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Practical Steps for Addressing Theft in the Workplace

by Robert A. Berry

*Therefore, since the world has still
Much good, but much less good than ill,
And while the sun and moon endure
Luck's a chance, but trouble's sure,
I'd face it as a wise man would,
And train for ill and not for good.*

– A. E. Housman
“A Shropshire Lad, Poem LXII” (1896)

Business is tough. It's even harder in today's climate and that's assuming all of your employees are working for the good of the business. Unfortunately, that's not always the case. It may be a valued and trusted employee with many years of dedicated service or it may be someone new or temporary. Either way, it's the same end result: the employee is working for the good of themselves and has stolen from the company.

Recognizing Theft by an Employee

Mava Terhaar was an employee of the Elmore County Department of Motor Vehicles. She had been employed by the agency since 1987. In April 2010, she pleaded guilty to embezzlement (a type of theft). Over the prior nine years, she had taken cash receipts for state license plates or tags, voided out the listed payments, and then pocketed the remainder. She embezzled over \$270,000.

Tammy Law was a Collections Manager at Pioneer Federal Credit Union in Mountain Home, Idaho. She was a 13 year employee who had worked her way up from a teller position. She used her knowledge of credit union procedures and the authority of her managerial position to defraud the credit union of almost half a million dollars through various complex schemes over the course of 8 years. One of those schemes included submitting altered invoices to cause hundreds of checks to be written on the credit union, payable to a vendor located in Twin Falls. Ms. Law would then cash the checks at a local check cashing facility.

By its very nature, employee theft is not easily discoverable. Employee theft is broad and may involve company property, property that is for sale to the consumer, and may even include cash or cash equivalents. As the stories above demonstrate, theft may not be discovered until years after it has begun and someone follows a hunch or finds an irregularity. The most likely reason for this is because the company lacked operational standards or internal controls to protect itself. If such precautionary standards are not in place, then they should be developed. Without detailing all the precautionary steps to take, the following are ways to either prevent or discover theft or fraud of cash or cash equivalents within the workplace.

- *Lock up all checks and deposit slips. Store trust account checks and deposit slips separately from your operating account. This should make it more difficult to steal and lessen the chance of mistakenly writing a check on or making a deposit to the wrong account.*
- *Require supporting documentation when signing checks or authorizing transactions. Question check requests for any vendor whose name you don't recognize.*
- *Follow check-writing procedures. Scrutinize everything, including requests for "rush" signatures to meet accounting or court deadlines. Never sign a blank check.*
- *Limit the amount of petty cash on hand. Establish procedures for reimbursement, require original detailed receipts, and use standardized forms.*
- *If you need to move funds from one account to another, write a check payable to the specific account you wish to transfer funds to and not to your bank. Checks made payable to your bank can be deposited into a thief's personal account.*
- *When the bank statement arrives, examine transactions for any irregularities. Verify that deposits were made timely and that no deposits were reduced by cash returned to the person making the deposit. Make note of any missing checks or breaks in check sequence and investigate.*
- *Review financial statements, or their equivalent, at least quarterly for any radical changes in expenditures. Look long and hard at categories such as payroll or office expense.*
- *Conduct periodic audits. If you uncover missing or altered documents or "past due" notices for bills that should have been paid, investigate. Amounts credited to clients on billing statements should match funds collected.*
- *Know your people. Run background checks and call references.*
- *Know the people where you bank. Talk to the branch manager about your normal banking needs, as well as activity that would be unusual for your type of practice. Ask the bank to notify you of any suspicious teller transactions.*
- *Separate and rotate accounting duties if staff size allows. Centralized accounting responsibilities make it more difficult to detect theft or other problems. Payroll in particular should be scrutinized by someone other than the person responsible for cutting the payroll checks. One option is to hire a reputable payroll or bookkeeping service. Consult a CPA firm for help with setting up proper controls and accounting procedures.*

For a more detailed and excellent list, please see Beverly Michaelis, *How a Partner or Employee Can Steal from Your Firm*, OR. ST. B. BULL., Jan. 2010, at 34. Obviously, the above examples only concern cash or cash equivalents, but similar practices may be adopted for addressing theft of property.

Employer Options When Theft Is Suspected

Instituting internal controls such as those provided above should help employers identify irregularities within the business. Identification of an irregularity may or may not be actual theft. However, if an employer has such suspicions, then the employer must consider the available actions and potential repercussions. The employer should take one of three actions: 1) place the employee on administrative leave; 2) suspend the employee from the workplace and not permit their return until the initial investigation into the scope of the theft or dishonesty is completed; 3) transfer the employee to another location. It is critical that immediate action be taken upon discovery of facts giving rise to belief that theft has occurred.

Investigating Potential Workplace Theft

An employer should already have an employee handbook in place. The handbook is a statement of the policies of the business and how business is to be conducted. It sets forth the company's expectations for an employee, and it also describes what employees can expect from the company. The handbook should note that an employee could be investigated by the company if the employee is suspected of failing to uphold the expectations

contained within the handbook. The handbook should address employee dishonesty and theft and set parameters as to conduct that falls into such categories. The handbook should also address any consequences that may arise.

An example of a property theft prevention policy within an employee handbook follows:

THEFT: Internal theft is a serious problem for many businesses. Although taking small items of company property may seem inconsequential, the cumulative effect can be very large. Stealing from ABC, Inc. is like stealing from yourself. Losses from theft immediately affect our ability to increase salaries and can jeopardize the profitability of ABC, Inc. ABC, Inc. will not tolerate property theft of any type. We consider property theft to include the unauthorized use of company services or facilities or the taking of any company property for personal use. Violators of this policy will be subjected to disciplinary action, up to and including possible discharge and prosecution.

