment insurance denial).

192. *Id.*; *see also In re* James, 315 N.E.2d 471, 475 (N.Y. 1974) (stating that a "valid cause" for discharge must rise to the level of misconduct before an employee becomes disqualified for unemployment benefits).

193. 315 N.E.2d 471 (N.Y. 1974).

194. *Id.* at 473 (stating that inefficiency, negligence, and bad judgment are valid causes for discharge but do not render an employee disqualified for unemployment benefits).

195. 444 N.Y.S.2d 492 (N.Y. App. Div. 1981).

196. *Id.* at 492-93 (holding that every discharge for cause does not amount to misconduct).

197. *See In re* Bruggeman, 477 N.Y.S.2d 449 (N.Y. App. Div. 1984) (holding that selling controlled substances during nonwork hours reflected adversely upon the employee's ability to hold a position as town assessor, which required trust and confidence, and that such conduct rose to the level of misconduct). *See also In re* Brewer, 384 N.Y.S.2d 269 (N.Y. App. Div. 1976) (holding that theft by employees from the employer violated reasonable work conditions and, thus, amounted to misconduct).

198. N.Y. LAB. LAW § 593, ch. 312, art. 18 (McKinney 1991).

199. *In re* James, 315 N.E.2d 471, 474 (N.Y. 1974).

200. *Id.*

nored her superior and avoided meeting with her director.[201] A conviction for a crime against the employer, or for a crime away from work which adversely impacts the employer's interest, also constitutes disqualifying misconduct in New York.[202]

Most state statutes require that the misconduct also be "connected with work."[203] However, these courts recognize that employees also have a duty to regard the employer's interest while away from work.[204] For instance, in *Dean v. South Dakota Department of Labor,*[205] two charges of shoplifting away from work were sufficient to constitute disqualifying misconduct for unemployment insurance purposes.[206] The court held that an employee's duty to consider the employer's interests continues away from work.[207]

Another distinction between the disqualifying provisions of COBRA and state unemployment insurance law is the resulting degree of disqualification. Under COBRA, an employee who is terminated for gross misconduct is completely disqualified, as are his or her spouse and dependents.[208] For purposes of unemployment insurance, however, the degree of the misconduct affects the period of unemployment benefit disqualification.[209] For instance, a disqualification under unemployment insurance laws may result in: 1) postponement of benefits for a prescribed period in addition to the waiting period required of all claimants; 2) reduction in benefits; 3) cancellation of benefit rights; or 4) some combination of the above.[210] In most

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201. *Id.*

202. *In re* Bruggeman, 477 N.Y.S.2d 449 (N.Y. App. Div. 1984). The rationale for allowing disqualification for nonwork misconduct is that an employee violates an implied condition of employment by committing an act involving "moral turpitude" even where the act did not occur during work hours. *Id.*

203. 1B Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-54.

204. *Id.; see also* Dean v. South Dakota Dep't of Labor, 367 N.W.2d 779, 782 (S.D. 1985) (finding that a clerk-typist's discharge, after her second charge of shoplifting away from work, was sufficient to satisfy denial of unemployment benefits since an employee's duty to regard an employer's interest continues away from work).

205. 367 N.W.2d 779 (S.D. 1985).

206. *Id.* at 782.

207. *Id.*

208. 29 U.S.C. §1163(2).

209. 1B Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-53.

210. EMPLOYMENT & TRAINING ADMIN. UNEMPLOYMENT INS. SERV., *supra* note 147, at 4-4. Seven states provide for variable disqualification periods for discharge for misconduct with Alabama on the low end (three to seven weeks), and South Carolina on the high end (five to twenty-six weeks). *Id.* at 4-8. The other five states are: Florida, Maryland, Missouri, Nebraska, and North Carolina. *Id.* at 4-37. Other states have fixed disqualification periods, disqualification for the duration of unemployment or longer, reduced benefits, or cancellation of benefit rights. *Id.* at 4-8.

states, misconduct involving a criminal act, a felony, a misdemeanor, or gross misconduct warrants a more severe disqualifying period.[211] For example, under Minnesota law, if an employee's misconduct does not amount to gross misconduct, the employee is disqualified for unemployment benefits for a limited period.[212] If instead the employee is terminated for gross misconduct, he is totally disqualified for an entire benefit year.[213]

