

You've Caught a **Thief** Amongst You— *What Now?*

Options Available to Employers in Attempting to Recover from Employee Theft

by **Douglas B. Kauffman**

The United States Chamber of Commerce estimates that loss from employee theft is over \$20 billion per year. Virtually every employer is faced with the harsh reality that some employees will steal if given the opportunity. A proper investigation designed to collect the necessary evidence and prove guilt is always the first step. However, the adventure does not end when the suspect is fingered. Just like the old adage goes, once the dog catches the car, what does it do with it? Likewise, after an employer has performed a proper investigation and has

convincing proof of the theft, what are the employer's options to legally recover what has been wrongfully taken from it? Often these decisions must be made quickly due to the individual's immediate pending discharge from employment. Employers often seek help from their attorneys on the best course of action to take, but sometimes the answers are not always clear. This article discusses some of the options available to employers to recover from current and former employees who have stolen, embezzled or misappropriated money or property.



One Option Really Is To Do Nothing

When faced with the risks associated with other options, some employers prefer to let it go and do nothing, other than perhaps re-examine internal controls or audit practices in an attempt to avoid any further similar losses in the future.

Generally, there is no legal obligation requiring an employer to collect or otherwise pursue money or property that has been stolen by its employees or former employees. Of course, an issue involving millions of dollars or an officer of a public company may require specific action and should be more closely and specifically examined. Further, in the event of insurance coverage for the loss, the applicable insurance policy should be reviewed to determine if the company must make certain attempts to collect prior to recovering any insurance funds. However, absent these or other unusual circumstances compelling some obligation to attempt to recover lost amounts, a decision as to whether to attempt to recover the loss most likely will be completely up to the discretion of the employer. Even in the corporate law context, such decisions fall under the business judgment rule, meaning that the courts will not second-guess the company's decision as long as there is a rational basis for the decision. *See, e.g., Hensley v. Poole*, 910 So. 2d 96, 104 (Ala. 2005) (stating Alabama's business judgment rule). Regardless, a company should consider and discuss all the relevant business factors and issues relating to its options before making a decision to do nothing, to avoid an appearance that the decision is something other than a legitimate business decision.

Give It Back Or Else

An employer may request immediate restitution from an employee or former employee who owes it money. In addition, there are few risks with an employer expressing its plans to explore its civil legal options to recover from the individual, assuming that the employer in fact has probable cause to believe such money is legally owed. However, an employer should avoid telling the employee that the decision as to whether to press criminal charges is dependent on the employee's restitution or agreement to pay restitution. *See Ala. Code* §§ 13A-8-1(13)e, -13, -15 (defining extortion in part as knowingly obtaining control over the property of another by threatening the institution of criminal charges). Further, it is not a good employment practice in general to threaten to discharge the employee unless the employee makes restitution, because the decision to

terminate employment, which is often a given in these situations, should not be dependent on whether the money is repaid.

Make A Deal With The Devil

In reaching a written agreement with an employee to repay what he or she has wrongfully taken, the use of a promissory note or other type of restitution agreement is helpful, so that if the employee defaults on payments, the matter may be more easily pursued in court without the need to prove the underlying debt is owed. However, prior to making an agreement with the employee to make restitution, the employer should be confident that it knows the full amount of financial loss at issue. An agreement to accept an amount from the employee as restitution may prevent the employer from later asserting that the employee owes more than the initial agreed upon amount.

In some situations, the employer may be concerned that the employee may file an employment claim (e.g., discrimination claim) against the employer resulting from the

employee's discharge or other adverse employment action taken by the employer against the employee. In this situation, it may be possible for the employer to use the debt owed by the employee as leverage to secure a general release from any possible claims. For example, the employer might agree to release the employee from any possible liability arising from the money allegedly misappropriated by the employee in exchange for a general release in favor of the employer for all potential claims held by the employee.

Take Back What Is Rightfully Yours

If the subject employee is still employed or is due some wages or other benefits, it may be possible to deduct what is owed to the employer. Unlike many states (*see, e.g., Okla. Admin. Code* § 380:30-1-7; -1-11; *Tex. Lab. Code Ann.* § 61.018), Alabama does not have a statute that dictates permissible or non-permissible reasons for setting off wages with amounts owed to an employer. *But see Ala. Code* § 6-8-82 (limit on counterclaim against employee that is head of household). All employers, however, must be mindful of the Fair Labor Standards Act ("FLSA"). The following are some precautions for employers:



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- *No deduction below minimum wage:* An employer should make sure that after any deductions it at least pays the employee the minimum wage for each hour worked by the employee. This is especially true with respect to any deductions for cash register shortages and money owed for the destruction of property. *See, e.g., Donovan v. Hudson Stations, Inc.*, No. 77-2172, 1983 U.S. Dist. LEXIS 12751, at *11 (D. Kan. Oct. 14, 1983) (“Except where an employee is convicted of misappropriating funds, it is unlawful for an employer to require an employee to reimburse employer for cash register or inventory shortages . . .”). The United States Department of Labor states that an employer may deduct to recoup cash advances on the

principal (not interest or fines) relating to bona fide loans made to an employee even if such deduction reduces the employee’s cash wages below the statutory minimum. *See* 2004 Wage & Hour Op. Ltr. No. 19NA, at 1 (Dep’t of Labor Oct. 8, 2004) (“It has been our long-standing position that where an employer makes a loan or an advance of wages to an employee, the principal may be deducted from the employee’s earnings even if such deduction cuts into the minimum wage . . . under the FLSA.”). In addition, some support exists for a deduction below the minimum wage where an employee has misappropriated funds. *See Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1369 (5th Cir. 1973) (“[R]epayment to the employer of amounts misappropriated by the employee may be made by means of paycheck deductions, even where they reduce the net pay to the employee below minimum wage.”). However, the most prudent practice would be to avoid any potential violation of the minimum wage standard.

- *No deduction of overtime for non-exempts:* In addition, for non-exempt employees, an employer should not withhold any overtime pay required to be paid pursuant to the FLSA.
- *No deduction below minimum salary rate for exempts:* For exempt employees, it is advisable to pay the employee at least \$455 per week, which is the minimum weekly salary requirement for exempt employees. *See* 29 C.F.R. § 541.600

Despite compliance with the FLSA’s overtime and minimum wage requirements, there is a risk that deductions from earned wages, benefits or bonuses could result in a breach of contract or a conversion claim against a company. The validity of such claims and the risk of whether they would be filed depend on a number of factors to be evaluated on a case-by-case basis, such as the evidence supporting the employee’s alleged indebtedness to the employer.

Also, the Employment Retirement Income Security Act (“ERISA”) prohibits any type of garnishment, attachment or constructive trust remedy by an employer with respect to pension and profit-sharing plans covered by ERISA. *See* 29 U.S.C. § 1056(d). However, should the employee voluntarily request distribution of his or her benefits, upon receipt of the funds, the employee can voluntarily give the money

to the company. However, care must be taken to avoid any appearance of undue coercion or duress on behalf of the employer as to any distribution request and turnover of funds from an employee’s ERISA-governed accounts.

Bring Out The Big Guns

Civil litigation against the employee to recover any amounts owed by the employee is an option. One advantage to civil litigation to recover amounts owed as opposed to just “taking back” what is owed is that it eliminates the risk of a potential breach of contract or conversion by the employee against the employer. Some of the disadvantages are obvious: civil litigation is expensive and time-consuming. Further, an employer should consider that even if it collects a judgment, actual collection of the amounts may be difficult and another expensive process. In the event an employee has sued the employer for some type of employment-related claim, a counter-claim against the employee for the amount owed to the employer is an option to consider as well.

Pressing criminal charges against the employee is always an option and not

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Prior to filing a civil lawsuit or pressing charges, an employer should be sure that it has **probable cause** to believe that the employee has violated the law in order to decrease the risk of a malicious prosecution claim.



mutually exclusive of filing a civil lawsuit. Pressing criminal charges puts the matter, including another investigation in the hands and control of the government. An employer should consider whether it wants law enforcement looking into its affairs, including its records and practices. Although the employer will not have to pay the expenses associated with the criminal process, the employer will have to invest time and other resources while cooperating with the applicable law enforcement agency. On the other hand, many employers feel they have a civil duty (although there is no legal obligation) to report or prosecute criminal behavior by their employees in order to protect society in general and as a deterrent to future theft by other employees. In addition, pressing criminal charges sometimes results in a confession and restitution.

Prior to filing a civil lawsuit or pressing charges, an employer should be sure that it has probable cause to believe that the employee has violated the law in order to decrease the risk of a malicious prosecution claim. *See Lee v. Minute Stop, Inc.*, 874 So. 2d 505, 512 (Ala. 2003) (elements of a malicious prosecution claim include lack of probable cause). In addition, any publication to a third party (i.e., anyone outside the

employer's organization or inside the organization without "a need to know") that an employee has stolen money or property from the company could result in a defamation action against the employer. Whenever information is reported to a third party, the best practice is to report information or facts that cannot be disputed (e.g., "Employee's corporate card was used to purchase a boat motor and we have been unable to determine that a legitimate business need for a boat motor existed" or "There is sufficient evidence that persuades us to believe that our employee has submitted a false expense report."). An employer should avoid absolute conclusions that could be disproved (e.g., "Our employee stole money from us.>").

Conclusion

Each instance of employee theft contains its own set of facts, circumstances and, as discussed above, several options. An employer who carefully weighs all of its options when faced with an employee theft issue and avoids letting only emotion dictate its moves has a better chance in making the right choice and avoiding placing itself in a worse position. ▲▼▲



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