Disciplining Employees for Theft

The obvious first thought when an employer confirms that an employee has committed theft is termination. In practically every circumstance, such a decision likely is justified. However, there are instances when mitigating factors should be considered. First, the employer may have approved or was in some way involved in the dishonest behavior. Second, the employee may have a long, unblemished work record and the theft or dishonest behavior is not grand in the big scope of things.

The first situation may arise where the employer has a dishonesty policy that is selectively enforced. To borrow from the example theft provision above, an employer should likely not terminate an employee where the employer is aware of previous instances of theft of small items. In such a scenario, an employee could defend his or her actions on the basis that the employer's decision to terminate was arbitrary.

The second situation may arise where the employee has served the company for years without problem. Usually, the personnel file is clean and the employee has no reported problems or violations. In such a situation, there may be an external factor causing the employee to deviate from his normal patterns. Or, the mishap may be minimal, such as the theft of a bag of chips. Whatever it is, discharge or termination of the employee may simply not be worth the costs of replacing and training a new employee. With proper monitoring and guidance, the retained employee could be even more valuable than before the mishap.

Terminating an Employee for Theft

While Idaho is an "at-will" state (meaning, in its broadest sense, that an employer or employee may choose to part ways on a moment's notice) employers should always be aware of the potential for lawsuits. An employer will have to examine whether any special liability exists, such as whether the employee is a member of a protected class or is currently on disability, is pregnant or is ill. Employers may face charges of discrimination, wrongful discharge, defamation, intentional infliction of emotional distress, false imprisonment and assault should the employer follow through with terminating the employee. An employer may also face an unemployment claim filed by the terminated employee.

An employer should take seriously the charges relating to defamation. Defamation is making a public statement about an employee despite knowing that the statement is false. Employees have a right to expect that their reputation and good name will not be unnecessarily blackened or tarnished during an investigation. As such, an employer investigating a suspected theft should take care to ensure that the investigation remains confidential. Only those people who need to know should be provided with information about the proceeding.

Another factor to consider is unemployment compensation. Generally, an employer is not responsible for unemployment compensation where the former employer was discharged for "misconduct" in connection with

his employment. Misconduct may take several forms, but theft generally is regarded as misconduct. The Idaho Supreme Court has upheld the Idaho State Industrial Commission's ruling that theft by an employee is a deliberate disregard of an employer's interest and constitutes misconduct. Still, an employer should conduct a thorough and reasonable investigation as discussed above, which should present a good case and defense for unemployment benefits, should the discharged employee make such a claim.

After Theft and Discharge, What Next?

An employer has several options available to address an employee's theft. The employer may sue the employee, or the employer may allow the police to investigate and bring criminal charges against an employee and hope that the court issues an order for restitution. An employer may also seek to have any losses attributable to the theft be covered through insurance.

An Employer May Sue the former Employee

Where theft by an employee has been shown, an employer may sue an employee. The claims that may be asserted include conversion and unjust enrichment. These actions are not based on a breach of any employee contract. Both essentially seek to recover the value of the item wrongfully taken by the employee. Benefits to pursuing civil relief include legal counsel's ability to ask a court to freeze an embezzler's bank accounts and other assets to secure an eventual judgment.

An Employer May Recover from a Criminal Conviction

Local law enforcement officials may investigate an employee's workplace theft. The investigation may result in criminal charges, and that employee may be found guilty. If an employee is found guilty of theft, the court may order restitution (repayment) of the stolen money as part of the sentencing. The court will order restitution if it serves to rehabilitate the offender, compensate the victim, and if there is no other compensation available. Of note, the potential to sue civilly does not destroy the ability to obtain restitution. If the discharged employee fails to make a restitution payment in accordance with the court's order, he or she may be additionally prosecuted for contempt of court.

An Employer May Recover Through Insurance

Finally, one other means of recovery is through insurance. Employers can and should insure their company from dishonest employees. Employee dishonesty insurance may also sometimes be called crime coverage, employee dishonesty bond, fidelity bond and crime fidelity insurance. These policies protect the employer from financial loss due to the fraudulent activities of an employee or group of employees. The loss can be the result of the employee's theft of money, securities, or other property of the employer. It generally protects an employer from all current or former employees, partners, members, directors, volunteers, trustees, seasonal employees and temporary persons at your direction and control. It generally excludes accounting errors, vandalism, and governmental action, such as seizure of the property. Coverage may also be limited to employees and not cover partners or owners.

Employee dishonesty policies have some disadvantages, which may be that the policy limits could be insufficient to cover real losses. Terms, conditions and exclusions may limit coverage and only cover employee dishonesty losses marginally. Additionally, proving any losses and recovering under the policy may be difficult due to "inventory computation" provisions. Generally, such provisions do not allow an employer to prove theft or loss through inventory records. Despite this, recent decisions tend to allow an inference of employee dishonesty to be drawn from relatively thin circumstantial evidence and then to permit the full extent of the losses to be proven by inventory comparisons.

Concluding Thoughts

An employer should reevaluate existing internal controls to detect dishonest behavior within the business. If an employer does not have existing internal controls, then they should be developed and adopted. At the same time, an employer should revisit its employee handbook to determine whether it adequately reflects company policy on the issues of dishonesty or theft. If an employer suspects that an employee has committed theft, then the situation should be handled with care in light of potential liability issues. Once enough evidence is obtained to make a formal decision, such as terminating the employee, then an employer should analyze and determine whether it's worth it to proceed against the former employee and attempt to obtain some form of recovery.

Not every employee is a thief or dishonest. It's just that the wisdom of A. E. Housman stands as good today as it did back in 1896. It's best to prepare for the worst because "luck's a chance, but trouble's sure."