When determining the degree of misconduct and, thus, the severity of the benefit disqualification, there appears to be no uniform rule as to the number of acts of misconduct that will justify disqualification.[214] Depending on the act, some courts might find one act of misconduct sufficient.[215] The Delaware Supreme Court held, in *Unemployment Insurance Appeal Board v. Martin*,[216] that two employees were not disqualified after single incidents of "failure to heed an employer's instructions," not because additional acts were needed for disqualification, but because the employer had tolerated "actions of similar severity" in the past.[217] The number of acts of misconduct appears determinative where the conduct is such that it would not normally result in disqualification (e.g., acts of carelessness, negligence, inefficiency, and rule breaking).[218] For example, a Florida court held that a bank teller who was terminated after negligently

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211. 1B Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-53; *see also* Department of Economic & Employment Dev. v. Owens, 541 A.2d 1324, 1327 (Md. Ct. Spec. App. 1988) (holding that an employee's threat to kill his supervisor after a grievance meeting constituted gross misconduct for unemployment insurance benefit disqualification purposes).

212. MINN. STAT. § 268.09(1) (1986).

213. *Id.* § 268.09(1)(d). Gross misconduct is defined in Minnesota as involving "assault and battery or the malicious destruction of property or arson or sabotage or embezzlement or any other act, including theft, the commission of which amounts to a felony or gross misdemeanor." *Id.* However, the law provides an exception to disqualification for misconduct (not for gross misconduct) if the employee is separated from employment because of a chemical dependency. *Id.* § 268.09(1)(c).

214. 1B Unempl. Ins. Rep. (CCH) ¶1970, at 4451-55; *see also* Department of Economic & Employment Dev. v. Jones, 558 A.2d 739 (Md. Ct. Spec. App. 1989) (holding that an employee's persistent absenteeism and drug use constituted gross misconduct where there was a series of repeated violations of employment rules, proving the employee regularly and wantonly disregarded his obligation to his employer); Bailey v. Rutledge, 327 S.E.2d 456, 458 (W. Va. 1985) (holding that an employee's refusal to accept a single out-of-state trucking assignment for personal reasons constituted misconduct, but not gross misconduct, and therefore triggers a shorter period of disqualification).

215. Unemployment Ins. Appeal Bd. v. Martin, 431 A.2d 1265, 1268 (Del. 1981).

216. *Id.* at 1268.

217. *Id.* (quoting Boughton v. Division of Unemployment Ins., 300 A.2d 25, 27 (Del. 1972)).

218. *See* Terjesen v. State, 491 So.2d 1189, 1189-90 (Fla. Dist. Ct. App. 1986) (holding that an employee was properly disqualified after mishandling bank funds several times).

mishandling funds *several* times was properly disqualified for unemployment benefits.[219]

A few states do not require misconduct for unemployment insurance disqualification. In these states, "just cause" is sufficient to trigger disqualification.[220] For example, under Utah law, an employee may be disqualified for unemployment benefits if terminated for just cause, regardless of his willfulness or wantonness.[221] Just cause may be satisfied by establishing an employee's culpability, knowledge of the consequences of his action, and control over his action.[222]

Although the results are varied, state case law offers useful insight for employers trying to define gross misconduct, at least within the context of a particular state.

b. Federal employee health benefit law

The Federal Employees Health Benefits Amendments Act of 1988 (FEHBAA)[223] provides a second area of analogous law. The primary purposes of FEHBAA were to protect Federal Employees' Health Benefits Program (FEHBP) participants from unfit health care providers and to provide certain participants with continued health coverage.[224] FEHBAA extends to federal employees essentially the same right of continued health coverage given to private sector employees and state and local government employees under COBRA.[225]

Like COBRA, FEHBAA offers continued health coverage to terminated employees, certain unmarried dependent children, and former spouses who would otherwise lose their coverage under the FEHBP.[226] FEHBAA provides, as does COBRA, that employees who are terminated for gross misconduct are not entitled to contin-

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219. *Id.*

220. 1B Unempl. Ins. Rep. (CCH) ¶ 1970, at 4451-54 to 51-55. Such states include Colorado, Ohio, and Utah. *Id.*

221. *Id.* at 4451-4.

222. *Id.* Colorado, another just cause state, also provides no definition for just cause, but it does provide a list of possible acts that would disqualify an employee for unemployment benefits. *Id.* at 4451-54 to 51-55 (citing COLO. REV. STAT. ANN. § 8-73-108(5) (West 1990)).

223. 5 U.S.C. §§ 8901-8913 (1988).

