

A STEP-BY-STEP GUIDE TO TERMINATING EMPLOYEES FOR THEFT (PART ONE)

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There's good news for retailers: you are getting better at preventing shrink from employees. In 2005, a University of Florida study found that employee theft accounted for 47 percent of shrink. In a follow-up study in 2016, the university found that the percentage of shrink caused by employee theft was "only" 30 percent. The bad news: this is still a fairly significant number, accounting for approximately \$15 billion in losses on an annual basis.

Retailers use a variety of tactics to battle this epidemic, from low-tech options such as offering rewards to employees who turn in thieves, to high-tech systems that can, for instance, monitor transactions to reveal issues that managers would normally be unable to detect. Yet unscrupulous employees remain undeterred, and will forever try to beat the system.

Even more upsetting is that catching an employee red-handed on video sliding product will not necessarily prevent them from bringing a wrongful termination claim against you. Many individuals, even guilty ones, feel compelled to try to clear their name through litigation. Although you would likely win such a suit in the end, the expense and time involved can be hundreds of times the amount of the theft, and might sway you to instead negotiate a frustratingly unfair settlement.

In order to maintain consistency, there is usually no choice but to terminate employees who engage in dishonest or even suspicious behavior. But if you or your managers were to make innocent mistakes during what should be a legitimate termination, you could find yourself facing a

Related People



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lawsuit. Worse, you could learn that your mistakes gave the lawsuit legs because it opened you up to exposure to an individual who stole from your company.

In this issue, we'll look at some common mistakes that have resulted in otherwise unassailable terminations going south in court, and step-by-step solutions to prevent the worst-case scenario from unfolding.

THE INVESTIGATION

In virtually every employment lawsuit arising from a termination for wrongdoing, the first step of the termination process—the investigation—becomes the most critical when scrutinized in front of a jury. It's even more important when theft is involved. An allegation of theft is a powerful accusation and one that should never be taken lightly. While ordinarily you bear no burden of proof at trial, the jury will often look to you to prove theft beyond a reasonable doubt. Thus, the employee's first tack in a trial will be to attack the quality of your investigation.

The Appropriate People Should Conduct The Investigation

There are many important missteps to avoid. First, at least two individuals should be involved in your investigation and, optimally, one should not be personally acquainted with the subject. This will help avoid claims that the allegation was trumped-up against an employee by a hostile or biased investigator. For example, an employee might claim that they were framed for theft by a manager for refusing earlier sexual advances. Using several investigators might shield such an accusation from gaining traction.

Make Sure The Accused Tells Their Tale

You must allow any employee being investigated to tell their story and include the account in your record of the investigation. Otherwise, a jury may think the employee was railroaded. The investigation must be thorough, and your investigator should never limit questioning to the witnesses identified by the accused when there may be other individuals with relevant knowledge.

Follow Your Own Internal Policies

If your company has a protocol for investigations, it must be followed to the letter. Juries demand that employers follow

written procedures. Failure to do so can serve as evidence of “pretext” (a justification for a course of action that is found to be false) and could defeat your efforts at winning the case on written motions, rather than going all the way to trial.

Make Sure Your Witnesses Provide Their Own Testimony

It is important for witnesses to write their statements in their own handwriting and using their own words. Nothing tanks the credibility of a witness faster than when they don’t understand the meaning of words used in “their” written statement when testifying on the stand.

Preserve Records And Recordings

Another concern arises when a company acts as if it will never hear from the employee again once they depart the workplace following a termination. Even if you obtain a written confession of theft, it will be no substitute for a complete investigative file. Your investigator must organize and store all the records of the investigation for future use. Nothing should be destroyed.

If you plan to use business records or recordings that are ordinarily destroyed in accordance with your company’s record retention and destruction protocol, they should be moved from their usual location and preserved. Just as video footage of an employee pocketing a twenty is solid gold in a court, not having that video footage is solid gold for the plaintiff in an employment trial. If the video is missing, no explanation will overcome a jury’s assumption that you did not want them to see the video for some nefarious reason. Likewise, if an investigator reviews evidence, such as financial reports, stored on a computer, they should create copies of these records to be included in the investigation file.

