

SEEKING PROSECUTION OF YOUR THIEVIN' EX-EMPLOYEE

It's Monday morning and you get to the office early. As you walk past your bookkeeper's station, who was on vacation last week, you notice the monthly bank statement envelope with the mail on her desk. Although you normally let her handle all the banking, on a whim you decide to open it and peruse the statement. When you do, a wave of shock rolls over you. Instead of the healthy balance she has been telling you was in the company's account and which seemed right given how well the company had been doing recently, the statement reflects that the company is running on financial fumes. This can't be right??? But it is ... so what do you do?

Employee theft is one of the most rampant, but undiscussed, problems confronting businesses of all size. Oftentimes, it occurs to small businesses which least can afford it. Frequently, employees who steal from their employers start small and when they don't get caught, they become more emboldened, both in terms of frequency and amounts they steal. It usually involves a trusted employee who has been with the company an extended period of time and is considered "one of the family." Often, they have been given more responsibilities over time of handling a company's checks and credit card payments, with less oversight by others within the company. In these situations, it is common that they not only write the checks and pay the bills; they also reconcile the monthly bank and credit card statements.

Employee theft can occur in a myriad of ways. It can be very simple, from misusing a company credit card or writing company checks to themselves to a much more complicated scheme that could involve tampering with company financial records or other techniques designed to hide what they have done.

So what are your choices when you discover this? First, you can fire the employee (if they haven't already gotten wind that you're on to them and quit) and write off the losses and try to do a better job of staying on top of things in the future. If you handle it that way, however, that ex-employee will be out in the business world the next day, looking for another employer to victimize.

Second, you can sue the ex-employee, but that will put what happened out in the marketplace, to be known by your customers and competitors indicating that you were asleep at the switch while someone was looting the company bank account. Unfortunately, it is common that when employees steal from their company, they don't take their proceeds and put them into some asset you can try to seize in order to recoup the company's losses. Instead, they frequently use the money to simply upgrade their lifestyle or otherwise blow it, so they have nothing to go after if you win your lawsuit.

Your third choice is to try to get the employee prosecuted for their theft. If you are successful, it will send a message to other employees that you will take action against those who steal from the company. If the case is prosecuted by law enforcement and you win, in some cases the employee could go to jail. If they get probation, the court will typically require them to pay restitution for the amount of the theft as a condition of probation. While the court may permit that restitution to be paid out monthly over the course of a the probationary period, having the hammer of possibly going to jail if the

probationer doesn't make the required payment can be a powerful incentive for them to find the money to make the restitution payment.

In addition, no matter which option you choose, it is important that you review and enhance your company's financial policies and procedures to minimize the potential for such a reoccurrence.

Assuming you choose to prosecute your employee how do charges get filed? The vast majority of criminal cases are originally investigated by the police and then presented to a prosecution agency (DA's Office for State charges; US Attorney's Office for federal charges) for its determination whether to file the charges. The police cannot actually "file" criminal charges; that has to be done by a prosecution agency or grand jury. As part of the determination decision, the DA's Office (which files more charges than the US Attorney's Office) will look at the strength of the evidence to determine whether it shows a particular individual committed the crime. Unfortunately, because the police are so overloaded with potential cases, and because most of their resources are devoted to the investigation of "street" crimes, it is frequently difficult to present them with a "white collar" case, particularly one with a complicated fact pattern, and have them devote the time and resources necessary to put that case together. It is not unusual for a request for investigation to languish on the desk of some police officer because they are tied up with other investigations they have been given responsibility to investigate.

As an alternative, you can sometimes present these cases directly to the DA's Office. Most DA's Offices have a Special Crimes Division, whose prosecutors are devoted to prosecuting larger and more complicated "white collar" (i.e., financial) crimes.

DA's Office budgets have frequently been cut in recent years, resulting in there being fewer investigators with the Office to conduct the underlying investigative work necessary for a prosecutor to review when deciding whether there is sufficient evidence to file charges in a white collar case. Should you decide to go directly to the DA's Office to try to get charges filed, you will need to do as much of that investigative work as possible and put it together in a format that makes their job when assembling and reviewing the evidence as easy as possible. Imagine an overworked, underpaid Special Crimes prosecutor who has two files in front of them and they are deciding which they should work on: One file is given to them in a shoe box with little organization and is the proverbial "can of worms;" the other is presented to them with all or most of the necessary evidence in a format that would be admissible in court, with factual information provided which addresses all the necessary elements to sustain a conviction for a particular crime. In that situation, if you were that prosecutor, which file would you devote your time to?

Thus, the goal is to present your case to them with most if not all the leg work already done and wrapped up with the proverbial bow. This makes it easy for the prosecutor to review the file and determine that the evidence is present which supports a criminal charge and will allow a conviction. You can either try to gather that necessary evidence yourself and take it to a prosecutor OR you can hire someone who is familiar with the criminal justice system, the elements of the crime, and the rules relating to admissibility of evidence to put together a package of information and documentation for the police or prosecutor. Using a financial analyst or fraud examiner in conjunction with an attorney who is

conversant with how the criminal justice system works and what a prosecutor will need can maximize the chances that the case will be accepted by the DA's Office for investigation and, ultimately, prosecution. Fraud examiners and investigators are also trained in interrogation so that they may be able to confront and obtain a statement from the employee which could provide guidance into all the ways they were stealing from the company. Such statements are frequently admissible in court and would be another piece of evidence showing the guilt of the individual. Further, investigators are skilled in tracing what the employee did with the stolen funds, which could allow them to find whether there might be assets which the company could seize in satisfaction of the amount stolen. The more the necessary information has been gathered and any records analyzed and put into a prosecution-friendly format, the better the chances are that law enforcement will accept the matter for investigation.

Frequently, certain documentation such as the employee's bank or other financial records may only be obtainable by subpoena. A private person doesn't have a right to go to a bank to obtain the banking records of a third party, absent the individual's consent. Subpoenas can sometimes be issued by law enforcement agencies (administrative subpoenas) or by a prosecution agency through a grand jury investigation to obtain the necessary records. If a civil lawsuit has been filed by the company against the ex-employee for their theft from the company, the use of civil Discovery (Interrogatories and Request for Production) to the ex-employee, the issuance of subpoenas to third parties for records (e.g., to their bank for their banking records), or deposition notices to the ex-employee or third parties can provide vehicles through which you may be able to obtain the factual pieces of the puzzle to complete the picture of their crime. These can help you present a roadmap to law enforcement to persuade them that a crime has been committed, who the culprit is, AND that you have the evidence to prove it.

To be fair to both the police and prosecutors, even if a prosecution agency is provided a complete package of information and documentation laying out the crime, obtaining charges can sometimes be a long and tedious process that could take many months. Prosecutors have many investigations and other cases that also require their time. If they have to obtain bank or other financial records from third parties through the issuance of grand jury subpoenas, that can be a time-consuming process waiting for the financial institution to provide the requested records.

In sum, should you decide you want to pursue a prosecution of an ex-employee who has stolen from your company, it is suggested that you let that effort be handled by those who are trained in the nuances of the criminal justice system and rules of criminal evidence. Simply put, if you're going to go that route, make sure it gets done correctly to maximize your chances of prosecution and conviction.

For more information about white-collar crime or if you need help navigating through the issues related to this matter, please contact Charley Davidson at 713-522-9444 or cdavidson@hanszenlaporte.com.

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