224. H.R. REP. NO. 917, 100th Cong., 2d Sess. 1, 2 (1988).

225. *Id.* at 7.

226. 5 U.S.C. § 8905a(b) (1988) (enunciating classes of people covered by the Federal Employee Continued Coverage Act).

ued coverage.[227] Unlike COBRA, Congress and the Office of Personnel Management[228] made a clear attempt to define gross misconduct for purposes of FEHBAA.[229] This definition was included in the regulations published the year following FEHBAA's enactment.[230]

The regulations define gross misconduct as a "flagrant and extreme transgression of law or established rule of action for which an employee is separated and concerning which a judicial or administrative finding of gross misconduct has been made."[231] The regulations explain that the definition was drawn from the understanding of gross misconduct in the legal community, and that gross misconduct includes felonies and, possibly, lesser criminal offenses.[232] In addition to the gravity of an offense, the determination of gross misconduct involves consideration of: 1) the nexus between the offense and the employee's job;[233] 2) the employee's ability to comprehend the gravity of his actions;[234] and 3) whether the offense was affirmative and willful, not just negligent.[235] The regulations also provide that certain individuals, such as judges, will be held to higher standards of conduct.[236]

Thus, FEHBAA offers additional insight for employers in search of a good faith, uniform definition of gross misconduct.

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227. *Id.* § 8905a(b)(1)(A).

228. *Id.* § 8905a(f) (stating that the Office of Personnel Management (OPM) is directed to issue regulations); *see also* H.R. REP. NO. 917, *supra* note 224, at 2-10 (indicating the authority of the OPM to issue regulations).

229. Federal Employees Health Benefits Program, 5 C.F.R. § 890.1102 (1992) (defining gross misconduct for purposes of Federal Employees Health Benefits Program - Temporary Continuation of Coverage).

230. *Id.*

231. *Id.*

232. 54 Fed. Reg. 52,333, 52,333 (1989).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* Different definitions have been developed based on an employee's position. *See, e.g.*, Avina v. Texas Pig Stands, Inc., No. SA-88-CA-13, 1991 U.S. Dist. LEXIS 13957 (W.D. Tex. Feb. 1, 1991) (discussed in the text accompanying *supra* notes 133-40). Under corporate law, gross misconduct might include "concepts of an officer's abuse of power, bad faith, willful abuse of discretion, or positive fraud." John v. John, 450 N.W.2d 795, 801 (Wis. Ct. App. 1989), *cert. denied*, 111 S. Ct. 53 (1990). In *John*, an officer of a nonprofit corporation who engaged in self-dealing was guilty of gross misconduct. *Id.* at 802. Gross misconduct might also be found by intentional wrongdoing or failure to act within the officer's duties to the corporation. *Id.* at 801.

3. Option Three — COBRA Amendments or Explanatory Regulations

The third option is for Congress to amend COBRA to include a uniform statutory definition of gross misconduct and to pressure the IRS to issue regulations providing substantive guidelines specifically addressing gross misconduct. The need for a uniform definition and for uniform application of ERISA, as amended by COBRA, finds support both in the language of ERISA[237] and in its interpretation by the United States Supreme Court in *FMC Corp. v. Holliday*.[238]

Generally, state laws which "relate to" employee benefit plans are preempted by ERISA.[239] A state law relates to employee benefit plans if it has a "connection with" or makes "reference to" such plans.[240] Thus the ERISA preemption clause provides that the subject of any state law which relates to an ERISA employee benefit plan falls under exclusive federal concern.[241] An exception to this rule is the "savings clause."[242] This clause returns to states the power to enforce state laws which relate to employee benefits but also regulate insurance.[243] The savings clause applies to every "insurance company or other insurer, bank, trust company, or investment company" that is "engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies."[244] It does not, however, include self-insured employee benefit plans or any trusts established under such plans.[245] ERISA retains power over self-insured plans under an ex-

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237. 29 U.S.C. § 1144(a) (1988); ERISA § 514(a) (stating the preemption provision).

238. 111 S. Ct. 403, 408 (1990) (holding that ERISA's preemption clause should be applied to ensure that benefit plans are governed by a single set of regulations as opposed to various and numerous state regulations).

239. 29 U.S.C. § 1144(a); ERISA § 514(a).

240. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983) (holding that New York's Human Rights Law is preempted by ERISA).

