

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

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In [our last issue](#), we looked at some ideas about how to investigate, catch, and terminate employees who are stealing from your company. In this conclusion, we'll talk about some ways to avoid—or at least reduce the possibility of—getting sued by those same thieves.

### ADMISSIONS OF GUILT

This seems like a simple piece of advice, but it's crucial: if an employee admits to the theft, ask for a written confession. As with any other witness statement relating to an investigation, this should be in the employee's own handwriting. Managers should also be taught that the Law and Order hot-boxing method of extracting written confessions could easily backfire. If the circumstances under which the employee gives the confession can be characterized as coerced, a jury may choose to ignore it. To this end, allow an employee to leave the interview and go to another area where the investigators are not hovering around as the document is prepared.

If the employee refuses to admit theft even where there is indisputable evidence of guilt, you must choose carefully how to characterize the termination. Employees who refuse to admit guilt in the face of overwhelming evidence will most likely continue to fight the assertion of theft at every opportunity. These are the individuals most likely to sue.

Once you submit "theft" as the reason for termination to an unemployment compensation board, the battle will be on. It may well be a battle worth fighting, but that decision must be made in light of all the potential claims an employee may

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have against you, not just the unemployment compensation claims. These include discrimination allegations, wrongful termination claims, and defamation suits.

## **POLICE INVOLVEMENT**

For years, many managers and owners have subscribed to the theory that having the police arrest a suspect at the store and parading them out in handcuffs in front of all the other employees was a good method of deterring theft. While this might be true, it is certainly one of the best methods of instigating a lawsuit.

Before calling the police, it is critical to know how seriously they will respond to allegations of theft of a few hundred dollars in merchandise. Some police departments are simply too overwhelmed to do more than write a report of the complaint. Either a lack of interest or sloppy handling of the matter by the police can both be used to undercut your claims against the employee. Ultimately, no police involvement is better than limited or poorly handled police involvement.

If a police department is ready, willing, and able to respond to reports of theft, call them when the missing item or money is discovered. In such a situation, it is critical that whoever interfaces with the police does not point the finger at the suspected employee. If a different employee turns out to be involved, your initial finger-pointing might spur a claim for malicious prosecution under state law. Should the suspect beat the charges, which sometimes occurs, the employee will be more likely to succeed on a claim for malicious prosecution against you.

If the police move forward with charges against the employee, you must be willing to provide all the assistance they require. Witnesses failing to appear for trial will result in charges being dropped and will cast doubt on your good faith.

## **THE UNEMPLOYMENT COMPENSATION HEARING**

Treating the almost inevitable unemployment compensation claim lightly can wreak havoc on later proceedings related to the termination. If the employee already has counsel, that attorney will likely attend the hearing and question witnesses. Testimony is under oath and, in some cases, can

be used against you in later proceedings. For these reasons, it is important to prepare for an unemployment hearing as if it were a formal court proceeding.

Another problem can arise if key witnesses are no longer employed by the time of the hearing. While they can be subpoenaed, many employers fail to take this step, hoping that the written statements taken during the investigation will carry the day. The problem is that, while the statements are often admissible, the court or administrative body might not be able to credit hearsay statements over the first-hand accounts of the employee.

The employee often becomes emboldened to assert other claims when they prevail in an unemployment compensation claim. Additionally, an employer that loses at the unemployment hearing might also lose the qualified privilege defense to a defamation claim for statements accusing the employee of malfeasance. If you do not want to spend the time, energy, and effort needed to fully prepare for the unemployment compensation claim, it may well be better not contesting the claim at all.

## **CONCLUSION**

While retailers can take strong efforts to reduce employee theft, eliminating it entirely is likely an impossibility. But employers have the ability to greatly diminish the opportunity for the insult of an expensive lawsuit being added to the injury of theft.

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