CATCHING THE THIEF

The method used to catch thieves is another aspect that can result in liability. For example:

- It is common for retail managers to hide baby monitors or other electronic listening devices in break rooms to try to catch employees talking about stealing. While the idea seems perfectly logical, it could also be illegal under federal anti-wiretapping laws and state privacy statutes.

- During an investigatory meeting with an employee who is suspected of theft, if you have the employee in a position where they cannot leave the room or area without “going through” one of your managers, it could lead to a false imprisonment claim.
- Digging through an employee’s purse or other personal belongings looking for stolen merchandise without consent to search could generate an invasion of privacy claim.
- Using a lie detector during an investigation of monetary loss could open you up to legal claims given strict federal regulations on the subject.

Because of factors like these, it’s important that you take several steps while attempting to catch an employee on suspicion they are stealing.

Destroy The Expectation Of Privacy

First, every employee should sign an acknowledgment that they understand they have no privacy rights in regard to those items they choose to bring on the premises. While not required by federal law, you should also have your employees acknowledge and consent in writing that they are under video surveillance while in all public and employee-only spaces at your store (not bathrooms or other private spaces). This will prevent them from bringing a successful invasion of privacy claim in the future.

Set Expectations For Investigations

At the outset of any investigation into alleged theft, the accused employee should be made aware that participating in company investigations is mandatory. Provide them a written notice that refusal to cooperate may result in termination.

Create And Enforce Policies Related To Company Assets

Finally, you should expressly advise all of your employees regarding your policies pertaining to the protection of company assets. Instruct them that violations of the policy may lead to their immediate termination without any finding of intentional wrongdoing.

THE TERMINATION MEETING

The termination meeting should not be the first time the accused is informed that they are suspected of malfeasance. However, even if you have done some legwork into the matter and feel like you have a rock solid case before talking with the suspected thief, you should still consider your plan for carrying out the disciplinary action.

Consider A "Suspension Pending Investigation"

Regardless of any benefit to keeping the employee in the dark about your suspicion while you conduct a covert investigation, and even if termination is essentially a foregone conclusion at the time of your interview with the accused, you should still hold off on making a termination decision and from communicating that sort of message during that first interview. It is far better to suspend the employee pending the outcome of the investigation. Many times the employee will not return for a follow-up meeting and can be terminated as having abandoned their job. There are far fewer facts to argue when an employee is terminated on these grounds.

Your Words Matter

How the termination meeting is to be conducted depends heavily on the strength of your evidence. If all the signs point to theft but you don't necessarily have anything that is conclusive, you should not use terms like "theft," "dishonesty," or even "suspicion of theft" as reasons the employee is being terminated. This does not mean you cannot terminate the employee, but accusing an individual of a crime is *per se* defamatory in many jurisdictions, and you may be required to prove in court that the employee did, in fact, commit a crime. Instead, language centering on your lack of trust in the employee—"we are terminating you because we have lost confidence in your ability to perform your job up to our expectations"—is much less likely to be considered defamatory.

Focus On Your Policies, Not The Criminal Code

Another way to couch your justification for termination if you are less than 100 percent certain of the employee's guilt is to cite a violation of your company policies and not any allegation of *criminal* wrongdoing. In this scenario, you should tell the employee that you have not reached a conclusion as to their culpability for a crime, but that the

termination is because proper store procedures were not followed.

STAY TUNED FOR PART TWO

Terminating employees for the reasons stated in this article may not prevent the employee from securing unemployment compensation, but as we'll discuss in Part Two of this article, fighting unemployment compensation is overrated. In the next issue of the Retail Update, we'll look at other problem areas in terminating for theft, including when—and when not—to call the police.

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