241. *FMC Corp.*, 111 S. Ct. at 407 (holding that the Pennsylvania Motor Vehicle Financial Responsibility Law is preempted by ERISA in so far as the law precludes reimbursement to a self-funded employer health plan from a claimant's tort recovery); *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-47 (1987) (holding that ERISA preempts a claimant's suit under state common law for alleged improper handling of his claim for benefits under ERISA); *Shaw*, 463 U.S. at 91 (holding that ERISA preempts New York's Human Rights Law).

242. 29 U.S.C. § 1144(b)(2)(A); ERISA, § 514(b)(2)(A); *see FMC Corp.*, 111 S. Ct. at 407; *see also* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 733 (1985).

243. *FMC Corp.*, 111 S. Ct. at 407.

244. *See* 29 U.S.C. § 1144(b)(2)(B); ERISA § 514(b)(2)(B).

245. *See* 29 U.S.C. § 1144 (b)(2)(B); ERISA § 514(b)(2)(B). *See also Metropolitan Life Ins. Co.*, 471 U.S. at 733-35.

ception to the savings clause exception. This is known as the "deemer clause."[246]

A major purpose behind the preemption clause is best explained in the resulting case law on the issue. In *FMC Corp. v. Holliday*, the Supreme Court stated that the purpose behind the ERISA preemption is to promote uniformity and circumvent the frustration of employee benefit plan administrators administering ERISA plans nationwide.[247] Where a " 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation,' "[248] the Court has applied ERISA's preemption clause "to ensure that benefit plans will be governed by only a single set of regulations."[249] The Court stated that ERISA employee benefit plans should be governed by a single set of regulations.[250] A uniform definition of gross misconduct would help to ensure that ERISA is administered as the Supreme Court says it should be.

Having detailed the three proposed options, and in light of the Supreme Court's likely endorsement of uniformity, this Comment next suggests why this option is the appropriate solution.

II. ANALYSIS

This Comment's position is that the best solution for employers is the third option: Congress should amend COBRA by adding a uniform definition of gross misconduct or, at the very least, should require the IRS to issue substantive regulatory guidelines for determining what conduct constitutes gross misconduct.

Most employers are subject to COBRA. Essentially, only employers who do not offer group health benefits or who maintain a workforce of fewer than twenty employees on a typical business day are not subject to COBRA.[251] Employers subject to COBRA must either comply or suffer the consequences.[252] Without additional guidance, an employer who incorrectly believes it is in compliance

246. 29 U.S.C. §1144(b)(2)(A); ERISA § 514(b)(2)(A). *See FMC Corp.*, 111 S. Ct. at 409.

247. *FMC Corp.*, 111 S. Ct. at 408-09; *see also* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10 (1987) (holding that to require employee benefit plan providers to design their programs in an "environment of differing state regulations" would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits (citing Shaw v. Delta Airlines, Inc., 463 U.S., 85, 105 n.25 (1983))).

248. *FMC Corp.*, 111 S. Ct. at 408 (quoting *Fort Halifax Packing Co.*, 482 U.S. at 11).

249. *Id.*

250. *Id.*

251. 29 U.S.C. § 1161.

252. *See supra* notes 74-77.

may suffer these negative consequences even if its belief was in good faith.

COBRA is a comprehensive piece of legislation which places extensive administrative costs on most employers. These costs include tracking and notifying qualified beneficiaries as well as the costs involved in providing the continued health benefits.[253] Although qualified beneficiaries may be required to pay 102% of the group rate, it is unlikely that the extra 2% is sufficient to cover these administrative costs.[254] Further, the potential exists for adverse selection against the plan.[255] For example, qualified beneficiaries may elect COBRA for the purpose of visiting all those doctors they were *meaning* to see before the qualifying event but did not get around to seeing. Such a qualified beneficiary could stock up large insurance bills during the period of COBRA coverage, realizing the coverage is limited and alternative coverage may not be available.

Once subject to COBRA, there are few provisions that allow the employer to deny continued health coverage. On its face, the gross misconduct provision appears to give employers some discretion to limit coverage. In practice, in light of the fact that gross misconduct remains undefined, it is not clear how much discretion, if any, an employer really possesses. Without a statutory definition or explanatory regulations, a decision to utilize this provision presents a potentially costly risk to employers. If an employee or the Department of Labor successfully challenges the employer's definition of gross misconduct, retroactive coverage to wrongly denied beneficiaries and noncompliance sanctions may be imposed upon the employer.[256]

Employers can find little comfort in the fact that they are required to merely operate in good faith compliance with a reasonable interpretation of the statutory requirements and regulations.[257] As the employers in *Dayton-Hudson*[258] and *Paris*[259] discovered, an at-

253. Robert M. Howard, *The Terminated Employee's Right to Continue Group Health Insurance*, 17 COLO. LAW. 53, 54-55 (1988).

254. *Id.* at 54.

255. Adverse selection is defined as the "tendency of an individual to recognize his or her health status in selecting the option under a retirement system or insurance plan that tends to be most favorable to him or her (and more costly to the plan)." EMPLOYEE BENEFIT PLANS: A GLOSSARY OF TERMS (June M. Lehman ed., 6th ed. 1990).

256. *See supra* notes 74-77 and accompanying text (discussing possible sanctions for noncompliance).

257. H.R. REP. NO. 241, *supra* note 14, at 4-7.

258. Dole v. Dayton-Hudson Corp., No. 89-1901-Z (D. Mass. filed Aug. 31, 1989).

259. Paris v. F. Korbel & Bros., 751 F.Supp. 834, 838-39 (N.D. Cal. 1990).

tempt at a good faith, reasonable interpretation of gross misconduct may not be sufficient.

Congress's initial failure to provide guidance may be rationalized by the fact that the original legislation behind COBRA was not intended to provide coverage to voluntarily or involuntarily terminated employees.[260] Coverage of terminated employees was introduced late in the process, unaccompanied by any explanation.[261] The replacement of the terminated "for cause" provision with the terminated for "gross misconduct" provision also took place without discussion or explanation.[262] Nonetheless, since COBRA's introduction in 1985, and its enactment in 1986, Congress has had ample opportunity to fill this void by including guidance in any of the several post-1985 COBRA amendments.[263] Without specific documented legislative history, it is difficult to know for sure what Congress intended.[264] Unfortunately for employers, regardless of whether Congress thought about its meaning or impact, the term "gross misconduct" was included in the bill and was enacted into law. COBRA became effective generally for plan years beginning on or after July 16, 1986. Guidance is long overdue.

It is common for a law to state a rule and provide little or no implementation guidance. In such cases, the parties subject to the law generally must rely on judicial interpretation of the law. However, because the case law is so limited in this specific area, an employer trying to apply the gross misconduct provision may need to turn to other options for interpreting its meaning. A discussion of the appropriateness of these options follows, moving away from reliance on an employer-selected good faith definition, toward a single, uniform definition.

A. Employer-by-Employer Definitions

The first option, relying on dictionary definitions of gross and mis-

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260. H.R. 21, *supra* note 19; S. 1632, *supra* note 19. *See supra* notes 29-41 and accompanying text (discussing the original bills which introduced continued employer-provided health care to certain spouses and dependent children of covered employees).

261. *See supra* notes 44-46 and accompanying text (discussing how the proposal that terminated "for cause" employees not qualify for benefits was later replaced by the requirement that they be terminated for gross misconduct).

262. H.R. REP. NO. 453, *supra* note 8, at 564-65.

263. *See supra* note 88 and accompanying text (discussing five acts passed since enactment of COBRA amending various provisions of COBRA).

264. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 154-62 (1975).

conduct, can be dismissed quickly. Common sense tells us that if applied consistently, this approach should satisfy the good faith interpretation requirement. In fact, this appears to have been the approach taken in *Avina v. Texas Pig Stands, Inc.*,[265] where the court defined gross misconduct for managerial employees as the "substantial deviation from the high standards and obligations of a managerial employee that would indicate that said employee cannot be entrusted with his management duties without danger to the employer."[266] Similarly, the Office of Personnel Management (OPM) stated in its regulations to FEHBAA that the definition drafted for gross misconduct was drawn from the meaning the term has in the legal community.[267] However, it is one thing for a federal office to rely on a dictionary definition or common usage to arrive at a uniform definition all public employers must follow; it is another for affected employers to do the same, thereby arriving at their own, separate definitions. The IRS should provide guidance for employers affected by COBRA as the OPM did for federal employers affected by FEHBAA.

Relying on dictionary definitions is more appropriate for a legislator drafting a statutory definition than it is for individual employers. The dictionary, though helpful, is not a primary source of authority on which employers may rely, as are statutes and regulations drafted or authorized by Congress. Further, this approach does not offer any real guidance since employers would still need to determine which conduct Congress intended to constitute gross misconduct.

B. State-by-State Definitions

The second option, looking to analogous areas of law to arrive at a good faith interpretation of gross misconduct, was the approach suggested by *Dayton-Hudson Corp.*,[268] and endorsed in California in *Paris*[269] and *Adkins*.[270] The conclusion of the *Paris* court, that looking to state unemployment insurance laws is a better approach than relying on an employer's good faith interpretation,[271] also sup-

265. No. SA-88-CA-13, 1991 U.S. Dist. LEXIS 13957 (W.D. Tex. Feb. 1, 1991).
266. *Id.* at *5.
267. 54 Fed. Reg. 52,333, 52,533 (1989).
268. No. 89-1901-Z (D.Mass. filed Aug. 31, 1989).
269. 751 F. Supp. at 834, 838 (N.D. Cal. 1990).
270. No. C91-0087BAC, 1992 U.S. Dist. LEXIS 4719, at *11 (N.D. Cal. 1992).
271. *Paris*, 751 F. Supp. at 838.

ports the use of a uniform definition, at least within the state. The *Paris* court presented a convincing argument for relying on state unemployment insurance law, focusing on the undeniably parallel purposes behind providing unemployment income and providing continued health benefits.[272] Both serve to protect an employee during a period of unemployment — COBRA as to continued health coverage and state unemployment insurance as to continued income. The rationale for relying on unemployment insurance law exists, but it is not free of problems.

As the discussion on state unemployment insurance laws demonstrates,[273] states do not agree on what acts constitute misconduct or gross misconduct justifying unemployment insurance disqualification. Most states require some degree of misconduct,[274] but some only require just cause.[275] Even the definitions that appear facially similar may be applied differently. Among the states requiring the higher standard of willful or deliberate misconduct, differing degrees of severity may be required. Usually, but not always, conduct must be harmful to the employer's interest, connected to the employee's job, or both.[276] While one act of misconduct may be sufficient for benefit disqualification in some states, it may be insufficient in others.[277] The states also differ as to the required amount of investigation into the conduct (e.g., as to an employee's state of mind, any mitigating considerations, or good faith on the part of the employee),[278] the amount of harm to an employer's interest, and the relation of outside actions to the workplace. Some states require that the severity of the act be tantamount to a criminal offense,[279] while others merely require a violation of a reasonable work rule which directly or indirectly harms an employer's interest.[280] For in-

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272. *Id.*

273. *See supra* notes 143-225 and accompanying text.

274. *See supra* notes 146-50 and accompanying text.

275. *See supra* note 220 and accompanying text (noting that Colorado, Ohio, and Utah require only just cause for disqualification).

276. *See supra* notes 169-74, 197-207 and accompanying text (discussing that some states require that the misconduct be harmful to the employer's interest and/or that it be connected with work).

277. *See supra* notes 214-22 and accompanying text (discussing how in some states one act of misconduct may be adequate while in others inadequate).

278. *See supra* notes 175-84 and accompanying text (discussing additional considerations courts evaluate in determining disqualification).

279. *See supra* note 213 and accompanying text.

280. *See supra* notes 197-98 and accompanying text (discussing New York's unemployment law).

stance, recall the hostess-cashier in *Rowe v. Hansen* whose refusal (in front of customers) to wear a sweater was determined to constitute sufficient harm to the employer's interest to disqualify her for unemployment insurance.[281] If the same case arose in New York, the court would likely have found this action sufficient cause for discharge, but insufficient to justify disqualification for employment insurance benefits.[282]

Therefore, a major problem in relying on state unemployment insurance law is the inherent inconsistency among states. Employees residing in different states, terminated for the same reasons, will be treated differently. Employees of the same nationwide employer, terminated for essentially the same reason, may or may not receive unemployment insurance, again, depending on the state in which they were employed. This problem provides one of the strongest arguments in favor of the third option, a single uniform definition.

The second area of analogous law discussed, FEHBAA,[283] provides further support for a single uniform definition. The regulations to the Act provide a single, statutory definition of gross misconduct.[284] Unlike the suggestions of some early commentators on COBRA, regulations promulgated under FEHBAA, a law intended to mirror COBRA, do *not* state that an employee's actions need be "almost criminal."[285] Rather, according to the regulations, an act constitutes gross misconduct if it is a "flagrant and extreme transgression of law *or established rule* of action for which an employee is separated and concerning which a judicial or administrative finding of gross misconduct has been made."[286]

This definition is certainly useful, but it should not be lifted verbatim and incorporated into COBRA. Public and private sector employees are not traditionally treated identically.[287] COBRA, for in-

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281. *See supra* notes 169-74 and accompanying text (discussing a California court holding in which conduct was found to be willful).

282. *See supra* notes 191-96 and accompanying text (discussing how discharge for just cause in New York may not rise to the level of misconduct justifying disqualification).

283. H.R. REP. NO. 917, *supra* note 224, at 1.

284. Federal Employees Health Benefits Program, 5 C.F.R. § 890.1102 (1992).

285. *See* 54 Fed. Reg. 52,333, 52,333 (1989); *see also supra* notes 231-36 and accompanying text (discussing how gross misconduct under FEHBAA may include felonies and lesser criminal offenses).

286. Federal Employees Health Benefits Program, 5 C.F.R. § 890.1102 (1992) (emphasis added).

287. COBRA, as applied to state and local government employees, is governed by the Public Health and Safety Act and the Department of Health and Human Services. *See supra* notes 3-8 and accompanying text.

stance, does not require a judicial or administrative finding of gross misconduct. Public employment is more similar to private union employment in that public employers are generally subject to greater restrictions and tighter regulation, such as progressive discipline and discharge procedures.[288] Private employers, on the other hand, although subject to ERISA,[289] Title VII,[290] ADEA,[291] and the like, are not subject to progressive discipline and discharge procedures[292] and therefore are given greater discretion over employment decisions. For example, the regulations of FEHBAA call for a judicial or administrative determination of gross misconduct.[293] This requirement is not applicable to private employers.[294] As a result, any statutory or regulatory amendment to COBRA should be designed specifically for the private employer.[295] The solution, therefore, is to gain insight from the first and second options, and to pursue the third option.

C. *A Single Uniform Definition*

In pursuit of the third option, a single uniform definition of gross misconduct under COBRA, employers should lobby Congress to amend COBRA by adding a uniform definition of gross misconduct or requiring the IRS to issue substantive regulatory guidance for determining what conduct constitutes gross misconduct.

Allowing, or essentially requiring, administrators of ERISA employee benefits plans to rely on state law contradicts the broad holding of the Supreme Court in *FMC Corp. v. Holliday*.[296] In *FMC*

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288. FRANK ELKOURT & EDNA ASPET ELKOURT, HOW ARBITRATION WORKS 632-34 (3d ed. 1973) (discussing due process and procedural requirements in the context of discharge and discipline).

289. 29 U.S.C. § 1145; ERISA § 515.

290. 42 U.S.C. § 2000e (1988).

291. 29 U.S.C. § 623 (1988).

292. An exception would be when an employer puts into place discipline and discharge procedures on which employees may rely.

293. Federal Employees Health Benefits Program, 5 C.F.R. § 890.1102.

294. *See supra* notes 226-33 (discussing how FEHBAA and its regulations are applicable to federal employees only).

295. It would be appropriate for the state and local employers to adopt the definition of gross misconduct provided under FEHBAA. Federal employment is, of course, more similar to state and local government employment than that of private employment. COBRA amended both ERISA and PHSA, the latter affecting local employees. *See supra* notes 3-8 and accompanying text. Therefore, separate regulations and, thus, definitions of gross misconduct would be appropriate.

296. 111 S. Ct. 403, 403 (1990); *see supra* notes 250-53 and accompanying text (discussing how ERISA requires that benefit plans be governed by a single set of regulations and not by the patchwork system of regulation created by state unemployment law).

Corp., the Supreme Court stated that the purpose behind the ERISA preemption clause is to promote uniformity and circumvent the frustration of employee benefit plan administrators administering ERISA plans nationwide.[297] Therefore, to avoid a "patchwork scheme" which would result in "considerable inefficiencies in benefit program operation,"[298] ERISA's preemption clause should be enforced "to ensure that benefit plans will be governed by only a single set of regulations."[299] The Court specifically stated that ERISA employee benefit plans should be governed by a single set of regulations.[300]

Although the savings clause exception to state law preemption returns jurisdiction over insured employee benefit plans to the states, under the deemer clause, self-insured employee benefit plans are still exempt.[301] COBRA does not distinguish between insured and self-insured group health plans.[302] Therefore, an inconsistency might result if state laws were relied upon. For example, assume two employees reside in the same state and work for the same employer. Assume also that one is covered under an insured health maintenance organization and the other is covered under a self-insured traditional indemnity plan. Without a uniform definition, two separate definitions may result, even though COBRA did not anticipate a distinction based on how the group health plan was insured. If both employees were allegedly terminated for the same gross misconduct, one determination might be based on the state's unemployment law while the other might be based on the employer's own definition of gross misconduct. Clearly this would present a situation in conflict with the Supreme Court's position favoring uniformity and circumventing the frustration of employee benefit plan administrators implementing ERISA plans.[303]

Unfortunately, the reality is that Congress is not likely to act with due diligence on such a plea by private employers. Therefore, it

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297. 111 S. Ct. at 408.

298. *Id.* (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987)).

299. *Id.*

300. *Id.*

301. *See supra* notes 245-49 and accompanying text (discussing how the savings clause returns to states the power to enforce state laws regulating insurance while ERISA retains power over self-insured plans under the deemer clause).

302. *See* 29 U.S.C. § 1161 (1988) (subjecting both insured and self-insured plans to COBRA).

303. *See supra* notes 250-53 and accompanying text (discussing how ERISA requires that benefit plans be governed by a single set of regulations and not by the patchwork system of regulation created by state unemployment law).

would be in the best interest of such employers to approach Congress armed with a proposed definition.[304] With this in mind, a suggested uniform definition of gross misconduct, as well as regulatory language for private employers, is included in the Appendix.

CONCLUSION

Just as Congress saw fit to include a definition in FEHBAA and the Office of Personnel Management issued regulations interpreting the gross misconduct provision for federal employers,[305] Congress and the IRS should do the same for private employers attempting in good faith to comply with COBRA.

Again, the nature of this option, getting Congress or the IRS to act, does not present a realistic solution in the short term. For now, a consistent application of a definition like the one included in the Appendix should satisfy COBRA's good faith compliance requirement, and should provide employers with a clearer concept of what is meant by gross misconduct.

Carol M. Hines

304. In *United States R.R. Bd. v. Fritz*, when the Railroad Retirement Board was threatened with insolvency, representatives of the union and the railroads drafted a plan for changing the retirement benefit qualification and distribution requirements, and then took their plan to Congress, which enacted it into law. 449 U.S. 166, 179 (1980) (stating that the manner in which the legislation was enacted was constitutional).

305. *See supra* notes 230-39 and accompanying text (discussing Congress's definition of gross misconduct and the OPM's determination that the definition is drawn from its meaning in the legal community).

APPENDIX

I. Proposed Amendment to Statutory Language of COBRA

Add to 29 U.S.C. § 1167, Definition and Special Rules:

(6) Gross Misconduct

(A) In General

The term "gross misconduct" means a flagrant, deliberate, or willful act by an employee in violation of the law or established reasonable rule, policy, or procedure of the workplace which results in such employee's termination.

(B) In Addition, (i) a connection must exist between the gross misconduct and the employee's job; however, acts outside the workplace may constitute gross misconduct for purposes of the Act where an employer's interest is adversely affected; and (ii) the average employee must be able to understand or be on notice concerning the consequences of the act(s) in question.

(C) An act(s) of negligence or carelessness does not constitute gross misconduct unless excessive and adverse to an employer's interest(s) and unless the employee was sufficiently warned.

II. Proposed Amendment to the June 15, 1987 Proposed Rules

Add to Question & Answer 15 in (c) after 11, . . . of the covered employee's employment:

In general, the term "gross misconduct" refers to a flagrant, deliberate, or willful act by an employee in violation of the law or established reasonable rule, policy, or procedure of the workplace which results in such employee's termination.

Examples

Gross Misconduct:

(1) An employee is terminated for committing a felony upon another employee or the employer during work. Termination based on such an act is for gross misconduct.

(2) A regional bank manager is terminated for committing theft away from work. Termination based on this act is for gross misconduct. Although the act took place away from work, it is adverse to the employer's interest in having a trustworthy managerial employee in a position of responsibility.

(3) An employee with access to employer trade secrets is terminated for knowingly selling such secrets. Termination based on this

act is for gross misconduct. The act was done in willful disregard of the employer's interests.

NOT Gross Misconduct:

(1) An employee is terminated for high absenteeism. Termination based on this does not constitute gross misconduct.

(2) A truck driver is terminated for refusing to accept a trucking assignment. Termination based on this act may be just cause to terminate but does not constitute gross misconduct.

(3) An employee is aware of the employer's termination policy for breach of confidence and is terminated for such a breach. Termination based on an act of negligence or poor judgment does not constitute gross misconduct.